REPORTS

— OF THE —

SUPREME COURT

— OF —

CANADA.

REPORTER

GEORGE DUVAL, Advocate.

ASSISTANT REPORTER

C. H. MASTERS, Barrister at Law.

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ERRATA.

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

Page 95—In head-note line 3 from bottom for "maintainance" read "maintenance."

" 408—In line 7 from bottom read as follows: "the demurrer should be set aside."

" 451—In head-note line 17 from top for "dues" read "used."

" 570—In line 3 from bottom for "appeal allowed" read "appeal dismissed."

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.

ATTORNEYS-GENERAL OF THE DOMINION OF CANADA:

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

" " John S. D. Thompson Q.C.

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OF THE

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CASES

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SUPREME COURT OF CANADA

ON APPEAL

FROM

THE COURTS OF THE PROVINCES

AND FROM

THE EXCHEQUER COURT OF CANADA.

HER MAJESTY THE QUEEN..... .....APPELLANT; 1885

AND

THE BANK OF NOVA SCOTIA *et al.*, Liquidators..... } RESPONDENTS.

*Feb'y. 23.

*June 26.

ON APPEAL FROM THE SUPREME COURT OF PRINCE EDWARD ISLAND.

Insolvent bank—Winding-up proceedings—Priority of Crown as simple contract creditor—Estoppel—Acceptance of dividends by Crown not waiver—45 Vic., ch. 23.

The Bank of Prince Edward Island became insolvent and a winding up order was made on the 19th June, 1882. At the time of its insolvency the bank was indebted to Her Majesty in the sum of $93,494.20, being part of the public moneys of Canada which had been deposited by several departments of the government to the credit of the Receiver General. The first claim filed by the

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

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Minister of Finance at the request of the respondents (liquidators of the bank), did not specially notify the liquidators that Her Majesty would insist upon the privilege of being paid in full. Two dividends of 15 per cent. each were afterwards paid, and on the 28th February, 1884, there was a balance due of $65,426.95. On that day the respondents were notified that Her Majesty intended to insist upon her prerogative right to be paid in full. At this time the liquidators had in their hands a sum sufficient to pay in full Her Majesty's claim. The following objection to the claim was allowed by the Supreme Court of Prince Edward Island, viz: "That Her Majesty, the Queen, represented by the Minister of Finance and the Receiver General, has no prerogative or other right to receive from the liquidators of the Bank of Prince Edward Island the whole amount due to Her Majesty, as claimed by the proof thereof, and has only a right to receive dividends as an ordinary creditor of the above banking company.

On appeal to the Supreme Court of Canada,

Held,—(Reversing the judgment of the court below):—

1. That the crown claiming as a simple contract creditor has a right to priority over other creditors of equal degree. This prerogative privilege belongs to the crown as representing the Dominion of Canada, when claiming as a creditor of a provincial corporation in a provincial court, and is not taken away in proceedings in insolvency by 45 Vic., ch. 23.

2. That the crown had not waived its right to be preferred in this case by the form in which the claim was made, and by the acceptance of two dividends.

APPEAL from an order or decision of the Supreme Court of Prince Edward Island, made and given on the third day of November, A.D. 1884. The following is the special case:—

"The President, Directors and Company of the Bank of Prince Edward Island" were a banking corporation, incorporated by the Legislature of Prince Edward Island by an Act, passed in the year one thousand eight hundred and forty-four, intituled: "An Act to incorporate sundry persons by the name of 'The President, Directors and Company of the Bank of Prince Edward Island.'"

The said company, from the time of its incorporation,

until its insolvency, hereinafter mentioned, transacted a banking business in Prince Edward Island.

On the first day of July, A.D. 1873, Prince Edward Island became part of the Dominion of Canada.

The Bank of Prince Edward Island never came under the provisions of any of the Banking Acts of the Parliament of Canada, but the Parliament acknowledged its existence by the passage of an Act, in the forty-fifth year of the present reign, ch. 56, intituled: "An Act for the Relief of the Bank of Prince Edward Island."

The said Bank of Prince Edward Island became insolvent, and, on the nineteenth day of June, A.D. 1882, an order was made by the Hon. James Horsfield Peters, one of the judges of the Supreme Court of Prince Edward Island, for the winding up of the said bank, under the provisions of the Act, 45 Vic., ch. 23, intituled: "An Act respecting Insolvent Banks, Insurance Companies, Loan Companies, Building Societies and Trading Corporations."

The Bank of Prince Edward Island, at the time of its insolvency, was indebted to Her Majesty in the sum of $93,494.20, being part of the public moneys of Canada, which had been deposited by several departments of the Government, to the credit of the Receiver-General.

The respondents do not deny that the bank, at the time of its insolvency, owed her Majesty $93,496.20 of the public moneys of Canada, deposited to the credit of the Receiver-General, and the only question arising for decision now is: Is Her Majesty entitled to be paid in full? In other words, is Her Majesty a privileged creditor, or must she rank as an ordinary creditor and take a *pro rata* amount?

It is agreed between Her Majesty and the respondents that the question to be raised and decided on the present appeal shall be:—

Is Her Majesty, in her Government of Canada, entitled

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to be paid the full amount of the said indebtedness of the insolvent company to her, in priority to the simple contract creditors of the said insolvent company?

If the Supreme Court of Canada decide that Her Majesty is so entitled, then the appeal is to be allowed, and the respondents ordered to pay the said indebtedness in full.

The Bank of Prince Edward Island became insolvent, and the winding-up order was made on the 19th June, 1882.

The first claim filed by the Minister of Finance, at the request of the respondents, did not specially notify the liquidators that Her Majesty would insist upon her privilege of being paid in full.

Two dividends of 15 per cent. each were afterwards paid, and on the 28th of February, 1884, there was a balance due of $65,426.95, over and above the $30,000.

On that day (28th February, 1884) Mr. Hodgson acting for the Crown, notified the respondents that Her Majesty intended to insist upon her prerogative right to be paid in full.

At the time of serving this notice the liquidators had in their hands a sum sufficient to pay Her Majesty's claim in full.

A more formal demand for preference was made on the 17th March, 1884.

The objections to Her Majesty's claim (filed by leave of Mr. Justice Peters) were heard before him. The first objection is:—

"That Her Majesty the Queen, represented as aforesaid" (by the Minister of Finance and the Receiver-General) "has no prerogative or other right to receive from the liquidators of the above-named banking company the whole amount due to Her Majesty, as claimed by the proof thereof, dated the 8th day of March, A.D. 1884, and has only a right to receive dividends as an

ordinary creditor of the above-named banking company."

This objection was allowed.

From the order allowing this objection, an appeal was taken (under sec. 78 of 45 Vic., ch. 23) to the Supreme Court of Prince Edward Island.

That court, by order dated 4th November, 1884, affirmed Mr. Justice Peters' order, and dismissed the appeal.

Permission to appeal to the Supreme Court of Canada from this order was granted by Mr. Justice Strong on the 26th day of November, 1884.

G. W. Burbidge, Q.C., and *E. J. Hodgson*, Q.C., for appellant:

It has been established beyond dispute, that when the rights of the Crown and of the subject concur, that of the Crown is to be preferred. Chitty on Prerogatives (1).

The Queen, as the head of the Government of Canada is invested with all her prerogatives, and will not be held to be deprived of any of them by parliament, unless the intention to do so is expressed in explicit terms, or the inference is inevitable (2); *Lenoir* v. *Ritchie* (3); *Cushing* v. *Dupuy* (4); *Johnston* v. *Ministers and Trustees of St. Andrew's Church* (5); *Theberge* v. *Landry* (6); *Hartington, Marquis of* v. *Bowerman* (7).

The court below conceived itself bound by the winding-up Act, 45 Vic., ch. 23, to order the distribution of the assets equally, even as against the Queen.

Now we admit that the Crown is bound by a statute "made for the public good, the advancement of religion and justice, and to prevent injury and wrong," without

(1) Pp. 290, 381.
(2) 31 Vic., ch. 1, sec. 7, sub sec. 33.
(3) 3 Can. S. C. R. 575.
(4) 5 App. Cas. 409.
(5) 3 App. Cas. 159.
(6) 2 App. Cas. 102.
(7) Ir. Rep. 2 C. L. 683.

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being expressly named. Bac. Abr. Prerogative (1); *The King* v. *Wright* (2). But the statute under which this insolvent bank is being wound up (45 Vic. ch. 23) is not a statute within these exceptions.

In *re Henley* (3) is decisive upon the question at issue in this case (4).

On the question of estoppel we contend:

(*a*) that estoppels do not bind the Crown. Chitty on Prerogatives (5); *Regina* v. *Renton* (6); *The Queen* v. *Fay* (7).

See the remarks of Mr. Justice Strong in *The Queen* v. *McFarlane* (8).

(*b*) That in this case there has been no election.

The receiving of the indebtedness by instalments was a mutual convenience.

The court below decided that the prerogative right to be paid in full is in the Government of Prince Edward Island, to the exclusion of the Queen in her Government of Canada, and that had this been an indebtedness to the former Government, and proper proceedings taken to make it a record debt, it would have been entitled to preference over all other creditors.

The learned judge, in the court below, has misapprehended the preamble to the British North America Act, when he says: "It is true that the provinces have given executive power to the Dominion over subjects before belonging to them, but by the convention recited in this preamble they are to have a constitution similar to that of England regarding her colonies, with respect to the subjects retained, and, if so, the Lieutenant-Governors must have the Queen's prerogative still vested in them."

(1) (E) 5.
(2) 1 A. & E. 434.
(3) 9 Ch. D. 469.
(4) See also *re Oriental Bank.* 28 Ch. D. 646.
(5) P. 381.
(6) 2 Ex. 216.
(7) 4 L. R. Ir. 606.
(8) 7 Can. S. C. R. at p. 242.

It is not the Provinces, but the Dominion of Canada, which the preamble declares is to have a constitution "similar in principle to that of the United Kingdom :" *City of Fredericton* v. *The Queen* (1).

The whole judgment of the court below is based on this fallacy.

The fact of the insolvent bank being a local institution does not affect the question to be decided. If moneys due to the Crown were in the possession of a commercial firm or private individuals, residing and doing business in Prince Edward Island, and they became insolvent, the Queen would not be deprived of her prerogative right to be paid in preference to other creditors on the ground that the commercial firm or the private individual had never been brought under the control or influence of the Dominion Government.

R. Fitzgerald, Q.C., and *A. Peters* for respondent ;

The Crown's claim to a preference arises under what are termed the minor prerogatives of the Crown, which do not extend to this province. See *Attorney General* v. *Judah* (2).

The right of the Crown in relation to all such minor prerogatives can only be exercised in Prince Edward Island by the Queen in her government thereof, and for the benefit of the province. This would clearly have been the case before confederation, and there is nothing in the British North America Act conferring on the Government of Canada the right to exercise these prerogatives.

The autonomy of the provinces is preserved by the British North America Act, and their several Lieutenant-Governors represent the Queen in the performance of many executive prerogative and administrative acts. It is contended that the prerogative here claimed (if it

(1) 3 Can. S. C. R. per Gwynne, J., at p. 560.

(2) 7 Legal News, Q., 147.

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exists) is vested in the Lieutenant-Governor, and cannot be exercised both by the Provincial and the Dominion Governments. If such a right existed in both Governments their several interests might clash, and in case of deficiency of assets must clash. Supposing such a contest, can it be contended that the provincial prerogative, which existed previous to confederation, has been taken away without express enactment. *Attorney General* v. *Mercer* (1); *Holmes* v. *Regina* (2).

At confederation only such of the prerogatives as were necessary for carrying on the general government of Canada, became vested in the Governor General, and the prerogative right to a preference here claimed is not necessary for such purpose.

The Crown's claim in this case clearly arises out of a simple trading contract, the Crown dealing with the bank as an ordinary customer, and in such case we contend the Crown has no privilege over any other creditor. *Attorney General* v. *Black* (3); *Monk* v. *Ouimet* (4).

Another ground for affirming the judgment is that the Crown, in this case, elected to prove their claim under the Winding-up Act, and to stand in the same position as other creditors, and having done so, cannot now revoke their election and claim a preference. See *Bigelow* on Estoppel (5); also, argument *in re Bonham* (6).

It is further submitted, that even if the Crown has a legal preference, the proper course has not been taken to enforce it, and that before such preference can be enforced the debt must be made a debt of record and writ of extent must issue. Manning's Exch. Practice (7); Chitty on Prerogatives (8); West on Extents (9); *Doe dem. Hayne* v. *Redfern* (10).

(1) 5 Can. S. C. C. R. 538.
(2) 8 Jur., N. S. 76.
(3) Stewart's Rep. 325.
(4) 19 L. C. Jur. 71.
(5) P. 503.
(6) 10 Ch. D. 598.
(7) 2nd edit. 90.
(8) P. 358.
(9) P. 193.
(10) 12 East 96.

In relation to the $30,000 draft, under no circumstances can the Government of Canada now claim any prerogative right. So far as liquidation proceedings are concerned, the Bank of Montreal is the only creditor therefor, and with the consent of the government were duly settled on the list of the creditors of said bank by order of the Judge in liquidation.

E. J. Hodgson, Q.C., in reply:—

When the bank became insolvent, there was no dispute as to its indebtedness to the Crown, nor is there any now. The matter of the $30,000 is not a disputed indebtedness; the Bank of Prince Edward Island admits owing the money; the contest is, who is to rank as a creditor, the Bank of Montreal or the Queen?

RITCHIE, C.J.:—

The debts due by the insolvent bank to "the various persons and corporations" are due by simple contract only.

The ground upon which Mr. Justice Peters has rested his judgment is stated by him as follows:—

I have now gone through the various points raised by the issues, and I wish to observe, that although some of my observations may apply to provincial banks and corporations generally, the ground on which I rest my decision is, that the insolvent bank is a purely local institution, never brought under the control or influence of the Dominion Government in any way, and whose claim is, therefore, a civil right of a merely local and private nature in this province. Whether a provincial bank, holding its charter from the Dominion Government or brought under the Dominion Bank Act, would occupy the same position, is a question not before me, and on which I, therefore, express no opinion.

The claim of the Crown must be dismissed with costs, and I order that the costs, when taxed, be deducted from the dividend now ready to be paid to the Receiver-General of the Dominion.

This, it appears to me, is conclusively answered in the factum of the appellant, where it is said:—

"The appellant contends that the fact of the insolvent

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bank being a local institution does not affect the question to be decided. If moneys due to the Crown were in the possession of a commercial firm or private individuals residing and doing business in Prince Edward Island, and they became insolvent, the Queen would not be deprived of her prerogative right to be paid in preference to other creditors, on the ground that the commercial firm or the private individuals had never been brought under the control or influence of the Dominion Government."

I do not think there can be a doubt that the Crown is entitled at common law to a preference in a case such as this, for when the rights of the Crown come in conflict with the right of a subject in respect to the payment of debts of equal degree, the right of the Crown must prevail, and the Queen's prerogative in this respect, in this Dominion of Canada, is as exclusive as it is in England, the Queen's rights and prerogatives extending to the colonies in like manner as they do to the mother country.

I am at a loss to conceive how the acceptance of two dividends on account of the indebtedness of the bank to the Crown, can deprive the Crown of payment of its claim in full, there being sufficient funds, independent of the two dividends, to satisfy the Crown's demand in full. It is unquestionable that no laches can be imputed to the Crown; the interests of the Crown are certain and permanent, and, as it is said, "it must not suffer by the negligence of its servants or by the compacts or combinations with the opposite party." There is no pretence for saying that there ever was any waiver of the prerogative rights of the Crown by the Deputy-Receiver General, nor that he had any power or authority to waive them; and if the officers of the Crown, in receiving the dividends, should have insisted on payment in full, and did not do so, this could not enure to the detriment

of the crown. As the Crown cannot be prejudiced by the misconduct or negligence of any of its officers, so neither can an officer give consent that shall prejudice the rights of the Crown. He could not give an express consent that could prejudice the rights of the Crown, still less, impliedly waive the Crown's rights.

The Deputy Receiver General might have refused the dividends and insisted on payment in full. That claim is not to be barred or extinguished; for, as has been said, no laches can be attributed to the Crown, and the Crown cannot be deprived of its prerogative right by any neglect of its subordinate officers; but here there was neither laches nor neglect. The receipt of a portion of the Crown's claim by instalment may have been, and, as suggested, probably was for the mutual convenience and benefit of all parties, and was no abandonment of the Crown's rights, or election on the part of the Crown to be paid ratably with the other creditors.

I think this case too clear on principle to require authority (1), and if modern authorities are required the cases in *Giles* v. *Grover*; *in re Henley* and *in re Oriental Bank* are directly in point

In *Giles* v. *Grover* (2), Alderson, J., says:

> The next prerogative of the Crown about which I apprehend there is no dispute is, that, where the right of the Crown and the subject concur, that of the Crown is to be preferred; a prerogative depending, first, on the principle that no laches is to be imputed to the king, who is supposed by our law to be so engrossed by public business as not to be able to take care of any private affair relating to his revenue; and, secondly, on the ground that by the King is, in reality, to be understood the nation at large, to whose interests that of any private individual ought to give way. In the quaint language of Lord *Coke, Thesaurus Regis est firmamentum pacis et fundamentum belli.* And until restrained by various enactments of the statute law, this prerogative extended to

(1) *Co. Little* 30 B. 4 Co. 55, 9 Co. 129; Hard. 24; Bac. Ab. Prerogative E. 4.

(2) 9 Bing. 156.

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prevent the other creditors of the King's debtor from suing him, and the King's debtor from making any will of his personal effects without special leave first obtained from the Crown. But without further adverting to the ancient state of the prerogative, it is clear that at this day the rule is, that if the two rights come in conflict that of the Crown is to be preferred.

If, however, the right of the subject be complete and perfect before that of the King commences, it is manifest that the rule does not apply, for there is no point of time at which the two rights are in conflict; nor can there be a question which of the two ought to prevail in a case where one, that of the subject, has prevailed already. But if, whilst the right of the subject is still in progress towards completion, the right of the Crown arises, it seems to me that two rights do come into conflict together at one and the same time, and that the consequence in that case is, that the right of the Crown ought to prevail. Lord Mansfield expresses this proposition in shorter language when he says: No inception of an execution can bar the Crown. *Cooper* v. *Chitty* (1).

In re Henley & Co. (2), James, L.J.:

It appears to me clear on every principle that the Crown is not bound by the Companies Act, 1862, not being specially mentioned in it. * * * Whenever the right of the Crown and the right of a subject with respect to payment of a debt of equal degree come into competition, the Crown's right prevails. Whether, therefore, the debt is treated as a debt of record, or of specialty, or of simple contract, there being a right of priority in the Crown, it is right that the debt should be paid.

Brett, L.J.:

I am of the same opinion. There are two prerogatives of the Crown bearing upon this question. The first is that the Crown is not bound by a statute in which it is not specially mentioned. Therefore the Crown is not bound by the Companies Act. It follows that, this being clearly a debt for which the Crown can distrain, its powers of distress are not taken away by the Act, and it can proceed to distrain in this case. It is, therefore, right that the debt should be paid in priority to other creditors. But suppose we regard it merely as a simple contract debt: then in the administration of the assets of the company the Crown comes into competition with the other simple contract creditors, and then the other prerogative to which I have alluded comes in, namely, that in competition with subjects the right of the Crown must prevail. Therefore, in which ever way

(1) 1 Burr. 36. (2) 9 Ch. D. 481.

we look at the question, I think the Crown ought to be paid this debt in priority.

In re Oriental Bank Corporation ex parte The Crown (1).

McNaughton, Q.C., and W. Latham, for the liquidator:

We are willing to concede that the prerogative of the Crown in the colonies is as high as in this country.

Chitty, J.:

It is settled law that on the construction of the Companies Act, 1862, the Crown is not bound, the Crown not being named, and there being no necessary implication arising from the Act itself by which the Crown's prerogative is affected or taken away. That is the short statement of the decision of the Court of Appeal in the case of *in re Henley* (2). In that case there were two prerogatives brought into question—the one was the prerogative of the Crown, when assets had to be administered, to priority over the subject. It was held that that prerogative was not taken away. The other was the prerogative which the Crown, not being bound by the statute, had notwithstanding the statute, to issue process. That was also held not to be taken away.

The 98th section of the Act of 1862 contains an enactment that the court shall cause the assets of the company to be collected and applied in discharge of its liabilities. Now, the fund to be administered would consist, by virtue of the decision in *In re Henley & Co.*, of the whole of the assets of the company, if the Crown came in under the liquidation, and sought to prove, and the Crown would then retain its rights of priority as against the other creditors. But if the Crown stood out and insisted on its prerogative, then the assets to be administered would be the assets of the company, less that portion of the assets which the Crown had taken away.

No distinction was drawn in argument, and very properly, between the rights and prerogatives of the crown suing in respect of Imperial rights, and the rights of the Crown with regard to the colonies.

In re Bateman's trust, Sir James Bacon, V.C., said:

I cannot hesitate to say and to decide, that the Queen's prerogative is as extensive in New South Wales as it is here, in this county of Middlesex. It has been contended that the title of the Crown by

(1) 28 Ch. D. 646.
(2) 9 Ch. D. 469.
(3) L. R. 15 Eq. 361.

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forfeiture was confined to this soil—the soil of England. But the Queen is as much the Queen of New South Wales as she is the Queen of England, and I must hold that every right which the Queen possessed by forfeiture extended as much to the colonies as to this country.

The learned judge in the court below referred to what I said in *Atty.-Gen.* v. *Mercer* (1) as to the Lieut.-Governors of provinces representing, in a limited manner, the Crown. To all that I said in the case referred to by the learned judge I still adhere, but what I then said has no bearing on the present case, but must be read with reference to the cases I was then considering. In regard to the case before us, I may say I can discover nothing in the B. N. A. Act which takes away from Her Majesty the prerogative right in regard to debts due Her Majesty in the Dominion of Canada of an Imperial character, or in relation to the Government of Canada.

No question arises in this case as to the rights of the Local Government, should it be a creditor, or of the relative rights of the Dominion and Provincial Governments, should both be creditors, with assets only sufficient to pay one, as has been suggested. It will be quite time enough to deal with these questions when they arise.

STRONG, J.:

Four questions are raised by this appeal. First, the right of the Crown, claiming as a simple contract creditor, to priority over other creditors of equal degree, as a general rule, of English law, is disputed. Secondly, assuming the Crown to have this right according to the general rule it is denied that such a prerogative privilege appertains to the Crown, as representing the dominion of Canada, when claiming as a creditor of a provincial corporation in a provincial

(1) 5 Can. S. C. R. 538.

court. Thirdly, it is insisted that the priority of the Crown, even if it exists and applies in favor of the Crown in its government of Canada, as regards ordinary proceedings for the recovery of debts at common law, is taken away by the Act of Parliament (45 Vic. ch. 23) under which the present proceedings in insolvency are being taken. And lastly, it is urged, that, failing all of the preceding contentions, the Crown has, in the present instance, by the form in which its claim was made and by the acceptance of the two dividends already declared, waived its right to be preferred to other simple contract creditors.

In my opinion, the Crown is entitled to succeed on every one of these points, and that upon authority so clear and decisive as to leave little room even for argument on the part of the liquidators.

The rule of law formulated in the maxim *Quando jus domini regis et subditi concurrunt, jus regis præferri debet* we find propounded by Lord Coke in 9 Rep. 129, and also in Co. Litt. 30*b*, and recognized in many later authorities (1): and its existence at the present day, as a well established principle of the constitutional law of the Empire relating to the royal prerogative, was distinctly recognized and acted on by the English Court of Appeal in the late case of *Re Henley* (2), decided as recently as 1879. This case of *Re Henley* has been said, not to be a decision upon the point in question, but a mere dictum. This is not so, for the report of the case itself, as well as later judicial recognition and comments, shows that the right of the Crown, as a simple contract creditor, to priority over other simple contract creditors, was one of the *rationes decidendi* upon which all of the three eminent

(1) *Giles* v. *Grover*, 9 Bing. 128; *Rex* v. *Edwards*, 9 Ex. pp. 32, 628, 5 Bac. Ab. 558.

(2) 9 Ch. D. 469.

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judges who decided it proceeded. That case arose under a "winding-up" proceeding under the Companies Act, 1862. The claim of the Crown was for arrears of income tax, in respect of which it had a right of distress. Vice-Chancellor Malins, in a long judgment, which need not be particularly referred to, held that the Crown was only entitled to payment out of the assets of the company rateably with other creditors of like degree. The Crown appealed, and, although the arguments of counsel are not given in *extenso* in the report, it is apparent, from the authorities cited, that the right of the Crown was rested, not merely on the statutory right of distress, but also on the general preference which is now in question; and that the judgment of the court proceeded as much on one of these grounds as on the other, is apparent from the language of the learned judges.

James, L.J. says:

But if the matter is treated as a matter solely of administration of assets under the direction of the court, I think it is also right. Whenever the right of the Crown and the right of a subject with respect to the payment of a debt of equal degree come into competition, the Crown's right prevails. Whether, therefore, the debt is treated as a debt of record or of specialty, or of simple contract, there being a right of priority in the Crown, it is right that the debt should be paid.

Brett, L.J. says:

But suppose we regard it merely as a simple contract debt: then, in the administration of the assets of the company, the Crown comes into competition with the other simple contract creditors, and then the other prerogative to which I have alluded comes in, namely, that in competition with subjects the right of the Crown must prevail. Therefore, in whatever way we look at the question, I think the Crown ought to be paid this debt in priority.

Cotton, L.J. concludes his judgment as follows:

But if the case is looked at as one in which the Crown submits to come in under the administration of assets in the winding-up, there is still the right which the Crown has, when in competition with other creditors, of being paid in priority.

These extracts show conclusively, that the principle now disputed was one on which the judgment in *Re Henley* was based by all the judges who took part in the ultimate decision of that case. Further, if anything additional is wanting to show that what the judges who decided *Re Henley* say in the quotations before given were no mere *dicta*, the case of *The Oriental Bank Corporation ex parte The Crown* (1) may be cited. Chitty, J., who decided the last-mentioned case, referring to *Re Henley*, says :—

> In that case there were two prerogatives brought into question: the one was the prerogative of the Crown, when assets had to be administered, to priority over the subject. It was held that such priority was not taken away.

And again :

> Now the fund to be administered would consist, by virtue of the decision in *Re Henley*, of the whole of the assets of the company, if the Crown came in under the liquidation and sought to prove, and the Crown would then retain its right of priority as against the other creditors.

These observations of Mr. Justice Chitty show that he recognized the authority of *Re Henley* as determining the point which now calls for decision; but, further than this, it appears that, without question by the counsel for the liquidator, Mr. Justice Chitty acted on this view of the effect of *Re Henley*, and in this same case of the *Oriental Bank Corporation* gave the Crown priority in respect of simple contract debts over other simple contract creditors.

It being thus demonstrated by satisfactory authorities that the Crown has the right of precedence now claimed, according to the fundamental doctrines of English constitutional law, is any distinction to be made in applying such a rule in England and in the province of Prince Edward Island? That the law of England is the rule of decision in the province

(1) 28 Ch. D. 643.

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has not been and cannot be disputed, nor has it been pretended (save as regards the very statute now in question, a matter to be separately considered hereafter) that by any express and direct legislation, provincial, federal or imperial, the rights of the Crown, as applicable in Prince Edward Island, have been in any way interfered with. Authorities which it would be useless to quote, so familiar are they, establish, that, in a British colony governed by English law, the Crown possesses the same prerogative rights as it has in England, in so far as they are not abridged or impaired by local legislation, and that, even in colonies not governed by English law, and which, having been acquired to the Crown of Great Britain by cession or conquest, have been allowed to remain under the government of their original foreign laws, all prerogative rights of the Crown are in force, except such minor prerogatives as may conflict with the local law. The two decisions of the Court of Queen's Bench of the Province of Quebec *Monk* v. *Ouimet*(1) and *Attorney-General* v. *Judah*(2) may, perhaps, be referred to this distinction. Then, if the Crown's right of priority has been taken away in Prince Edward Island, it can, apart from the provisions of the Insolvent Act, only be by some of the provisions of the British North America Act. The most careful scrutiny of that statute will not, however, lead to the discovery of a single word expressly interfering with those rights, and it is a well settled axiom of statutory interpretation, that the rights of the Crown cannot be altered to its prejudice by implication, a point which will have to be considered a little more fully hereafter, but which, it may be said at present, affords a conclusive answer to any argument founded on the British North America Act. Putting aside this

(1) 19 L. C. Jur. 71. (2) 7 Leg. News 147.

rule altogether, I deny, however, that there is anything in the Imperial legislation of 1867 warranting the least inference or argument that any rights which the Crown possessed at the date of confederation, in any province becoming a member of the dominion, were intended to be in the slightest degree affected by the statute; it is true, that the prerogative rights of the Crown were by the statute apportioned between the provinces and the dominion, but this apportionment in no sense implies the extinguishment of any of them, and they therefore continue to subsist in their integrity, however their locality might be altered by the division of powers contained in the new constitutional law. It follows, therefore, that the Crown, speaking generally, still retains this right to payment in priority to other creditors of equal degree in Prince Edward Island.

It is said, however, that, whilst the last proposition may be true as regards the rights of the Crown as representing the provincial government of the Island, it does not apply to the Crown as representing, as in the present case it does, the government of the dominion. This objection is concluded by authority still more decisive than the former. That the Crown is at the head of the government of the dominion, by which I mean that Her Majesty the Queen is, in her own royal person, the head of that government, and not her Viceroy, the Governor General, there can be no doubt or question, for it is in so many words declared by the ninth section of the British North America Act, which enacts—"The Executive Government and authority in and over Canada is hereby declared to continue and be vested in the Queen."

That, for the purpose of entitling itself to the benefit of its prerogative rights, the Crown is to be considered as one and indivisible throughout the Empire, and is not

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to be considered as a quasi-corporate head of several distinct bodies politic (thus distinguishing the rights and privileges of the Crown as the head of the government of the United Kingdom from those of the Crown as head of the government of the dominion, and, again, distinguishing it in its relations to the Dominion and to the several provinces of the dominion) is a point so settled by authority as to be beyond controversy. In the case already referred to of the *Oriental Bank Corporation* (1) this very point occurred, and the counsel who opposed the contention of the Crown, with the approval of the learned judge, declined to argue it. The claim of the Crown there was to priority, over simple contract creditors, in respect of a simple contract debt (amongst others) due to it in right of its government of the colony of Victoria—a colony possessing a constitutional government; and the counsel for the liquidator, so far from drawing any distinction between the claims of the Crown in respect of its Imperial rights, or as representing colonies, and as representing Victoria, say: "We are quite willing to concede that the prerogative of the Crown in the colonies is as high as in this country;" and the learned judge (Mr. Justice Chitty) says, at the end of his judgment:—

> No distinction was drawn in argument, and very properly, between the rights and prerogatives of the Crown suing in respect of Imperial rights and the rights of the Crown with regard to the colonies.

In re Bateman (2), the Crown claimed in England the goods and personal property of a felon, as for a forfeiture on a conviction for felony in the colony of New South Wales, and it was there seriously argued, that the rights accruing to the Crown under such forfeiture were not enforceable in England. The court (Bacon, V.C.), however, entirely rejected this contention, and determined that the rights of the Crown were not to be considered

(1) 28 Ch. D. 643. (2) L. R. 17 Eq. 355.

divisible according to the several governments and jurisdictions into which the Empire is apportioned, but that prerogative rights, accruing to it in one jurisdiction, may be enforced against persons and property anywhere throughout the Queen's dominions. To these authorities may also be added the well known cases which have determined that the benefit of the prerogative applies when the Crown sues nominally, though entirely in the interests of private parties, upon recognizances given by, or as security for, receivers and committees of lunatics, in which cases it has long been the universal practice to treat such debts as debts of record due to the Crown, entitling the parties interested to the benefit of the Crown's title to priority in respect of that class of obligations. It is therefore safe to conclude, as a general proposition of law, that whenever a demand may properly be sued for in the name of the Queen, the prerogative rights of the Crown attach in all portions of the British Empire subject to the prevalence of English law, irrespective of the locality in which the debt arose and of the government in right of which it accrued.

It is, however, said, that this right of the Crown to priority over other creditors, in a case like the present, where the assets of an insolvent banking company are being administered under the statute 45 Vic., ch. 23, is taken away by the necessary effect of the statute making equality the rule of distribution. The general rule for the construction of statutes, when the prerogatives of the Crown are in question, is thus stated in a work of authority (1) :—

> Where a statute is general and thereby any prerogative, right, title, or interest, is divested or taken away from the King, in such case the King shall not be bound, unless the statute is made by express words to extend to him (2).

(1) Bac. Abrid. Pre. E. 5.

(2) See also Maxwell on Statutes, 2 Ed. p. 161 et Seq.

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In the case of *re Bonham, ex parte The Postmaster General* (1), it was held that the Crown, though named in some of the provisions of the English Bankruptcy Act, 1869, was not bound by provisions in which it was not expressly named. And in the cases *re Oriental Bank* and *re Henley*, before cited, it was held, that the Crown was not bound by the winding-up clauses of the Companies Act, 1862.

By the 150th section of the English Bankruptcy Act, 1883, the priority of the Crown is expressly taken away.

These authorities, which could be multiplied to any extent, are sufficient citations in point to exemplify a rule so familiar as that just stated.

Then, applying it here, there is no pretence for saying that the Crown is bound by the Act under which these proceedings are taken. In no one clause of the Act is the Crown named, and it can be no more said that, by necessary implication, it includes the Crown than the same could have been said of the English Bankruptcy and Companies Acts, which, as just shown, do not affect the Crown.

The last and most untenable of all the points which have been made against this appeal is, that the Crown has waived and abandoned its priority by the way in which it proved, and by accepting the two dividends of 15 per cent. each. I have examined the claim, but find nothing in it indicating any intention of waiver, even if the rights of the Crown could be waived in this way, which I doubt. As regards the acceptance of the dividends, that, under the admitted fact stated in the case, that at the time of serving the notice claiming payment in full, on the 28th February, 1884, a date long subsequent to the receipt of the last dividend, the liquidators had in their hands a sum sufficient to pay the Crown in full, can amount to no more than

(1) 10 Ch. D. 595.

a creditor receiving part payment, which surely does not amount to waiver.

My conclusion is, that the order of the court below must be reversed, and an order allowing the claim of the Crown to be paid in full substituted for it, with costs both in this court and the court below.

FOURNIER, J.:

For the reasons given by the Chief Justice, I am of opinion that the appeal should be allowed.

HENRY, J.:

I never had any difficulty in this case. There is no authority, that I can find, in opposition to the principle that where the claim of the Crown under a simple contract and the claim of a subject under a simple contract conflict, the Crown has precedence. So, whatever may be the degree of the claim, when the Crown is otherwise on an equal footing with the subject, the decisions have always been that the Crown is entitled to precedence. The Crown represented in the dominion and the Crown represented in Prince Edward Island—in fact, in each of the provinces—might possibly have claims against the same debt. What proportion should be allotted to each in such a case would be a matter for subsequent regulation and settlement; but the fact that the Crown has a claim for the dominion, and a claim for each of the provinces, certainly cannot affect the decision in this case.

I think the grounds taken by the learned judge below were untenable. I do not think there is any waiver in this case. The evidence does not point to any such waiver. Certainly, the parties who received dividends did not expressly stipulate that there should be a waiver of any of the rights of the Crown; and even if they had done so, I do not think they had the

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power to bind the Crown. I think the appeal should be allowed.

TASCHEREAU, J.:—

I am also of opinion that this appeal should be allowed. The question does not, it seems to me, admit of any doubt. The contention that the local government of Prince Edward Island could alone exercise this prerogative right in the province is untenable. The Lieutenant-Governors, no doubt, in the performance of certain of their duties as such under the B. N. A. Act, may be said to represent Her Majesty, in the same sense and as fully, perhaps, as Her Majesty is represented, for instance, by justices of the peace, constables and bailiffs, in the execution of their duties. But it is the first time that I hear it contended, as has been done in this case, that the Lieutenant-Governor in a province, on matters not exclusively left to the provinces under the B. N. A. Act, could ever use Her Majesty's name and prerogatives to defeat Her Majesty's rights and prerogatives. Not less extraordinary, to my mind, is the dictum of the court below, that if Her Majesty had proceeded in the Exchequer Court at Ottawa to recover judgment for this indebtedness, the court of Prince Edward Island, if applied to, would grant a prohibition to prevent the process of the Exchequer Court from being enforced.

Appeal allowed with costs.

Solicitor for appellant: *Edward J. Hodgson.*

Solicitor for respondent: *Rowan R. Fitzgerald.*

FERDINAND JACQUES SULTE DIT VADEBONCŒUR..... } APPELLANT;

AND

THE CORPORATION OF THE CITY OF THREE RIVERS, SÉVÈRE DUMOULIN, AND JOSEPH GEORGE ANTOINE FRIGON.... } RESPONDENTS.

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*Nov. 17.
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*Jan'y 12.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR THE PROVINCE OF QUEBEC (APPEAL SIDE).

Powers of Local Legislatures—Regulation of the sale of liquor—License fees—British North America Act, 1867, *sec* 91, 41 *Vic., ch.* 3 (*P.Q.*)—*Intra vires—Mandamus.*

The Quebec License Act (41 Vic., ch. 3), is intra vires of the Legislature of the Province of Quebec. (*Hodge* v. *The Queen*, 9 App. Cas., 117, followed).

As this Act does not interfere with the existing rights and powers of incorporated cities, a by-law passed by the corporation of the city of Three Rivers, on the 3rd April, 1877, in virtue of its charter (20 Vic., ch. 129, and 38 *Vic.*, ch. 76), imposing a license fee of $200 on the sale of intoxicating liquors, is within the powers of the said corporation.

APPEAL from a judgment of the Court of Queen's Bench for Lower Canada (appeal side) (1), whereby the judgment of the Superior Court at Three Rivers, rendered by Mr. Justice McCord in favor of the appellant, was reversed.

The appellant, wishing to obtain a license under the Quebec License Act of 1878, (41 Vic., ch. 3), to keep a saloon, on the 31st March, 1880, presented a certificate signed by twenty-five electors, to the council of the

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

(1) 5 Leg. News 331.

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corporation of Three Rivers for confirmation, as required by sec. 11 of said act, and on the 5th May, 1880, requested the officers of the corporation to deliver over to him the certificate of confirmation, which they refused to do, unless the appellant should pay $200 as required by the by-laws of the corporation.

On this the appellant petitioned for a writ of mandamus dated the 5th May, 1880, alleging that the respondents refused to deliver to him the certificate required by the License Act of 1878, ch 3; that the by-laws relied on were illegal, null and void; that the respondents had not the right, according to the act of incorporation or any other law, to enact such by-law; that the local legislature could not authorize the council of the corporation of the city of Three Rivers to enact a by-law, with the object of imposing a tax of two hundred dollars, to be paid by those who desired to obtain the certificate of confirmation, required by the 11th sec. of the said License Act of 1878; and that finally such by-laws have the effect of regulating commerce to wit: the sale of spirituous liquors, which is the prerogative of the federal parliament, and that the local legislature acted ultra vires of its powers.

By his petition the appellant asked for the issue of a peremptory mandamus to declare the said by-laws null and to order the officials of the council to sign and deliver the said certificate to the appellant.

The respondents met this petition and the writ:

First, by a demurrer alleging that the respondents had never refused to perform any act which they were bound to do by law, but, on the contrary, that even in the said petition it is alleged that they did not sign nor deliver the certificate asked for, because of the existence of a by-law to the contrary, which prevented them doing so, before the reception from the appellant of the sum of two hundred dollars; and that the principal object of

the petition is to obtain the voiding of said by-laws which cannot be done by a writ of mandamus.

Secondly, the respondents pleaded that the Parliament of Canada, in 1857, by 20 Vic., ch. 129, authorized the council to enact the by-laws in question, which are at present in force and obligatory for all; that the sum of two hundred dollars is a duty or fee which must be paid by those who wish to sell spirituous liquors.

And that the British North America Act does not abrogate the said authority, but on the contrary confirms it. Finally, the respondents pleaded *une défense au fonds en fait.*

The statutes and by-laws bearing on the case are reviewed in the arguments and judgments hereinafter given.

J. Doutre, Q.C., for appellant :

The by-law which is relied on was passed prior to 1875, when all existing statutes concerning the city of Three Rivers were repealed, and in lieu thereof 38 Vic., ch. 76, was substituted as a new charter. This charter contains an important departure from the provisions of the Act of 1857, especially on the subject of retailers of spirituous liquors; and for any by-law subsequent to the passing of this statute, the city council had no other powers or authority than those contained in sec. 101, and by that section they can levy a tax by means of a license, and no discriminating scale of taxes on the trades or professions is authorized

At that time, 38 Vic., ch. 5, amending the Quebec License Act, was in force, and the legislature, when granting that charter, was fully aware of the burdens it had already imposed upon retailers of spirituous liquors. It had no doubt the right to authorize the city of Three Rivers to increase these burdens to any extent. On the other hand, the provincial government,

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deriving from the liquor trade an important part of its revenue is interested in delegating its taxing powers with prudence and deliberation.

Otherwise some municipalities, by imposing excessive taxes, might, in effect, prohibit the trade and thereby deprive the government of an important source of revenue. Therefore the delegated powers ought to be strictly construed.

Then, can the city fare better with the provisions of the License Act of 1878, under which the appellant applied and obtained the certificate of confirmation, the refusal of which caused the original action and the subsequent appeals?

I submit that the License Act of 1878 does in no way maintain or revive by-laws previously existing, whether conflicting or conforming with the new License Act.

Sec. 36 says: "On each confirmation of a certificate for the purpose of obtaining a license for the cities of Quebec and Montreal, the sum of $8 is paid to the corporation of each of those cities; and to other corporations, for the same object within the limits of their jurisdiction, a sum not exceeding twenty dollars may be demanded and received."

Sec. 37: "The preceding provision does not deprive cities and incorporated towns of the rights which they may have by their charters or by-laws." This last provision did not exist in 34 Vic., ch. 2. It has been shown that the charter of 1875 did not contain any provision authorizing the council to single out the tavern keepers and impose upon them an exceptional tax, either directly or by means of a license. If it was not within its jurisdiction to impose such a tax, it is very doubtful if it could make a by-law to collect $20, for a confirmation of certificate, under the 36th sec of the License Act of 1878. However, such by-law is not in existence, and

it is useless to enquire into the extent of a power which has not been exercised.

Now, as to the constitutional question:—

The case raises a broader question than those discussed so far. Supposing the charter of 1857 ample enough to cover the by-law of 1871, could any legislation be had from the provincial legislature after the constitutional Act of 1867, to authorize a by-law to prohibit or regulate the liquor trade, beyond police regulations, such as ordering the closing of bar-rooms at certain hours, on Sundays, or on election days?

The maintenance of the charter of 1857 was protected by the 129th sec. of the British North America Act of 1867. As long as the city of Three Rivers was satisfied with that charter, the new constitution of Canada could not affect it. But as soon as they demanded and obtained the repeal of that charter, they fell under the provisions of the constitutional act, which placed within the power of the federal authority only the regulation of the liquor traffic, as an incident of the regulation of trade generally.

By the Consolidation Act of 1875, 38 Vic., ch. 76, sec. 1 (P. Q.), all the statutes concerning the city of Three Rivers were unqualifiedly repealed. From that moment, the legislature of Quebec could not delegate powers which it did not itself possess, such as prohibiting or impeding the sale of intoxicating liquors, otherwise than making regulations for the government of saloons, licensed taverns, &c, and the sale of liquors in public places, which would tend to the preservation of good order and prevention of disorderly conduct, rioting, or breaches of the peace. Going further was to assume to exercise a legislative power which pertains exclusively to the Parliament of Canada (1). So held, by

(1) Ritchie, C. J., in *Regina* v. *The Justices of Kings.* 15 N. B. Rep. (2 Pugsley) 535.

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the Supreme Court of Canada, in *Mayor of Fredericton* v. *the Queen* (1). So held, by the Privy Council, in *Russell* v. *Queen* (2).

These considerations, as well as those previously insisted upon, seem to have been overlooked by the Queen's Bench.

Incorporating and regulating municipal bodies, must be understood to be done in conformity with the general provisions of the constitutional act. The provincial legislatures cannot authorize municipalities to do things which the legislatures themselves could not do. For instance, the local legislatures could not authorize a municipality to organize or drill militia, a thing which they could not do themselves.

As regards the raising of a revenue for municipal purposes, no doubt they could do it always within the same limit, and it was plainly done, and exhausted by 38 Vic., ch. 76, sec. 101, sub-sec. 7, which empowered the city of Three Rivers to levy a business tax on the tavern keepers, either directly or by means of a license. Beyond the powers contained in that section, the legislature of Quebec authorized the respondent if they had jurisdiction from their charter, to levy a license fee, to the extent of $20, but no more.

In passing that License Act of 1878, the legislature of Quebec was conscious of its power, as is manifested by the authority granted to Quebec and Montreal to levy a moderate license fee of $8 and to other municipalities, having jurisdiction from their charter, to impose a license fee up to $20 The legislature evidently thought that going further would encroach upon federal authority, and amount to partial prohibition or to regulation of traffic.

N. L. Denoncourt, Q.C., (*J M. McDougall* with him) for respondents:

(1) 3 Can. S. C. R. 505. (2) 7 App. Cas. 829.

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The Act which created the respondents a municipal corporation gave them the power to enact the by-laws of the 30th January, 1871, and of the 3rd April, 1877, and this last act has not been in any way repealed by the License Act of 1878 of the Quebec legislature, and is not *ultra vires* (1).

As to the constitutional question, the British North America Act, by the sub-sec. 8 of sec. 92, gives to local legislatures the right to pass a prohibitory liquor law for the purposes of municipal institutions.

The City of Fredericton v. *The Queen* (2) and *Russell* v. *The Queen* (3) decided that the Parliament of *Canada* had the power to legislate on traffic of intoxicating liquors; but it is not said that municipalities had no more the right to impose taxes on persons wishing to sell liquors as they had before. So these decisions do not affect in any way the respondents in this present appeal. [The learned counsel also relied on the reasons given by Mr. Justice Ramsay in the court below (4).]

RITCHIE, C.J.:—

No matter of fact comes up before this court. The whole case consists in enquiring whether the corporation and its officers had the right to exact $200 before delivering their certificate of confirmation of the elector's certificate.

I think the appeal should be dismissed. I cannot discover that any of the rights conferred on the corporation of the city of Three Rivers are superseded or taken away by the Quebec License Act of 1878, or any other Act. On the contrary, by sec. 255 of the Quebec License Law of 1878, it is enacted, "But the dispositions of this act shall in no way affect the rights and powers belonging to cities and incorporated towns by virtue of their

(1) See secs. 37 and 255, 41 Vic., ch. 3 and sec. 129 of B. N. A. Act, 1867.
(2) 3 Can. S. C. R. 505.
(3) 7 App. Cas. 829.
(4) 5 Leg. News 332.

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charters and by-laws, and shall not have the effect of abrogating or repealing the same," showing how careful the Legislature was to make it apparent beyond all doubt, that the existing rights and privileges of incorporated cities were not to be interfered with.

The case of *Hodge* v. *Queen* (1), just decided by the Privy Council, covers the constitutional question raised.

STRONG, J.:—

I agree entirely with the judgment delivered by Mr. Justice Ramsay in the Court of Queen's Bench, determining that the Quebec License Law of 1878 does not repeal or in any way affect the powers conferred on the city of Three Rivers by its Act of incorporation; and that the by-law now in question requiring the payment of a license fee of $200 by tavern keepers, was authorized by that Act. If the Act of incorporation had been passed since Confederation, it would have been *intra vires*, as an exercise of the police power, which, by the British North America Act, is vested in the Local Legislatures.

As Mr. Justice Ramsay has so fully and ably considered the case, I do not feel called upon to say anything further on this head. *Hodge* v. *The Queen* decided by the Privy Council, since the judgment of the Court of Queen's Bench was delivered, having put an end to the question, any further discussion of it is uncalled for. I desire to add, however, that the powers with which the corporation is invested by the Act 37 Vic., ch. 129, sec. 37, clause 14 would, if now for the first time conferred upon the municipality by the Local Legislature, be valid under the British North America Act, sec. 92, sub-sec. 9, as an exercise of the power to raise money, by means of tavern licenses, for municipal

(1) 9 App. Cas. 117.

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

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FOURNIER, J. :—

I am also of opinion that this appeal should be dismissed. The constitutional question has now, to my mind, been definitely settled by the decision of the Privy Council in the case of *Hodge* v. *The Queen* (1). As to the legality of the by-laws, I am of opinion that they are continued in force by the statute, and that the corporation, by virtue of its Act of incorporation, had power to pass the by-laws in question.

HENRY, J. :

The city of Three Rivers was incorporated by an Act of the late Province of Canada (20 Vic., ch. 129), by which it received power to raise funds for the expenses of the city, and for improvements, by the imposition of taxes, including those on proprietors of houses for public entertainment, taverns, coffee houses and eating houses, and on retailers of spirituous liquors, &c. The council of the city was empowered to make by-laws for restraining and prohibiting " the sale of any spirituous, vinous, alcoholic and intoxicating liquors, or for authorizing such sale, subject to such restrictions as they may deem expedient for determining under what restrictions and conditions, and in what manner, the revenue inspector * * * shall grant licenses to merchants, traders, shopkeepers, tavern keepers and other persons, to sell such liquors; for fixing the sum payable for every such license—provided that, in any case, it shall not be less than the sum which is now payable therefor by virtue of the laws at present in force; for regulating and governing all shop-keepers, tavern-keepers and other persons selling such liquors by retail; and in what

(1) 9 App. Cas. 117.

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places such liquors shall be sold, and in such manner as they may deem expedient to prevent drunkenness, &c."

That Act was substantially confirmed by section 129 of the British North America Act—leaving it to be continued, repealed, altered or amended, as therein provided.

By a by-law passed by the council of the city in 1871, a license fee of one hundred dollars was imposed on all licensees to keep an inn, hotel, tavern or public house, for the selling or retailing of any spirituous, vinous, alcoholic or intoxicating liquors; and such license was not to be issued until such sum, and all fees, should be paid.

In 1875 the Legislature of the Province of Quebec passed an Act amending and consolidating the Act of incorporation of the city of Three Rivers, and several Acts in amendment thereof, and re-enacted the provisions of that Act in relation to licenses, tavern-keepers, &c.; leaving the same powers with the council of the city as those conferred by the Act of incorporation in relation to by-laws.

Under the provisions, and by virtue of the power given by the latter Act, the council, by a by-law passed in 1877, raised the license duty from $100 to $200.

It is objected by the appellant that the legislation of the Province of Quebec in 1875 was *ultra vires*, on the ground that by the British North America Act the legislative power to deal with the subject in question was vested in the Parliament of Canada, and not in the Legislature of the Province of Quebec. If that objection is well founded, he would be entitled to our judgment. He refused to pay the sum provided by the later by-law of the council, and if the council had not the power to impose the increased duty under the Act of 1875, before mentioned, they got it in no other way.

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I am and, I may say, always have been, of the opinion that the British North America Act, if read in the light which a knowledge of the subject before the passage of that Act would produce, plainly gives the power of legislation to the Local Legislatures in respect of such licenses. I so gave my opinion in the case of *Fredericton* v. *The Queen* (1), argued and decided in this court; and I think it better to refer to my judgment in that case for some of my reasons than to repeat them at length here. It is true that my views expressed in my judgment in that case, as to "The Canada Temperance Act, 1878," were not shared by my learned brethern, nor by the Judicial Committee of the Privy Council; but the judgment of this court in that case, and that of the Privy Council in *Russell* v. *The Queen* (2), contain nothing, or but little, in conflict with the proposition that the Legislature of the Province of Quebec had the exclusive power to deal with the subject-matter in question; and that view is fully sustained by the judgment of the Privy Council in a later case, *Hodge* v. *The Queen* (3).

By sec. 92 of the British North America Act the Local Legislatures were given the exclusive power to legislate in regard to "shop, saloon, tavern, auctioneers and other licenses, in order to the raising of a revenue for provincial, local or municipal purposes," and also as to "municipal institutions." The power over those subjects is therein stated to be exclusive, and when we find that expression used we would hardly think it necessary to examine other parts of the Act with any expectation of finding a counter provision—the power is not only given expressly but exclusively. Did parliament mean what it said, or did it so provide, and intend that the provision should be overridden and controlled, and rendered totally inoperative? I cannot come to

(1) 3 Can. S. C. C. 565.
(2) 7 App. Cas. 829.
(3) 9 App. Cas. 117.

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such a conclusion. The uncontrolled power is thus given to the Local Legislatures to raise a revenue for either of the purposes named; it is given as an exclusive right, and unless modified by some one of the enumerated powers in sec. 91, I maintain that the Parliament of Canada has no power to interfere with that right for any object or purpose, or for any reason or consideration whatever. I am not forgetful of the substance and importance of the last clause of sec. 91, which provides that "any matter coming within any of the classes of subjects enumerated in this section shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of the subjects by this Act assigned exclusively to the legislatures of the provinces." Can we, however, conclude that the framers of the Act and Parliament meant, by a clause of such a general character, intended principally to cover unforeseen difficulties, to completely override and control such a plain enactment as the following:

In each province the legislature may exclusively make laws in relation to shop, saloon, tavern, auctioneer and other licenses, in order to the raising of revenue for provincial, local, or municipal purposes.

The object, as stated, was to enable each province to raise a revenue. Under the provisions as to "municipal institutions" the Local Legislatures derive the power to make laws to regulate shops, saloons and taverns. These provisions are explicit as well as comprehensive, and exclude every other legislation in the Dominion as to those subjects; unless, indeed, under the concluding clause of sec. 91, just quoted, they are subordinated to the power of legislation given to the Dominion Parliament as being within one or more of the classes of subjects enumerated in sec. 91. The Act most pointedly and effectually excludes and prohibits the

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interference of the Dominion Parliament with the exclusive powers of the local legislatures as to the matters in question, except (and only in that case) the subject-matter comes within one of the classes of subjects mentioned and enumerated in sec. 91. The first part of sec. 91 gives power to the Parliament of Canada.

To make laws for the peace, order and good government of *Canada*, in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the legislatures of the provinces.

The right to make laws for the peace, &c., of Canada, is as fully restricted to such subjects as do not come within the classes of subjects assigned to the legislatures of the provinces, as language can make it. The subject of licenses for shops, taverns, &c., are exclusively so given, and therefore the right to make laws for the good government of Canada does not include power to interfere with local legislation. Here, then, the power is limited; and any substantial interference with the functions assigned to the legislatures of the provinces, is excepted from the power conferred by the general terms of the preceding part of the clause. It was, to my mind, the clear intention of the clause, and of those who framed it, that the exclusive powers given to the legislatures of the provinces should not be affected; but that, outside of and apart from them, the power of the Parliament of Canada was to be unlimited.

Legislation by that Parliament, under the power conveyed by that clause, conflicting with Acts of the local legislatures under the powers exclusively given by sec. 92, I consider *ultra vires*.

In the judgment of the Privy Council in *Russell* v. *The Queen* (1), I find this sentence:

It was not, of course, contended for the appellant that the Legislature of New Brunswick could ha e passed the Act in question,

(1) 7 App. Cas. 829.

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which embraces in its enactments all the provinces; nor was it denied, with respect to this last contention, that the Parliament of Canada might have passed an Act of the nature of that under discussion, to take effect at the same time throughout the whole Dominion.

If not denied when such a proposition was stated, it is the same as if it were alleged to have been admitted. If so admitted by the counsel at the argument, there was but little left requiring the judgment of the august tribunal considering the case. The result was therefore, only what would be reasonably expected.

I am always ready to give such a construction to that concluding clause of section 91 as will give it all the effect it was intended to have and it is legitimately entitled to, but I cannot do so to the extent of nullifying other provisions so unambiguous and explicit as those of sec. 92, to which I have referred. My learned brethren differed from me in the case of *Fredericton* v. *The Queen* (1), on the ground that the right to legislate as to "trade and commerce" being vested in the Parliament of Canada, the local legislatures could not enact the same provisions as are found in the "Canada Temperance Act, 1878," and consequently the power must be in the Canadian Parliament to pass that Act. That was, however, a result and conclusion I felt unable to arrive at or appreciate, for the reasons given in my judgment in that case. The same questions involved in *Fredericton* v. *The Queen* came subsequently, in the case of *Russell* v. *The Queen* before the Judicial Committee of Her Majesty's Privy Council. The grounds taken by my learned brethren were neither adopted nor repudiated in the judgment in the latter case, but the same result on other grounds was reached, and the constitutionality of the "Canada Temperance Act, 1878," established, on grounds which, in my opinion, do not

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touch the issue before us in this case. It has been argued that because a prohibitory Act of the Legislature of any of the provinces would be an interference with "trade and commerce," the power to deal with the regulation of which was given to the Parliament of Canada, such an Act would be *ultra vires;* and therefore the power to pass such an Act must necessarily be in that parliament. I cannot adopt that proposition, because I think, that independently of other reasons, such legislation would, and must, necessarily override and destroy the provision intended to enable the local legislatures to raise the revenue, as in sub-sec. 9 of sec. 92. No doubt, it was fully understood and agreed upon, by those who considered the subject of the confederation of the four provinces, that certain means for raising a revenue for the purposes named in that sub-section should be given to the local legislatures. Some of the provinces were then raising thousands of dollars by revenues from licenses; and it must be assumed that such means of revenue were intended to be continued. If, therefore, the Parliament of Canada passed a prohibitory Act, it would tend to sweep away the revenues intended to be raised and expended in each of the provinces. No one could or would object to the passage of such an Act, if rights incontestably vested in the local legislatures, as to revenue for the purposes named, were not interfered with. The learned judges of the Privy Council hesitated to ascribe the power to pass such an Act to the right to legislate for the "regulation of trade and commerce," possibly considering that prohibitory legislation might not be "regulation." Suppose, under what is termed the local option provisions of the Canada Temperance Act, 1878, the prohibitory principle should be adopted by a large number of the districts in a province, there would necessarily be a comparative

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loss of local revenue. That loss would be caused by means of Dominion legislation, and without any provision for making up the loss to the province. Taking the whole of the British North America Act, into consideration, with the knowledge of the state of matters existing in the four confederated provinces at the time of confederation, can it be fairly and reasonably contended that such a result was intended by the framers of the constitution? As one of those so engaged, as well as in the preparation of the British North America Act, I can arrive at no such conclusion. My decision in this case, and the views I have expressed, are, however, the result of my construction of the words and phraseology of the Act itself.

It was claimed that the License Act of 1878 limited the power of the corporations by the provisions of sec. 36. Sec. 37, however, enacts that "The preceding provision does not deprive cities and incorporated towns of the rights which they have by their charters or by-laws."

For the reasons given, I think the appeal should be dismissed, and the judgment below confirmed, with costs.

GWYNNE, J.:

By the Act 20 Vic., ch. 129, passed by the parliament of the late Province of Canada, the city of Three Rivers was incorporated, and by section 36 sub-sec 7 of that Act it was enacted, that in order to raise the necessary funds to meet the expenses of the said city, and to provide for the several necessary public improvements in the said city, it should be lawful for the council of the city, among other taxes, to impose certain duties or annual taxes on the proprietors or occupiers of houses of public entertainment, taverns, coffee houses and eating houses, and on all retailers of spirituous liquors,

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&c.; and by the 37th section of the Act the said council was empowered to make by-laws:

For (among other things) restraining and prohibiting the sale of any spirituous, vinous, alcoholic and intoxicating liquor, or for authorising such sale, subject to such restrictions as they may deem expedient for determining under what restrictions and conditions, and in what manner, the Revenue Inspector of the district of Three Rivers shall grant licenses to merchants, traders, shop-keepers, tavern-keepers, and other persons to sell such liquors, for fixing the sum payable for every such license, provided that in any case it shall not be less than the sum which is now payable therefor by virtue of the laws at present in force. For regulating and governing all shop-keepers, tavern-keepers, and other persons selling such liquors by retail, and in what places such liquors shall be sold in such manner as they may deem expedient to prevent drunkenness, and for preventing the sale of any intoxicating beverage to any child, apprentice or servant.

This act was in force when the British North America Act was passed, which, by its 92nd section, items 8 and 9, enacts, that in each province thereby constituted the legislature may exclusively make laws relating to municipal institutions in the province, and to shop, saloon, tavern, auctioneer and other licenses, in order to the raising of a revenue for provincial, local or municipal purposes; and by its 129th section, that, except as otherwise provided by the Act, all laws in force in Canada, Nova Scotia or New Brunswick, at the Union, should continue in force in Ontario, Quebec, Nova Scotia and New Brunswick respectively, as if the union had not been made, subject, nevertheless (except with respect to such as are enacted by or exist under Acts of the Imperial Parliament) to be repealed, abolished or altered by the Parliament of Canada, or by the legislature of the respective provinces, according as the matter of each such Act should be subjected by the British North America Act to the authority of parliament, or to that of the provincial legislatures. The effect, then, of the 129th section, was to continue in force all the provisions of the Act 20th Vic., ch. 129, incorporat-

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ing the city of Three Rivers, except in so far as provision to the contrary was made, if provision to the contrary was made, by the British North America Act. While this Act was so continued in force the council of the city passed a by-law in 1871, whereby it was enacted that no hotel keeper or other person could obtain a license to keep an inn, hotel, or tavern, or any public house for the selling and retailing any spirituous, vinous, alcholic or intoxicating liquor, in the city of Three Rivers, before conforming to all the provisions of the law which regulates the obtaining such license, nor until he shall have obtained a certificate, as required by law, which certificate shall not be granted by the said council until such hotel keeper or other person shall have paid to the secretary treasurer of the said council the sum of one hundred dollars over and above all duties and fees on such license. Now, this by-law having for its authority only the above quoted sections of 20th Vic., ch. 129, could only be a valid by-law in the event of such sections being continued by the 129th section of the British North America Act, which section only continued the above sections of 20 Vic., ch. 129, if there was no provision to the contrary in the British North America Act, and in that case the right to repeal, abolish, and alter the provisions contained in the above sections of the 20th Vic., ch. 129, equally with all other sections of that Act as had been continued by the 129th section of the British North America Act, would seem naturally to fall within the jurisdiction of the provincial legislature under the clause of the 92nd section, which places under the exclusive jurisdiction of the legislatures of each province, the power to make laws in relation to municipal institutions in the province. Acting on this assumption, the Legislature of the Province of Quebec, in 1875, passed the Act 38 Vic., ch. 76, for amending and consolidating

the act of incorporation of the city of Three Rivers and the different Acts amending that Act, and by the 74th and 75th sections of this Act, re-enacted in substance and almost *verbatim* the provisions contained in the above 37th section, and by the 101st section, sub-sec. 7, the precise provision contained in the above 36th section of 20 *Vic.*, ch. 129.

Now, is there anything in the British North America Act which makes it to have been *ultra vires* of the Legislature of the Province of Quebec to re-enact, as they have done by 38 Vic., ch. 76, the substance of the above sections of 20th Vic, ch. 129, regulating the conditions upon which licenses to sell spirituous liquors may be granted in a municipality by the Revenue Inspector and for regulating the conduct of the licensed dealers therein? This question, as it appears to me, must be answered in the negative. I cannot doubt that by item No. 8 of sec. 92, which vests in the provincial legislatures the exclusive power of making laws in relation to municipal institutions, the authors of the scheme of confederation had in view municipal institutions as they had then already been organized in some of the provinces, and that the term as used in the British North America Act, unless there be some provision to the contrary in sec. 91 of the Act, comprehends the powers with which municipal institutions, as constituted by Acts then in force in the respective provinces, were already invested for regulating the traffic in intoxicating liquors in shops, saloons, hotels and taverns, and the issue of licenses therefor, as being powers deemed necessary and proper for the beneficial working of a perfect system of local municipal self-government Unless, then, there be some provision in the British North America Act to the contrary, the Legislature of the Province of Quebec had full power, in any Act passed by it creating a

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municipality, or in any Act amending and consolidating the Acts already in force incorporating the city of Three Rivers, to insert the provisions in question here which are contained in the 74th, 75th and 101st sections of 38 Vic., ch. 76.

It seems to be supposed that the judgment of this court in the *City of Fredericton* v. *The Queen* is an authority to the effect that since the passing of the British North America Act it is not competent for a provincial legislature to restrain or prohibit, in any manner, the sale of any spirituous liquors, and that therefore the Legislature of the Province of Quebec could not invest the corporation of the city of Three River with the powerss purported to be vested in them by the 74th and 75th sections of the Act 38 Vic., ch. 76, and that the Dominion Parliament alone could enact the provisions contained in the 75th section. The effect of this contention, if sound, would be, that instead of the Provincial Legislatures having exclusive power to make laws in relation to municipal institutions in the province, which the B. N. A. Act they are declared to have, and which by the authors of the scheme of Confederation intended they should have, the joint action of the Dominion Parliament and of the legislature of any province would be necessary to invest municipal corporations in that province with powers which have always been considered to be necessary and proper for the effectual working of that system of local municipal self-government which prevailed at the time of Confederation being agreed upon. But the *City of Fredericton* v. *The Queen* (1), raised no such question, nor is any such point professed to be decided by our judgment in that case. There was no question there as to the right of a provincial legislature to insert, in an Act passed by it in relation to municipal institutions, such a provision as that in question here.

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

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What was decided in the *City of Fredericton* v. *The Queen* was, that the Provincial Legislatures had not jurisdiction to pass such an Act as "The Canada Temperance Act of 1878," and that the Dominion Parliament alone was competent to pass it; and of this opinion, also, was the Judicial Committee of the Privy Council in *Russell* v. *The Queen* (1); but there was nothing whatever in the decision calculated to call in question the right of the provincial legislatures to insert, in all acts in relation to municipal institutions, such provisions as those in question here, which relate to the raising of revenue from the issue of tavern licenses, and to the establishment of regulations of a purely local and municipal character for governing the conduct of the parties licensed, which have always been deemed to be usual, and indeed proper and necessary regulations, to be established and enforced in all well-ordered municipalities, and essential to the efficient working of a system of local municipal self-government; and which, being of a purely local, municipal, private and domestic character, do not come within the true meaning of the term "regulation of trade and commerce" as used in section 91, which term, as there used, is to be construed as applying to subjects of a general, public and quasi national character, in which the inhabitants of the Dominion at large may be said to have a common interest, as distinct from those matters of a purely provincial, local, municipal, private and domestic character, in which the inhabitants of the several provinces may, as such, be said to have a peculiar and local interest. The by-law, therefore, of the city of Three Rivers, passed in 1877, increasing the license fee as established by the by-law of 1871, from $100 to $200, was authorized by the Act 38 Vic. ch. 76, and there is nothing in the License Act, 41 Vic. ch. 3, depriving the corporation of the powers vested in it by

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38 Vic. ch. 76. On the contrary, all those powers are, by the 37th sec. of 41 Vic., expressly preserved intact. The plaintiff, therefore, has failed to show any right to have had granted to him the certificate which he demanded of the corporation officers, he having failed to pay the $200 established by the by-law of the city then in force, as the fee necessary to be paid to entitle him to such certificate.

If a corporation, under color of passing a by-law in virtue of the powers vested in it, should, for the purpose of effecting a total prevention of the trade in spirituous liquors in the municipality, pass a by-law establishing such an extravagant license fee as would have the effect of total annihilation of such trade within the municipality, the question of the validity of such a by-law will be open to consideration upon a proceeding raising that question. No such question is involved in the present case, and it will be time enough to entertain it if and when it shall arise.

Appeal dismissed with costs.

Solicitor for appellant: *M. Honan.*

Solicitor for respondents: *N. L. Denoncourt.*

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*May. 16.

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*Jan. 12.

GEORGE MOFFATT (DEFENDANT).....APPELLANT;

AND

THE MERCHANTS' BANK OF CANADA (PLAINTIFFS)..... } RESPONDENTS.

ON APPEAL FROM THE CHANCERY DIVISION OF THE HIGH COURT OF JUSTICE FOR ONTARIO.

Deed—Construction of—Estoppel—Misrepresentation.

G. M., a man of education, well acquainted with commercial business, executed a bond to pay certain sums of money, in certain events, to the Merchants' Bank of Canada. By an

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

agreement, bearing even date with the bond, it was recited *inter alia* that in consideration of a mortgage granted to the bank by M. Bros. & Co., the bank had agreed to make further advances to M. Bros. & Co., joint obligors with G. M., and parties to the agreement, and that the agreement was executed to secure the bank in case there should be any deficiency in the assets of the firm, or in the value of the property comprised in said mortgage, and to secure the bank from ultimate loss. The agreement contained also a proviso that if the firm should well and truly pay their indebtedness, then the bond and agreement should become wholly void. In a suit brought upon the said agreement against G. M., alleging a deficiency in the assets of the firm and indebtedness to the bank, G. M. pleaded that the agreement had been executed by him on representation made to him by one of his co-obligors that it was to secure the bank against any loss which might arise by reason of the refraining from the registration of the mortgage, or by reason of any over valuation of the property embraced in the mortgage, and not otherwise. The bank, the plaintiffs, made no representations whatever to the defendants.

Held (affirming the judgment of the Court below, Gwynne, J., dissenting), that G. M. was bound by the execution of the documents, and was liable upon them according to their tenor and effect.

APPEAL from the judgment of Ferguson, J., sitting as a judge of the Chancery Division of the High Court of Justice for Ontario (1).

Leave to appeal direct to the Supreme Court of Canada, without any intermediate appeal being first had to the Court of Appeal for Ontario, was given by Gwynne, J., under sec. 6 of the Supreme Court Amendment Act of 1879, on the ground that the Court of Appeal for Ontario would be bound by the case of *Cameron* v. *Kerr* (2), whereas the appellant sought to avoid the effect of that decision in this action.

The facts of the case, as set out in the judgment of Mr. Justice Ferguson in the court below, are as follows:

"On and prior to the 26th day of January, 1874, the

(1) 5 Ont. R. 122. (2) 3 Ont. App. R. 30.

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commercial firm, Moffatt Bros. & Co., being composed of Lewis Moffatt, Kenneth Mackenzie Moffatt and Lewis Henry Moffatt, were largely indebted to the plaintiffs for advances made, and the plaintiffs held the commercial paper of the customers of the firm for such advances, this being the kind of paper upon which the advances had been made; and the firm then applied to the plaintiffs for additional advances for a limited period, and it was agreed that such additional advances should be made upon the plaintiffs receiving security for the indebtedness of the firm, which was $153,011. In pursuance of this agreement, a mortgage upon certain lands and premises was executed by the members of the firm. The proviso in the mortgage so far as material here was as follows: Provided this mortgage to be void on payment of $153,011 in nine months from the date hereof (the 26th January, 1874), and all bills of exchange, promissory notes, drafts and other paper on which the firm were liable to the plaintiffs on the 31st day of December, 1873, together with all renewals, substitutions and alterations thereof, and all indebtedness of the firm to the plaintiffs in respect of the same, and it was in the proviso stated that the mortgage was intended to be a continuing security to the plaintiffs for the amount, notwithstanding any change in the membership of the firm either by death, retirement therefrom, or addition thereto, and that the mortgage was also to secure and cover any sum due, or to become due, in respect of interest, commission upon the notes or renewals, or other commercial paper. This mortgage was in favor of Archibald Cameron, who was a trustee for the plaintiffs.

"On the same day (the 26th January, 1874,) an agreement was executed between Lewis Moffatt of the first part, Kenneth Mackenzie Moffatt of the second part, the defendant of the third part, and the plaintiffs of the fourth part.

This agreement recited the facts of the indebtedness, that the plaintiffs had refused to make further advances to the firm, and had threatened to close the account and compel immediate payment thereof, unless they received additional security for the advances, and that the mortgage bearing even date with the agreement had been executed.

"The agreement further recited that in consideration of the security, the plaintiffs had agreed to make further advances to the firm, and that the agreement was executed to secure the plaintiffs in case there should be any deficiency in the assets of the firm, or in the value of the property comprised in the mortgage, and to secure the plaintiffs from ultimate loss, and contained a covenant by the parties thereto of the first and second parts, that the capital of the party of the second part, then invested in and forming part of the assets of the firm, should not be withdrawn therefrom until the mortgage should be fully paid and satisfied, unless with the consent of the plaintiffs. Also a covenant by the parties to the agreement of the first, second and third parts in consideration of the premises, and of the acceptance by the plaintiffs of the mortgage and agreement to pay to the plaintiffs, and the covenantors thereby declare themselves jointly and severally indebted to the plaintiffs, their successors and assigns in the sum of ten thousand dollars, to be well and truly paid in nine months from the date of the agreement, as secured by a money bond bearing even date therewith. The agreement also contained a proviso, that if the party of the second part thereto should not withdraw his capital from the firm until the indebtedness of the firm to the plaintiffs should be paid and satisfied, and that if the firm should well and truly pay their indebtedness to the plaintiffs, then the bond and agreement should become wholly void. The agreement also pro-

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vided that the plaintiff should be at liberty to deal with the firm or their successors, and to make such business arrangements as they might deem just and proper, and that nothing thereby done should alter, impair, diminish or render void the liability of the parties to the mortgage bond and agreement, and that the doctrines of law and equity in favour of a surety should not apply to the prejudice of the plaintiffs in consequence of any act done, committed or suffered by them, unless the parties or some one of them should have previously notified the plaintiffs of their objection thereto.

"One the same day a money bond in the penal sum of $20,000 in favour of the plaintiffs was executed by Lewis Moffatt, Kenneth Mackenzie Moffatt and the defendant. The condition of the bond was that if the obligors and each of their heirs should jointly and severally well and truly pay or cause to be paid to the plaintiffs, their successors and assigns, the just and full sum of $10,000 in nine months from the date thereof without any deduction, &c., then the bond to be void, otherwise to remain in full force and virtue.

"The plaintiffs bring this suit upon the said agreement and bond against George Moffatt as a sole defendant, alleging that the indebtedness of the firm Moffatt Bros. & Co., to them the plaintiffs, continued from the date of the time of the giving of the securities as aforesaid to the time of an assignment in insolvency of the said firm on the 12th day of August, 1875; and that it has continued to a large extent thence hitherto, and the plaintiffs allege and charge that the said firm did not well and truly pay their indebtedness to the plaintiffs, and that there is a deficiency in the assets of the firm and in the value of the property mortgaged to the extent of $50,000; and that they, the plaintiffs, are entitled to be paid the sum of $10,000 and interest by the Defendant George Moffatt, and ask that it may be declare

that the sum of $10,000 is due and payable by the defendant under and by virtue of the said agreement and bond, and that the defendant may be ordered to pay the same and interest and the costs of this suit.

"The defendant, in his defence, says that shortly before the execution of the documents that have been before mentioned, he was informed by Lewis Moffatt that at the request of the plaintiffs he had agreed to execute a mortgage upon certain real estate to secure the then indebtedness of the firm to the plaintiffs, and that the property to be comprised in the mortgage had been by him represented to the plaintiffs as being of the value of $50,000; and that he was desirous that the execution of this mortgage should not become known through the registration thereof, and so impair the credit of the firm, and that he and the plaintiffs had agreed that they should refrain from registering the mortgage, and also from having a valuation made of the property; and that he Lewis Moffatt on the same occasion stated that the plaintiffs were willing to agree to the foregoing—provided he could give them security against any loss which might arise by reason of the refraining from the registration of the mortgage or by reason of any over-valuation of the property embraced in the mortgage, and that upon these representations, he, the defendant, consented to become surety for such purposes and not otherwise; and that Lewis Moffatt thereupon presented certain documents to him the defendant for execution—at the same time informing him that they had been prepared in accordance with the understanding before mentioned as to the nature and extent of the intended suretyship by his solicitors, who were also the solicitors for the plaintiffs, and that relying on the assurance of the said Lewis Moffatt, and the said solicitors through him, that the documents correctly expressed, and were strictly in accordance with the nature and ex-

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tent of the suretyship which he had agreed to enter into, he executed the documents without reading them or examining their contents, and without consulting a legal adviser or obtaining advice respecting them; and that if he, the defendant, had known that the tenor and effect of the documents were in any respect different from, or could be construed to increase the liability that he had as aforesaid consented to assume, he would not have executed them. The defendant also says that he never agreed to become in any way liable as surety for any deficiency in the assets of the said firm, and that the documents sued on cannot, nor can either of them be held to so operate. He also says that the mortgage was agreed to be given and was intended to secure the plaintiffs against any loss, and none other—that they might sustain upon the commercial paper of the customers of the said firm held by the plaintiffs on the 31st day of December, 1873; and the then existing indebtedness of the said firm to the plaintiffs as represented by the said commercial paper, and all renewals, alterations or substitutions thereof; and that the said indebtedness so secured had long before this suit been extinguished and ceased to exist, and this the defendant says is an effectual bar to the plaintiffs' claim. The defendant contends that the mortgage was not a continuing security for any amount of indebtedness up to the of $153,011; but only a continuing security for the due payment of the bills and promissory notes in existence and under discount on the 31st day of December, 1873; and any renewals, alterations and substitutions of the same, and that he cannot be made liable as surety otherwise, and he alleges that all such bills and notes had been paid; and satisfied before this suit.

"The defence also alleges that large portions of the said $153,011 were not at the time, the 31st December,

1873, debts contracted to the plaintiffs, nor for which the plaintiffs could legally take and hold the mortgage as additional security, and that as to debts not contracted at the time of the giving of the mortgage, and all renewals and substitutions therefor, the mortgage was and is null and void; and the defendant sets up and relies upon the plaintiffs' charter and the General Banking Acts.

"The defendant pleaded by way of supplemental answer, stating the transactions somewhat, but not I think materially differently, and in this supplemental answer he alleges that the agreement and bond sued upon were given for the purpose of guaranteeing and securing the plaintiffs that the property contained in and covered by the mortgage was not over-valued on the estimate of value placed upon it by the firm, and that the same was of the value of $50,000; and for no other purpose, and that the bond and agreement so far as they purport to contain any further or other guarantee do not express the true intention, object and agreement of the parties; and that they were executed by mutual mistake, and that the property was of the value of $50,000; and that no breach of the agreement and bond occurred, and the defendant asks that these documents should be rectified so as to express the true agreement between the parties to them. At the close of the evidence, however, defendant's counsel by leave amended the supplemental answer by striking out the 7th and 8th paragraphs of it so as to abandon any claim to have the document reformed."

The judgment appealed from was rendered on the 26th April, 1883, and was in favor of the respondents for the full amount payable under the bond, $10,000, and interest from the date of the commencement of the action, with costs.

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Dalton McCarthy, Q. C., and *J. H Ferguson* for appellants:

Under the agreement, the appellant's liability was limited to the indebtedness of the firm at the time of the execution of the agreement, and that indebtedness has long been extinguished. It was never suggested or intended that the mortgage was to be a continuing security for anything more than the due payment of bills and promissory notes in existence, and under discount at the date of the agreement, and any renewals, alterations and substitutions of the same, and he cannot be made liable as surety otherwise. If the agreement and bond are drawn to express a wholly different contract from what was intended, such as to make the appellant liable to the respondents for any deficiencies in the assets of the firm of Moffatt & Co., or that he was to save the bank from ultimate loss on its transactions with that firm, *primâ facie* the agreement and bond on the evidence adduced in the case are not the deeds of the appellant, and are not binding upon him. See *Thoroughgoods'* Case (1), *Comyn's Digest* (2), *Edwards* v. *Brown* (3), *Simmons* v. *G. W. R. Coy.* (4), *Kennedy* v. *Greene* (5), *Vorley* v. *Cooke* (6).

The present is not a case where the interest of the third party can intervene. It is a question between the original parties alone, and there has been no negligence here which the plaintiffs can avail themselves of against the defendant. No estoppel can arise in such a case. See *Swan* v. *North British A. Co.* (7).

But even if the appellant is bound by the documents in their present form, we submit that the bond as controlled by the explanatory agreement must be held

(1) 2 Co., Rep. 9 B.
(2) Fait, B. 2.
(3) 1 C. & J., 311.
(4) 2 C, B. N. S. 620.
(5) 3 M. & R. 699.
(6) 1 Giff. 230.
(7) 2 H. & H. 176.

to be only collateral, and his liability thereon can extend only to such of the indebtedness of the firm as existed at the date of the agreement and as was secured by the mortgage; and the evidence shows that all the paper held by the bank at the time of the agreement had been paid and retired, and that the respondents held no renewals or substitutions thereof secured by the mortgage when this suit was brought. *Corley* v. *Lord Stafford* (1), *Royal Canadian Bank* v. *Cummer and Mason* (2).

C. Robinson, Q. C., and *J. F. Smith* with him for respondents:

The appellant and all the parties to these documents were intelligent men of business, and merchants of long standing The appellant was in addition a director of various corporations, and knew thoroughly what he was about, and no one ever attempted to mislead him. He says he did not read the documents, but he evidently had read the guarantee in its original shape, when the documents sued on were presented to him for execution, and had declined to execute it. He afterwards executed it in its altered form on or about 5th February, 1874, subsequent to the execution of the other documents.

On the other hand, the respondents never had any doubt as to what security they required for the continuance of the account; and although at this distance of time it is not possible to recall what took place verbally during the negotiations, the various letters in the case in connection with the documents leave no doubt as to what the respondents intended to have as security, what they believed they got, and what they have since acted and relied on, viz., security from ultimate loss in case there should be any deficiency in the assets of the firm.

(1) 1 DeG, & J. 238. (2) 15 Gr.

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The counsel relied on the cases cited in the judgment of Ferguson, J., in the court below (1), and particularly on *Campbell* v. *Edwards* (2); *Foster* v. *McKinnon* (3); *Dominion Bank* v. *Blair* (4); *Hunter* v. *Walters* (5).

It is said that the indebtedness under the mortgage in the pleadings mentioned has been extinguished and paid off. This question was raised in an action on the mortgage, in the suit of *Cameron* v. *Kerr*, and was decided by Blake, V. C., in favor of the Bank; and on being carried to the Court of Appeal for Ontario it was again decided in favor of the respondents by an unanimous judgment of that court (6). The respondents rely on that case and the authorities there cited, as well as on the expressed intention of the parties in the instruments, and on the evidence; and also on the letters of Mr. Lewis Moffatt. The evidence on this point in this action does not materially differ from that in the case last cited. The object of the taking of the securities was to protect the respondents from ultimate loss on the account, which had grown too large, and had become weak. This account consisted of commercial paper, discounted for the firm, and endorsed by them. On the 31st December, 1873, the date fixed by the parties, it amounted to $153,011, and that amount was made payable in nine months. From that date to the insolvency of the firm (11th August, 1875) the amount of their indebtedness to the bank, although it sometimes increased, never fell below $140,000. This account is kept in banks in a book called the "Liability or Discount Ledger," and is altogether distinct from the ordinary "Deposit Ledger," which is entirely a record of cash transactions. By the contention of the appellant, the debt was all paid off by the time the

(1) 5 Ont. R. 124.
(2) 24 Gr. 171 *et seq.*
(3) L. R. 4, C. P. 711.
(4) 30 U. C. C. P. at p. 608.
(5) L. R. 7 Ch. 81.
(6) 3 Ont. App. R. 30.

mortgage was executed. At the time of the insolvency, the indebtedness of the firm amounted to a much larger sum than the amount secured. The entries in the Liability Ledger of the respondents show this. As to the method of keeping the accounts: see *The City Discount Co. (Limited)* v. *McLean* (1); *Fenton* v. *Blackwood* (2), and *Cameron* v. *Kerr* (3).

Dalton McCarthy, Q. C., in reply, cited *The Commercial Bank* v. *The Bank of Upper Canada* (4).

RITCHIE, C.J.:—

In no sense, in my opinion, can Lewis Moffatt be said to have been the agent or representative of the bank in obtaining the defendant's signature to the bond and agreement, nor should the defendant have dealt with or treated him as such; and if Lewis Moffatt made false representations as to the contents of the bond and agreement, and, if the defendant, a man of business, or, as Mr. Justice Ferguson expresses it, a gentleman of education and well accustomed to commercial business, having been for many years a member of a large and prominent commercial firm, who carried on their business in Montreal, and having been a director in several business corporations for several years, chose, well knowing, as he must have done, the relative positions of Lewis Moffatt and the bank to one another, to act on such representations, and, without reading the bond and agreement, or satisfying himself as to what the contents really were, when he could easily have done so, to execute the same and permit Lewis Moffatt to deal with such bond and agreement so executed by delivering the same to the bank to be acted upon, and they, there being no fraud or misrepresentation on their part, innocently acted upon the faith of the bond and

(1) L. R., 9 C. P. 692.
(2) L. R., 5 C. P. 176.
(3) 3 Ont. App. R. 30.
(4) 7 Gr. 250.

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agreement being valid, the defendant is estopped as between himself and the bank so acting. If the defendant chose to rely on the understanding and belief which he says he derived from Lewis Moffatt, no representations having been made to him on the part of the plaintiffs, as he says, that he is aware of, and did not choose to read the document, or make other enquiries as to its contents, he has only himself to blame.

Mr. Justice Ferguson says (1) :—

Jackson Rae, who was the plaintiffs' manager at Montreal, and whose evidence was also taken under a commission, says: "The special conditions referred to in my last answer consisted of the requirement of collateral security of a satisfactory character, and the bank preferred to exact personal security." This, however, the firm could not find, but offered instead mortgages covering real estate in the city of Toronto and elsewhere. After much negotiation, the bank at length consented, provided it could be offered in such a shape and of such value as would be satisfactory. The proposed security when defined, was valued by the firm at $75,000 or over, and the firm urged the bank to waive a formal valuation by some independent party, and as an inducement offered to give the bank personal security to the extent of $10,000, to protect it from loss consequent upon over estimate. Subsequently it was further urged upon the bank to waive registration of the mortgage deeds, and that personal security to the amount of $50,000 would be furnished to secure the bank against any injury that might be suffered in consequence of the non-registration. After much negotiation, it was ultimately agreed that if satisfactory personal security were given for the said $50,000, to cover non-registration, and to the extent of $10,000 to cover any possible ultimate loss there might be on the account, the bank would comply with their request to waive registration and special valuation. The evidence of Mr. Rae, the solicitor, who acted for the plaintiffs, is very positive as to the arrangement being in fact as it is stated in the agreement. He appears to have no doubt on the subject, his letter of the 30th of December, 1873, to the plaintiff, then manager at Montreal, speaks of the $10,000 as being in addition to the other security. The recollection of Mr. Lewis Moffatt appeared to be very imperfect regarding many of the particulars of the transactian. Both he and the defendant appear to be under a mistake as to the amount of the valuation of

(1) 5 Ont. R. 135.

the property embraced in the mortgage, about which so much was said, and he had entirely forgotten that he had taken the documents to Montreal at the time of the execution. I think it a fair conclusion upon the evidence, and that I must find that the transaction or arrangement made between him and the plaintiffs, was stated in the documents. The bank - the plaintiffs—did not make any representation whatever to the defendant. Mr. Lewis Moffatt was not the agent for the plaintiffs, I think, as was contended: his representations were not, I think, in any sense, representat'ons of the plaintiffs; it is not shown that any representation was made to the defendant after the 21st of December, 1873, which was nearly a month before the execution of the papers; none was made to him at the time of their execution, and I am of opinion that the weight of authority binding upon me shows that the defendant by executing the documents sued on, under the circumstances disclosed in the case, became liable upon them according to their tenor and effect.

In this conclusion I concur; and, under these circumstances, I think, that the judgment of the Court of Appeal should be affirmed with costs.

STRONG, J.:—

I am of opinion that the appeal should be dismissed for the reasons assigned by Mr. Justice Ferguson in his judgment.

FOURNIER, J., concurred.

HENRY, J.:—

I entertain exactly the same view. A gentleman of intelligence and education, accustomed to mercantile transactions has a document placed before him, and he signs it. The plaintiffs having acted upon it, the defendant is, in my opinion, answerable for the continued indebtedness of the firm with which the agreement was made, and there is evidence that the firm was really indebted (upon going into insolvency) to an amount larger than the agreement, for which this was the security. Under the circumstances in connection with this bond, if the party could get clear of the effect of an

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obligation of that character, a solemn document involving thousand of dollars, if he signs it under a misapprehension, I do not know where the end would be, from the facilities which would be afforded to parties to avoid the payment of liabilities, or to avoid their liability for the enforcement of documents which they executed. I think the appeal should be dismissed with costs, and the judgment of the court below affirmed with costs.

GWYNNE, J.:—

The evidence appears to me to establish beyond all doubt that the utmost extent of the intention of the bank authorities in procuring the preparation and execution of the bond sued upon, was that it should operate, when executed, only as a guarantee to the extent of $10,000 for payment of the balance, if any, which, upon taking a final account of the commercial paper, which at the time of the execution of the bond represented the debt for which the mortgage was given, and of all notes, drafts, &c., in renewal of or which might be given in substitution for any of such commercial paper, as the lands conveyed by the mortgage executed by Messrs. Moffatt Brothers & Co. at the same time should be insufficient to pay; and that this is the extent of the appellants liability upon the bond is, in my opinion, the proper construction to be put upon it, in view of all the surrounding circumstances. The bank were advised that the mortgage could not be taken to secure future advances, and they were willing, upon being secured the then existing debt of Moffatt Brothers & Co., to make them advances to the amount of thirty or thirty-five thousand dollars upon commercial paper of theirs for a limited period of nine months. The mortgage was, therefore, designedly limited to securing the then existing debt, and the design of the bond was to guarantee to the extent of ten thousand

dollars, any balance which might remain unpaid after realizing upon the commercial paper representing the debt, and upon the mortgaged lands. The security of the then existing debt is the object of all the instruments executed simultaneously with the mortgage. True, it is that the promise upon the part of the bank (upon the then existing debt being secured as it was by those instruments,) to make further advances to Messrs. Moffatt Brothers & Co. upon further commercial paper to be furnished by them is recited, but all liability under the instruments, of the parties executing them, is limited to the amount of the then existing debt as set out in the mortgage, and represented by the commercial paper of Moffatt Brothers & Co. then held by the bank. By the mortgage which is executed by Messrs. Moffatt Brothers & Co., that is to say, by Lewis Moffatt, Kenneth Mackenzie Moffatt and Lewis Henry Moffatt, as mortgagors, after reciting that the mortgagors are indebted to the Merchants Bank for debts contracted by the said mortgagors to the said bank in the course of banking, and for which the said bank now hold the commercial paper of the customers of the said mortgagors upon which the said advances have been made, and the said mortgagors have applied to the said bank for additional advances for a limited period to which the said bank has agreed upon receiving security for the present indebtedness; and it is intended by these presents to carry out such agreement, it is witnessed, that in consideration of one hundred and fifty-three thousand and eleven dollars, being the amount of the indebtedness of the mortgagors to the said bank on the 31st day of December now last past, and still unpaid, and of 5 per cent. the lands therein mentioned, are conveyed to Mr. Cameron, manager of the Merchants Bank at Toronto, in fee, subject to a proviso therein contained, that the mortgage should be

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void on payment of one hundred and fifty-three thousand and eleven dollars in nine months from the date thereof, and all bills of exchange, promissory notes, drafts and other paper upon which the said Moffatt Brothers & Co. were liable to the said bank on the 31st of December last preceding the date of the mortgage, together with all renewals, substitutions and alterations thereof, and all the indebtedness of the said mortgagors to the said bank in respect of the said sum, this indenture being intended to be a continuing security to the said bank for the above amount, notwithstanding any change in the membership of the said firm, either by death, retirement therefrom, or addition thereto, and also to secure and cover any sum due, or to become due, in respect of interest commission upon the said notes or renewals, or other commercial paper, and taxes and performance of statute labor. The mortgage then contains a covenant by the mortgagors to pay the said mortgage debt and interest. The bond is then executed on the same day by Lewis Moffatt and Kenneth Mackenzie Moffatt, two of the above mortgagors, and by George Moffatt, the appellant, as their surety in the penal sum of $20,000, conditioned for the payment to the bank of $10,000 in nine months from the date thereof, and on the same day is executed an instrument explanatory of the whole transaction. This indenture recites that the firm of Moffatt Brothers & Co. are indebted to the bank, and that the bank had refused any longer to make advances to them, and had threatened to close their account and to compel immediate payment of their debt, unless the bank should receive additional security for said advances, and that the parties of the first, second and third parts to the said indenture, that is to say, the said Lewis Moffatt, and Kenneth Mackenzie Moffatt, and the now appellant George Moffatt had agreed to give such security, and for that purpose that

the said Lewis Moffatt, Kenneth Mackenzie Moffatt, and one Lewis Henry Moffatt had executed a mortgage of even date to the bank to secure the same, and that in consideration of such security the said bank had agreed to make further advances to said Moffatt Brothers & Co., and that the indenture now in recital was executed to secure the bank in case there should be any deficiency in the assets of the said firm, or in the value of the property comprised in the mortgage and to secure the bank from ultimate loss. The indenture then witnessed that in consideration of the premises Lewis and Kenneth Moffatt covenanted with the bank, that the capital of Kenneth Mackenzie Moffatt then invested in and forming part of the assets of the firm of Moffatt Brothers & Co., should not be withdrawn therefrom until the said mortgage should be fully paid and satisfied, unless with the consent in writing of the bank and the said Lewis Moffatt and Kenneth Mackenzie Moffatt and the appellant George Moffatt, jointly and severally covenanted with the bank that in consideration of the premises and of the bank's acceptance of the said mortgage, and the indenture now in recital, to pay to the bank the sum of ten thousand dollars in nine months from the date of the said indenture as secured by money bond bearing even date with the said indenture. The indenture then contained a clause by which it was declared that if the said Kenneth Mackenzie Moffatt should not withdraw his capital from the said firm of Moffatt Brothers & Co., until the indebtedness of the said firm to the bank should be fully paid, and if the said firm of Moffatt Brothers & Co. should well and truly pay their indebtedness to the said bank, then the said bond and this indenture now in recital should become wholly void. Now, it appears to me, to be very obvious that what is meant by the word "indebtedness" here used is the then existing debt se-

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cured by the then existing commercial paper upon which the moneys constituting the debt were advanced by the bank, and in further security for which the mortgage was given, and it is also, in my opinion, obvious that the words "ultimate loss," as used in this indenture, apply to any loss, if any there should be, upon a final account being taken of the moneys which the bank might receive in respect of the commercial paper then in existence, which constituted the debt secured by the mortgage as additional security, and in respect of all renewals thereof and of all commercial paper which might be accepted by the bank in substitution of such notes, &c., and renewals, and of the moneys arising from the sale of the mortgaged lands. It was only with that debt and with any loss arising in respect of it, that the appellant had anything to do. He never was asked to guarantee and never contemplated guaranteeing the bank against any loss, if any should arise in respect of the future advances which, upon the then existing debt being secured, they promised Moffatt Brothers & Co. to make to them. For such advances the bank were to look alone to the personal credit of Moffatt Brothers & Co., and to the commercial paper upon which such future advances should be made. That this was the clear intention of the bank is apparent from some of the letters which were produced in evidence.

On the 29th December, 1873, Mr. Jackson, the general manager of the bank at Montreal, writes to Mr. Cameron, the manager of the bank at Toronto, as follows:

DEAR SIR,—Referring to the correspondence between us on the subject of Messrs. Moffatt Brothers & Co's. account, I have now to inform you the firm desire to make over security on real estate to extent of $75,000 in value to protect the bank from ultimate loss on the same, and in consideration thereof to procure from the bank an increase temporarily in their present line of discount to the extent of $35,000. I hand you herewith the firm's statement of affairs

also that of Mr. Moffatt's private estate, and I wish you to ascertain from him in what way he proposes to make up the required amount of security, and then submit the whole matter to Messrs. Smith, Rae & Fuller in order to ascertain:

1st. That the bank can legally possess the proposed security and hold it as a protection against ultimate loss on the bills now current or renewals thereof.

2nd. Can any portions of the private estate property be legally pledged to the bank for the same purpose.

3rd. A proper valuation of the property proposed to be mortgaged will be required.

4th. Can this agreement which is now proposed to be made to continue for the period of, say nine months, at the end of which time the bank shall have the right to discontinue discounting for the firm and to recover as best it can upon the bills and securities then in its possession.

I am now awaiting statement of the present position of the firms account with you, on receipt of which, and of Messrs. Smith, Rae and Fuller's report, the board will decide what course shall be taken in regard to the application.

Now, from this letter, which shows the origin of the transaction, it is apparent that what the bank contemplated getting additional security for was the then existing debt—and protection against ultimate loss on the bills then current or renewals thereof. They were not asking for any security for the future advances contemplated to be made to Moffatt Brothers & Co. upon the then existing debt being secured. At this time the guarantee bond sued upon was not contemplated. By a letter of the 30th December, 1873, addressed to Mr. Jackson Rae by Messrs. Smith, Rae & Fuller, they send him their report upon the question submitted to them as contained in the above letter of the 29th December In this letter the solicitors of the bank wrote to the general manager as follows:—

Re Moffatt Brothers.

DEAR SIR,—Mr. Cameron has handed us your letter of yesterday in this matter, and, also the enclosed statement of Mr. Moffatt, and we have seen Mr. Moffatt as to it. On the points stated in your letter, we are of opinion that the bank can take a mortgage or mortgages from

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the different members of the firm as additional security for the present indebtedness of the firm to the bank on the bills now current or renewals thereof.

2nd. That the private property of any member of the firm can be pledged for that purpose.

3rd. Mr. Moffatt is very much averse to greater publicity being given to this matter than is absolutely necessary, and he has gone over the valuation of the properties with us. The first property is a farm, regarding which we know nothing. The second, a part of Collingwood harbor, which had for a long time a merely speculative value. For the last few years it has risen much, and two years ago seven acres were rented for seven years, and one condition of the lease is that the tenant was to erect, keep, and have, at the expiration of the term a saw mill costing at least $6,000. This mill has been built and other improvements made, which, in Mr. Moffatt's opinion, are worth the sum at which the whole property is valued. The warehouse has been valued at $35,000 by the officer appointed by the company in which it is mortgaged for $20,000. As to the mills we know nothing. As to the house Mr. Moffatt states that he holds a policy on the building and contents for $30,000, which he will assign, and the land is certainly valued low at $30 a foot.

Mr. Moffatt offers, in case the bank has any doubt, to give in addition a bond for $10,000 from himself and his brothers George and Kenneth, but does not wish the valuation made for the reason we have before given.

4th. The agreement can be drawn as you propose and for the period; upon this point we had no conversation with Mr. Moffatt."

Now, the bond as here offered, is plainly contemplated as being collateral to the mortgage and as additional security for the same debt as that intended to be secured by the mortgage and as a protection to the bank against ultimate loss on the bills then current, which represented that debt or renewals thereof, in case the property proposed to be mortgaged should prove insufficient for that purpose. The idea that it should operate as a security for any part of the future advances, promised to be made by the bank upon the then existing debt being secured, does not seem to have been entertained by anyone.

On the 14th January, 1874, the Messrs. Smith Rae and

Fuller again wrote to the general manager of the bank as follows:—

Re Moffatt Brothers.

DEAR SIR,—We have consulted (confidentially) with Mr. Bethune in this matter and have come to the conclusion that the best course to take is to take a mortgage in the usual form. This can be taken to Mr. Cameron so that some publicity will be avoided. Your first letter to us proposed to take security upon the real estate for the then indebtedness of the firm being $152,000, and we understand that the bank has arranged to make a further advance to the firm in all of $30,000 in their line of discounts. If this be so, then we do not think these additional advances will be secured by a mortgage under a possible interpretation of the Act, and that it is not your intention to do so; simply the present indebtedness and any renewals of paper securing it.

Again on the 16th January, 1874, they write to him as follows:—

Re Moffatt Bros. & Co.

DEAR SIR,—We have received your telegram and also your letter of the 15th instant. We had previously settled and partly engrossed mortgage and copies covering the properties submitted by Mr. Lewis Moffatt, in which mortgage all the members of the firm, viz., himself, his son and Col. Moffatt join. A bond from Mr. Lewis, Moffatt, Col. Moffatt and George Moffatt, of Montreal, for $10,000, and, also an agreement showing that this $10,000 should be payable in the event of any loss or deficiency in payment of the mortgages, and enabling the bank to make any arrangement with Moffatt Brothers & Co., they deemed proper. We had drawn the mortgage for $153,011, the balance due on the 31st of December, and all renewals or substitution on this account up to this amount. Mr. Bethune agrees with us, and, in fact holds a much stronger opinion than we do regarding the impropriety of taking a mortgage to cover future advances, he holds that this mortgage and bond being given partly upon the promise of further advances is on that account made stronger against any other creditors, and that if taken to cover future advances, the whole security might be set aside. In that view we had advised Mr. Cameron to open a separate account for the future advances beyond $153,011, and to take care that the paper taken on that account should be unexceptionally good. In this view the bank is not likely to sustain much loss as all the private estate of Messrs. Lewis and Col. Moffatt would be liable for $153,011 and George Moffatt for $10,000, should there be any deficiency on this account.

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On the 24th January, 1874, Mr. Jackson Rae, the general manager of the bank, wrote to Mr. Cameron, the manager at Toronto, a letter in which occur the following passages:

DEAR SIR,—I have had several interviews with Mr. Moffatt recently, and he has produced the various mortgages executed in your name in trust for the bank in accordance with the views of your solicitors. The bank has (executed) the $10,000 guarantee bond from Lewis George and Col. Moffatt, and all the documents have been placed in Mr. Moffatt's possession for transmission to your solicitors at Toronto. Mrs. Moffatt's signature to the deeds has yet to be obtained. When this is done, the mortgage may be considered effected. The bank has agreed to delay registration for the period of ten days from this date to enable Mr. Moffatt to procure a bond of indemnity signed by Messrs. Henry Covert and George Moffatt protecting the bank to the extent of $50,000 from any evil consequences which might result to it by refraining from registering the mortgage. If Mr. Moffatt fails to satisfy the bank in regard to this matter within the time named, registration must then proceed.

You will be careful to preserve the old account at about the sum named in the mortgage ($153,011), the additional advances or increased accommodation must be carried on in a new account, which you will understand is not secured, and therefore the paper composing it must be carefully selected. This new account is in accordance with your solicitor's advice.

The indemnity referred to in this letter as to be executed by Messrs. Henry Covert and George Moffatt protecting the bank to the extent of $50,000 from any evil consequences which might result to the bank by reason of its refraining to register the mortgage was given; but it is unnecessary to set out here, for it is not alleged, that any evil consequences did result from the non-registration of the mortgage, nor is any claim now made by the bank as accruing under this guarantee; all that is in question in this suit is as to the liability of the appellant, George Moffatt, under his guarantee bond for $10,000.

A question having arisen as to whether the bank had agreed to give up the guarantee bond for $10,000 upon

receiving the above guarantee to the extent of $50,000 executed by Messrs. Covert and George Moffatt, and a letter having been written upon the subject, of the date of the 7th February, 1874, by Messrs. Smith, Rae and Fuller to the general manager of the bank, the latter replies thereto by a letter dated the 9th February, 1874, addressed to Messrs. Smith, Rae and Fuller as follows :

I have received your letter of the 7th instant enclosing the document as stated, which I now return herewith to be placed in charge of the *Toronto* branch. Mr. Moffatt is in error as to the willingness of the bank to surrender the bond for $10,000 or the deed of agreement in consequence of the execution of the bond of indemnity by H. Covert and G. Moffatt. The latter was taken merely between the bank from loss in consequence of consenting to withhold the mortgage from registration. The bond for $10,000 was accepted in lieu of the requirement as to valuation, and the agreement provides for the continuance of Col. Moffatt's money in the concern as long as the firm continues indebted to the bank.

Col. Moffatt's capital never was removed from the firm, so that no question arises upon that point. The sole question is as to the liability of the appellant under that bond as a collateral security to the mortgage of even date therewith, and in view of the above documents and letters relating to the preparation and execution of the documents, it is, in my opinion, impossible to hold that the bond was prepared or executed with any intent, that it should operate directly or indirectly as security for any part of the future advances which might be made by the bank to Messrs. Moffatt Brothers, or as any protection to the bank against any ultimate loss, if any should arise, upon the taking of an account of such subsequent advances, or for any other purpose than to secure the bank against ultimate loss on an account being taken of the bills, &c., then current, or any renewals thereof, or any paper expressly taken by the bank in substitution for any such paper after realization of the properties comprised in the mortgage. It was as a security against loss in

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respect of the then existing debt alone that the bond was given, and its operation cannot, in my opinion, be extended beyond that purpose.

By the contemporaneous agreement executed for the purpose of defining the extent of the operation of the bond, it is declared to be void if Kenneth McKenzie Moffatt shall not withdraw his capital from the firm, and if Moffatt Brothers & Co., shall well and truly pay their indebtedness to the bank, which indebtedness clearly, as it appears to me, is the only debt which then existed, and to secure which the mortgage was given, and which in that mortgage is described as being $153,011, consisting, as is recited in the mortgage, of bills of exchange, promissory notes, drafts, and other paper upon which the said firm of Moffatt Brothers & Co., were liable to the said Merchants' Bank at Toronto, on the 31st December, 1873, together with all renewals, substitutions and alterations thereof, and all indebtedness of the mortgagors to the bank in respect of said sum, and also any sum then due or to become due in respect of interest or commission upon the said notes or renewals or substitutional paper.

Now, to entitle the bank to recover against the appellant upon this bond, it appears to me to be clear that the onus lies upon them to show that of the moneys constituting the debt of Moffatt Brothers & Co. to the bank, when the bond was given, secured by commercial paper held by the bank, there still remained after realizing upon the properties comprised in the mortgage a sum due to the bank. For any amount so established to be due within the sum of $10,000, the appellant would be liable; but until there should be established to be such ultimate loss upon taking an account, apart altogether of all future advances, of the paper held by the bank at the time the mortgage was given, and of all renewals thereof, and of all commercial paper, if any,

accepted by the bank in actual substitution for any of such paper, and after realization of the mortgaged lands no action could be sustained against the appellant upon his bond. To the taking of such an account, it was absolutely necessary that an account of the secured debt and of the paper held by the bank representing such debt, and of all renewals thereof and of all paper accepted in substitution therefor, should be kept quite separate and distinct from an account of the future advances. And this was well understood by the bank as appears from Mr. Jackson Rae's letter of the 24th January, 1874, to Mr. Cameron, giving him very peremptory instruction to that effect and giving the reason therefor, namely, that any debt to arise in respect of the subsequent advances was unsecured otherwise than by the notes, bills, &c., upon which such subsequent advances should be made, which paper was, therefore, to be most carefully selected by Mr. Cameron. That a loss should arise in respect of the paper which was to be so carefully selected was never contemplated or anticipated. The bank kept no account of the transactions in relation to the old secured debt separate and distinct from the account kept of the subsequent advances. What they did, and the manner in which the paper representing the old secured debt was dealt with, was this: They countinued the account in which the old debt appeared and of the subsequent advances as one account. The customers of Messrs. Moffatt Brothers, who were primarily liable upon some of the commercial paper held by the bank representing the old debt, paid the amounts due on such paper to the bank direct and retired the paper. What amount was so paid to the bank direct, and what notes, bills, &c., were so retired does not appear. Other makers of notes and acceptors of bills held by the bank representing the old debt, were in the habit of paying the amounts

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secured by such paper to Messrs. Moffatt & Co., who were in the habit of paying the sums so paid to them into their credit in the bank. The proceeds of the new discounts constituting the further advance were deposited by the bank to the credit of Messrs. Moffatt Brothers in the same account. The amount to their credit on this account during the first six months after the execution of the mortgage and bond was $1,094,973, of which from 20 to 25 per cent. consisted of cash deposits and the residue of the proceeds of the discounts upon new paper.

By cheques given by Messrs. Moffatt Brothers upon this account, and by direct payments to the bank made by parties, the customers of Messrs. Moffatt, who were primarily liable on the notes and bills, the whole of the notes and bills which the bank had held representing the original debt, which was collaterally secured by the mortgage and the guarantee bond now sued upon were paid, and the notes and bills taken up. No renewals or substitutional paper having ever been given for any of such paper.

Payments so made operated, in my opinion, as direct payment, discharge and extinguishment of so much of the original debt as was represented by the notes and bills taken up, of which the appellant is entitled to the benefit.

Besides the subsequent advances made by the bank to Messrs. Moffatt Brothers upon customers paper the bank advanced to them from $50,000 to $60,000 upon what they knew to be accommodation paper, which moneys were also entered to the credit of the firm in the same account. The result of the taking an account of all these transactions blended into one, is that, after realizing upon the property mortgaged there still remains due to the bank by Messrs. Moffatt Brothers a sum about the same precisely as the amount of the

advances made by the bank upon the accommodation paper. An amount so arrived at cannot, in my opinion, be said to be within the appellant's guarantee. The loss which the bank are seeking indemnity from the appellant for, more properly may be said to have arisen by reason of the bank's own improvidence in making the advances which they made upon the accommodation paper.

It is contended, however, that the bank is entitled to recover this loss from the appellant upon his bond, notwithstanding that the loss should be attributable wholly to the subsequent advances, and even though traceable specially to the advances made upon the accommodation paper, by reason of a clause in the instrument, which provides for defeasance of the bond, which is as follows:

> And it is further agreed, that the said parties of the fourth part, (the bank) shall be at liberty to deal with the said Messrs. Moffatt Bros. & Co. or their successors, and to make such business arrangements as they may deem just and proper, and that nothing thereby done shall alter, impair, diminish, or render void the liability of the parties to the said mortgage bond or this agreement; and that the doctrines of law and equity in favor of a surety shall not apply to the prejudice of the parties of the fourth part (that is the bank) in consequence of any act done, committed, or suffered by them, unless the parties hereto, or some, or one of them, shall previously, in writing, notify the parties of the fourth part of their objection thereto.

It is impossible to construe this clause which specially provides that no business arrangements which the bank should make with Messrs. Moffatt Brothers & Co., should have the effect of altering or diminishing the liability incurred by the appellant as appearing in the previous part of the instrument, should nevertheless have the effect of altering by increasing that liability by making the appellants' bond, which, as I have shown, was given and accepted as, and intended to be, a guarantee in respect of the old debt only, and the commercial paper representing it, to be a guarantee also

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against loss in respect of the subsequent advances, including not only those made upon business paper but those also made upon accommodation paper. So to construe this clause would be to defeat the plain intention of all parties at the time of the execution of the bond. In so far as the clause can affect the appellant, it can only relate to such business arrangements as the bank and Messrs. Moffatt may deem just and proper in relation to the subject-matter with which the appellant is concerned, namely, the old debt and the business paper representing it, and the doctrine of law and equity in favor of a surety which are not to be asserted to the prejudice of the bank, must be limited to the same subject-matter in respect of which the appellant is a surety; and sufficient effect can be given to the clause by construing it as providing that the surety should not avail himself of the doctrine of discharge from his liability by reason of any extension of time which might be given to the parties primarily liable upon the banking paper representing the original debt, by renewals, or by reason of the discharge of any of such parties by reason of the bank accepting substitutional paper in lieu of the current paper or renewals thereof. In the view which I take of the documents and of the intention of the parties to them, *The City Discount Co.* v. *McLean* (1) and *Fenton* v. *Blackwood* (2), and such like cases have no application whatever to the present case, which, in my judgment, does not present any question arising upon the rule in Clayton's case as to the right, in the absence of specific appropriation, of applying the oldest item on the credit side of an account in payment of the oldest item of debt. What the evidence shows, in my opinion, is the retirement of the notes and bills which constituted and represented the

(1) L. R. 9 C. P. 692. (2) L. R. 5 P. C. 167.

old debt by specific payment directly to the bank of some of those notes and bills by the parties primarily liable thereon, and by equally direct and specific payment of the residue of such bills and notes by cheques given to the bank by Messrs. Moffatt Brothers upon a fund over which they had, as is admitted, absolute control, and which fund was composed in part of moneys expressly placed in their hands for the purpose of retiring such notes, &c.

Upon such notes having been retired in the manner above stated, and not by renewal or substitutional paper, so much of the old debt, as those notes respectively represented, was paid and extinguished, and nothing has occurred to deprive the appellant of his right to compel the bank to show that the loss in respect of which they now claim indemnity from him, arose wholly out of the transactions connected with the old debt apart from all the subsequent advances; and as the bank has not only failed in establishing this to be the fact, but in my judgment have, on the contrary, shown that it have risen wholly in respect of the subsequent advances, and specially by reason of the advances made upon the accommodation paper, this appeal should be allowed with costs, and the action in the court below against the appellant be ordered to be dismissed with costs (1).

Appeal dismissed with costs.

Solicitors for appellant: *Ferguson & Ferguson.*

Solicitors for respondents: *Smith, Smith & Rae.*

(1) Application was made to the Judicial Committee of the Privy Council for leave to appeal from this judgment and was refused.

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*Nov. 25.
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*Feb'y. 6.

GEORGE B. BURLAND (PLAINTIFF).....APPELLANT;

AND

ALEXANDER MOFFATT, *ès-qualité*, (DEFENDANT)..... } RESPONDENT.

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

Right of Assignee to sue under voluntary assignment—Arts. 13 *and* 19, *C. C. P.* (*L. C.*)—*Assignee represents only Assignor.*

In the absence of a statutory title to sue as representing creditors, such as is conferred by bankruptcy and insolvency statutes, an assignee in trust for creditors can only enforce the same rights as the person making the assignment to him could have enforced; therefore the defendant could not, by a plea in his own name, ask to have a conveyance, made by the debtor to the plaintiff prior to the assignment under which defendant claimed, rescinded or set a side as fraudulent against creditors.

The nullity of a deed should not be pronounced without putting all the parties to it *en cause en déclaration de jugement commun.*

Semble—The plaintiff, being a second purchaser in good faith and for value, acquired a valid title to the property in question which he could set up even against an action brought directly by the creditors.

APPEAL from a judgment of the Court of Queen's Bench for Lower Canada (appeal side) (1).

The action in this case was commenced by the appellant (plaintiff), by a writ of seizure in revendication of certain machinery. The appellant claimed to be the proprietor of the machinery in question, in virtue of a deed of sale thereof executed by a certain firm of J. G. Gebhardt & Co. to the Canada Paper Co. before Beaufield, notary public, on the 27th day of April,

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

(1) 4 Dorion's Rep. 590.

1880, and of another deed executed by the Canada Paper Co. to appellant on the 12th day of May, 1881, before Marler, notary. Concurrently with the sale from Gebhardt & Co. to the Canada Paper Co. the latter executed a lease of the object of sale to the former, and Gebhardt & Co. remained in possession of the goods. After the date of this sale Gebhardt & Co. continued their business, and used the machinery in question for about a year, when they became financially embarrassed, and made a voluntary assignment of all their estate and effects to respondent, Alexander Moffatt, before a notary; and in virtue of that deed Moffatt took possession of Gebhardt & Co.'s place of business and its contents—and among other property, the machinery now in question. Moffatt had advertised the estate, including this machinery, for sale, when he was stopped by the present action. The action was directed against the firm of Gebhardt & Co., as being legal possessors of the effects claimed, and also against respondent, as being in physical possession thereof, and detaining them against appellant's will. Gebhardt & Co. did not plead, but Moffatt appeared and pleaded the assignment of the said effects to him, as above set forth: that the deed from Gebhardt & Co. to the Canada Paper Co. was fraudulent and simulated; that Gebhardt & Co. were at the time insolvent; and concluded that said deed should be declared null, and that he (Moffatt) be maintained in his possession.

The appellant, by his answer to the plea of Moffatt alleged that Moffatt had no right to defend his possession of the goods seized in this cause, by setting up pretended matters personal to the creditors of G. J. Gebhardt & Co.

That Moffatt was not, and did not allege himself to be, a creditor of said firm, or to have suffered damage by reason of the pretended fraud, which he alleged.

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That if the deed or transfer in trust, alleged by Moffatt, conveyed to him any rights whatever, which was denied, the same did not convey to him the right to take possession of property not belonging to the defendant, nor to represent the rights of the creditors generally, nor to defend any action such as the present.

That if Moffatt held any legal position under the said deed, such position was that of defendants George J. Gebhardt & Co., and not that of the creditors of the firm.

That all of the creditors of the said firm of G. J. Gebhardt & Co. did not consent to the said deed of assignment, nor did even a majority of them, nor did any of said creditors authorize Moffatt to plead as he had done.

That Moffatt was pleading *droits d'autrui*, and his plea was void.

That said Moffatt alleged nothing personal to himself, nor to G. J. Gebhardt & Co., to justify his retention of the goods seized.

The plaintiff in addition fyled a general answer.

The Superior Court dismissed Moffatt's plea and maintained Burland's action. On appeal to the Court of Queen's Bench for Lower Canada (appeal side), that court reversed the judgment of the Superior Court, on the ground that the assignee under a voluntary deed of assignment by a debtor for the benefit of his creditors can, as such assignee, sue and be sued in reference to the estate and property assigned to him.

Archibald for appellant, and *Strachan Bethune*, Q. C. and *J. Doutre*, Q. C., for respondent.

The points relied on by counsel and authorities cited are fully noticed in the judgment of Taschereau, J., hereinafter given, and in the judgments of the court below (1).

(1) 4 Dorion's Rep 590 *et seq.*

RITCHIE, C. J., concurred with Taschereau, J.

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STRONG, J.:

This is an action of revendication to recover certain plant and machinery, brought against the assignee for the benefit of the creditors of the original vendors, under whom the plaintiff claims. The defendant impeaches the original contract of sale entered into between the insolvents, the assignors of the defendants, and the persons from whom the appellant purchased, as being fraudulent against creditors.

The objections to the judgment, very ably urged in argument by Mr. Archibald, which seem to me to be conclusive in favor of the appeal are: first, that the assignee, the present respondent, has no *locus standi* for the purpose of maintaining such a defence, as it could not have been successfully pleaded by the assignors themselves. The debtor who makes a deed which is fraudulent against creditors cannot institute an action to set it aside, and his assignee can stand in no better position than his author. This is the view taken by Mr. Justice Monk, and I think he is entirely right. In English law, as administered in England and the Province of Ontario, the law to this effect is well understood and settled, as is apparent from the cases of *Robinson* v. *McDonell* (1), in England, and that of *McMaster* v. *Clare* (2), in Ontario. And in the United States, though the decisions are not uniform, the law is generally settled the same way—at least, I find it so stated in a recent and American treatise on the law relating to conveyances in fraud of creditors (3), where the authorities will be found collected. In the Province of Quebec the reasoning upon which these decisions proceed is *a fortiori* applicable—since

(1) 2 B. & Ald. 136.
(2) 7 Gr. 550.
(3) Wait on Fraudulent Conveyances, at p. 179.

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the maxim "*nemo potest plus transferre quam ipse habet*," is of course also the rule of that law, and the principle upon which the exceptional American cases profess to be founded, namely, that the assignee is the representative of the creditors, is, in Quebec, excluded by the well known rule of the ancient French law, that no one can sue by "*procureur*" except the King. Therefore, in the absence of a statutory title to sue as representing creditors, such as is conferred by bankruptcy and insolvency statutes, an assignee in trust for creditors can only enforce the same rights of action as the parties making the assigment to him could have enforced.

A second ground for allowing this appeal is that the appellant was a purchaser in good faith and for value. There is no evidence to show that he had any intimation of fraud in the first sale by Gebhart & Co. to the Canada Paper Company, so that he stands in a different and more advantageous position than the original purchasers (1). Therefore, if this action had been instituted by the creditors directly, instead of by the assignee, it must have failed.

On these grounds, which I only state shortly and in outline, I am of opinion that the judgment of the court below should be reversed. The reasons I assign for my judgment will be fully treated in the judgment which has been prepared by my brother Taschereau, and I refer to that for a more amplified statement of the arguments and reasons upon which, I think, the appeal should be decided.

FOURNIER, J., concurred with Taschereau, J.

(1) See Demolombe, Contrats et obligations, t. 2 p. 196 No. 200, *et seq.*; Capmas, Revocation des Actes, No.74 to 76; Aubry et Rau. 4 ed., Vol. 4, p. 157; Larombière, Vol. 1, p. 252, *et seq.*; Bedarride, Vol. 4, Art. 1670, *et seq.*

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Henry, J.

HENRY, J.:—

The defendant in this action claims under a conveyance from Gebhart & Co. they having made to him an assignment of their property in general terms for the benefit of their creditors. The plaintiff claims under a conveyance from another party about a year previous, who purchased the property in question from Gebhart & Co. for a valuable consideration. He had a prior title from Gebhart & Co. to that of the assignee. He says: I have the title, I have paid a valuable considreation for the property and I am entitled to hold it. It remained in the possession of Gebhart & Co. under the lease by which they were to pay rent to the original purchasers, and they were at the time in the position of tenants of the property purchased from Gebhart & Co He was therefore in possession of the property by his tenants from whom he had a right to receive rent, and, that being so, and the defendant being in possession the action is brought to recover possession of it. The assignee claims under an assignment from Gebhart & Co. of all their property. The question then arises: What did he take under that? He took only such property as Gebhart & Co. had the right to sell. Gebhart & Co., having the year previously sold this property, had no right or title to it. But he says: You made that assignment to the other company fraudulently, in fraud of your creditors. But the question is: What right had he to say so? He did not take possession under the Insolvent Act, which enables the assignee to go back and enquire into the transactions of the insolvent for some time previous to his becoming insolvent; and which, if he finds creditors have been improperly preferred, or that assignments made previously have been in contemplation of bankruptcy, provides that he shall have the right of enquiry into the circumstances; and no such power is given to an assignee apart from

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the Act. The assignee merely took the title that Gebhart & Co. had, and, having taken that, he has no right to enquire into the dealings of Gebhart & Co. by which they transferred the property previously. The property was theirs at the time, and they cannot say: We assigned it fraudulently, and he as their assignee is not permitted to say so. Under these circumstances, I think the case, independently of any questions which might otherwise arise, is clearly in favor of the plaintiff in the action. I, think, therefore that the judgment of the court below is erroneous. There was a good deal of law cited by the learned Chief Justice of the Court of Appeal in the Province of Quebec, but it does not touch the point. The assignee had conveyed to him the property that Gebhart & Co. had, but that is not the question here. The position here is that he did not receive any itle to this property in question, because Gebhart & Co., at the time they made the assignment, had no title to give him. Therefore the law cited, that an assignee of property may bring an action to recover it, is not applicable. I, think, therefore, the appeal should be allowed and that the judgment should be to affirm the judgment of the Superior Court in favor of the appellant.

TASCHEREAU, J.:—

This is an appeal from a judgment dismissing an action in revendication by which Burland, the appellant, claims certain machinery, which he contends the respondent Moffatt, detains illegally. Burland, in his declaration, alleges that he bought this machinery by deed of the 12th of May, 1881, from the Canada Paper Co., who had themselves bought it from Gebhart & Co. by deed of the 27th of April, 1880.

Moffatt answered this action by a plea alleging that he detains the said machinery under a voluntary assignment, of the 13th June, 1881, by the said Gebhart & Co.,

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of the whole of their estate, to him, Moffatt, for the benefit of their creditors; and that when Gebhart & Co. sold it to the Canada Paper Co., they were insolvent or embarrassed, the said sale having been collusively concerted in order to give to the said company a fraudulent and illegal preference in fraud of the other creditors of the said Gebhart & Co. The conclusions of this plea are that the said sale of Gebhart & Co. to the Canada Paper Co., and the sale by the Canada Paper Co. to the plaintiff, be declared to have been, and to be simulated, fraudulent, inoperative, null and void; that the said deeds be rescinded and set aside, and the action in revendication of the said plaintiff dismissed. To this plea Burland replied that Moffatt had no legal status to oppose such objections to this action; that Moffatt was not a creditor, and had no interest; that he could not plead defences that belonged only to the creditors; and that he had no authority to represent the creditors by pleading in his own name.

The Superior Court in Montreal (Rainville, J.,) dismissed Moffatt's plea, and maintained Burland's action on these grounds, as follows:—

Considérant que le défendeur n'a pas droit de plaider à cette cause en la qualité par lui invoquée parce que personne d'après l'article 19 du Code de Procédure Civile ne peut plaider au nom d'autrui.

Considérant en outre qu'en supposant que la vente faite par les dits George J. Gebhart et Cie. serait simulée et frauduleuse, cette simulation ou cette fraude ne pouvait réflechir contre le démandeur qui a acquis les dits meubles de bonne foi, pour valable consideration.

Considérant que d'après les articles 1025 et 1027 du Code Civil du Bas Canada, l'aliénation d'une chose certaine et determinée rend l'acquéreur propriétaire par le seul consentement des parties sans tradition, et ce aussi bien a l'égard des tiers qu'a l'égard des parties contractantes, et qu'en conséquence le démandeur est propriétaire des effets saisis revendiqués.

I am of opinion that this judgment was right, and should not have been reversed by the Court of Appeal

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as it has been. Clearly, Moffatt, by his plea, professes to represent and act in lieu of the creditors of Gebhart & Co., and of them only. It is not for Gebhart & Co. and as their representative that he asks the resiliation of these deeds. In that quality he could not have done so, for the simple reason that Gebhart & Co. could not themselves have done it. And as to himself, he is not a creditor, does not claim to be one, and has personally no interest whatever in the case. He is certainly not *procurator in rem suam*. By the said plea he became virtually a plaintiff, in his own name, in an action *Pauliana*, or *en déclaration de similation*. Now, if he had instituted a direct action, of the same nature, would he have done so in his own individual name, or in his quality of assignee. I can answer without hesitation, that he never would have thought of sueing otherwise than in his quality of assignee. Then, on what ground can he contend that here he, in his own individual name, has the right to demand for Gebhart's creditors the resiliation of the said deeds? The only answer he has given to this, is that he had to do it because he is sued in his own individual name. But surely that could not hinder him from filing an intervention in his quality of assignee, or from bringing a direct action in this quality. That *nul ne peut plaider par procureur* is, and has always been, the law. In *Nesbitt* v. *Turgeon* (1), the Court of Queen's Bench (as far back as 1845, Sir James Stuart, C.J., Bowen, Panet and Bedard, JJ.), held that, even in the case where the debtor had expressly agreed that the action against him should be brought in the name of the attorney or agent, it could not be done. There are apparent though no real exceptions to this rule, but none applicable here, and the respondent has failed to produce a single authority to establish that with us, the assignee, or trustee, for the benefit of credi-

(1) 2 Rev. Leg. 43.

tors has, in his own and individual name, the actions of the creditors. And this alone would dispose of his demand *en résiliation*. Could he, however, be considered an assignee or trustee, he would not have has more success. In the absence of a bankrupt law, the assignee represents the assignor, but not the creditors. Mr. Justice Monk has clearly demonstrated this proposition in his dissenting opinion in the present cause, and the respondent has cited no authority to the contrary, outside of the writers, under the Ordinance of Commerce of 1673, or the French Code of Procedure, or the Code of Commerce, all of which are not law here.

In our own courts I cannot find a single case in which, the point being taken, it has been held, that an assignee under such circumstances can act for and in the name of the creditors. In all the cases cited by the respondent and which I have been able to refer to, the assignee was suing for the assignor, as his *locum tenens* and claiming the assignor's right. In not one of them, can I see that the assignee was exercising the personal actions of the creditors, that is the actions given to them alone, and denied to the assignor. *Withall* v. *Young* (1), and *Bruce* v. *Anderson* (2), would seem to be exceptions to this, but a reference to these cases shows that the point there was not at all raised by the parties, or decided by the court. In *Starkie* v. *Henderson* (3), it was the assignor's action that the plaintiff had taken, and on the peculiar state of facts, the court held that there was a privity of contract between himself and the defendant, and that so he had rightly brought the action in his name. Of course in exercising the assignor's action, and claiming the assignor's rights and debts, the assignee does it in the interest of the creditors, as well as of his assignor, but that is

(1) 10 L. C. R. 122. (2) Stuarts' Rep. 137.
(3) 9 L. C. Jur. 238.

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quite different. It is then as any *concessionaire* may do, the actions pertaining to the assignor, the actions that before the assignment, or without it, the assignor would himself have had which he then brings, whilst here the assignee claims rights pertaining to the creditors alone, and to which his assignor could never have had any claim.

In *Prevost* v. *Drolet* (1), in the Court of Appeal, Mr. Justice Loranger, delivering the judgment of the court, held that an assignee, under the assignmet to him by an insolvent for the general benefit of his creditors, not made under the Insolvent Act, has no quality to sue in his own name for anything connected with such assignment. That was going further than was necessary to do here. By the report of the case one would certainly think that the court there were unanimous in that holding. It may be, however, as has been said at the bar, that the three other judges composing the court simply concurred in the result of the judgment on the plea to the merits without entering into the question discussed by Judge Loranger. But to make them hold quite the reverse as contended here by the respondent, simply because the demurrer attacking the plaintiff's rights of action had been dismissed by the judgment of the first court, and because the said judge in appeal did not reverse that judgment seems to me going far, as the appeal was by the plaintiff, who had obtained *gain de cause* on the demurrer, and who consequently did not complain of the judgment which had dismissed it. However, this is immaterial, the case having no application here, as the plaintiff there also claimed, purely and solely as *locum tenens* of the assignor a debt due to the assignor. The cases of *Ferries* v. *Thomson* and *Amour & Main* (2), and *Mills* v. *Philbin* (3), cited

(1) 18 L. C. Jur. 300. (2) 2 Rev. de Legis. 303.
(3) 3 Rev. de Legis. 255.

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by the respondent, do not seem to me to have any bearing the present case, whilst two reported cases are decidedly adverse to him. In *Chevalt* v. *de Chantal* (1), it was distinctly held that the assignee cannot judicially represent the creditors of the assignor. And in *Whitney* v. *Bideaux* (2), Mr. Justice Badgley also held that the assignees of an insolvent cannot *ester en justice* for the creditors.

The respondent has cited some unreported cases from Montreal, of 1845 or 1846. I have not been able to refer to them, but they were probably under the then existing bankruptcy law, 7 Vic, ch. 10 (1843), and from what has been said of them, they were, I believe, all actions belonging to the assignor that had been so brought by the assignee.

I may here remark, this assignment was not made for the benefit of Gebhart & Co's. creditors generally, but only for the benefit of nine specified creditors, parties to the said deed, the said nine creditors to be paid their claims on the proceeds of the sale of Gebhart & Co's. estate, goods and chattels, the surplus, if any, to be paid over to the said Gebhart & Co. Burland, the appellant, was himself one of these nine creditors, and it has been urged upon us that this was fatal to his present action, But I really cannot see how this alone could confer upon the respondent the right to *ester en justice* as *locum tenens* of the creditors. *Burland*, moreover, signed the deed without prejudice to any privilege or security he had; and when Gebhart & Co. assigned their goods and chattels, without any description or enumeration whatsoever, and without any schedule annexed to the deed or any mention whatsoever, of the machinery in question here, *Burland* was, it seems to me, perfectly justified in not seeing in the deed an assignment of what were then

(1) 8 L. C. Jur. 85. (2) 12 Rev. Leg. 518.

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his goods and effects. They ceded their goods, not Burland's.

Another serious objection taken against the respondent is, that none of the parties to the sale by Gebhart & Co. to the Canada Paper Co., of which the revocation is asked are *en cause*. See *Lacroix v Moreau* (1). Neither the paper company nor Gebhart are parties to this issue, and neither of them have had an opportunity to contest this demand in revocation. Moffatt here, as I have already remarked, does not represent Gebhart & Co., and does not pretend to do so.

L'action en rescision, (says Bédarride), (2), doit être poursuivie directement contre les auteurs du dol., alors même que la chose qui en est l'objet serait passée en d'autres mains.

The reasons this author there gives for this opinion apply to all revocatory actions, and to the actions instituted by the creditors not parties to the deed (3).

And it is on the party who demands the revocation of any deed under such circumstances that lies the duty to see the entire fulfilment of all the conditions necessary for the success of his demand. If Moffatt had formed his demand in resiliation by an action, he would have had to direct it against Gebhart & Co., as well as against the Canada Paper Co. and against Burland Now, when he demanded this resiliation, as here, by an incidental procedure, why did he not bring *en cause* Gebhart & Co. and the Canada Paper Co. *en déclaration de jugement commun*. By holding fast to the old and well established rule that, in any proceeding and demand, all the parties interested in its results should be called in, courts of justice will prevent a multiplicity of contestions and contradictory judgments. For it is evident that, here, for instance, a judgment between the appellant

(1) 15 L. C. R. 485.
(2) Dol et fraude, No. 299.
(3) Ibid No. 273. See also 4 Bédarride, No. 1436.

and the respondent could not be opposed to the Canada Paper Co., and would not be *res judicata* as to them. And this would be so, perhaps, even as regards Gebhart & Co. Though some cases have gone so far as to say that it is not always necessary that all the parties should be called in (on what authority does not appear). I am not aware of any case in which a deed has been annulled in the absence of all and every one of the parties thereto. The court may, perhaps, sometimes, if in the course of the proceedings it is of opinion that certain other parties have an interest in the case, upon proper application, order them to be summoned (1). But it would not do so after a final hearing on the merits. If it then appears that though the objection has been taken, *ab initio*, the party demanding the resiliation has claimed the right and persisted in going on with the case on the issue joined with the adversary he has chosen, his demand must be dismissed; he has failed voluntarily to put the court in a position to grant it, and his adversary has then an acquired right to its dismissal. Were the court to order, then, the *mise en cause* of any other party, it would necessarily follow that the pleadings, *enquête*, and all the proceedings, would have to be begun over again, a result which, it is obvious, would be an injustice to the party entitled to a judgment.

Moffatt's contention, that in an action in revendication—"*Si la chose n'appartient pas au possesseur, vous devez faire assigner son bailleur*"—is irrefutably answered on the part of the appellant, by the fact that he has done so, and that Gebhart & Co., Moffatt's *bailleurs*, are co-defendants in this suit. That the appellant should have summoned the creditors, I cannot see. Is the plaintiff, in a petitory action, obliged to put *en cause* the mortgagees? Then, if Moffatt had no

(1) Bioche dict. de procéd. vo. mise en cause No. 4.

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right to question the titles upon which the action is based, his doing so cannot have put the appellant under the obligation to call in any other party who might have had that right. Burland's action is to revendicate the possession and ownership of this machinery, and is surely well brought against both the actual detainer and the pretended owners of it (for the assignment would not deprive Gebhart & Co. of the ownership of it.) Then, how can Moffatt be admitted to contend that the appellant should have called in the creditors, when he rests and leaves his whole case on the ground that he himself here is acting for them, and represents them, and that it is entirely and solely for and in their name that he asks the resiliation of the plaintiff's title. If he represents the creditors, they have not to be called on. If he does not represent them, he is out of court.

The rule that the defendant, in an action in revendication, upon his declaring that he does not hold for himself, has a right, upon saying for whom he holds, to be put *hors de cause*, does not apply, I believe, where the said defendant joins issue and engages in a contestation with the plaintiff. This contestation, it is evident, has to be brought to judgment between the parties to it and them alone, and the defendant then, who has taken upon himself to resist the plaintiff's demand, cannot be admitted to complain that the real owner is not *en cause*.

Another important question raised by the appellant, and also decided in his favor by the Superior Court, is that he was a second purchaser in good faith of the machinery in question, and that whatever fraud may have been committed between Gebhart and The Canada Paper Co. cannot affect his rights to the said machinery, and his purchase of it from the Paper Co. The

great majority of writers on this point (1) are of opinion that the action *Pauliana* does not lie against a subsequent purchaser in good faith, though Laurent (2), it would seem, is of a contrary opinion. However, it is unnecessary for us to consider and determine that question here as on the first ground alone the appellant is entitled to succeed.

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Appeal allowed with costs.

Solicitors for appellant: *Archibald & McCormick.*

Solicitors for respondent: *Dunlop & Lyman.*

THE EUREKA WOOLLEN MILLS COMPANY, LIMITED (Defendants)... APPELLANTS;

AND

SAMUEL MOSS *et al* (Plaintiffs)..... RESPONDENTS.

1885
*Oct. 28.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Appeal - New trial ordered by court below—Verdict against weight of evidence.

The court will not hear an appeal where the court below, in the exercise of its discretion, has ordered a new trial on the ground that the verdict is against the weight of evidence.

THIS was an appeal from a judgment of the Supreme Court of Nova Scotia, ordering a new trial on the ground that the verdict for the appellants (defendants below) was against the weight of evidence.

By the judgments in the court below, published in the printed case, it appeared that the judges, in order-

* PRESENT—Sir W. J. Ritchie, C.J., and Fournier, Henry, Taschereau and Gwynne, JJ.

(1) Bédarride, Dol et fraude, No. 1764; Demolombe, 2 des Contrats, Nos. 198 in 204 and No. 235; 4 Proudhom, usufruct, No. 2412; Duranton, vol. 10, No. 582; Marcadé, vol. 4, p. 406; Capmas, de la révocation, p. 104; Table Gén. v. Vente, No. 13, 737 seq.; 3 Aubry et Rau, p. 92.

(2) Vol. 16, Nos. 464, et seq. and 497 et seq.

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ing a new trial, considered that the evidence greatly preponderated in favor of the respondents (plaintiffs below) and that the jury had given a sympathetic verdict, the respondents being a foreign firm doing business at Montreal.

A. F. McIntyre, for the appellants, stated the facts of the case and the nature of the appeal.

Dunlop on behalf of the respondents was not called on

RITCHIE, C. J.:—

We must not encourage appeals to this court in such cases, and we wish it understood, that where a court below has ordered a new trial on the ground that the verdict is against the weight of evidence, this court will not interfere.

This appeal must be dismissed.

Appeal dismissed with costs.

Solicitor for appellants: *D. C. Fraser.*

Solicitor for respondents: *W.B. McSweeny.*

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*Oct. 29.

HENRY HOWARD (Plaintiff)..... .....APPELLANT;

AND

THE LANCASHIRE INSURANCE COMPANY (Defendants)..... } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Appeal—New trial ordered by Court below—Questions of law—Insurance policy—Insurable interest—Special condition—Renewal—New contract.

J., the manager of appellant's firm, insured the stock of one S., a debtor to the firm, in the name and for the benefit of the appellant. At the time of effecting such insurance J. represented appellant to be mortgagee of the stock of S. S. became insolvent and J. was appointed creditor's assignee, and the property

*PRESENT—Sir W. J. Ritchie, C.J., and Fournier, Henry, Taschereau and Gwynne, JJ.

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of the insolvent was conveyed to him by the official assignee. On March 8, 1876, S. made a bill of sale of his stock to J., having effected a composition with his creditors under the Insolvent Act of 1875, but not having had the same confirmed by the court. The insurance policy was renewed on August 5, 1876, one year after its issue. On January 12, 1877, the bill of sale to J. was discharged and a new bill of sale given by S. to the appellant, who claimed that the former had been taken by J. as his agent, and the execution of the latter was merely carrying out the original intention of the parties. The stock was destroyed by fire on March 8, 1877. An action having been brought on the policy it was tried before Smith, J., without a jury, and a verdict was given for the plaintiff. The Supreme Court of Nova Scotia set aside this verdict, and ordered a new trial on the ground that plaintiff had no insurable interest in the property when insurance was effected, and that no interest subsequently acquired would entitle him to maintain the action.

One of the conditions of the policy was "that all insurances, whether original or renewed, shall be considered as made under the original representation, in so far as it may not be varied by a new representation in writing, which in all cases it shall be incumbent on the party insured to make when the risk has been changed, either within itself or by the surrounding or adjacent buildings."

On appeal to the Supreme Court of Canada.

Held,—1. That the appeal should be heard. *Eureka Woollen Mills Co.* v. *Moss* (1) distinguished.

2. That the appellant having had no insurable interest when the insurance was effected, the subsequently acquired interest gave him no claim to the benefit of the policy, the renewal of the existing policy being merely a continuance of the original contract.

THIS was an appeal from a judgment of the Supreme Court of Nova Scotia (1), making absolute a *rule nisi* for a new trial.

The facts of the case are sufficiently stated in the head note.

Gormully for the appellant:

The court decided yesterday, in the case of *The Eureka Woollen Mills Co.* v. *Moss*, that they would not hear an appeal when the court below had ordered a new

(1) 11 Can. S. C. R. 91. (2) 5 Russ. and Geld. 172.

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trial on the ground that the verdict was against the weight of evidence. In this case the ground for ordering a new trial was that no insurable interest in the plaintiff had been shown, and, by the practice of the Supreme Court of Nova Scotia, a verdict for the defendant could not be entered, and the only course open to the court was to grant a new trial. Under sec. 20 of the Supreme and Exchequer Courts Act I submit that we are entitled to have this appeal heard.

[RITCHIE, C.J.—This case is distinguishable from *Eureka Woollen Mills Co.* v. *Moss.* We will hear the appeal.].

When Strong gave the bill of sale to Jenkins he was in possession of the goods, and his discharge by the court made the mortgage of the eighth of March valid. On the fifth of August a new premium was paid, and I contend that each payment of premium is a new contract. It was not intended to make a change in the policy, but to continue a binding contract of insurance.

I am going to contend that a party need not have an interest in the property at the time of effecting the insurance; it is sufficient if he has such interest at the time of the loss.

Tremaine for the respondents was not called on.

RITCHIE, C.J.:—

I do not think this is an arguable case at all. I think that before a man can recover on a policy of insurance he must have an insurable interest in the property when he effects the insurance. The renewal was merely a continuance of the original insurance and not a new policy. This appeal must be dismissed.

Appeal dismissed with costs.

Solicitor for appellants: *Robert Motton.*

Solicitor for respondents: *F. J. Tremaine.*

THE REV. JOEL TOMBLESON WRIGHT (PLANTIFF)..... } APPELLANT;

AND

THE INCORPORATED SYNOD OF THE DIOCESE OF HURON (DEFENDANTS)..... } RESPONDENTS.

1884
*Dec. 8.
1885
*June 22.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Member of Synod—Trust, Construction of—Vested rights—Commutation fund.

The sum received for commutation under the Clergy Reserve Act was paid to the Church Society of the Diocese of Huron, upon trust to pay to the commuting clergy their stipends for life, and when such payment should cease then "for the support "and maintainance of the clergy of the Diocese of Huron in "such manner as should from time to time be declared by any "by-law or by-laws of the Synod to be from time to time passed "for that purpose." In 1860, a by-law was passed providing that out of the surplus of the commutation fund, clergymen of eight years and upwards active services hould receive each $200, with a provision for increase in certain events. In 1873, the plaintiff became entitled under this by-law, and in 1876 the Synod (the successors oft he Church Society) repealed all previous by-laws respecting the fund, and made a different appropriation of it.

Held (affirming the judgment of the court below, Fournier and Henry, JJ., dissenting,) that under the terms of the trust there was no contract between the plaintiff and defendants; the trustees had power, from time to time, to pass by-laws regulating the fund in question and making a different appropriation of it, for the support and maintainance of the clergy of the Diocese, and the plaintiff must be assumed to have accepted his stipend with that knowledge and on that condition.

APPEAL from a judgment of the Court of Appeal for Ontario (1), reversing the judgment of Proudfoot, J. (2).

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

(1) 9 Ont. App. R. 411. (2) 29 Gr. 348.

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The facts of the case are fully given in the report of the case 29 Gr. 348, and in the judgments of the court below, reported in 9 Ont. App. Rep. 411.

Dalton McCarthy, Q. C., *Harding* with him, for appellant; *S. H. Blake*, Q. C. for respondents.

The points relied on by counsel and cases cited are fully noticed in the reports of the case in the courts below and in the judgments hereinafter given.

RITCHIE, C.J.:—

I think the judgment of the Court of Appeal must be sustained and the appeal dismissed. I cannot see that the plaintiff has made out any valid and binding contract or vested right whereby he became entitled to receive an annuity of $200 out of the funds in question, and that no power existed in the Synod whereby a change in its management of the fund could be made which would affect him, on the contrary I think the synod had, by the express provisions concerning the management of the fund, the power of determining from time to time by by-law, in what manner the trust fund should be dealt with, provided always it was for the support and maintenance of the clergy of the diocese.

The learned judge of first instance, says: "The plaintiff had the right to assume when placed on the fund that he would remain there while the conditions on which the grant was made continued to exist." On the other hand, may it not with much more force be said, that in as much as the trust was for the support and maintenance of the clergy, in such a manner as shall from time to time be declared by any by-law or by-laws to be from time to time passed for that purpose, the plaintiff had no right to assume that the disposition of the fund would not be from time to time altered as the exigencies of the diocese, and the maintenance and

support of the clergy then might, in the judgment of the synod, require.

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STRONG, J.:—

In stating the reasons for the conclusion at which I have arrived that this appeal must fail, I shall be as concise as possible. I need not trace the title to the trust fund in question from the clergymen who originally commuted their charges on the clergy reserves, with the Government of Canada, to the Church Society of the Diocese of Huron, and from the latter society to the Synod of Huron, the present defendant, all of these mutations are sufficiently set out and explained in the pleadings and in the judgments delivered in the courts below. It is sufficient for the present purpose to say that upon the 2nd March, 1869, the defendants held this fund subject to the claims upon it of the original commuting clergymen upon trusts which may be stated as follows, viz.: "For the support and maintenance of the clergy of the Diocese of Huron in such manner as should from time to time be declared by any by-law or by-laws of the synod to be from time to time passed for that purpose." The principal, and as it seems to me the only substantial question which we are called upon to decide is that involved in the construction of this trust. If the by-law of the 2nd of March, 1869, under which the plaintiff in effect claims title to an irrevocable annuity for his life or during active service as a clergyman of the Diocese of Huron is in excess of the powers conferred on the synod as trustees of the fund, it is of course to that extent void, though before determining it to be void we must endeavor so to construe its terms as to read it consistently with the trust and to make it *intra vires* of the trustees. What, then, was meant by the founders of this charity, for such in law it is, when they declared

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that it should be applied to the purposes designated in such manner as should be declared "from time to time" by by-laws to be "from time to time" passed? It is plain that this must depend entirely on the meaning to be attributed to the words "from time to time," an expression, it will be observed, twice repeated. Did the settlors, by that expression, intend to confer on the members the power to create absolute vested interests in the fund or in its income, or must it be taken to mean that such dispositions as the synod should make, should be by by-laws at all times subject to repeal or alteration? No one can doubt that the terms of this declaration of trust would not warrant the permanent alienation of the capital of the fund, for such a disposition of it would clearly be a breach of trust since the trustees would be thereby incapacitated from dealing with it from time to time by by-laws to be passed from time to time. Then the income of the fund is to be held on precisely the same trust as the principal for the words are, "shall have and hold the said commutation money and all interests and proceeds thereof upon trust," as before stated. Therefore, a permanent alienation of the income would be as objectionable as a similar alienation of the corpus. Next, if a permanent alienation is inadmissible, upon what principle can it be said that an alienation of revenue for a fixed limited time is authorized? None that I can see. Such a disposition of the income would disable the trustees from performing the duties of their trust, which is from time to time as they in their discretion shall think fit (for such is the construction we must attribute to this provision), to make by-laws regulating the administration of the income of the fund—which they could not do if their hands were tied by irrevocable disposition of the proceeds binding on them for a fixed and limited time however short.

I, therefore, come to the conclusion that the terms of

this trust made it incumbent on the trustees to reserve to themselves such power as should enable them to be free to act at all times, and did not warrant any disposition of the income which should not be subject to be recalled or altered by any by-laws which the synod might think fit to pass. It is, therefore, unnecessary to consider the terms and proper construction of the by-law of 2nd March, 1869, under which the plaintiff makes title. That by-law must either be in conformity with the trust, as I construe it, in which case the plaintiff has no right to object to its alteration or repeal, or if it is to be construed as attempting to give the plaintiff a vested and irrevocable interest it is *ultra vires* of the trustees and void. If the terms of the trust had been sufficiently wide to have authorized the trustees to confer a permanent and limited interest in the revenue, it would of course have been essential to the disposition of the case to have considered the proper construction of the by-law, and to have ascertained from it what interest the synod intended to give to clergymen of the class to which the plaintiff belongs, but that alternative in the view I take, does not arise. I think it right, however, to state that if we were restricted to a consideration of the terms of this by-law of March, 1869, I should be unable to determine that it amounted to a grant of an annuity to the plaintiff either for life or for his term of office or during active service. In this aspect of the case *Weir* v. *Mathieson* (1) might have been found to have some application. But I prefer to rest my judgment on the broader ground first indicated, and, therefore, I no not feel called upon to say anything decisive as to the construction of the by-law. The argument of analogy derived from the law relating to powers of appointment and the case of *Hele* v. *Bond* (2), which was pressed upon us by the counsel for the

(1) 3 Ont. Err. & App. R. 123. (2) Sugden on Powers, (8 ed.) 370.

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appellant has, in my opinion, no application here. In the case of a power, an exercise of which is made subject by the instrument of its creation to a power of revocation, the law, no doubt, is settled that the donee cannot revoke an appointment unless he expressly reserves to himself a power to do so. Thus the donee of a power so subject to revocation can exercise an option. But in executing a trust the terms prescribed by the settlor must be strictly followed, and if a trust fund is directed to be applied exclusively in such a manner and by such instruments as are from time to time subject to revocation by the trustees, it is a clear breach of trust on the part of the trustees to attempt to execute the trust in any other manner than that so prescribed, and such attempted execution is void. To put it still more concisely, in the case of the power it is optional with the donee to provide for a revocation or not as he may elect. In the case of a trust it is obligatory upon him to execute it according to the very terms the settlor has directed.

As regards the canon or by-law (it matters not which it is) of June, 1876, I am unable to see any valid objection to that enactment. The plaintiff himself had given notice of a proposal to amend the by-law of 1875, and the amendment proposed by Mr. Logan, which the synod ultimately adopted, was strictly an amendment to the canon or by-law introduced by the plaintiff. Further, the consequence of an omission to give notice was not according to the constitution, that the regulation should be void, but merely that the business should not be entitled to precedence according to the order indicated. Moreover, I am of opinion that these provisions of the constitution are entirely directory, and that it was competent to the synod to dispense with their observance without at all events making by-laws or canons passed without a strict observance of their

requirements subject to be avoided and disregarded as nullities in a judicial proceeding. Upon this head I refer to what has been said by Mr. Justice Patterson, with whose judgment upon this point I entirely concur.

The appeal should be dismissed.

FOURNIER, J.:—

I am sorry to differ from the judgment of the majority of this court, but I interpret the trusts as Mr. Justice Proudfoot has, and for the reasons given in his judgment, I am in favor of allowing the appeal.

HENRY, J.:—

I also feel bound to sustain the decision of the Vice-Chancellor in this case, and I entirely endorse all the reasons which he gives for his judgment. The fund in this case applicable to the clergymen of the diocese, who were not originally to receive the commutation, was an accumulating one. It was provided to be received after the death of the different incumbents on the commutation fund; and provision was made, that the funds, arising from the death of the different incumbents, should be appropriated by the trustees, for the support and maintenance of the clergy from time to time, as, by the by-laws of the Church Society, should be provided. This is the agreement referred to:—

Indenture day of A.D. 1855, between the Church Society of the diocese of Toronto of the one part and

of the other part. Wheraes A. M. is a clerk in holy orders, and is incumbent of and as such is now and has been in receipt of £121 13*s.* 4*d.*, from the Clergy Reserved Fund, and whereas the said A. M., under and by virtue of a statute lately passed by the provincial parliament, is entitled with the consent of the Bishop of the said diocese to receive from the Government of Canada a certain sum of money in commutation of his said salary of £121 13*s.* 4*d.*, and has consented and agreed to pay the said sum so to be received from the government as such commutation to the said Church Society in

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consideration of the payment by the said Church Society to the said A. M. of the said sum of £121 13*s.* 4*d.* per annum in manner hereinafter mentioned, and in further consideration of the several covenants hereinafter mentioned respecting the said commutation money. Now this Indenture witnesseth that for the consideration aforesaid and in consideration of the said commutation money to be paid by A. M. to the said Church Society, the said Church Society covenants and agrees with the said A. M., his executors and administrators, that the said Church Society shall and will well and faithfully pay to the said A. M. the annual sum of £121 13*s.* 4*d.* by even and equal payments on the first days of the months of January and July in each and every year, so long as the said A. M. continues to do duty in holy orders as aforesaid in the said diocese, and in the event of his being disabled from doing such duty by sickness or bodily or mental infirmity, so long as such sickness or infirmity shall continue; and when and as soon as such annual payment to the said A. M. shall cease the said Church Society shall have and hold the said commutation money and all interest and proceeds thereon upon such trusts for the support and maintenance of the clergy of the said church within the said diocese, or such other diocese as the diocese shall hereafter be divided into; and in such manner as shall from time to time be declared by any by-law or by-laws of the said Church Society, to be from time to time passed for that purpose, so long as the said trust shall continue to be administered by the said society; and in the event of the synod of the said diocese being legally invested with corporated powers so as to be enabled to carry out the trusts aforesaid, shall and will transfer and assign the said commutation money and any securities in which the same may be invested and all interest and proceeds then unappropriated arising therefrom to the said synod by whatever corporate name called, upon the same trusts and interests and purposes as the same shall and may be held and taken by the said Church Society by virtue of these presents. In witness whereof the said Church Society affixed corporate seal, &c.

We have to construe that agreement before we go any further, and my construction of it is this—the funds were not provided at the time, they were to be the result of the death of the different incumbents, and the coming in of the funds; and that agreement gave the trustees power to appropriate them from time to time as new cases should arise; but not to re-appro-

priate the same money. Having once made the apportion of certan sums as they came in, they had the right, from time to time, only to make appropriations of the further funds as they accumulated.

If we look at the nature of the circumstances in which the clergy stood, the provisions of the different by-laws, and the object of the donors, we shall find that this was intended as a permanent provision for the clergy. We find as a condition of the grants, that the stipends that the clergymen received from the different parishes should be given up. There were certain other considerations connected with the grant, and although it is not stated in plain terms, I think the proper construction of the agreement is that when these clergymen came within the rules laid down, the society had no right to change the appropriation made in their favor, and mix them up and change them from time to time.

It is true that the words used "from to time" bear two different constructions, and which of these are we to adopt?

I am free to say that, looking at the nature of the whole surrounding circumstances, I can put but one construction upon them. It is true that if a person gives away what is his own, he has a right to impose such conditions as he pleases. But here is a fund that is placed under the control of the society as trustees of the donors; a fund not intended for the casual support of the clergy, but for their continuous support and maintenance. How could that be carried out if the society were to take to itself the power of withdrawing that aid in any one year, or for a term of years. If they could change it from year to year, if they could modify it, they could take it away altogether; and how, then, could they be said to be carrying out the undertaking to provide support and maintenance. It is to be noted

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that the fund was not for the maintenance of the clergy generally, but of each clergyman who was put upon that superannuation list.

What are the terms? It is provided that no other clergy shall be placed upon the list until other funds arise. A certain number are provided for, and it is provided that no further names are to be added. How, then, could there be that general supervision and control in these very words, which, if carried out, would deprive the church society of the power of revision.

Now, what does this mean? For how long a period is it intended? When a clergymen is superannuated, is it not the intention that the allowance should be made to him for life. Surely it was not intended to superannuate him for a year, when he is induced to give up his living on the understanding that he is to be superannuated. The agreement is not carried out by the superannuation for a year, or for any term less than the period of his natural life.

We are told in the judgments of some of the courts below that there was no contract. It is not necessary that a contract should exist. The question is what is the construction of the document by which the trust is created. It is not necessary, in order to carry out the object of the trust, that a contract should be entered into. The question is what is the construction of the document which creates the trust? If a contract existed at all, it would be between the settlor and those who were benefited by the trust; the Church Society were merely instruments, and, therefore, not in a position to enter into any contract at all.

Now, with regard to the by-law, I differ from those who sustain it.

The constitution under the law and under the statute requires that by-laws shall be made for the government of the society. The society made by-laws, which became

as binding as if enacted by the legislature. Under these by-laws the business to come before the meeting was provided to be only of two characters, first, that submitted by the bishop, and, second, that submitted by the committee. The plaintiff here gave notice, according to regulation, that he would submit an amendment to the by-law. That was brought forward regularly and properly, within the rules of the corporation. Every member submitted and was bound to submit to the by-laws. They were bound by them. If, then, there was a rule governing the meeting, every one was bound by that rule. And if the whole synod contracted with each individual member that there must be a certain rule of proceeding, that contract must be observed, or else what is done cannot have a legal binding effect.

Now, this motion to amend the by-law having been brought before the meeting, another member moved what purported to be an amendment to that motion. It was really nothing of the kind. It was another substantial motion to amend the original by-law. No notice had been given of such a motion; and I take it that a notice was as absolutely necessary, as it was in the case of the resolution moved by the plaintiff; and, if a notice is duly given of a motion to amend a by-law, that notice does not entitle another person to move a resolution to amend the by-law in a directly opposite direction. I think with the Vice-Chancellor who heard this case, that the by-law passed in 1876 was *ultra vires* and had no binding effect.

But we are told that the plaintiff took his stipend for two years under the by-law, altered as it was from the original one, and that therefore he is estopped from seeking to set aside the by-law that he complains of. I do not think his taking the stipend in that way can have that effect in law. He has brought this suit, not for himself alone, but in order to get a fair construction

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Henry, J.

of the trust for himself and all the other clergy interested; and if what he did could be considered at all, it was merely a submission, for the time being, to a superior force over which he had no control. It is true he received a salary for two years under the changed by-law, but when that was at an end, his salary was taken away altogether. Surely his agreement to take his usual salary under the changed by-law could not be held to debar him from claiming any salary at all. He may say, "So long as I get the $200 a year I will not complain of the particular mode of appropriation," but the very moment it is taken away altogether, he has the right to complain, and I do not think he is prevented from doing so by anything he did.

I think the appeal ought to be allowed, and the judgment of the Vice-Chancellor restored.

TASCHEREAU, J.:

It is not without some difficulty that I have arrived at a conclusion on this appeal. My first impression was in favor of the appellant's contention, but for the reasons given by the Chief Justice and my brother Strong, I have come to the conclusion that the appeal should be dismissed. The by-laws were not accompanied with the formalities required by the constitution, but it is a question of form, and I would not differ from the court below on such a point. It is a question of hardship, no doubt, for the appellant in this case, but if the law is as stated, he is supposed to have known the law, knowing it he must have known it was in the power of the trustees to alter or repeal the by-law. The appeal should be dismissed.

Appeal dismissed with costs.

Solicitors for Appellant: *Harding & Harding.*

Solicitors for Respondents: *Cronyn & Betts.*

JOHN MACDONALD & CO. (Plaintiffs)..APPELLANTS;

AND

ARCHIBALD CROMBIE & JOHN R. STEWART (Defendants).....} RESPONDENTS.

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*Dec. 4
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*May. 12.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Facilitating the recovery of judgment—Fraudulent preference, whether—Rev. Stats., Ont., ch. 118, *secs.* 1 *and* 2.

On the 28th March, 1882, a writ was issued by C. *et al* (respondents) against one M. for the recovery of the sum of $32,155.33, and said writ was duly endorsed, in accordance with the provisions of the Judicature Act, with particulars of the claim of the re-respondents for the said sum of $32,155.33 on an account previously stated and settled between C. *et al* and M., such amount being arrived at by allowing to M. a discount of 5 per cent. for the unexpired balance of the term of credit to which M. was entitled on the purchase of the goods. No appearance was entered by M. to the writ, and on the 8th April judgment was recovered for the amount, and on the same day writs of execution were issued. M. *et al* (appellants), creditors of M., instituted an action against him on the 8th April, 1882, and obtained judgment on the 14th April, and on the same day writs of execution were issued.

The stock-in-trade was sold by the sheriff at public auction, under all the executions in his hands, to the respondents, who were the highest bidders.

On a trial in an interpleader issue, to try whether appellants' execution against M. was entitled to priority over that of respondents, and whether the judgment of the latter was void for fraud, and as being a preference; and whether respondents' executions were void as against appellants' execution, on account of their having issued them before the expiration of eight days from the last day for appearance, Mr. Justice Armour directed a verdict or judgment to be entered in favor of the appellants. That judgment was reversed by the Queen's Bench Division of the

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

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High Court of Justice of Ontario, whose judgment was affirmed by the Court of Appeal for Ontario. On appeal to the Supreme Court of Canada;

Held (affirming the judgment of the Court of Appeal),—That what the debtor did in this case did not constitute a fraudulent preference prohibited by R. S. O., ch. 118, and that the premature issue of the execution of the respondents was only an irregularity, and not a nullity.

APPEAL from a judgment of the Court of Appeal for Ontario, rendered on the 28th of March, 1884, confirming that of the Queen's Bench Division of the 10th of March, 1883, which set aside a judgment of the Hon. Mr. Justice Armour in favor of the present appellants.

The facts of the case sufficiently appear in the head note and in the report of the case in the Ontario Appeal Reports (1).

J. J. McLaren for appellants contended: 1st. That the respondents' execution was a nullity because it was issued on the same day judgment was signed and before the expiration of eight days from the last day of appearance. He cited Rule 72, O. J. A. Code L. 5, De Leg., t. 14; *Montreal Bank* v. *Burnham* (2); *Kerr* v. *Douglass* (3); *Brooks* v. *Hodgkinson* (4).

2nd. That the judgment upon which it was issued, under the circumstances was a fraudulent preference and void against the appellants, citing and commenting on Rev. Stat. Ont., ch. 118, ss. 1 and 2; *Sharpe* v. *Thomas* (5); *Doe Mitchinson* v. *Carter* (6); *Billiter* v. *Young* (7); *Hurst* v. *Jennings* (8); *White* v. *Lord* (9); Maxwell on Statutes, (10); Hardcastle on Statutes, (11); and authorities cited by the Hon. Mr. Justice Armour in the court below.

Thomson for respondent contended that the judg-

(1) 10 Ont. App. R. 92.
(2) 1 U. C. Q. B. 131.
(3) 4 Ont. P. R. 106.
(4) 4 H. & N. 712.
(5) 6 Bing. 420.
(6) 8 T. R. 300.
(7) 6 El. & Bl. 1, & 8 H. L. Cas. 682.
(8) 5 B. & C., 650.
(9) 13 U. C. C. P., 289.
(10) P. 92.
(11) P. 24.

ment recovered by the respondents against the said Gideon Morrison was clearly unimpeachable under R S. O., cap. 118, sec. 1. It was not founded on a confession of judgment, warrant of attorney, or *cognovit actionem*. *Holbird* v. *Anderson* (1); *Young* v. *Christie* (2); *Mackenzie* v. *Harris* (3); *McKenna* v. *Smith* (4); *Labatt* v. *Bixel* (5); *King* v. *Duncan* (6); *Heamen* v. *Seale* (7); *Davis* v. *Wickson* (8); *Turner* v. *Lucas* (9); and that the judgment and executions of the respondents against Morrison, the sale of the goods by the Sheriff, and the purchase thereof by the respondents, are not, nor any of them, impeachable under the second section of the said act. They did not constitute an assignment or transfer by the debtor within the meaning of section 2 of the act.

As to the premature issue of the execution of the respondents, the learned counsel contended it was only an irregularity, which could be waived by the judgment debtor, and could be objected to by him alone. It was never open to the appellants to complain of such irregularity. *Avison* v. *Holmes* (10); *Farr* v. *Arderly* (11); *Perrin* v. *Bowes* (12); *Holmes* v. *Russell* (13); *Bank of Upper Canada* v. *Vanvochis* (14); *Weedon* v. *Garcia* (15); *Blanchenay* v. *Burt* (16); Archibold's Practice, (17); O. J. A., rule 473.

RITCHIE, C.J.:—

I think the language of chapter 118 R. S. O. too clear and explicit to admit of any doubt as to its

(1) 5 T. R., 235.
(2) 7 Grant, 312.
(3) 10 U. C. L. J., 213.
(4) 10 Grant, 40.
(5) 28 Grant, 593.
(6) 29 Grant, 113.
(7) 29 Grant, 278.
(8) 1 O. R., 369.
(9) 1 O. R., 623.
(10) 7 Jur. N. S. 722.
(11) 1 U. C. Q. B., 337.
(12) 5 U. C. L. J., 138.
(13) 9 Dowl. 487.
(14) 2 Ont. P. R. 382.
(15) 2 Dowl. N. S. 64.
(16) 12 L J. N.S. 291, & 4 Q.B.707.
(17) 13 Ed. P. 1193.

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legitimate construction. The legislature has in unmistakable terms declared that if any insolvent, &c., "voluntarily or by collusion with a creditor or creditors gives a confession of judgment, *cognovit actionem*, or warrant of attorney to confess judgment with intent, &c, to defeat or delay his creditors, &c., or to give a creditor a preference * * * every such confession, &c., shall be deemed void as against creditors (1)."

And by sec. 2. Any insolvent making any gift, conveyance, assignment, or transfer of any of his goods, &c, with intent to defect or delay creditors, or to give a creditor a preference, every such gift shall be void as against creditors. Not to invalidate assignments for satisfying rateably, &c., creditors, or to invalidate a *bonâ fide* sale in ordinary course of trade to innocent purchasers.

The insolvent in this case gave no such confession, cognovit or warrant of attorney,—instruments well known to and understood in the law,—nor any instrument, document or writing whatever, which by the most strained construction of any language can, in my opinion, be tortured into a confession, cognovit or warrant of attorney, nor can I understand how anything the debtor did in this case can be held to operate as a gift, conveyance or transfer of goods or effects, when, in fact, no gift, conveyance or transfer was made, nor anything done which, either at law or in equity, can be held to amount to a gift, conveyance or transfer. In buying the goods at the sheriff's sale the defendants were in the position of ordinary bidders, the goods became theirs, not by gift, conveyance or transfer from the debtor, but simply because they bid higher than any one else; how could this have any bearing on the transaction to make it good or bad, any

(1) Ch. 118, R. S. Ont. sec. 1.

more than if any outsider had purchased and the proceeds in cash had been paid over to defendant by the sheriff? But, in fact, the goods were sold under other executions as well as that of the defendants and prior to defendants' execution. Considering the case in the strongest manner that Mr. Justice Armour presents it, and that the parties intended just what he suggests, the question still is, (however desirable it may be that such a transaction should be prohibited) has the legislature, by the 118 ch. of the Revised Statutes, made the transaction illegal? It nowhere prohibits a party from admitting an immediate indebtedness and foregoing a credit on getting, in accordance with the terms of the original indebtedness, 5 per cent. discount in lieu thereof, as in this case, and the debt becoming thereby immediately payable; and where is there any law prohibiting the creditor from suing to recover his debt, or to prohibit the debtor from suffering judgment by default when he could have no defence to the action, or to prohibit the creditor, having obtained a regular judgment, from issuing execution and levying on the debtor's goods with the obvious intent to secure his debt? For, so far as the creditor is concerned it could be done with no other intent than to get payment in preference and priority to the other creditor. The transaction was no more, then, than saying to the debtor: "You cannot secure by a cognovit, &c, or by gift, conveyance or transfer, but if I can get a judgment against you in regular course and an execution in the sheriff's hands before other creditors, that not being prohibited, the law will give me a priority."

It is, in my humble opinion, quite wrong to say this is putting a narrow construction on the words of the statute, it is putting the only construction on the language that the words will bear. To adopt any other construction is to go outside of the words and extend

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the effect of the statute beyond the terms, and so to ignore instead of interpret the language of the statute, and so to legislate rather than to adjudicate.

The issuing of the execution was a mere irregularity and not open to objection by plaintiff.

STRONG, J.:—

I entirely agree with the Court of Appeal and the majority of the Court of Queen's Bench. Were we to hold that judgments come within the enactment against preferences contained in the 2nd sec. of R. S. O. ch. 118, we should either be legislating or otherwise determining that "judgment" is included in the words "gift, conveyance, assignment or transfer," neither of which I am prepared to do, though I entirely agree with the observations of Mr. Justice Armour showing how very ineffectual the law is to prevent the frauds at which it is aimed, when construed as, I think, we are bound to construe it.

As regards the 1st sec. I am not prepared to overrule *Young* v. *Christie*(1), which could only have been decided as it was, unless judgments by default were held to be included in the words "*cognovit actionem* or warrant of attorney," which could not be done without violating the rules of construction laid down in modern cases, decided by courts of high authority and by which we are bound.

The appeal should be dismissed with costs.

FOURNIER, J.—I concur.

HENRY, J.:—

I am of opinion that the statute does not provide for the case of a party shortening the credit for payment by a deduction of five per cent. None of the prohibitory

(1) 7 Gr. 312.

provisions of the statute are shown to have been contravened. Under the circumstances I think we are to take the execution as good, and, I therefore, concur with the Chief Justice that this appeal should be dismissed.

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TASCHEREAU, J, concurred.

Appeal dismissed with costs.

Solicitors for appellants: *MacLaren, MacDonald, Merritt and Shepley.*

Solicitors for respondents: *Thomson and Henderson.*

JOSHUA SPEARS AND WILLIAM C. SPEARS (Plaintiffs)..... } APPELLANTS;

AND

JAMES WALKER (Defendant)..... RESPONDENT.

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*Feb'y.21,26,
*June 23.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

Building contract—Enforcement of—Violation of city by-law—Liability of owner—Effect of by-law passed after contract was made.

S. & Co., contractors for the erection of a building for the respondent in the city of St. John, N.B., brought an action claiming to have been prevented by respondent from carrying out their contract. The declaration also contained the common counts, part of the work having been performed. By the terms of the contract the building, when erected, would not have conformed to the provisions of a by-law of the city passed (under authority of an Act of the General Assembly of New Brunswick, 41 Vic., ch. 7) two days after the contract was signed.

On the trial of the action the plaintiffs were non-suited, and an application to the Supreme Court of New Brunswick to set such non-suit aside was refused.

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

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Held, (Henry, J., dissenting)—That the by-law of the said city of St. John made the said contract illegal, and, therefore, the plaintiffs could not recover. *Walker* v. *McMillan* (1) followed.

Per Henry, J.—That the erection of the building would not, so far as the evidence showed, be a violation of the by-law, and, therefore, the non-suit should be set aside and a new trial ordered.

APPEAL from the Supreme Court of the Province of New Brunswick, refusing to set aside a non-suit and order a new trial.

The action in this case arose out of a contract made between the appellants and the respondent for the erection of a building in the city of St. John, N.B. After the building was partially up a portion of the centre wall gave way, and the appellants (the contractors for the erection of the building) refused to complete it, unless an undertaking was given by the owner that by so doing they would not be considered as acknowledging responsibility for the fall of the wall. Such undertaking was refused and respondent completed the building himself. It appears that two days after the signing of the contract a by-law had been passed by the corporation of the city of St. John, (under the provisions of 41 Vic., ch. 7, N. B.) regulating the erection of buildings in the city, and the erection of this building, according to the terms of the contract, would not be in accordance with the provisions of such by-law.

The contract itself and other facts bearing on the case will be found set out in the case of *Walker* v. *McMillan*.

Weldon, Q. C., and *Barker*, Q. C., for the appellants.

This case is very different from *Walker* v. *McMillan*. That was an action by a third party who had sustain-

(1) 6 Can. S. C. R. 241.

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ed damage by the negligence of the owner of an adjoining building and the contractor employed by him. Here, we are claiming redress for breach of contract, and would submit:

That the contract being lawful when made, and, by subsequent agreement, so altered as to make its performance lawful, it is not affected by a by-law passed after it was made, and the parties had no intention of violating the law, which is an important ingredient in the case, the action being upon a contract. *Waugh* v. *Morris* (1); *Pearce* v. *Brooks* (2); *The Teutonia* (3).

There was evidence to go to the jury as to whether or not a new agreement was made, and, if so, whether or not it was within the terms of the by-law.

Tuck, Q. C., and *Straton*, for the respondent.

From the time of the injury to respondent's building the contract was in contravention to the city by-law and unlawful. It is admitted that the centre wall, as agreed to be built, became unlawful as soon as the by-law was passed, and such a contract cannot be enforced. *Walker* v. *McMillan* (4); *Stevens* v. *Gourley* (5).

The intention of the parties has nothing to do with the question. They seek to recover under a contract to erect a building in a manner forbidden by law. The following cases also were cited: *Ellis* v. *The Sheffield Gas Co.* (6); *Bower* v. *Peate* (7), and *Angus* v. *Dalton* (8).

Weldon, Q. C., in reply.

RITCHIE, C. J.:—

I agree with Mr. Justice King that this case is concluded by the judgment of this court in *Walker* v. *McMillan*(9), which judgment is, in my opinion, fully

(1) L. R. 8 Q. B. 202.
(2) L. R. 1 Ex. 213.
(3) L. R. 4 P. C. 171.
(4) 6 Can. S. C. R. 241.
(5) 7 C. B. N. S. 99.
(6) 2 E. & B. 767.
(7) 1 Q. B. D. 321.
(8) 4 Q. B. D. 162 affirmed on appeal 6 App. Cas. 740.
(9) 6 Can. S. C. R. 241.

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sustained by the case of *Hughes* v. *Percival* (1), decided in the House of Lords since the case of *Walker* v. *McMillan* was decided. Unless we are prepared to overrule that case (which most certainly I am not prepared to do), the non-suit must stand.

STRONG, J., concurred.

FOURNIER, J.:

L'action en cette cause est bâsée sur un contrat passé le 24 septembre 1877. Le 26 du même mois un by-law de la municipalité de St. John, passé en vertu d'une loi du Nouveau-Brunswick, réglant les constructions de bâtisses dans la cité de St. John, déclarant illégal la construction dans la dite cité de murs d'une épaisseur moindre que celle posée par le dit réglement, devenait en force.

Quoique le contrat fût légal au moment où il fut passé, il cessa de l'être par l'adoption du règlement en question. Les appelants en connaissaient l'existence aussi bien que les dispositions, même avant d'avoir commencé leurs travaux, cependant ils les continuèrent, en contravention aux dispositions du règlement. Cette raison seule suffit pour faire rejeter la demande.

Je suis d'avis de renvoyer l'appel avec dépens.

HENRY, J.:—

This is an action by a declaration consisting of three counts—two of them on a building contract, and the third for work and labour done and materials provided. The declaration sets out the written contract, alleges part performance and a readiness to complete it, and that the contractors would have completed but they were hindered and prevented by the respondent from so doing, and that they were wrongfully dis-

(1) 8 App. Cas. 443.

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charged and prevented from doing and completing the same.

The respondent in his eighth plea to the first count, and in his twenty-second plea to the second count, substantially denies that he so prevented or hindered the appellant from completing the contract, and alleges in both pleas that the appellants "utterly refused to go on and perform their part of the said agreement" and complete the building. The appellants do not and cannot contend full performance, but depend, to entitle them to succeed, on the reason they allege. The excuse for non-performance must be a legal one, and the onus of proving the issue is on the appellants who allege it. Under the issues raised by the two counts and the pleas thereto, which I have stated, the only question to be preliminarily decided was as to the truth of the appellants' allegation that they were prevented from the full performance of the contract by the respondent. That issue was one to be submitted to, and resolved by, the verdict of a jury, inasmuch as touching it there was conflicting evidence, although the weight of it preponderated greatly in favour of the respondent. The judgment of non-suit having been given, and none of the facts proven as to the issue in question, I think that the judgment of non-suit was not warranted, and that the non-suit should be set aside and a new trial awarded. There is, however, another view to be taken of the pleadings and evidence. The contract was entered into on the 24th of September, 1877, for the erection of a building on a lot of land owned by the respondent in the city of St. John, New Brunswick, bounded on the west by Prince William street. It was prescribed to be 55 feet front, four storys high, 105 feet deep, first story; 60 feet deep, second, third and fourth stories. From other evidence it is shown the walls were to have been 65 feet in height. The specification which formed

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part of the agreement provided for a central wall of brick from front to rear, sixteen inches thick. Two days after the agreement was entered into, the mayor, aldermen, and commonalty of the city of St. John passed a by-law—being authorized so to do by statute—requiring that brick or stone buildings to be subsequently erected in St. John should be according to the prescriptions thereof. The carrying out of the contract in this case, if it involved a breach of any of such prescriptions by any of the parties to it, would not be justifiable. It is shown that the appellants, immediately after entering into the contract, commenced work on the building and continued therewith till the early part of the autumn, when the partition or centre wall gave way, and the greater part of the erection fell. This partition wall was not built according to the provisions of the contract, it being partly built on clay. Before the fall of the building it had rained hard for a part of two days, and from the statements in evidence of one of the appellants, the mortar in parts of it had become softened and was pressed away from its proper connection with the bricks. Wm. M. Sears acted as agent and manager of the respondent as to the building and contract, and the evening before the 8th of September, the appellant, W. C. Spears, received from him a notice demanding him to remove the *débris* of the fallen building, and to rebuild the same as per contract. On the 8th the appellants replied, denying any responsibility for the loss, and refusing to remove the *débris* or restore the buildings without a written statement from him (Sears) declaring "that any such acts or operations on my part will in no wise be construed by you as an acknowledgment on my part of any errors or defects in my work, leading to the disaster." Upon this negotiations ended, and the respondent proceeded to re-erect the building at his own

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costs and charges. He alleges that it cost him more than the contract price with the appellants. The question of the liability of the appellants to re-erect the building is not a matter for inquiry in this suit, and it is unnecessary to refer to it. Neither is the question of damages for non-performance of the contract. In addition to the other issue on the two pleas before mentioned, the respondent alleges, in a great many pleas, that the agreement for the partition wall of the width of sixteen inches, became illegal by the by-law beforementioned; that inasmuch as the walls of the building were over thirty-five feet in height, the partition wall should have been twenty inches to the top of the third floor to have complied with the by-law, and that he, the respondent, was therefore released from the agreement. A great deal of irrelevant evidence, I think, was admitted in this case, and much more than affects the only issues raised.

I have carefully read and examined the by laws before referred to, and I have wholly failed to find any prescription that the partition walls of a building such as the respondent's should be twenty inches, or indeed of any particular thickness. In fact, the thickness of partition walls in such buildings is, as far as I can see, not specially provided for. In respect of buildings in which the walls exceed thirty feet, provision is made that the foundation walls shall not be less than twenty-four inches, the external walls not less than twenty inches, party walls (other than dwelling houses) not less than twenty inches to the top of the second floor above the street. The only reference to the thickness of partition walls is to be found in number 24, which is as follows:

Every building hereafter erected, more than thirty feet in width, except churches, theatres, railroad station buildings and other public buildings, shall have one or more partition walls running from front to rear, and carried up to a height not less than the top of the second

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story floor joists; said wall or walls may be four inches less in thickness than is called for by the provisions relating to the thickness of walls; these walls shall be so placed that the space between any two of the floor bearing walls of the building shall not be over twenty-five feet.

The distinction between party walls and partition walls is readily appreciable, and such distinction is seen to be preserved in the by-laws. No. 18 provides that:

> Party walls for buildings exceeding thirty five in height shall not be less than twenty inches.

No. 32 provides that:

> All party walls shall be carried up to a height of not less than one foot above the roof covering, &c.

This shows that a party wall was not intended to be understood as a partition wall, as the latter could not regularly be, and never is, built out through the roof.

There is no provision in the by-laws requiring any wall of a building to be over twenty inches, except foundation walls, which are required to be twenty-four inches. Such, however, are not the walls referred to in No. 24, before quoted.

Such being the case, I fail to find anything in the by-laws requiring a partition wall to be over sixteen inches in thickness, that is, four inches less than the prescribed thickness of the party and external walls, which are required to be not less than twenty inches. There being no other provision for a greater thickness of partition walls, I cannot come to the conclusion that the agreement to build the partition wall in this case was illegal, and that on that account the respondent would be justified in refusing to permit the appellants to re-erect the building and finish their contract; and a non-suit of the appellants would therefore be unjustifiable. The contract, or rather the specification, refers to a plan under the head "stone walls," which were to

be built as cellar walls; and under the head "brick-work," reference is also made to a plan, which was not put in evidence, in this way:—

All walls coloured red on plan to be built of brick of the given heights and dimensions.

And, after describing how other parts of the work were to be done,

To carry up all walls at least twenty-four inches above the roof to twelve inches thick above the top of the roof beams, all other walls sixteen inches thick throughout their height.

Without the plan referred to, where would, no doubt, be found "the given heights and dimensions," I am unable to construe satisfactorily the meaning of the provision as to "all other walls." I am, however, of opinion that the plan showed the external and party walls required to be twenty inches, and that the clause first above quoted was to provide for their height, and that the latter clause was not intended to apply to them. If it did apply to the external or party walls, the agreement would in that respect have been illegal, but as no pretence was made that they were not of sufficient thickness, the fair conclusion is that by the plan they would be shown to be provided to have sufficient thickness. The onus of showing the illegality was on the respondent, and it should have been clearly shown, which it has not been. So far then, I cannot see my way clear to sustain the non-suit.

There is, however, a plea setting up the illegality of that part of the contract which is alleged to provide that the walls were to be so placed that the space between the floor-bearing walls would be over twenty-five feet, which, under the concluding clause of number 24 of the by-laws, would be illegal. I have carefully consulted the specification and I can find nothing therein to show whether one or more partition walls were to have been built. That, however, I have no doubt

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was provided for by the building plan referred to, but as it is not in evidence we cannot decide that the contract in that respect is illegal, when we have not the necessary proof. The width of the building from the centre of the two outside walls was shown to be 55 feet. Each wall 20 inches, taking half off each side would leave a space of 53 feet 4 inches. A wall in the centre of 16 inches would leave a space on each side of 26 feet, one foot more than prescribed by the by-law. It was for the respondent to furnish evidence of the illegality alleged, and that evidence is in this respect wholly wanting—because, for all that appears by the agreement the plan referred to may have provided for more than one partition wall. There are a great many other pleas on the record to which it is quite unnecessary, in my opinion, to refer; but in reference to the general plea of illegality of the agreement I may say that I have carefully considered the agreement and the by-laws, and can discover nothing that could affect our decision of the issues on that point. The judgment of a majority of this court in *Walker* v. *McMillan* (1) was cited and referred to on the trial, but the decision of this case depends on other evidence and the issues are wholly different. That was an action to recover damages for losses sustained by the negligence of the parties to this action. The decision of this court was not, in that case, founded solely on the statutory negligence attributed through a violation of the by-law, but upon other evidence of negligence on the part of the present appellants by means of defective building, by which the respondent's building fell down and injured that of the respondent in that case, and for which this court held the present respondent answerable under the facts in evidence in that case. The alleged deficiency in the thickness of the partition

(1) 6 Can. S. C. R. 241.

wall was not stated in the judgment of the learned Chief Justice of this court, in which my brothers Fournier and Taschereau and I concurred—to be the cause of the illegality referred to. The illegality was stated in general terms. As far as my memory serves me, it was tacitly, if not expressly, admitted on the argument of that case, that a 16-inch partition wall would be a violation of the by-law, and having examined the evidence, I find the plan was in evidence in that case. We had therefore, in that case, what was absolutely necessary to properly understand and construe the specification which referred to it, and which is, in respect of the question now under consideration, all important, and without which we cannot decide whether or not the agreement is illegal. To come to a conclusion on the issues now before us I had more specially to examine the agreement and by-laws, and with the result before stated.

At the instance of the counsel for the appellants, the learned judge on the trial did not submit the issues raised on the third count to the jury, as the counsel preferred a judgment of non-suit on the two special counts, and it is only with them we have to deal. I am of opinion that the non-suit should be set aside and a new trial ordered, with the costs of the appeal to this court.

GWYNNE, J. :—

In the case of McMillan against the above defendant (1), I was of opinion that the by-law of the corporation of the city of St. John for regulating the mode of constructing buildings in the city of St. John, passed upon the 26th September, 1877, in pursuance of the provisions of an Act of the Legislature of the Province of New Brunswick, 41 Vic., ch. 7, known as "The

(1) 6 Can. S. C. R. 241.

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St. John Building Act of 1877," had no application whatever to the matters in issue in that action, which was one for damages alleged in the declaration to have been occasioned to certain property of the plaintiff by negligence in the manner in which a house, which was being erected for the defendant under a contract entered into by him with the present plaintiff, was erected. It seemed to me to be reconcilable neither with principle nor with authority that the plaintiff in that action should recover against the defendant by reason of the latter's non-compliance with the provisions of the by-law, for an injury which the plaintiff charged to be, and which the jury found to be, and which was upon all sides admitted to be, attributable, not to non-compliance with the provisions of the by-law, but to causes wholly independent of, and in no way connected with, the provisions of the by-law or the violation thereof. Non-compliance with the provisions of the by-law not having caused the injury complained of, I could not see what application the by-law could have to the matters in contestation in that action, but in the present one, that by-law and its provisions constitute, in my opinion, the material substance of the matter now under consideration. The by-law, and the fact that the work for which the plaintiffs bring this action was executed by him in violation of its express terms and provisions, and in a manner prohibited thereby, are specially pleaded in bar of the action, the gist of the pleas setting up this defence being, that although the contract declared upon was executed on the 24th September, 1877, and the by-law passed on the 26th of the same month, yet that the work now sued for was not commenced until after the by-law was passed, and thereafter the plaintiffs, in violation of the terms of the by-law, commenced and proceeded with the work; and the evidence, moreover, shows that they did so with full

knowledge of the by-law and its provisions. Upon this ground alone, without reference to the other grounds of defence pleaded, I am of opinion that the non-suit must be sustained, which, it appears, the plaintiffs agreed to accept rather than that the case should be submitted to the jury in the manner in which the learned judge who tried the case proposed to submit it, he having expressed the opinion that the plaintiffs could not recover for work done under the contract, such work having been of a nature which was prohibited by the terms of the by-law, and therefore illegal. Although the contract was not illegal upon the 24th September, when it was executed, the execution of the work thereby contracted for became illegal two days afterwards by the passing of the by-law, and the proceeding with the work thereafter by the plaintiffs, under the contract, was as illegal as if they had done so under a contract which had been executed after the passing of the by-law, and for such work they can no more recover in the one case than they could in the other. The judgment of the court below should, in my opinion, be affirmed, and appeal dismissed.

Appeal dismissed with costs.

Solicitors for appellants: *Weldon & McLean.*

Solicitor for respondent: *James Straton.*

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*May 1.

*June 19.

MERCHANTS BANK OF HALIFAX. (PLAINTIFFS)..... } APPELLANTS;

AND

PETER S. McNUTT. (DEFANDANT).....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF PRINCE EDWARD ISLAND.

Promissory Note—Notice of dishonor by post sufficient—37 Vic., ch. 47, sec. 1 (D).

The Merchants Bank of Halifax (appellants) as holders of promissory notes endorsed by McN. (respondent) brought an action against him for their amount. The notes were dated at Summerside, and were payable at the agency of the Merchants Bank of Halifax, Summerside. The defendant resided at the town of Summerside, and his place of business was there. Notices of dishonor were given to defendant by posting such notices, addressed to the defendant at Summerside, at 1 o'clock p.m. on the day after the day on which the notes matured, the postage on such notices being duly prepaid in both cases. There is no local delivery by letter carriers from the post office in Summerside. No evidence was given by defendant that he did not receive the notices of dishonor, nor was any evidence given by the plaintiffs that the defendant had received them. The jury found for the defendant, contrary to the charge of the learned judge. A rule *nisi* having been granted to set aside this verdict, and for a new trial, the court discharged this rule *nisi* and directed the verdict to stand, on the ground that the posting of the notices of dishonor to the defendant was not sufficient notice of dishonor, inasmuch as both plaintiff and defendant resided in the same town, and the notices of dishonor should have been delivered to the defendant personally, or left at his residence or place of business.

Held, (reversing the judgment of the court below), that since the passing of 37 Vic. ch. 47, sec. 1, the notices given in the manner above set forth were sufficient.

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

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APPEAL from a judgment of the Supreme Court of Prince Edward Island.

The following was the special case stated for the opinion of the Supreme Court of Canada.

"This cause came on for trial before Hensley, J., and a common jury, at Summerside in Prince County, at the term of the court held there in June, 1882.

"At the trial it appeared that the defendant duly endorsed to the plaintiffs the promissory notes mentioned in the first and second counts of the declaration, and that these notes were discounted at the agency of the plaintiffs' bank at Summerside.

"The maker of these promissory notes made default in payment of them as they respectively became due, and notices of dishonor were given to the defendant by posting such notices, addressed to him at Summerside aforesaid, at one o'clock p m on the day after the day on which the notes matured, the postage on such notices being duly prepaid in both cases.

"The defendant resided at the town of Summerside, and his place of business was there. There is no postal delivery by letter carriers.

"No evidence was given by the defendant that he did not receive the notices of dishonor, nor was any evidence given by the plaintiffs that the defendant had received them.

"The judge, at the trial, directed the jury to find a verdict for the defendant on the first count of the declaration, he being of opinion that a chattel mortgage (referred to in his judgment) was a discharge to the defendant of his liability upon the note mentioned in that count, inasmuch as time was given to the maker; but as regards the note mentioned in the second count, their verdict should be for the plaintiff for the amount of that note and interest.

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"The jury found a verdict for the defendant on all the issues.

"In Trinity Term, 1882, a rule *nisi* was granted to set aside this verdict and for a new trial.

"This rule *nisi* was argued in Michaelmas Term, 1882, and judgment delivered in Hilary Term, 1883, discharging this rule and directing the verdict to stand on the ground that the posting of the notices of dishonor to the defendant was not sufficient notice of dishonor to the defendant, inasmuch as both plaintiffs and defendant resided in the same town, the court holding that the notices of dishonor should have been delivered to the defendant personally, or left at his residence or place of business.

"The judgment of the court was delivered by Hensley, J., a copy of which forms part of this case.

"It is agreed that the only question intended to be raised on the present appeal, is—

"Were the notices of dishonor sufficiently given by addressing the same to the defendant at Summerside in the manner before set forth?

"If the court should be of opinion that these notices were sufficiently given, it is agreed that the appeal should be allowed, the verdict of the jury in the court below set aside, and a new trial ordered.

E. J. Hodgson, Q.C., for appellants, contended:

(1) The notices of dishonor were sufficiently given pursuant to the provisions of the 37th Vic., ch. 47.

(2) Even independent of this statute, the posting of a notice through the post office is sufficient. Chalmers on Bills of Exchange (1); *Stocken* v. *Collin* (2); *Woodcock* v. *Houldsworth* (3); *Mackay* v. *Judkins* (4); *Cosgrave* v. *Boyle* (5).

(1) Pp. 160-161.
(2) 7 M. & W. 515.
(3) 16 M. & W. at p. 126.
(4) 1 F. & F. 208.
(5) 6 Can. S. C. R. 165.

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L. H. Davies, Q.C., for respondent :

Where the holder and endorser of a promissory note reside in the same town and there is no postal delivery in such town by letter carrier, the simple posting of a notice of dishonor in the post office addressed to the endorser is not sufficient notice unless proof is given that he received it on the day after the dishonor of the note, and the law is not altered by 37 Vic., ch. 47, sec. 1.

He cited, *inter alia*, Story, Prom. Notes (1); Story, Bills of Exchange (2); Daniel Neg. Instruments (3); Chitty on Bills (4); *Crosse* v. *Smith* (5); *Stocken* v. *Collin* (6).

RITCHIE, C.J. :—

This was an action against defendant as indorser of two promissory notes. Maker made default. The notes were dated Summerside, and were payable at the agency of the Merchants Bank, of Halifax, Summerside. The defendant resided at the town of Summerside, and his place of business was there. Notices of dishonor were given to defendant by posting such notices addressed to the defendant at Summerside, at 1 o'clock p.m. on the day after the day on which the notes matured, the postage on such notices being duly prepaid in both cases. There is no local delivery by letter carriers from the post office in Summerside. No evidence was given by defendant that he did not receive the notices of dishonour, nor was any evidence given by the plaintiffs that the defendant had received them. The jury found for the defendant, contrary to the charge of the learned judge. A rule *nisi* having been granted to set aside this verdict, and for a new trial, the court discharged this rule *nisi* and directed

(1) 7 Ed , sec. 312.
(2) Sec. 382.
(3) 2 vol. pp 60 & 61 (3rd ed).
(4) 11th Ed., ch. 19, p. 321.
(5) 1 M. & S. 544.
(6) 7 M. & W. 515.

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the verdict to stand, on the ground that the posting of the notices of dishonour to the defendant was not sufficient notice of dishonour, inasmuch, as both plaintiff and defendant resided in the same town, the notices of dishonour should have been delivered to the defendant personally, or left at his residence or place of business.

The only question raised on this appeal is, were the notices of dishonour sufficiently given by addressing and posting the same to the defendant, or in the manner before set forth.

Defendant's contention is, that as the plaintiffs carried on business, and the note became due and payable, in Summerside, and the defendant also resided in Summerside, the notice should have been served personally, or at the place of the indorser's abode or business.

Plaintiffs contend that, whatever the law formerly might have been, it is now, since the passing of the Dominion statute 37 Vic , ch. 47, sec. 1, quite sufficient, even where the parties do reside in the same place, to give notice as done in the present case, through the post office.

The words of the section in question, are as follows :

> Notice of the protest or dishonour 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 in due time to him 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.

The word "addressed" in this statute refers to the place at which a letter directed to the indorser will find him ; the place to which it is addressed need, by

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no means, be either the place of his residence or of his business; it is fixed without reference to either by arbitrarily dating the note at any given place. The simple addressing the note to the indorser, if nothing more was done, would amount to no notice; it must be put in the way of reaching the indorser. What is the usual way of transmitting a letter so as to reach a stranger, but through the post office? The holder having received a note dated at a particular place, what is there in the statute to require him to seek out the actual place of residence, or place of business, of the indorser, with which the statute intended he should have nothing to do, and of which he may be entirely ignorant? It was not, in my opinion, the intention of the statute that he was to deal with the notice, addressed in accordance with the provisions of the statute, in one way if he discovers the indorser lives in the same town or city, as he, the holder, and in another manner if he lives a mile or so outside of the town or city at which the note is dated. Suppose the holder and indorser, as in this case, were at Summerside, but the note should have been dated Charlottetown, surely a notice addressed to the indorser at that place and mailed, would be sufficient, or if the parties resided in Charlottetown and the note was dated Snmmerside, a notice addressed and mailed to the indorser there, would be likewise clearly sufficient; then what possible objection can there be to an indorsee addressing the notice and mailing it at Summerside, having pre-paid all postage that could be exacted? I can find nothing in the statute to indicate that any duty of making inquiry as to the residence of an indorser, before determining how the notice should be given, is imposed on the holder; on the contrary, I think the object of the statute was to relieve holders from the necessity of making any such inquiry, and to prevent any such issue being raised as that on

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which this case was decided in the court below, and simply to enact that if you date a note at a particular place, a notice addressed and mailed to you there, without reference to your actual place of residence or business, shall be sufficient. If you wish a notice sent or mailed to any other place, you must under your signature on such note designate it. The principles enunciated in the case of *Cosgrave* v. *Boyle* (1), as to the object and policy the legislature had in view in passing this statue are, in my opinion, quite as applicable to this case, as to that case, though it is very true the point then before the court was not the same, and as I thought in that case, so I think in this case, we should give full force and effect to this enactment and not unnecessarily limit its operation, and thereby necessarily hamper commercial and banking operations, which it was obviously the object of the legislature to simplify.

STRONG, J., concurred.

HENRY, J.:—

The inconsistency of the position taken by the defendant in this case, the respondent now, is, that admitting the law to be that if this note fell due in Charlottetown, the bank there could post a letter to him at Summerside. It would go to the same office at Summerside as the notice that was posted in this case; but he says that although the law may be that you can post a notice in Ottawa to my address in Summerside, if the note falls due in the same town you cannot proceed in the same way. There is no reason at all, I think, to support such a contention. If the law allows the holder of a note to give notice through the post office 1,000 miles away, is that notice the less perfect because it is put in the identical way office in the village when the note is

(1) 6 Can. S. C. R. 165.

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payable in that village? It appears to me the very moment we decide that under the Act, a notice posted from Charlottetown to Summerside would be good, we must decide that a letter by any means put into the way office or post office at Summerside is also regular. I can see no more reason for personal service where the parties reside in the same town than if he lived in another. I think, not only in the decision in the case referred to, but in others that have come before this court, according to all the authorities the contention cannot be sustained, and therefore the appeal ought to be allowed with costs.

FOURNIER, TASCHEREAU and GWYNNE, JJ., concurred in allowing the appeal with costs.

Appeal allowed with costs.

Solicitor for appellants: *E. J. Hodgson.*

Solicitor for respondent: *J. M. Sutherland.*

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I. N. BELLEAU (Respondent below).....APPELLANT;

AND

*Mar. 3.
*Mar. 16.

ET. DUSSAULT, *et al* (Petitioners).....RESPONDENTS.

ON APPEAL FROM THE JUDGMENT OF CARON, J., SITTING FOR THE TRIAL OF THE LEVIS CONTROVERTED ELECTION CASE.

Dominion Elections Act, 1874, *secs.* 96 *and* 98.—*Promise to pay debts due for a previous election—Hiring of carters to convey voters to poll—Corrupt practices.*

Held (affirming the judgment of the Court below), 1st. When an agent of a candidate receives and spends for election purposes large sums of money, and does not render an account of such expenditure, it will create a presumption that corrupt practices have been resorted to.

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

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2. The payment by an agent of a sum of $147 to a voter claiming the same to be due for expenses at a previous election, and who refuses to vote until the amount is paid, is a corrupt practice.

3. The hiring and paying of carters by an agent to convey voters who are known to be supporters of the agent's candidate is a corrupt practice.—*Young* v. *Smith* (1) followed.

APPEAL from a judgment of Mr. Justice L. B. Caron, sitting under the provisions of the Dominion Controverted Elections Act, 1874, unseating the appellant for corrupt practices committed by his agents (2).

The petition of the respondents contained the usual charges of bribery, corrupt practices, &c., by the appellant personally and by his agents.

The facts of the charges upon which this appeal was decided sufficiently appear in the head note and in the report of the case in the court below.

J. Belleau, the appellant, in person.

Geo. Irvine, Q.C., for respondents.

RITCHIE, C J.:

This case has come before us on appeal from a judgment of Mr. Justice Caron. I feel bound to say, that as long as I have had the honor of presiding in this court, no case has come before us where there was such a clear, undisguised infraction of the law as there has been in this case. In the first place, without going into the two particulars brought before us, we have what to me is a startling admission made. Dr. Lacerte, an agent of the appellant, says that he has spent $150. This agent offers $50 to one man, (who will not take it from him,) to organize the carters in the interest of the appellant in this case. He then

(1) 4 Can. S. C. R. 494. (2) 10 Q. L. R. 247.

gives it to another, to a devoted friend of his party, and when he is asked who this devoted friend was, he says he does not recollect his name, and no account is rendered by the election agent of this money, nor does the present appellant, the sitting member, profess to know anything about it. Then we have another leading manager at this election, who expends, he admits, $1,100 in the interest of the present appellant, and yet he renders no account of it to the agent, and cannot tell to whom, cannot apparently name one person to whom he gave this money, or any portion of it, but says it was distributed over the county in the interest of the appellant. Then we come to the charges of giving drink on voting day, and here it appears to have been done wholesale, that is, to this extent, that in the very committee room of this person, for the purpose, the witnesses say, of amusing the supporters, they put three gallons of spirits, and the people were invited in, and go, and are treated; any one who would take it, got it. Then, again, there is the payment of carters without apparently any disguise—the engagement of carters to take voters to the poll, and payment of them. All these are known to be corrupt acts, and, if done by an agent, will avoid the election.

There is another question, as to the agency, but, as far as I am concerned, I do not think it necessary to do more than to read the judgment of Mr. Justice Caron. I read, as my judgment, the words he has used in his judgment (1):

> Ainsi que je l'ai fait voir plus haut, les pétitionnaires ont prouvé par le défendeur lui-même, que *L. E. Couture*, le Dr. *Lacerte* et le Dr. *G. Guay* ont agi durant l'élection du défendeur et comme ses agents.

And concludes by saying: "*Chacun de ces actes constitue des manœuvres frauduleuses.*"

(1) 10 Q. L. R. 253.

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I think the evidence fully sustains the conclusions at which the learned judge has arrived, and I think it was impossible for him, or any other man, lay or legal, to come to any other conclusion than that there was a gross violation of the Election Act by agents, admitted to be agents of the candidate; and therefore this appeal must be dismissed with costs here and in the court below.

STRONG, J.:

I am of the same opinion.

FOURNIER, J.:

The judge of the court below has shown a great deal of lenity and patience, and I think, perhaps, he ought to have resented a little more than he did the insults, the reiterated insults, offered to him during the trial of the election. He was exposed to very harsh attacks by the newspapers, impeaching his impartiality, and everything has been disposed of rather in too mild a manner. As to the merits of the election, never has an election tried or decided in this court shown such strong, complete evidence of every offence alleged. The most direct agencies were proved. It is impossible to entertain a single doubt on any one of the offences alleged.

HENRY, J.:

I have no difficulty in coming to the conclusion that this election ought to be avoided for the reasons given in the judgment of Judge Caron. Every case he mentions there was, I think, sufficiently proved. Furnishing the liquor in the committee-room on election day is sufficient of itself to avoid the election, and I think it is proved they were very liberal about it. It was there for everybody, friend and foe. Still, that being the case, where it might go to show the motive

was not a corrupt one, it is forbidden by the statute, and avoids the election if done by the candidate or his agents. I think the seat should be vacated, and the appeal dismissed with costs.

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TASCHEREAU, J.:

I am of the same opinion. In fact, I am sure that the appellant never expected any other judgment. I am sorry the Legislature does not give us power to punish the appellants in such cases, and give treble costs. This was never intended to be a serious appeal. I was of opinion, after hearing the appellant, to dismiss the appeal without calling upon the respondent.

Appeal dismissed with costs.

Solicitor for appellant: *J. G. Bossé.*

Solicitor for respondents: *F. Langelier.*

ALEXANDER ROBLEE AND ANOTHER (DEFENDANTS)..... } APPELLANTS;

AND

ALEXANDER K. RANKIN (PLAINTIFF)..RESPONDENT.

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*Feb'y. 20.
*June 23.

ON APPEAL FROM SUPREME COURT OF PRINCE EDWARD ISLAND.

Appeal—Final judgment—Supreme and Exchequer Court Act, 1875, *Sec.* 25—*Supreme Court Amendment Act*, 1879, *Sec.* 9—*Promissory note overdue in hands of payee—Garnishee clauses, C. L. P. Act—Payment by drawer into court by order of a judge, effect of.*

An action was brought by respondent as endorsee of a promissory note made by appellants in favour of one J. A. and by him endorsed to respondent. The appellants pleaded that the amount of the note had been attached in their hands by one of A's judgment creditors and paid under the garnishee clauses of the Common Law Procedure Act of P. E. I., transcripts of secs. 60

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to 67 inclusive, of the English C. L. P. Act, 1854. To this plea respondent demurred on the ground that the debt was not one which could properly be attached, and on the 5th February, 1883, the Supreme Court gave judgment in favour of the respondent on the demurrer. No rule for judgment on the demurrer was taken out by the respondent. On the 19th March following an order was obtained to ascertain amount of debt and damages for which final judgment was to be entered, and judgment was signed for the respondent on the 2nd May following. The appellants then appealed to the Supreme Court of Canada.

Held (reversing the judgment of the court below), that an overdue promissory note in the hands of the payee is liable to be attached by a judgment creditor under the C. L. P. Act, and that payment of the amount by the garnishee to the judgment creditor of the payee, in pursuance of a judge's order, is a valid discharge.

On motion to quash for want of jurisdiction, it was contended on behalf of respondent that the appellant should have appealed from the judgment rendered on the demurrer on the 5th February, 1883, and within thirty days from that date; but,

Held, that the judgment entered on the 2nd May, 1883, was the "final judgment" in the case from which an appeal would lie to the Supreme Court.

APPEAL from a judgment of the Supreme Court of Prince Edward Island.

This was an action to recover the amount of a promissory note made by defendants on 5th December, 1876, payable to Isaac Auld or order, for the sum of $200 twelve months after date, with interest at rate of 10 per cent. per annum until paid, and which note Auld endorsed to the plaintiff.

Defendants pleaded: that after the making of the said promissory note, and after the same became due and payable, and while the said Isaac Auld was the legal holder of the said note, and before the same was endorsed to the plaintiff, Alexander Strang and Jessie Strang, his wife, obtained a judgment in the Supreme Court of this island, at Charlottetown, for the sum of $1,500 damages, and $118.65 costs of suit, making in all $1,618.65, against the said Isaac Auld, and was a judgment creditor of

the said Isaac Auld within the meaning of the Common Law Procedure Act, 1873, for that amount; and afterwards, and while the said Isaac Auld was the legal holder of the said note, and after the same became due and payable, and before it was indorsed to the now plaintiff, the said Alexander Strang and Jessie Strang, his wife, in pursuance of the said Act, as such judgment creditors, made an *ex parte* application to Mr. Justice Hensley, one of the judges of the said court, upon affidavit by the said Alexander Strang, stating that such judgment had been recovered, and that it was still unsatisfied, and that the now defendants were indebted to the said Isaac Auld, and were within the jurisdiction of the said court, whereupon it was, in pursuance of the said Act, ordered by the said judge that all debts due and owing, or accruing due, from the now defendants to the said Isaac Auld, should be attached to answer the said judgment debt, and that the now defendants should appear before the said judge to show cause why they should not pay the said Alexander Strang and Jessie his wife the debt due from the now defendants to the said Isaac Auld, or so much thereof as might be sufficient to satisfy the said judgment debt; and the said order was duly served on the now defendants, and the now defendants did not forthwith pay into court the amount due from them to the said Isaac Auld, or any part thereof, and did not dispute the debt due from them to the said Isaac Auld, whereupon it was, in pursuance of the said statute, duly ordered by the honorable Edward Palmer, Chief Justice of the said Supreme Court, that the now defendants should forthwith pay the said Alexander Strang and Jessie Strang, his wife, judgment creditors as aforesaid, the said debt due from them to the said Isaac Auld, judgment debtor, and that in default thereof an execution should issue for the same,

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being the amount of the claim herein pleaded to, towards satisfaction of the said judgment debt, and the last mentioned order was duly served on the said defendants; and afterwards the defendants paid to the said Alexander Strang and Jessie Strang his wife, under such proceedings as aforesaid, the amount of the note and interest due thereon and herein pleaded to, and the said note was indorsed by the said Isaac Auld to plaintiff after it became due and after the payment by the now defendants to the said Alexander Strang and Jessie his wife, under the proceedings aforesaid.

The plaintiffs both joined issue and demurred as follows:

The plaintiff takes issue on the defendants' plea.

As to the defendants' plea, says that the same is bad in substance.

A matter of law intended to be argued is, that the order for attachment, and the order for payment of all debts due from the defendants to the said Isaac Auld, and the payment by the defendants of said moneys so due by them, is no defence to this action as against the present plaintiffs.

There was a joinder in demurrer.

The respondent subsequently obtained an order from one of the judges of the court below ordering the issues in law to be first disposed of.

The following were the plaintiff's points for argument on demurrer.

1—That the order for attachment and the order for payment and the payment thereunder, is no defence to this action, as against the present plaintiff.

2—That the promissory note, the subject of this action, is not a debt within the meaning of the Common Law Procedure Act of 1873, being a negotiable security.

3—That the payment under the orders for attachment herein is not such an equity, attaching to the

promissory note, the subject of this action as can be set up by the defendants against the plaintiff, the endorsee of the note, although it was endorsed after it was due.

4—That the payment made under the provisions of the Common Law Procedure Act, as alleged in plea, only amounts to a discharge as against the judgment debtor, and does not operate as a discharge as against third persons.

5—The pleas are bad because they do not plead the matters set out on equitable grounds.

6—The plea is bad as it does not show that the claim or debt of plaintiff was barred by the order of a judge.

The case came on for argument, and was heard before the full Supreme Court of the Province on the fifth day of February, A. D. 1883, and on a subsequent day judgment was given on said demurrer in favor of the plaintiff below by Peters and Hensley, JJ., two of the judges of the Supreme Court of this province, the chief justice dissenting.

On the 19th day of March last, the respondents obtained an order absolute, authorizing the prothonotary of the Supreme Court of this Province to ascertain or compute the amount of debt and damages for which final judgment was to be entered in said cause.

On the 24th day of March, A. D. 1883, the prothonotary computed the amount for which final judgment was to be entered in the said cause,

No rule for judgment on the demurrer or other rule except the rule to compute above set forth was taken out by the respondent, nor was any judgment signed until the second day of May, A. D. 1883, on which day judgment was signed for the plaintiff below.

The application to quash appeal for want of jurisdiction made on the ground that time for appeal should run from the date of the judgment on the

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demurrer and that the present appeal was too late, was dismissed.

L. H. Davies, Q.C., for appellant:

The garnishee clauses of the local statute, under which the proceedings in this cause were taken, are transcripts of the 60, 61, 62, 63, 64, 65, 66 and 67 sections of the English Common Law Procedure Act, 1854.

The effect of an order that all debts owing or accruing from the garnishee to the judgment debtor to answer the judgment debt is, when served, *In re Stanhope Silkstone Collieries Company* (1,) to bind the debt or debts, and prevent the creditor, *i.e.*, the judgment debtor, from receiving it or them. Per Cotton, L.J., *ex parte* Jocelyne, *In re* Watt (2); *Chatterton* v. *Watney* (3).

It is immaterial whether the attached debts are due and payable at the time of the service of the order *nisi*, because the effect of the order is to deprive the judgment debtor of the right to receive, leaving the garnishee to shew cause why he should not pay.

Further, the attachment is not of the note but of the debt, which the garnishee has by payment admitted did at one time exist between him and judgment debtor, and which was only suspended during the running of the note.

Taking the note only operated as a suspension of the original debt due from appellants to the judgment creditor, and on the note becoming due in the hands of that judgment debtor, the original debt revived and existed at the time of garnishment (4).

The payment made by order of the judge to the judgment creditor, was in the eye of the law a payment

(1) 11 Ch. D. 160.
(2) 8 Ch. D. p. at 331.
(3) 17 Ch. D. p. 259.
(4) Byles on Bills, p. 335; *Tarleton* v. *Allhusen*, 2 A. & E. 32; *Belshaw* v. *Bush*, 11 C. B 191; *National Savings' Bank* v. *Tranah*, 36 L. J. C. P. 260; and see *Cohan* v. *Hale*, 3 Q. B. D. 371.

to the judgment debtor. It was therefore, an equity attaching to the note when Auld, after that payment, endorsed it to respondent.

After payment a note loses all its validity, and is no longer negotiable. Story Prom. Notes (1).

The obvious reasons which may be urged for excluding current promissory notes from the operation of the garnishee clauses, viz., that they would destroy their negotiability, do not extend to overdue notes in hands of payee. See Drake on Attachment (2).

The arguments of the majority of the court below, that it would be very inconvenient to construe the statute as embracing debts secured by overdue promissory notes, are based upon an imaginary condition of things, and are not sound, and cannot over-ride the statute. In actual life, overdue promissory notes are not accepted as securities for large advances, as suggested in the judgment, and every mercantile man knows that in taking such an instrument he takes it at his peril, and subject to the chances of its having been paid, &c.

The appellants, having once been compelled to pay the notes, by order of a court of competent jurisdiction, will not be compelled to pay it a second time. *Wood* v. *Dunn* (3); *Westoby* v. *Day* (4).

A. Peters, for the respondents:

The real quesion in dispute raised by the demurrer is, "whether or not debts secured by promissory notes are attachable, under the garnishee clauses of the C. L. P. Act, 1873, when overdue."

My first point is, that debts secured by negotiable instruments are not attachable. The 258th section of the P. E. Island Common Law Procedure Act (English Act, 1854, section 65,) provides that payments made by the

(1) P. 197.
(2) Pp. 583 to 588.
(3) L. R. 2 Q. B. 73.
(4) 2 El. & B. 605.

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garnishee shall be a discharge as against the "judgment debtor." In order to support the appellant's construction, the statute should read as against those claiming through him, and I contend that the discharge given by the section is a discharge only against "the judgment debtor," and cannot be set up except by a person who comes strictly within the words of the section, and does not apply to an action brought by a third person; and this is obvious, for if it was intended that negotiable instruments could be attached, some machinery would have been provided for seizing the note itself, or, in case that could not be done, of indemnifying the person paying against the note, as is done in several of the states of the United States of America in the case of garnishment of negotiable paper. See Law of Mississippi and Iowa, cited in "Drake on Attachments (1), and analogous to the provision of the English law in case of plea of lost note pleaded.

Suppose the maker of a note is garnisheed, or attempted to be garnisheed, does he know whether the judgment debtor is then the holder of the note or not; and may he not be garnisheed when he actually believes that the note is in the hand of the judgment debtor, when as a matter of fact it has been endorsed away?

Again, the garnishee, if he is compelled to pay the note without any indemnity, and without getting his note, is left open to the risk and annoyance of having to defend an action brought against him by an indorsee claiming to be an indorsee before the attachment, when he, the garnishee, is not in a position to prove when the note was actually endorsed; the risk of paying costs that the garnishee might be compelled to run would, in such case, be very great and very unjust.

By the common law no person is required to pay a negotiable instrument unless the instrument is delivered

(1) Sec. 711, ss. 6.

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up to him at the time of payment. See *Hansard* v. *Robinson* (1); Byles on Bills (2).

I also contend that this statute should not be construed so as to alter the common law in so material a point unless the statute is express. See Maxwell on Statutes (3). Again, if the maker of a negotiable instrument can be attached, the same process might be applied against an indorser, which must lead to evident inconvenience. For instance, suppose a note made by "A" in favor of "B," or order indorsed by "B" to "C" and "C" to "D," a judgment is obtained against "D," and "C" is garnisheed and compelled to pay, "C" has no means of obtaining the note from "D" or of compelling him to give it to him (especially if "D" is in a foreign country). How is "C" to recover against the previous indorser or the maker?

The garnishee clauses apply to ordinary debts only, and not to those secured by negotiable securities, See *Holmes* v. *Tutton* (4) per Lord Campbell, where he says, the enactment under our consideration, extends the power of executing the judgment of mere ordinary debts, though not secured by bill or note followed in *Turner* v. *Jones* (5); *Mellish* v. *The Buffalo Ry. Co.* (6). Drake on attachments (7).

It is said that though negotiable instruments which are not due may not be attachable, still, that an attachment of an overdue note is an equity which would affect it in the hands of an indorsee who took it after it was due. I answer that it is not such an equity. The indorsee of overdue paper takes it subject to all the equities which attached to the bill in the hands of the holder at the time it became due, arising out of, or con-

(1) 7 B. & C. 90.
(2) 11th Ed. 375-376.
(3) P. 66.
(4) 5 E. & B. 65.
(5) 1 H. & N. 878.
(6) 2 U. C. P. R. 171.
(7) Sections 580, 583.

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nected with, the bill transaction itself, but not arising out of any collateral matter. *Burrough* v. *Moss* (1); *Oulds* v. *Harrison* (2); and see also per V. C. Malins *in re Overend* and *Gurney ex parte Swan* (3), where he says, "it is the equities which attach to the bill, not the equities of the parties; *Holmes* v. *Kidd* (4). See Story on Bills (5); Story on promissory notes (6) where he states that the law of France goes further and holds an attachment an equity; Byles on Bills (7); *Stein* v. *Yglesias* (8). A note does not lose its negotiability after it becomes due, but it is only then encumbered with the equities which legally attach to it and which are fully defined in the case above cited.

RITCHIE, C. J. :—

This is an appeal from the judgment of the Supreme Court of Prince Edward Island.

This action was brought by respondent as endorsee of a promissory note made by the appellants in favor of one Isaac Auld, and by him endorsed to respondent. The appellants pleaded that after the note fell due, and while Auld, the payee, held it, the amount was attached in their hands by one of Auld's judgment creditors, by whom they were summoned before one of the judges of the Supreme Court, who ordered them to pay the amount of the note to the judgment creditor, and that, in obedience to such order, they paid it, and that the note was after this, while long overdue, endorsed to respondent.

To this plea respondent demurred, and a majority of the court sustained the demurrer, holding that—

An overdue promissory note in the hands of the payee is not liable to be attached by a judgment creditor of

(1) 10 B. & C. 558.
(2) 10 Ex. 572.
(3) L. R. 6 Eq. 359.
(4) 3 H. & N. 891.
(5) Sec. 187.
(6) Sec. 179.
(7) P. 167, (11th Ed).
(8) 3 Dowl. 252.

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the payee, and that the garnishee clauses of the statute do not extend to promissory notes. From this judgment appellants appeal.

I have no doubt that a promissory note overdue, in the hands of the payee, is liable to be attached by a judgment creditor of the payee, the garnishee clauses of the Common Law Procedure Act, in my opinion, extending to overdue promissory notes, and that, irrespective of any question as to the right of a judgment creditor to attach an overdue promissory note, I think a payment into court by the drawer of the amount of such a note, in obedience to an order of a court of competent jurisdiction, discharges the drawer from any further liability on the note, and that the subsequent endorsement by payee to a third party gave such party no right of action against the drawer on the note.

Sec. 65 of C. L. P. Act, 1873, provides that—

> Payment made on execution upon the garnishee under any such proceeding as aforesaid shall be a valid discharge to him, as against the judgment debtor, to the amount paid or levied, although such proceeding may be set aside, or the judgment reversed (1).

The case of *Allen* v. *Dundas* (2), clearly establishes that the law, which is founded on wise and sound principles, will never compel any person to pay a sum of money a second time which he has once paid under the sanction of a court having competent jurisdiction. This case has been often since referred to with approval.

See per Channell, B., in *Wood* v. *Dunn* (3), in which the question was as to the protection of a garnishee under an order of a court of competent authority, in which case Pigott, B., says:—

> The garnishee's duty is to obey the order; not to contest conflicting claims.

and in which case, Channell, B., considered it neces-

(1) See *Turner* v. *Jones*, 1 H. & N. 878, and *Lockwood* v. *Nash*, 18 C. B. 536.

(2) 3 T. R. 128.

(3) L. R. 2 Q. B. 80.

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sary to examine the decided cases, and see whether there was anything in them to induce the judge's sitting in a court of error to decide "in opposition," as he expresses it, "to the broad principle of protecting honest payments made under competent authority;" and taking the first case of a payment being made under the order without any notice of an assignment, then, he says:—

We think we ought to hold that the payment has been made under the sanction of a court of competent authority, and that it ought to be protected.

And on the whole case he concludes thus:—

We think that it sufficiently appears in this plea, that the payment was made in obedience to the order of a competent authority, and is, therefore, protected, and the judgment of the court of Queen's Bench should be reversed.

Payment into court by a garnishee, under a judge's order, is a payment within this section, and discharges the garnishee.

In *Culverhouse* v. *Wickens* (1), Willes, J. says:—

It is clear that if the garnishee pays the money into court under a garnishee order instead of disputing the debt, it is, under sec. 65 of the Common Law Procedure Act, 1854, equivalent to a payment to the judgment creditor, and it should seem to be the same if money is subsequently paid into court by the garnishee, by order of a judge.

Bovill, C.J.:—

With respect to the sum of £25 that has been paid into court I see no reason for granting the rule. Under the 63rd sec. of the Common Law Procedure Act, 1854, the garnishee may pay into court the money he acknowledges to be due from him, and by the effect of that and the 65th section such a payment would undoubtedly discharge the garnishee. In this case the money was paid in under the order of a judge, but it was paid in as an acknowledgment of the debt, and I think the effect was the same as if it had been paid in in pursuance of the section above alluded to.

Willes, J.:—

(1) L. R. 3 C. P. 295.

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The 65th section of that Act must refer, I think, to all payments by the garnishee into court, whether made under the 63rd section as an acknowledgment of the debt, or subsequently under a judge's order, to be held for the creditor if he proves his claim to be just. The latter is, in fact, a payment to him if his claim is just, because it is payment into court in trust for him.

In *Sampson* v. *Seaton Railway Co.* (1), Lush, J. says:—

The right to attach a debt owing to the judgment debtor by a third party is a species of execution against the property of the judgment debtor. For the purpose of this new remedy given by the Common Law Procedure Acts, the debt is made equally available to the judgment creditor as property seizable under a fi. fa., and his rights are as ample in the one case as in the other. The machinery provided for determining questions of disputed liability has reference solely to cases where the garnishee disputes his liability to the judgment debtor. And although we have no doubt that the state of accounts between the garnishee and the judgment debtor may and ought to be gone into, so that the garnishee may not be in a worse position than if he had been sued for his debt by the judgment debtor, the case is different as between him and the judgment creditor. There is no place for the discussion of cross claims between the garnishee and the judgment creditor. If it had been intended to let in such claims, some mode of adjusting them in case of dispute would have been also provided. But there is none. The words of sec. 63 of the Act of 1854 appear to us clearly to define what is the right of the judgment creditor: "If the garnishee does not forthwith pay into court the amount due from him to the judgment debtor, or an amount equal to the judgment debt, and does not dispute the debt due, or claimed to be due, from him to the judgment debtor, or if he does not appear upon summons, then the judge may order execution to issue, and it may be sued forth accordingly, without any previous writ or process, to levy the amount due from such garnishee towards satisfaction of the judgment debt." All that the judge has to do is to decide whether the circumstances are such as to make it right and just that the garnishee should pay and that the judgment creditor should have execution against him. Having decided against the garnishee, the judge cannot go on to settle the accounts between him and the judgment creditor, nor to impose, as a condition of granting the remedy to which the statute entitles him, that he shall pay what he may owe to the garnishee.

(1) L. R. 10 Q. B. 30.

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The case of *Wood* v. *Dunn* (1), is also referred to.

In re Stanhope Silkstone Collieries Company (2), shows that the order of attachment, or the writ of attachment, (which James, L. J., says, in his opinion, are the same thing), does not prevail until it has been executed by being served on the debtor, and then, at the time, as an execution against goods actually executed.

I am of opinion to allow this appeal.

STRONG, J. :—

It has been decided by an Irish case—*Pyne* v. *Kinna* (3)—that a promissory note held by the judgment debtor as payee or endorser, not yet due, is not liable to attachment, for the reason that it may be endorsed to a *bonâ fide* holder for value without notice before it became due, but this reason is obviously inapplicable to an overdue promissory note, as the plea alleges this to have been when the attaching order was made. It would seem therefore, that as every subsequent endorsee would take the note subject to the equities to which the payee was liable, and as it was, beyond all question, by force of the express enactment of the provincial statute, corresponding to Common Law Procedure Act (Eng.), 1854, sec. 65, to be considered paid so soon as payment was made to the judgment creditor according to the exigency of the order, that it stands on the same footing as a bond. Sec. 65 of the English Common Law Procedure Act, 1854, is as follows :—

> Payment made on execution levied upon the garnishee under any such proceeding as aforesaid, shall be a valid discharge to him as against the debtor, liable under a judgment to the amount paid or levied, although such proceeding may be set aside or the judgment order reversed.

So that, even granting that the order ought not to have been made, the statute makes the payment under

(1) L. R. 2 Q. B. 80. (2) 11 Ch. Div. 160.
(3) 11 Ir. L. Rep. (C. L.), 40.

it good, and the plaintiff must therefore, on the averments of this plea, be considered as the endorsee of an overdue note which had been paid and satisfied before it was endorsed to him.

I venture to suggest, however, that in order to prevent frauds such as that practised in the present case, it would be a prudent and proper precaution if the court were to order the judgment debtor, on payment by the garnishee to the creditor, to deliver up the note to the latter, an order which the court, under its general equitable jurisdiction, has clearly power to make.

The judgment must be reversed, and judgment on demurrer entered for the defendant, and the appellant must have his costs of the appeal.

FOURNIER, J., concurred.

HENRY, J.:—

This is an action on a promissory note by the endorsee of the payee. The record shows, that after the note fell due, proceedings were taken by a judgment creditor of the payee, under the provisions of the Garnishee Act of Prince Edward Island, against the drawers of it. That Act is the same as the English Act on the same subject. The drawers appeared and admitted the debt due by them to the payee, and subsequently paid the amount of the note to the judgment creditor, under an order duly made by a judge in that behalf; the note, however, remaining in the possession of the payee. The drawers, being unable to deny the existence of the debt due by the note to the payee, were not only justified but compelled to admit it, as a contest on that point would be not only useless but expensive, and having so admitted such debt, were obliged to pay the same, as otherwise an execution for the amount might, and no doubt would, have been issued against them to enforce the payment thereof.

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The words of the statute are: "all debts owing by the garnishee to the judgment debtor shall be attached to answer the judgment recovered against them." Can it be for a moment contended that a debt is any the less a debt because it is secured and evidenced by a promissory note overdue? It is not hard to appreciate the difference in such a case between a current note and one overdue. In respect of the former, there is really no debt due by the maker to the payee, and if endorsed to a third party while current, he, or some other holder would become the creditor therefor of the drawer. A current note cannot therefore, be attached, or if the garnishee, as such, should be called upon to pay the amount, such payment would be no defence to an action at the suit of an endorsee, or any subsequent holder, at all events, if the note were endorsed before falling due.

The note in question was what is termed a "stale note" before it was endorsed to the respondent, and by well understood rules, his position in regard to it is no better than that of the payee who endorsed it to him, which would not have been the case if the indorsement had been made while the note was current. The endorsee here, it must be held, took the note on the credit of the endorser, and not of the drawer, and any defence available in an action by the payee is, as to all matters antecedent to the endorsement, equally available in an action by the endorsee. This note is shown to have been paid after maturity, and not only so, but its payment was enforced by legal means. The drawers had no option but to pay the amount of the note, and it would, in my opinion, evidence a most unsatisfactory state of the law, if a third party, claiming through the payee whose judgment debt the amount was appropriated to liquidate, could enforce the payment of it a second time.

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It is contended, on the part of the respondent, that the appellants might have successfully r sisted an order in favor of the judgment creditor until the note was produced. That point, however, it is unnecessary, I think, to discuss. The debt due by the note was paid, and, I think, legally paid. The question as to possession of the note was not at the time raised. The garnishee ran the risk as to the then holder of it, and, if it was then held by the judgment debtor as payee thereof, the payment under the garnishee proceedings was an extinguishment of the debt, and a legal payment of the note.

I am, for the foregoing reasons, of the opinion that the appeal herein should be allowed, and judgment given in favor of the appellants with costs.

GWYNNE, J.—I am of opinion that a debt secured by a promissory note overdue in the hands of the payee, who, while the holder thereof, became a judgment debtor to another person, is, while in the hands of such judgment debtor as the legal holder thereof, a debt owing to him by the maker and attachable at the suit of the judgment creditor of the payee. The statute of the province of Prince Edward Island is identical on this point with the English Common Law Procedure Act, and its provision therefore is, that in the case of a judgment recovered by one person against another remaining unsatisfied, all debts owing by, or accruing from, any third person to the judgment debtor may be attached to answer the judgment, and that service upon such third person of an order, that debts due or accruing due to the judgment debtor shall

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be attached, shall bind such debts in his hands, and that by the same or any subsequent order, it may be ordered that such third person (in the statute called the garnishee) shall appear before a judge or some officer of the court, to be specially named by the judge, to show cause why he should not pay the judgment creditor the amount due from him to the judgment debtor, or so much thereof as may be sufficient to satisfy the judgment debt, and that if the garnishee does not forthwith pay into court the amount due from him to the judgment debtor, and does not dispute the debt, execution may issue to levy the amount due from such garnishee.

Now the reason why a debt, secured and made payable by a promissory note, is not attachable to satisfy a judgment recovered against the payee while the note is still current—not yet arrived at maturity—is because the amount made payable by such a note is not, before maturity, either a debt owing by, or accruing due from, the maker to the payee within the words of the statute.

The amount secured by the note, until maturity, is not a debt owing by the maker and due to the payee or to any one. By the custom of merchants, which governs promissory notes, it is accruing due to the person who shall be the holder thereof at maturity, and therefore cannot be said to be accruing due to the payee, the judment debtor, within the words of the statute.

No such reason however, exists for holding that a debt secured by a promissory note, when overdue and still in the hands of the payee, cannot be attached to satisfy a judgment recovered against the payee, for in that case the amount does constitute a debt owing by the maker, and due and payable to the judgment debtor; and in case the maker does not dispute the debt there can be no reason why such a debt (whether the promissory note was given to secure an antecedent debt, or one

which was incurred only at the time of the making of the note) should not come within the comprehensive words of the statute "all debts owing by the garnishee to the judgment debtor shall be attached to answer the judgment recovered against him."

The plea here avers not only that at the time of the order *nisi* being served upon the defendant, the maker of the note sued upon, the note was overdue, but that it was then in the hands of the payee, judgment debtor, as the legal holder thereof, and that the maker did not dispute the debt; and further, that he had, in fact, paid the amount of the note to the judgment creditor in obedience to a judge's order to that effect, granted under the circumstances authorized by the statute before ever the note was transferred by the payee to the present plaintiff; all which being admitted by the demurrer, the defendant has, in my opinion, shown a good bar to the present action, for the statute expressly provides that payment by the garnishee, in pursuance of a judge's order granted under the circumstances stated in the plea, shall be a valid discharge as against the judgment debtor, and being so, it must be a good defence to an action, brought by a person who admits on the record that his sole claim to, and property, in the note was acquired from the person whose interest in the note and in the amount secured thereby was extinguished by a good and valid payment after the note had become due, and before ever the present plaintiff had received a transfer of the note or had acquired any interest therein.

The appeal should be allowed with costs and judgment be ordered to be entered for the defendants in the court below with costs.

Appeal allowed with costs.

Solicitor for appellants: *L. H. Davies.*

Solicitor for respondent: *Arthur Peters.*

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*Dec. 8.
1885
*June 22.

GIDEON VERNON AND MARY E. VERNON (Plaintiffs)..... } APPELLANTS;

AND

WARREN OLIVER (Defendant)..... ..RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

Arbitration and award—Misconduct of arbitrators—Bill to rectify award—Prayer for general relief—Jurisdiction of Court—Practice —Factum—Scandalous and impertinent.

The bill in this case was filed to rectify an award made under a submission to arbitration between the parties, on the ground that the arbitrators considered matters not included in the submission, and had divided the sums received by the defendant from the plaintiffs, because that defendant's brother and partner was a party to such receipt, although the partnership affairs of the defendant and his brothers were excluded from the submission. The bill prayed that the award might be amended and the defendant decreed to pay the amount due the plaintiffs on the award being rectified, and that, in other respects, the award should stand and be binding on the parties; there was also a prayer for general relief.

Held, affirming the judgment of the court below, that to grant the decree prayed for would be to make a new award which the court had no jurisdiction to do, but:

Held, also, reversing the decision of the court below, that under the prayer for general relief the plaintiff was entitled to have the award set aside.

The plaintiffs' factum, containing reflections on the judge in equity and the full court of New Brunswick, was ordered to be taken off the files as scandalous and impertinent.

APPEAL from the Supreme Court of New Brunswick,

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*PRESENT—Strong, Fournier, Henry, Taschereau and Gwynne, JJ.
(The Chief Justice being related to some of the parties in the cause, took no part in the hearing of the appeal.)

affirming the judgment of the judge in equity dismissing the plaintiffs' bill (1).

The facts of the case sufficiently appear in the judgment of the court.

J. Travis for appellants contended, first, that under the prayer of general relief in his Bill he was entitled to have the award rectified, and if not under that prayer, then under an amended prayer, which this court, under 43 Vic., ch. 34, has power to grant, and if the court was of opinion that the appellant was not entitled to have the award rectified, then he was entitled to have the award set aside, on the ground that the arbitrators made an award on matters not included in the submission and over which they had no jurisdiction, and relied on and cited *inter alia* Con. Stats., N.B., ch. 49, sec. 22. *Parsons* on Contracts (2); *Beaumont* v. *Boultbee* (3); *In re Dare Valley Railway Co.* (4); *Duke of Buccleuch* v. *Metropolitan Board of Works* (5).

C. A. Palmer for respondent:

The case made by the bill does not come within the class of cases where a Court of Equity will rectify an award, and the setting aside of the award would not be an alternative relief, for it is entirely inconsistent with the prayer of the bill. *Phillips* v. *Evans* (6); *Daniels* (7); *Stevens* v. *Guppy* (8); *Verplank* v. *The Mercantile Insurance Co.* (9).

J. Travis in reply.

The judgment of the court was delivered by

GWYNNE, J.:—

Three several actions had been commenced in the Supreme Court of New Brunswick against the above

(1) 23 N. B. R. 392.
(2) 7 Ed. 698.
(3) 5 Ves. 485.
(4) L. R. 6 Eq. 429.
(5) L. R. 5 H. L. 418.
(6) 12 M. & W. 309.
(7) 5 Am. Ed. 397.
(8) 3 Russ. 171.
(9) 1 Edw. Ch. Reps (N.Y.) 49.

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defendant, the one at the suit of the above named plaintiff, Gideon Vernon, another at the suit of him and his wife, and the third an ejectment on the demise of Gideon and Mary E. Vernon; before any thing was done in these actions further than service of the writs by which they were commenced, it was agreed by and between the parties to this present suit, that the several matters in dispute between them, and for which the said actions were commenced, should be referred to arbitration, and for carrying out such agreement mutual bonds of submission were executed; that executed by the defendant has been produced, and it contains the following statement of the matters intended to be referred:—

Whereas differences have arisen between the above named and bounden Warren Oliver on the one part, and the above named Gideon Vernon and Mary E. Vernon his wife, on the other part, and there are now depending in the Supreme Court of the Province of New Brunswick three suits at law, one brought by the said Gideon Vernon against the said Warren Oliver and one David Oliver to recover from them certain sums of money claimed to have been lent by the before mentioned Mary E. Vernon to the said Warren Oliver and David Oliver; one by the said Gideon Vernon and Mary E. Vernon, his wife, against the said Warren Oliver to recover from him damages for an alleged trespass to the person of the said Mary E. Vernon by the said Warren Oliver; and an action of ejectment brought by the said Gideon Vernon and Mary E. Vernon against the said Warren Oliver to eject him from certain lands situate, &c., &c., claimed by the said Mary E. Vernon to belong to her, which said differences and suits and all demands concerning the same, including mesne profits in the said last mentioned suit, the said Warren Oliver on his part, and the said Gideon Vernon and Mary E. Vernon his wife, on their part, have and do hereby agree to refer to the award and determination of, &c., &c., &c.

The submission contained further an agreement that the said arbitrators, or any two of them, should be at liberty to order and determine what they should think fit to be done by either of the said parties respecting the matters referred, and this further agreement:—

And it is agreed between the said parties that in the suit first

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above named, namely, *Gideon Vernon* v. *David Oliver* and *Warren Oliver*, that the award of the abitrators, or any two of them, shall, if it be against the said Warren Oliver and David Oliver, show the amount owing by the said Warren Oliver and David Oliver to the said Mary E. Vernon.

Upon the arbitration the defendant's attorney presented a claim of the defendant against Gideon Vernon alone, as a set off against his demand in his action for recovery of the monies lent by his wife to the defendant and David Oliver; the plaintiff's attorney objected to the arbitrators entertaining this claim of set off, and to their receiving any evidence in respect of it, upon the ground that, as he contended, it was not within the submission, and moreover, that it was barred by the Statute of limitations; the arbitrators however, entertained the claim, notwithstanding the plaintiff's objection, and disregarding wholly the last clause contained in the submission as above set out, they did not by their award find, as they were expressly required to do, what was the amount owing in the said first mentioned suit to the said Mary E. Vernon by the said Warren Oliver and David Oliver, but made their award as follows :—

That the said Warren Oliver should, on or before the 4th August next ensuing the date thereof, pay or cause to be paid to the said Gideon Vernon the sum of six hundred and eighty-three dollars, in full payment and discharge of and for all monies, debts, damages, dues, claims and demands of the said Gideon Vernon and Mary E., his wife, or either of them, upon any account or transaction or other matter whatsoever at any time before their entering into the said bonds of arbitration as aforesaid, and that the said Warren Oliver or his heirs shall and do, on or before the said fourth day of August next ensuing the date hereof, make and execute a good and sufficient deed of conveyance of all his share and right in the lands of the estate of his late brother, Alfred Oliver, situate, &c., &c.

The award then directed that the defendant should pay to the arbitrators the sum of $84 (eighty-four dollars) for their costs of the arbitration and award,

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and lastly, the arbitration did thereby further award and decree that the said award should be final and conclusive of all matters, actions, cause and causes of action, suits, controversies, trespasses, debts, damages, accounts and demands whatsoever, for or by reason of any matter, cause or thing whatsoever, arising out of the matters referred to them by the said bonds previous to the date thereof; the submission contained no clause, providing that it might be made a rule of any court. The plaintiffs filed their bill in equity in the Supreme Court of New Brunswick, wherein they alleged that the arbitrators, in disregard of the plaintiff's objection, had entertained the said matter of set-off which the plaintiffs insisted was not within the submission, and had allowed the same to the defendant to the amount of seven hundred and thirty-seven dollars and fifty-six cents, as against the monies lent by the said Mary E. Vernon to the said defendant and his brother David, and that they wholly neglected to find, although they were expressly required by the submission to find, what was the amount which was due by the defendant and his brother David to the said Mary E. Vernon, but that, on the contrary, they had in fact (after deducting from such amount whatever it may have been, which the arbitrators deemed to have been so due the said seven hundred and thirty-seven dollars and fifty-six cents,) divided the balance, without showing what that balance was, into two equal parts, and included in the sum of said six hundred and eighty-three dollars only one of such parts, and then awarded in effect that the plaintiffs should accept the one-half of such balance in full satisfaction and discharge of the whole amount, whatever it might be, which was really due to the said Mary E. Vernon from the said defendant and his brother; the bill then alleged that the plaintiffs, in order to take up the said award, had been obliged to

pay to the said arbitrators the said sum of eighty-four dollars, the costs of the said arbitration and award, which the arbitrators had adjudged should be paid by the defendant, and it prayed that the said award might be amended by the court in the above matters, that is to, say by expunging the credit given to the defendant for the amount of set off claimed by him, and by reinstating the half of the balance which the arbitrators had deducted from the amount due to Mary E. Vernon; and that the defendant might be decreed forthwith to pay to the plaintiff, Gideon Vernon, the whole amount coming to him on the said award, being rectified as aforesaid in the several particulars, in which it is wrongful and improper as aforesaid; and that in all other respects the said award should stand and be forthwith acted upon and be binding on the parties thereto; and that the said Warren Oliver should also pay to the said Gideon Vernon, the said sum of eighty-four dollars with interest thereon, and interest on the proper sum due and payable to him under the said award, and that the plaintiffs and each of them might have all other relief in the premises to which they are entitled, and that the defendant might pay the costs of this suit and that all proper directions should be given and accounts taken.

The plaintiffs' bill is framed upon the erroneous assumption that the jurisdiction of a Court of Equity over awards extends to the making of a wholly new award in the place of that made by the judges of the parties own selection. What is the precise limit of the jurisdiction of the court over awards it is not necessary to define, for it never has been supposed that it extended so far as to justify the court in undoing what the arbitrators, in the exercise of their discretion, have by their award deliberately done, and substituting therefor a finding which, in the opinion of the court, the arbitrators should have found; or in adding to the amount by

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an award adjudged to either party, a sum which the arbitrators have by their award deliberately disallowed, however erroneous their disallowance of that sum may have been. If, as is contended by the plaintiffs, the item of set-off which the arbitrators are by the bill charged with having allowed to the defendant was not within the submission, the allowance of that item by the arbitrators would afford ground for setting aside their award, but could not justify the court in putting themselves in the place of the arbitrators, and in making a new award quite different from that which the arbitrators deliberately, albeit erroneously, have made. It is unnecessary to enquire whether this item of set-off was or not within the submission, for, if it was, and this was contrary to the intention of the parties, the plaintiffs' remedy was to have the submission rectified; and if it was not within the submission, their sole remedy was to have the award set aside if the arbitrators entertained the matter which was not within the submission. So likewise as to the amount alleged to have been deducted by the arbitrators by the process alleged of their dividing into two equal parts, the balance of the claim of Mary E. Vernon, after deducting from the whole of such claim the above item of set-off, and including one only of such two equal parts in the amount of $683; the court can have no jurisdiction to add to the amount awarded that part which the arbitrators have deliberately, albeit erroneously, disallowed; by so doing the court would be constituting themselves judge of the differences between the parties in the place of the judges of the parties own selection. In so far therefore as the bill claims to have the award amended by the court in the particulars, and in the manner, specified, the jurisdiction of the court has been wholly misconceived The frame of the bill also, is most objectionable for the scandalous prolixity of its contents. The plaintiffs have

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introduced therein a great mass of irrelevant matter, consisting of a lengthy correspondence between the solicitors of the parties, and other matters which are wholly irrelevant, the object of the framer of the bill being to establish by such correspondence and other matters, that the intention of all parties to the submission was that it should be confined to the claims of Mary E. Vernon, and that therefore the item of set off was not within the submission; but whether it did or not, in fact, come within the terms of the submission, must needs be determined by the submission itself. The setting out therefore of this prolix correspondence in the bill was quite irrelevant. The prolixity thus introduced into the bill is followed, to an equally irrelevant extent, in the answer of the defendant, and is carried into the evidence adduced at the trial, where the whole of the evidence taken before the arbitrators, and the accounts entered into by them, was allowed to be introduced into this case, (notwithstanding the remonstrance and objection of the defendant's counsel,) just as if the bill was by way of appeal from the decision of the arbitrators upon the merits of the case. The result has been that the printed case in appeal laid before us has become expanded into a large book of about ninety printed pages, when the whole substance of the case might have been stated almost in as many lines. It is not, however, the printed case in appeal alone which is objectionable, for the factum of the plaintiffs is framed in such a scandalous manner, in fact, in such a virulent and malignant spirit of invective of the judgments of the learned judges whose decision is appealed from, as to disgrace not only the counsel by whom it was prepared, but this court also, if it should be permitted to remain upon its files or among its records; and for this reason, and to mark the sense of the court at the indignity offered to it by such a document being laid before it, it

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should be ordered to be struck off the files of the court, and not to be kept among the records of the case.

Although, in praying the interference of the court to amend the award in the particulars in which it was contended by the plaintiffs to be erroneous, the jurisdiction of the court has been misconceived, I am of opinion that under the prayer for general relief the plaintiffs were entitled to a decree setting the award aside, assuming sufficient cause for setting it aside to be established. *Stevens* v. *Guppy*, which was relied upon in the court below as establishing a contrary doctrine, was a case very dissimilar in its character. The substance of the present bill is, that the award is bad in the particulars mentioned, and that being so, it should be amended in the manner asked by the plaintiff in his prayer for special relief, or set aside under the prayer for general relief. It is the ordinary case of a prayer for alternative relief. Now, that the case made by the bill and established in evidence, requires that the award should be set aside, there can, I think, be no doubt, for the arbitrators have studiously, as would seem, refrained from finding, although they were expressly required by the submission to find, what amount was due to Mary E. Vernon for the monies loaned by her to defendant and his brother; the omission to find this amount constitutes a most important defect, for it now appears by the evidence of one of the arbitrators that in the amount of $683 awarded in bulk, not showing how much, if anything, was awarded for the debt to Mary E. Vernon, or how much for the assault, or how much for mesne profits, is included a sum which constitutes but the half of a sum which, assuming the allowance to the defendant of the set off to have been unobjectionable, was so due to Mary E. Vernon, and the award nevertheless adjudges that the sum of $683 so constituted shall be taken by the plaintiffs in full satisfac-

tion of all actions, and causes of action, up to the time of the execution of the submission, and so in satisfaction of a larger sum of undefined amount undoubtedly due to Mary E. Vernon, although not found by the award as it was by the submission required to be. In this respect the award cannot be sustained, but in view of the gross prolixity of the irrelevant matter set out in the bill, and of the fact that the plaintiffs wholly fail in what was made the chief object of the bill as framed, the plaintiff should have no costs in the court below nor upon this appeal.

The order of this court, in my opinion, should be that a decree for setting aside the award be issued out of the Court of Equity of the Supreme Court of New Brunswick, but without costs, and that the plaintiffs' factum filed in this case be struck from off the files and records of this court as scandalous and impertinent, and that no costs of this appeal be allowed to either party.

Appeal allowed without costs. Award ordered to be set aside and plaintiffs' factum to be taken off the files of the court.

Solicitor for appellants: *J. Travis.*

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

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*May 6

*June 22.

AGNES OLIVER *et al.* (Defendants)....APPELLANTS;

AND

ALEXANDER DAVIDSON (Plaintiff).....RESPONDENT;

AND

DUNCAN McFARLANE AND WM. OLIVER ..... } DEFENDANTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Will, construction of—Legacy—Condition Precedent.

W.O., by the third clause of his will, devised and bequeathed the residueof his estate to his wife, four sons and two daughters, the devise and bequest being subject to the condition that they should all unite in paying to the executors before the 1st January, 1877, the sum of $1,600, and the same sum before the 1st January, 1882, said sums to pay the shares of two of the sons, Alexander and Duncan. By the fourth clause he gave the sum of $1,600, without condition, to each of his sons, Alexander and Duncan. By the 5th clause he devised to his sons Douglas and Robert Oliver two lots; and after giving several legacies to his daughters, he proceeded, "and further, that Alexander and Duncan work on the farm until their legacies become due." Alexander left the farm in 1871, and entered into mercantile pursuits.

Held, reversing the judgment of the court below, Ritchie, C.J., and Henry, J., dissenting, that the direction that Alexander should work on the farm was a condition precedent to his right to the legacy of $1,600.

APPEAL from a judgment of the Court of Appeal for Ontario (1), affirming the decree of Proudfoot, V. C. The question which arose on this appeal was whether, under the provision of the will of one William Oliver

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

(1) 6 Ont. App. R. 595.

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(deceased) a legacy of $1,600, bequeathed to his son Alexander under certain conditions, was payable to the assignee in insolvency of the said Alexander Oliver.

The clauses of the will relating to the matter in question are fully set out in the judgments hereinafter given.

James Bethune, Q. C., for appellants, and *Bruce* for respondent.

The cases cited and relied on by the counsel are reviewed in the judgments hereinafter given.

RITCHIE, C. J.:—

In the introductory clause of the will the testator thus expresses himself:—

As it is the wishes of my family, all except my son Daniel Oliver who seems dissatisfied, and it is also my will, that the remainder of my family remain united one and all, as at present, until the mortgage is paid upon my farm in the township of Brantford, and other just debts paid, after said debts and mortgage are paid, the rest and residue of my property I give, devise, and dispose of as follows, that is to say:—

No intention is here indicated that should any of the family change their minds and not remain united, any forfeiture was to accrue in consequence. Then we have the bequeathing clauses: —

I give and bequeath to my son, Daniel Oliver, the sum of $1,200, along with the stock and money he has already received; and to my daughter, Flora Oliver, the sum of $400; also, to my daughter Mary, the sum of $400; and I direct and order the said legacies to be paid to the said legatees in the following manner, viz., to my son Daniel, $600 on or before the 1st January, 1873, and the sum of $600 on or before the 1st January, 1874; to my daughter Flora, $400 on or before the 1st January, 1875; to my daughter Mary, $400 on or before the 1st January, 1876.

Then by the clause second the testator says:—

2nd. I give and bequeath unto my two sons, Thomas and William Oliver, my farm in the township of Brantford and county of Brant, Ontario, being composed of Lots 2, 3, 4 and 5, in the Ox Bow Bend

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of the Grand River, containing by admeasurement 144 61-100 acres, together with all the heriditaments and appurtenances thereunto belonging, to be equally divided between them, share and share alike, and under the following conditions, viz., that they do pay to my executors thereinafter named, the following sums of money herein described, viz., the sum of $300 each on or before the 1st January, 1873; and the sum of $300 each on or before the 1st January, 1874; also, the sums of $200 each on or before 1st January, 1875; and the sum of $200 each on or before the 1st January, 1876.

Here we have a bequest on a condition clearly expressed, as we have in the next clause 3:—

3rd. I give, devise and bequeath all the rest and residue of my estate, real and personal, and mixed, of which I shall be seized, possessed, and entitled to at the time of my decease, to my wife Agnes Oliver, and four sons and two daughters namely, Alexander, Duncan, Douglas, Robert, Helen, Agnes Oliver, my property in the township of Onondaga, and county of Brant, consisting of lots 8 and 9 in the third concession, east of Fairchild's Creek, county of Brant, Ontario, together with all other property above named (except so much of the stock on both farms as shall form one-third of the whole, which I hereby give and bequeath to my sons Thomas and William Oliver, to be equally divided between them), and this bequest shall be made when the mortgage on my farm, on Ox Bow Bend, shall be fully paid, to have and to hold the same for their use from the year 1872, until the youngest child becomes 21 years of age, subject to the following conditions, viz.:—that they unite in paying over to my executors on or before the 1st January, 1877, the sum of $1,600, and also the sum of $1,600 on or before the 1st January, 1882, said sums to pay Alexander and Duncan Oliver's shares as herein provided for.

It may well be contended that the testator intended that the effect of the breach of this condition should exclude any of those who did not so unite from participating in this bequest or devise, but there is nothing whatever, by expression or implication, to indicate any intention that should some or all refuse to unite, the bequests referred to, and subsequently provided for, to Alexander and Duncan, were to lapse or become forfeited. Then comes clause 4, as follows:—

4th. I give and bequeath to my son Alexander Oliver, the sum of

$1,600; to my son Duncan Oliver, the sum of $1,600; to my daughters Helen and Agnes Oliver, the sum of $400 each as herein provided, and I order the said sums to be paid to the respective legatees as follows:—Alexander, on or before 1st January, 1877; to Duncan Oliver, on or before 1st January, 1882; and to my daughters Helen and Agnes Oliver, on or before 1st January, 1886.

Here we have a clear, separate, absolute bequest, without qualification, limitation or condition. Seeing that in clauses 2 and 3, where the bequests are intended to be conditional, the conditions are clearly, unequivocally and absolutely expressed, is it not a fair and legitimate inference that in the clauses 1 and 4, where the bequest is in clear and decisive terms without any conditions or qualifications, the testator intended the bequest should stand and be acted on as it is unequivocally and absolutely written. Up to this point in the will, no question can, it appears to me, arise as to these bequests to Alexander and Duncan being without condition.

The wish expressed in the preamble, or opening clause of the will, that the family should remain united, had no connection with, or control over, the bequests in either the 1st or the 4th clauses.

Then comes sec. 5:

5th. I give and bequeath unto my sons Douglas and Robert Oliver, their heirs and assigns, my two lots of land in the township of Onondaga and county of Brant, composed of lots Nos. 8 and 9, township aforesaid, to be divided as follows: Douglas Oliver to have lot No. 9 and Robert Oliver lot No. 8; Douglas Oliver to pay sister Helen $400 as above provided, and to his sister Agnes the sum of $400 as above provided; and further, that Alexander and Duncan Oliver work on the farm until their legacies become due, and when the youngest child becomes the age of 21 years, Douglas and Robert Oliver each to get possession of his lot specified, and of one-half of the stock and implements which shall be at that time on the said lots, and the other half shall be equally divided between my sons Alexander and Duncan Oliver, yet be it fully understood that I reserve for my wife, Agnes Oliver, the sole use of so much of the dwelling house and furniture situated on lot No. 8, where I now

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reside, as she may desire so long as she shall remain my widow, and she shall receive the sum of $180 per annum from my son Robert Oliver.

It is contended that the provision or stipulation that Alexander and Duncan shall work on the farm until their legacies become due, control and over-ride the preceding section, and on they or either of them neglecting to do so, their legacies respectively became void.

Had the testator so intended, I think the frame and phraseology of the whole will indicate that he would have so expressed it in clause 4 in which the bequest is made, or failing, that he could have done it in this clause 5, and not have left the matter in uncertainty or to inference. It may well be that if Alexander and Duncan neglect or refuse to work on the farm, they will lose all benefit of the bequest in clause 5, which contains the injunction for them to do so, and still the legacy in clause 4 be payable to them. I can discover no language from which it can be clearly and certainly concluded that a non-compliance with a stipulation in clause 5, was intended to work a forfeiture of a bequest in clause 4; the only reference to the bequest in clause 5 being that the times of the payments of the legacies, the dates of which are found in clause 4, are named as the periods until which they should work on the farm. No provision is made in case of a forfeiture for the disposition of these legacies, nor any intention exhibited that the testator intended them to form part of his residuary estate, which he disposes of by clause 3. On the contrary, the bequest of the residuary estate is on the express condition, without limitation or qualification, that they the devisees unite in paying over to the executors, on or before 1st January, 1877, the sum of $1,600, and also the sum of $1,600 on or before the 1st January, 1882, said sums to pay Alexander and Duncan's shares as herein provided for. Here is a positive and

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absolute condition which, according to the present contention, is again made conditional on the performance of an alleged condition on the part of Alexander and Duncan. But where do we get any language of the testator's to indicate that he had any such intention; and we have nothing whatever to show that the testator contemplated dying intestate as to these two sums of $1,600. There is a well established principle of law that, I think, should govern this case.

It is a rule of the courts, in construing written instruments, that where an interest is given, or an estate conveyed, in one clause of the instrument in clear and decisive terms, such interest or estate cannot be taken away, or cut down by raising a doubt upon the extent and meaning and application of a subsequent clause, nor by inference therefrom, nor by any subsequent words that are not as clear and decisive as the words of the clause giving that interest or estate. See *Biddulph* v. *Lees* (1); *Young* v. *Turner* (2); *Wright* v. *Wilkins* (3); *East* v. *Twyford* (4); *Grey* v. *Fryer* (5); *Key* v. *Key* (6).

In *Doe Luscombe* v. *Gates* (7) the court says:—

We are to consider that this is a proviso introduced to defeat an estate already vested for the breach of a condition subsequent, and is in the nature of a forfeiture, and consequently that the words of it must, according to general rules and principles, be construed strictly, and effect must not be given to it unless the supposed intention of the testator be expressed in plain and unambiguous language.

In *River* v. *Oldfield* (8), Per Lord Justice Knight-Bruce:—

This will, although singularly penned, clearly gives a fourth part of the property in question to the plaintiffs, or one of them, and this share cannot be taken from them except by language equally clear.

In *Thornhill* v. *Hall* (9) the Lord Chancellor says (10):—

(1) 9 E. B. & E. 312.
(2) 1 B. & S. 550.
(3) 2 B. & S. 244.
(4) 4 H. L. C. 517.
(5) 4 H. L. C. 565.
(6) 4 DeG. M. & G. 72.
(7) 5 B. & Ald. 544-554.
(8) 4 DeG. & J., p. 267.
(9) 2 C. & F. 22, 36.
(10) At p. 35.

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I hold it to be a rule that admits of no exception in the construction of written instruments, that where one interest is given, where one estate is conveyed, where one benefit is bestowed in one part of an instrument by terms, clear, unambiguous, liable to no doubt, clouded by no obscurity, by terms upon which, if they stood alone, no man breathing, be he lawyer or be he layman, could entertain a doubt,—in order to reverse that opinion, to which the terms would, of themselves and standing alone, have led, it is not sufficient that you should raise a mist; it is not sufficient that you should create a doubt; it is not sufficient that you should show a possibility; it is not even sufficient that you should deal in probabilities; but you must show something in another part of that instrument which is as decisive the one way as the other terms were decisive the other way; and that the interest first given cannot be taken away either by *tacitum* or by *dubium*, or by *possibile*, or even by *probabile*, but that it must be taken away, and can only be taken away, by *expressum et certum*.

If there ever was a case in which the principles here enumerated should be acted on, I think this is the case. Can it be said that these clear bequests to Alexander and Duncan have been limited by language, or even inferences, equally clear? The court of first instance, presided over by Vice-Chancellor Proudfoot, decided that the legacy was not subject to the condition precedent of his working on the farm; three judges out of the four in the Appeal Court of Ontario held the same and even the dissenting judge in the Court of Appeal says: "This will is so inartificially drawn that it can be no matter of surprise to find different views taken of its meaning." Under all these circumstances, in view of well established principles, I am unable to bring my mind to the conclusion that the judgment should be reversed. It is scarcely necessary to say I agree with all the judges in the courts below, that the evidence fails to establish the agreement referred to in the second of the reasons of appeal in the court below.

STRONG, J.:—

In the view which I take of the proper construction

of this will, the direction that the testator's sons, Alexander Oliver and Duncan Oliver, should work on the Onondaga farm until their legacies became due, constituted a condition precedent to the payment of those legacies. After 1872, when the mortgage on the Brantford farm would be paid off, and until which date the family were directed to remain together, the use of the Onondaga farm is devised to the testator's widow, and the six children named as residuary legatees, until the youngest child came of age, subject to what the testator calls a condition that all the legatees should unite in providing a fund for the payment of the legacies to Alexander and Duncan. The effect of the words "subject to the following conditions," and those which follow them at the end of the third clause of the will was, to make the legacies given to Alexander and Duncan charges upon the beneficial interest—an interest in the nature of a term commencing in 1872 and ending upon the youngest child coming of age—given to the widow and six children in the Onondaga farm. That this is the proper construction a moment's reflection will show, for if land is devised to A upon condition that he pay a sum of money to B, the money so to be paid constitutes a charge, though expressed in the form of a condition. And there is nothing by which we can make any distinction in principle, between the case presented to us by the provision in the 3rd clause of this will, and the more simple form of bequest just put. If there had been nothing more in the will restricting this charge to the actual profits of the land, to be raised by its actual occupation and cultivation as a farm, it would have been one which might have been raised either by the sale or mortgage of the term, or beneficial interest in the nature of a term, which had been devised, or out of the annual rents and profits, either those accruing from a lease or those derived from actual occupation, at

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the election of the devisees. The subsequent clause of the will, which directs that "Alexander and Duncan work on the farm until their legacies become due," shows, however, clearly that the enjoyment is to be a personal one, and not an enjoyment of the rents and profits derived from a lease or otherwise; in other words the expression "use" in the 3rd clause is to be taken in its popular, and not in its technical signification. The effect is the same as if the testator had directed, in terms, that the legacies to Alexander and Duncan should be payable out of profits to be derived from the working and cultivation of the farm; to raise which Alexander and Duncan were to contribute, not only their shares of the use and enjoyment of the farm, but also their labor; whilst the other residuary legatees, i. e., the widow and four other children, were only to contribute their shares in the profits of the farm to be thus raised by the personal services of Alexander and Duncan. This seems to me to make it clear, that it was a condition precedent to the payment of legacies to Alexander and Duncan that they should comply with the direction of the will. If a testator bequeaths a pecuniary legacy, and then directs for its payment the provision of a fund to be formed by the contribution of the legatees to whom the legacy is given as well as others, as, for instance, if a man bequeaths $1,000 each to his widow and six children, and gives a further sum of $1,000 to his widow, and then directs that for the payment of this last legacy a fund should be provided to which all, including the widow herself, should contribute in money payments of equal amount; in such a case it would be out of the question to say that the widow could insist upon the payment of the full amount of the second legacy, and resist any reduction from it in respect of the sum she was directed to contribute to the fund to be provided for its payment.

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The rights of the parties in this simple case would be administered by merely deducting the amount of the widow's contribution from the legacy given to her. The principle of construction is the same in the present case, but as the services of the sons were of uncertain value, and inasmuch as by the devotion of their time and labor to the farm the whole amount of the legacies given to them might have been raised without any contribution from the other legatees beyond the relinquishment *pro tanto* of their use and enjoyment of the profits of the farm, the obligation imposed on Alexander and Duncan could not be dealt with as a charge as in the case of a money payment. The only mode in which effect could be given to the testator's direction that they should work on the farm, is by treating it as a condition precedent. That they should take the legacy *cum onere*, was, I am satisfied, by the considerations I have already pointed out, the clear intention of the testator, and I am equally clear that no other mode can be suggested by which the performance of the obligations of personal service so imposed can be ensured, but by treating them as conditions precedent to the payment of the legacy. This being so, all difficulty in thus construing the will is at an end, for, if we do not adopt the construction indicated, we must treat the direction in question as wholly nugatory and ineffectual, and every principle, applicable to the interpretation of wills, forbids us to do this.

The appeal must be allowed with costs, and the decree of the Court of Chancery, and the judgment of the Court of Appeal affirming it, must be reversed with costs to the appellants in both of those courts.

FOURNIER, J.:—

In this case I agree with the view taken by Mr. Jus-

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tice Patterson in the court below, and am of opinion that the appeal should be allowed.

HENRY, J.:—

Under the pleadings in this case the decision of the issue depends upon the construction of the will of William Oliver, late of the township of Onondaga in the county of Brant and province of Ontario, farmer, deceased.

The respondent is the assignee of the estate and effects of Alexander Oliver and Douglas Oliver, sons of the testator, to whom bequests are made in the will. The question before us is as to the bequest to Alexander Davidson of $1,600, as made in the fourth clause of the will, which provides that the legacy should be paid to him on or before the 1st January, 1877.

The words of the bequest are "I give and bequeath to my son Alexander Oliver the sum of $1,600." It is, therefore, wholly unconditional so far as contained in that clause. There are, however, other provisions and directions in the will, by which it is claimed that the bequest was intended to be, and is, conditional. In the first part of his will the testator says:—

As it is the wishes of my family, all except my son Daniel, who seems dissatisfied, and it is also my will, that the remainder of my family remain united one and all, as at present, until the mortgage is paid upon my farm in the township of Brantford, and other just debts paid; after said debts and mortgage are paid, the rest and residue of my property I give, devise and dispose of as follows:—1st. I give devise and bequeath to my son, Daniel Oliver, the sum of $1,200 along with the stock and money he has already received.

He then gives and bequeaths to two of his daughters $100 each, and directed when the legacies were to be paid.

In the second clause of his will the testator bequeaths to his two sons, Thomas and William Oliver, a farm in the township of Brantford, but on condition of their

paying to his executors two thousand dollars by certain instalments therein mentioned.

He then in the third clause gives, devises and bequeaths:—

All the rest and residue of my estate, real and personal and mixed, of which I shall be seized and entitled to at the time of my decease, to my wife Agnes Oliver and four sons and two daughters, namely, Alexander, Duncan, Douglas, Robert, Helen and Agnes Oliver, my property in the township of Onondaga and county of Brant, consisting of lots 8 and 9 in the Third Concession, east of Fairchild's Creek, county of Brant, Ontario, together with all other property above named, (except so much of the stock on both farms as shall form one-third of the whole, which I hereby give and bequeath to my sons Thomas and William Oliver, to be equally divided between them). And this bequest shall be made when the Mortagage on my farm on Ox Bow Bend shall be fully paid; to have and to hold the same for their own use from the year 1872 until the youngest child becomes 21 years of age, subject to the following conditions, viz., that they unite in paying to my executors on or before the 1st January, 1877, the sum of $1,600, and, also, the sum of $1,600 on or before the 1st January, 1882, said sums to pay Alexander and Duncan Oliver's shares as herein provided for.

In the 5th clause of his will he bequeaths to his two sons, Douglas and Robert Oliver, the two lots 8 and 9 previously bequeathed in the 3rd clause—Douglas to pay his sister Helen $400 and his sister Agnes $400 "as above provided." "And further, that Alexander and Duncan Oliver work on the farm until their legacies become due." The clause then provides that "when the youngest child (Robert) becomes the age of 21 years, Douglas and Robert each to get possession of his lot specified, &c."

The question then is: Do the words which direct that Alexander and Duncan should work on the farm until their respective legacies should fall due, avoid the bequest to Alexander, he having failed to work on the farm as that part of the clause provides? No part of the will so provides in express terms, and we are, there-

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fore, to ascertain from the whole will whether or not that was the testator's intention. That intention must be found from strong language that should have no reasonable doubt.

The bequest to Alexander in the 4th clause of the will is absolute, and subject to no condition whatever. We must therefore, from some other part of it find, that although so made, a condition was annexed. We are not allowed to speculate as to it where the words relied upon are in themselves doubtful. The testator has spoken plainly in the 4th clause. His intention is clear and unmistakeable, and unless we find it equally clear that he intended to annex a condition, we are, I think, bound to sustain the bequest as unconditional.

In *Clavering* v. *Ellison* (1) the Vice-Chancellor says:

> Now, with regard to contingent limitations or conditions, which are to have the effect of defeating a vested estate, it is a plain rule that such limitations must be construed strictly. That rule is of very old standing.

And again:—

> If such be a clear rule, it appears to me to be an equally clear principle that the contingency on which such a limitation is to take effect should be something definite and certain; that the contingency should be so expressed as not to leave it in any degree doubtful or uncertain what the contingency is which is intended to defeat the prior estate.

In *River* v. *Oldfield* (2) Lord Justice Knight-Bruce, in giving judgment, says:—

> This will, although singularly penned, gives a fourth part of the property in question to the plaintiffs, or one of them, and this share cannot be taken from them except by language equally clear.

In *Thornhill and others* v. *Hall* (3), Lord Chancellor Brougham, when giving judgment in the House of Lords, said: [His Lordship read the extract] (4).

I think this clearly applies to the case before us.

(1) 3 Drew. 470.
(2) 4 De G. & J. 36.
(3) 2 Cl. & F. 36.
(4) See *ante*, p. 172.

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I hold that the moment a doubt is raised, the previous absolute bequest should be adjudged as uncontrolled by any thing subsequent. In a subsequent part of the same judgment his lordship said:

> Here is that which may apply to either; here is that which is doubtful; here is that which is not of necessity, or by necessary implication to be held to cover Robert's interest, and you are called upon, in the face of a devise clearly giving to Robert an absolute interest, to elect between two possibilities to convert what is doubtful into a certainty, and to convert that which is absolutely certain into absolute *dubium* or something the very reverse of certainty.

In view of the principles of construction adopted in the several judgments I have quoted from, and many others I might have referred to, I am of opinion that there is nothing in the will in this case to show that the testator would have declined to make the bequest to Alexander unless on the condition contended for. In the first part of his will he states the fact of his son Daniel being dissatisfied and declining to remain united with the rest of the family, but he nevertheless bequeaths him $1,200 in addition to stock and money he had previously received as advancement, in all probability a bequest much larger than that to Alexander. The latter, at his father's death, was but seventeen years old, and while thus dealing liberally with Daniel, his elder brother, are we necessarily to conclude that he would have cut Alexander entirely off from any participation in his estate had he, like Daniel, been dissatisfied and declined to remain. On the contrary I think we should conclude, in the absence of anything shown to the contrary, that he would have made no distinction between the two brothers. The testator, however, shows by the particular words used, that the idea of the family remaining united did not originate with him. "As it is the wishes of my family, all except my son Daniel," &c., "and as it is my will," &c. These expressions would lead to the conclusion

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that as it was their wish to do so, he would make the necessary provision for their doing so, independently of any particular desire on his own part. If that be the proper construction of the language referred to, it would go very far to negative the proposition that the subsequent provision that Alexander and Duncan should work on the farm until their legacies became due, was intended as a condition upon which they were entitled to the legacies made to them. As I, however, consider the rule of construction to be as I before stated it, there is no occasion, in my opinion, to resort to the view I have just given. According to the construction contended for by the appellants, if Alexander had worked on the farm for the whole period up to a week or a few days before his legacy fell due, and then left, such leaving would be the means of forfeiting the whole of it. To adjudge such a result, we should have such an intention on the part of testator stated in the most unequivocal terms, and we would not be justified while a doubt remained, but must be satisfied that the language of the will necessarily called for such a decision. It will be observed that the testator in the fifth clause makes use of no words such as "I direct," "I order," or "It is my will," preceding and referring to "that Alexander and Duncan work on the farm," &c. These words immediately follow gifts and bequests to his sons Douglas and Robert, upon condition to pay two of their sisters sums of money therein stated, and then proceeds "and further that Alexander and Duncan Oliver work on the farm," &c. As I view the rule of construction, it would not be sufficient if the testator had in the most positive terms ordered and directed his sons Alexander and Duncan to work on the farm, unless he added something to avoid the bequests to them if they failed to do so. Besides, he made no disposition over of the sums bequeathed to them, which, it must

be concluded, he would have done had he intended to limit their right to the legacies by a condition that they should work on the farm. The absence of such a provision is evidence, I think, sufficient to raise the presumption that he intended the bequests to them to be unconditional. Apart from the rule of construction before stated, were we permitted to speculate as to the intention of the testator, I would be inclined, even in that case, to doubt that intention to have been the annexing of the condition. The onus, even in the latter case, of shewing such an intention beyond any reasonable doubt, was on the appellants, and I think that they have failed to do so. The bequest in the first instance is clear and certain, and cannot be avoided by words of doubtful meaning that are capable of two interpretations and which may be construed differently, as it appears has been done in this case before it came to this court. For the reasons given, I am of the opinion the appeal herein should be dismissed with costs.

TASCHEREAU J.—I am in favor of allowing the appeal.

GWYNNE J.—We must consider the testator's will as a whole, and collect therefrom his intention irrespective of the fact that his will is divided into paragraphs, and so doing we cannot fail to see that the legacies of $1,600 to each of the testator's sons, Alexander and Duncan, mentioned in the fourth paragraph, are the same legacies as those of like amount which are mentioned in the third paragraph, in which the testator indicates how he contemplated that the fund to pay these legacies should be raised. The right of Alexander and Duncan to those legacies would be complete under the third paragraph without the addition of the fourth, which, in truth, adds no force to the gift as contained in the third, but defines the time when these legacies shall become payable.

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By the third paragraph it is apparent that the testator contemplated that the term which he granted to his widow, and Alexander, Duncan, Douglas, Robert, Helen and Agnes, should be instrumental in creating the fund out of which the legacies to Alexander and Duncan should be paid, for it is granted on condition that they all shall unite in paying those legacies. Now, the testator never could have contemplated that the grantees of this term should contribute to this fund simply by a money payment, and that so contributing they should have power to alien and dispose of them as they should think fit, for in such case, as Alexander and Duncan were themselves to contribute to the fund out of which their legacies were to come, if the contribution contemplated was such a money payment, they would not receive their $1,600 each. When, then, we find in the 5th paragraph the testator, in connection with these same legacies, declaring his intention and will to be that Alexander and Duncan respectively shall work on the farm, which is mentioned in the third paragraph and in respect of which the term is granted, until the respective periods, in that paragraph also mentioned, at which their respective legacies shall become payable, this declaration of the testator's will, plainly enough, I think, indicates his intention and will to be that they shall not enjoy the benefit of the bequest unless they shall respectively conform to this direction, and shall so contribute to the creation of the fund out of which the testator contemplated that payment of their legacies should be made. By conforming to this direction, they become, as it appears to me, relieved from any further obligation to continue working on the farm after their respective legacies became payable, but it is, I think, sufficiently apparent upon the face of this inartistically made will, that the testator's intention was that Alexander and

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Duncan respectively should continue to work on the farm, at least until the period named for their respective legacies becoming due, and that this intention was conceived, partly in the interest of the testator's widow and younger children, who, at the time of his death, were incapable of taking part in the management of the farm, and partly that Alexander and Duncan should, by their labour, contribute to the creation of the fund out of which the testator contemplated that their legacies should be paid.

I think the appeal should be allowed, and that the plaintiff's bill in the Court of Chancery, as affects the legacy in question here, should be dismissed with costs to the appellants in all the courts.

Appeal allowed with costs.

Solicitors for appellants: *Fitch & Lees.*

Solicitors for respondents: *Bruce, Walker & Burton.*

THE MILLVILLE MUTUAL MARINE AND FIRE INS. CO (Defendants).. APPELLANTS;

AND

BARTHOLOMEW J. DRISCOLL AND JOHN M. DRISCOLL (Plaintiffs). RESPONDENTS.

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*Feb'y.21,22.

*June 23.

APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

Commission from Sup. Court of N. B.—Cons. Stats. ch. 37—Directed to two Commissioners—Return signed by one only—Failure to administer interrogatories.—Mar. Ins.—Total loss—Notice of abandonment—Waiver.

A commission was issued out of the Supreme Court of New Brunswick directed to two commissioners—one named by each of the parties to the suit—to take evidence at St. Thomas, W. I., with liberty to plaintiff's commissioner to proceed *ex parte* if the other neglected or refused to attend. Both commissioners attend-

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

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ed the examination, and defendants' nominee cross-examined the witness, but refused to certify to the return, which was sent back to the Court signed by one commissioner only. Some of the interrogatories and cross-interrogatories were put to the witnesses by the commissioners.

Held,—That the failure to administer the interrogatories according to the terms of the commission was a substantial objection, and rendered the evidence incapable of being received.

Per *Ritchie* C.J., and *Strong*, *Fournier* and *Henry* JJ., that the refusal of one commissioner to sign the return was merely directory, and did not vitiate it.

Per Gwynne J., That the return should have been signed by both commissioners, and not having been so signed was void, and the evidence under it should not have been read.

On a voyage from Porto Rico to New Haven respondents' vessel sustained damage and put into St. Thomas. A survey was held by competent persons named by the British consul, and according to their report the cost of putting her in good condition would exceed her value. The captain, under instructions from owners to proceed under best advice, advertised and sold vessel, and purchaser had her repaired at a cost much less than the report, and sent her to sea.

Held, that there was no evidence to justify the jury in finding that the vessel was a total loss.

Owners of vessel gave notice to agent of underwriters that they would abandon, which agent refused to accept. Owners telegraphed to Captain that they had abandoned and for him to proceed under the best advice.

Held, that this act of telegraphing to the Captain did not constitute a waiver of the notice of abandonment.

APPEAL from a judgment of the Supreme Court of New Brunswick, refusing to make absolute a rule *nisi* for a non-suit.

The action was upon two policies of insurance upon the hull and freight of the respondents' vessel ("The Star") for a voyage from Porto Rico to New Haven. After starting upon the voyage the vessel encountered heavy weather, and put into St. Thomas, where a survey was ordered, and made by parties admitted to be the most competent obtainable, appointed by the British Consul. The report of the surveyors

showed that it would cost $4,500 to put the vessel in good repair, which was largely in excess of the captain's estimate of her value, and on notifying the owners, he was advised that they had abandoned to the underwriters, and directed to proceed under the best advice. It appeared on the trial that the agent of the underwriters refused to accept notice of abandonment. The captain then advertised the vessel, and sold her, the purchaser afterwards causing her to be repaired, at an expense of some $1,300; and she was kept employed for some time after.

The evidence for the plaintiff was mostly taken under a commission issued out of the Supreme Court of New Brunswick, directed to two commissioners, one named by each party to the suit, the commission containing a provision, that should the commissioner named by the defendant neglect or refuse to attend the examination of witnesses thereunder, his co-commissioner could proceed *ex parte*, on giving two days notice of hearing to the other. On the commission being opened at the trial, it appeared that the return was signed by the plaintiffs' commissioner only, although the defendants' commissioner had attended the examination and cross-examined some of the witnesses; and also, that some of the interrogatories had not been put to the witnesses. No reason was alleged for the failure of the other commissioner to sign the return, and the judge at the trial allowed the evidence to be read, subject to the objection of defendants' counsel. A verdict having been found for the plaintiff, a motion was subsequently made to the court *in banc* to set the same aside and enter a non-suit, which was refused, the majority of the court holding the return to the commission to be regular, and that there was evidence of a total loss to go to the jury. From that judgment the defendants appealed.

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Weldon Q.C. and *Palmer* for the appellants:

There was no evidence of a total loss. The vessel was in a harbor, a place of safety, and captain got no advice from his owners. *Wood* v. *Stymest* (1).

If the respondents were entitled to abandon, they had no right to interfere with the property after notice, and the telegram to the master was an interference, and a waiver of the abandonment. Then the sale by the master being unauthorized, and there being no evidence of a total loss, there was no notice of abandonment given in time to make it a constructive total loss.

Then in regard to the evidence taken under commission, it is submitted that it should not have been read at the trial. By sec. 194 of chap. 37 Con. Stats., the return to the commission must be under the seal of the judge, commissioner or other person taking the same; and by chap. 118, relating to interpretation of terms, a word importing the singular may extend to several persons. Therefore, all commissioners named must sign the return. And more particularly so when the commission itself contained the only provision for one commissioner to act alone, and the facts were not in accordance with such provision.

Again, the commission itself was not executed according to the exigencies of the writ, some of the interrogatories not being put. On these grounds it is submitted that the judgment of the court below should be reversed and a non-suit entered.

Barker Q.C. for respondents:

It is not pretended by any one that there was an actual total loss of the vessel, but only a constructive total loss, and that was what the jury really found. The captain acted according to his best judgment, and as soon as possible communicated with the owners.

(1) 5 Allen (N. B.) 309.

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As to the notice of abandonment, that was given as soon as owners were in possession of the facts, and the telegram to the captain was clearly no waiver of the notice, but merely a notification to him of their course.

Then as to the commission, it is submitted that the return was sufficient; but, if not, the objection goes only to a question of practice, and this court will not interfere. In fact, the application should have been made to a judge at chambers. *Grill* v. *General Iron Collier Co.* (1). As to the failure to administer the interrogatories, the appellants were represented at the examination, and not having then objected, it was too late to do so at the trial. *Robinson* v. *Davies* (2). The proper course for the appellants was to move to suppress the depositions, and for another commission to issue. For these reasons, I submit that the judgment of the court below must be sustained.

Weldon Q.C. in reply:

Grill v. *The General Iron Collier Co.* does not apply. By the practice in England the depositions are opened before the trial and copies furnished to the parties. As in New Brunswick the commission is not opened until the trial, it would be impossible to apply to a judge at chambers.

SIR W. J. RITCHIE C.J.:—

Under the practice and law in New Brunswick, I do not think it was the duty of the defendants to apply before trial to have the evidence under the commission suppressed. So far as my experience goes, such never was the practice in New Brunswick, and it is quite clear that no such motion could be made until the commission was opened, and its contents disclosed, and this could not be done before the trial by reason of the pro-

(1) L. R. 1 C. P. 600. (2) 5 Q. B. Div. 26.

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vision of sec. 194, ch. 37 of the Consolidated Statutes of New Brunswick, which enacts that the commission shall not be opened before trial without the consent of the parties.

By section 194, no examination or deposition is to be read in evidence without consent of opposite party, unless it is made to appear that the examinant or deponent is out of the province or dead, or unable from sickness or other infirmity to attend the trial:

> In all or any of which cases the examinations and depositions, certified under the hands of the judge, commissioner, or other person taking the same, shall and may, without proof of the signature to such certificate, be received and read in evidence, saving all just exceptions; provided always, that such examinations or depositions shall be closed up under the seal of the judge, commissioner, or other person taking the same, and addressed to the Supreme Court, and endorsed with the title to the suit in which the same were taken, and shall not be opened before the trial without the consent of the parties to the suit.

Though the commissioners are named one by each party, when the commission is issued to the commissioners so named do they not become officers of the Court and in no sense agents of the parties, but both alike bound duly and properly to execute the commission, entirely irrespective of either party? Chapter 37 of the Consolidated Statutes makes no provision whatever for the nomination of the commissioners by the parties. On the contrary, section 188 simply provides that:

> It shall be lawful for the court and the several judges thereof, in any action therein depending, upon the application of any of the parties to such suit, to order a commission to issue under the seal of the court for the examination of witnesses on oath at any place out of the province, by interrogatories or otherwise, and by the same or any subsequent order or orders, to give all such directions touching the time, place, and manner of such examination, and all other matters and circumstances connected with such examinations.

On the face of the commission there is nothing to show that either of the parties had anything to do with

naming the commissioners; in fact, for aught that appears, they may have been nominated by the court or judge without reference to the parties at all, though, no doubt, in point of fact, as was stated on the argument, the names may have been suggested one by each party, as no doubt is usually done.

The commission in this case is simply addressed to Francisco Fontana, Esq, of St. Thomas West Indies, and Edmund T. Merrill, of the same place, merchant:

Thus know ye that we, in confidence of your prudence and fidelity, have appointed you, and by these presents do give unto you, full power and authority, diligently to examine, &c., upon interrogatories hereto annexed.

It then commands that, without delay, and at a certain place or places, at St. Thomas aforesaid, to be appointed by you, the said Francisco Fontana, for that purpose, you (the commissioners) cause the said witnesses for said plaintiffs to come before you at St. Thomas aforesaid, and then and there examine each of them upon the said interrogatories, &c. The words of the commission are:—

And that you do take such examinations and reduce them into writing in the English language, and that when you shall have taken the same, that you do without delay send and return the same certified by you, the said Francisco Fontana, and closed up under your seals, or the seal of you the said Francisco Fontana, you shall alone execute this commission, together with this writ, addressed to the Supreme Court and endorsed with the title to the said cause.

Provision is made that Francisco Fontana give at least two days' notice in writing of the time and place of executing commission to Edmund T. Merrill, and authorizes Francisco Fontana, in case Edmund T. Merrill refuses or neglects to attend, to proceed *ex parte* with the examination and execution of commission.

In this case the omission to put the questions was by no means an irregularity, but was a most sub-

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stantial objection affecting the merits; an objection that has, as Mr. Justice Willes expresses it, "a solid foundation." And again, by reason of the express enactment of section 194, no application could be made till the commission was opened and the omission made apparent, which could only be on the trial; and the absence of any such provision in the Imp. Statutes, 1 *Wm. IV.* ch. 22, entirely distinguishes *Grill* v. *Gen. Iron Screw Collier Co.* (1) from this case.

I do not think there is anything in the objection as to the certifying of the commission. I think this may be treated as merely directory, and not fatal to the reception. The certificate is in the terms of the commission, which directs Francisco Fontana, to certify; if, under the statute, both commissioners must certify, as strictly speaking I think they should, the defendant should have had the commission altered in this respect.

The case of *Grill* v. *The General Iron Screw Collier Co.*, (1) is not applicable to this case. In that case there was at most a mere irregularity, and Willes, J., says he was not convinced there was any irregularity, and then says it is not necessary to decide whether the objections could be taken at the trial, or whether it should be taken before, and on application made at chambers to set aside the depositions, he says:—

> No question, however, has been suggested which might have been asked with advantage to the defendants, and has been omitted, and it appears, therefore, that the objection has no solid foundation, but only amounts to this, that the questions were put *viva voce* instead of in writing.

Keating J. concurred.

Montague Smith J. went a little further, and certainly held that the proper course, when there is any irregularity in the mode of taking a commission, was to apply at chambers to have it suppressed.

(1) L. R. 1 C. P., 600.

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In the *Boston Belting Co.* v. *Gabel* (1), Chief Justice Allen says:

> The commissioners are officers of the court, though nominated by the parties. They are appointed for the purpose of seeing that the evidence of the witnesses, who are examined, is properly taken and certified; and I think they ought not to be treated as the agents of the parties while acting as commissioners, unless it is clear they are so.

In the case of *Robinson & Co.* v. *Davies & Co.* (2), where the question arose as to the admissibility of evidence not objected to before the commissioners and—"one "of the commissioners was the defendants' agent at "Hamburg and represented their interests"—the court held that the defendant should have objected, and not having done so, it was too late to do so on the trial. That case is entirely distinguishable from this. The appointment of Merrill, as commissioner, did not make him the defendants' agent and there is not the slightest evidence to show that he was in any way defendants' agent *de facto* or *de jure*.

Davis v. *Nicholson* (3) is if possible still more inapplicable, so much so that I do not think it necessary to take up further time in discussing it.

If all the interrogatories had been put to the witnesses, I should not have thought so much of the non-certifying of the second Commissioner, because by the terms of the commission it is directed to be certified by only one. A commission such as this may be irregular, but it was acquiesced in by defendant, or if he had any objections he should have applied to the judge to have it rectified before being sent for execution.

But assuming, even if we could, that each party is to be considered as represented by a commissioner, there is nothing on the face of this commission to show that Merrill, if he was the defendants' commissioner,

(1) 20 N. B. Reports (4 P. & B.) 349.

(2) 5 Q. B. Div. 26.

(3) 7 Bing. 358.

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of which I have no evidence, assented to it or had any power to assent; on the contrary, it appearing on the face of the proceedings that he refused to sign the certificate of the examination that would show that he must have been opposed to the way in which the commission was executed in reference to the examination.

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I do not think that the circumstance of the assured, after Temple's refusal to accept abandonment, telegraphing to the master that they had abandoned to the underwriters, and that he should follow the best advice in reference to the vessel, amounted, in any way, to a withdrawal or waiver of the abandonment, but amounted to no more than an intimation that they had abandoned the vessel, and he was not to look to them for further advice or assistance. It amounts, in other words, to a refusal to advise the captain, and an intimation that they had nothing more to do with the vessel. That they acted in perfect good faith is evidenced by the fact, that they, while adhering to the abandonment, showed the telegram to Temple before sending it, a statement Temple does not contradict, though he says he did not recollect the fact, whereby Temple was placed in a position to act on the abandonment if he chose, or to leave matters in the hands of the captain, whose duty under such circumstances was to act for the benefit of all concerned.

I am of opinion, that under the circumstances of the case, the vessel was not an actual total loss when she arrived at St. Thomas, and thatt here was no evidence to justify the jury in finding such to have been the case.

If the circumstances warranted a notice of abandonment, which was a question for the jury, and which I think in this case it must be assumed was found in favor of the plaintiff, then I think the notice given

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was sufficient, but if there is any doubt as to this having been properly left to them, there should have been a new trial, but having found there was an actual total loss, there can be no doubt as to how they would have found as to this. I am therefore of the opinion that the appeal should be allowed.

STRONG, FOURNIER and HENRY JJ. concurred.

GWYNNE J.—The objection taken to the reception of the evidence taken under the commission obtained and issued in this case, by and on behalf of the plaintiffs, is, in my opinion, fatal.

The plaintiffs obtained a commission to issue out of the Supreme Court of New Brunswick, directed to Francisco Fontana, Esquire, of St. Thomas, in the West Indies, and Edward T. Merrill of the same place, merchant, appointing them as commissioners to examine certain witnesses to be produced before them, on the part of the plaintiffs in the action, upon interrogatories annexed to the commission; and the said Francisco Fontana was thereby authorized and empowered (in case the said Edward T. Merrill should refuse or neglect to attend at the time and place to be named in a notice in writing, which the said Francisco Fontana was directed to have served upon him, appointing a time and place for executing the commission, or at any adjourned meeting) to proceed *ex parte*, in the absence of him, the said Edward T. Merrill, with the examination of the said witnesses and the execution of the commission, the same as though he had attended and was present, and upon all the evidence being taken, the said Francisco Fontana was directed to return the commission closed up, under the seals of both of the commissioners, if they both should act, or under the seal of

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Francisco Fontana, if he alone should execute the commission, and addressed to the Supreme Court. Both of the commissioners acted together throughout the examination of the witnesses whose evidence was directed to be taken under the commission. Mr. Merrill however, for what reason did not appear, refused to sign and seal the commission, and the same was returned signed, sealed, and certified by Fontana alone, although both had acted in the execution of the commission. The reception of the evidence taken under the commission was, for this reason, objected to by the learned counsel for the defendants. By the 188th sec. of ch. 37 of the Consolidated Statutes of New Brunswick, the Supreme Court is empowered to issue commissions for the examination of witnesses upon interrogatories or otherwise, at any place out of the province. By the 194th section it is enacted that no examination or deposition to be taken by virtue of such commission shall be read in evidence at any trial without the consent of the party against whom the same may be offered, unless it shall appear to the satisfaction of the judge, on proof by affidavit or *viva voce*, that the examinant or deponent is out of the province, or dead, or unable from sickness or other infirmity to attend the trial, in all or any of which cases, the examinations and depositions, certified under the hand of the judge, commissioner or other person taking the same, shall and may, without proof of the signature to such certificate, be received and read in evidence saving all just exceptions; provided always, that such examinations or depositions shall be closed up under the seal of the judge, commissioner, or other person taking the same, and addressed to the Supreme Court and endorsed with the title of the suit in which the same were taken, and shall not be opened before the trial without the consent of the parties to the suit. The effect of this section, read in the light of the Inter-

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pretation Act whereby the singular number imports also the plural, is, that without the consent of the party against whom any evidence taken under a commission shall be offered, the same shall not be received and read in evidence unless the examinations and depositions are certified under the hands, and closed up under the seals, of the Commissioners, where there are more than one, or where there is only one, the commissioner taking the same, and so signed and sealed, are returned to the Supreme Court, endorsed with the title of the suit in which the same were taken. Mr. Merrill having joined with Mr. Fontana in taking all the examinations and depositions of the witnesses examined under the commission, his signature and seal was, by the statute, made as necessary to the reception of the evidence as the signature and seal of Mr. Fontana, and this being a statutory requirement, constituting a condition precedent to the reception of the evidence, cannot be dispensed with by the court against the will of the party against whom the evidence is tendered. Non-compliance with this condition precedent is not a mere irregularity, as was the subject of objection in *Grill* v. *General Iron Screw Collier Co.*, (1) but a defect which cannot, as it appears to me, be got over without the consent ot the parties to the suit.

That the objection is not technical only and one of mere form, but that it is one touching the merits of the case, is apparent from the fact that upon the commission being opened, and the evidence in it read, as it was against the will of the defendants, it appeared that some of the interrogatories in chief and of the cross-interrogatories, being those which touched the very marrow and substance of the case, were either not answered at all, or quite insufficiently ; and some, for anything appearing upon the commission, were not put

(1) L. R. 1 C. P. 600.

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to the witnesses at all; these questions were pointed to an enquiry into the nature of the damage done to the vessel insured, for the purpose of ascertaining the nature and extent of it, and of determining whether it was such as to constitute a constructive total loss, or to justify the sale of the vessel, for that she was not an actual total loss, but was in perfect sailing condition, and to all appearance, except in her sails, in the same condition in which she was before receiving the alleged damage, having upon her no visible sign of having undergone recent repairs, but having visible repairs which had been done to her before she sailed upon the voyage in which she received the damage sued for, was abundantly apparent from the evidence of witnesses examined *viva voce* at the trial. Even if, as was suggested, Mr. Merrill was to be regarded as the agent of the defendants at the examination, a position in support of which there does not appear anything in the evidence, still, that would not have authorized the Commissioners to dispense with putting the interrogatories and executing the commission by taking the examination of the witnesses as they were directed and required by the commsssion to do; nor, in disregard of the provisions of the Statute and against the will of the defendants, would it have authorized the reception and reading of evidence taken under a commission so imperfectly executed. It is impossible, as it appears to me, that any judgment in favor of the plaintiffs can be rendered upon the merits of the case, in the absence of a searching inquiry into the facts as to the actual extent of the damage done to the vessel and attending its sale and the alleged subsequent repair of the vessel, and under the circumstances of imperfection attending the execution of the commission, I am of opinion that what evidence was taken under it should not have been

received and read as evidence for the plaintiffs, and that they should therefore have been non-suited.

Appeal allowed with costs.

Solicitor for Appellant: *C. A. Palmer.*

Solicitor for Respondents: *F. E. Barker.*

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THOMAS R. JONES, ROBERT T. A. SCOTT, AND NORMAN ROBERTSON (Plaintiffs) ..... } APPELLANTS;

AND

WILLIAM H. TUCK (Defendant) ..... RESPONDENT.

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*Feb'y. 28.

*June 23.

APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

Arbitration by order of Court at Nisi Prius—To be entered as a verdict—Motion to set aside—Judge's order—Special paper Sup. Court, N. B.—Affidavits in reply—New matter—Discretion of Court below.

The cause was referred by Court of *Nisi Prius* to arbitration, the award to be entered on the postea as a verdict of a jury. After the award the appellants obtained a judge's order for a stay of proceedings, and for the cause to be entered on the motion-paper of the Court below, to enable the appellants to move to set aside the award and obtain a new trial, on the ground that the arbitrators had improperly taken evidence after the case before them was closed. Before the term in which the motion was to be heard, appellants abandoned that portion of the order directing the cause to be placed on the motion paper, and gave the usual notice of motion to set aside the award and postea, and for a new trial, which motion, by the practice of the court, would be entered on the special paper. Defendant, in opposing such motion, took the preliminary objection that the judges order should be rescinded before plaintiffs could proceed on their notice, and presented affidavits on the merits, and plaintiffs requested leave to read affidavits in reply, claiming

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

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that defendant's affidavits disclosed new matter. This the court refused, and dismissed the motion, the majority of the judges holding that plaintiffs were bound by the order of the Judge, and could not proceed on the special paper until that order was rescinded, the remainder of the court refusing the application on the merits. On appeal to the Supreme Court of Canada.

Held,—That the cause was rightly on the special paper, and should have been heard on the merits, and the court should have exercised its discretion as to the reception or rejection of affidavits in reply; *Strong* J. dissenting on the ground that such an appeal should not be heard.

Per *Ritchie* C.J.—A Court of Appeal ought not to differ from a court below on a matter of discretion, unless it is made absolutely clear that such discretion has been wrongly exercised. The statute (1) applies as well to motions for new trials, where the grounds upon which the motion is based are supported by affidavits, as in other cases. It makes no distinction, but applies to all "motions founded on affidavits."

APPEAL from a judgment of the Supreme Court of New Brunswick refusing to set aside an award in favor of the defendant and to grant a new trial.

The cause was referred to arbitration by order of the Judge at *Nisi Prius*, and the award under it was to be entered as a verdict of a jury. After the award was made, the plaintiffs obtained an order from Judge Weldon staying the proceedings and ordering the cause to be placed on the motion paper of the following term, and heard by the court on a motion to set aside the award. Before the term, plaintiffs gave notice of motion to set aside the award and have a new trial, and by that notice abandoned the portion of Judge Weldon's order directing the cause to be placed on the motion paper, and they entered it on the special paper, according to the usual practice in moving for a new trial. When the case was called the defendants objected that Judge Weldon's order was still in force and must be disposed of before plaintiffs could proceed, and the court allowed the hearing subject to such objection. The defendants

(1) Con. Stats. N. B. ch. 37, sec. 173.

then presented affidavits on the merits, whereupon plaintiffs asked leave to read affidavits in reply, claiming that defendants affidavits disclosed new matter. This the court refused, and finally gave judgment for the defendants, some of the judges holding the preliminary objection fatal, the rest of the court refusing the application on the merits. The plaintiffs appealed from that judgment.

G. F. Gregory and *J. G. Forbes* for appellants :—

The appellants had a right to abandon that portion of Judge Weldon's order directing the cause to be entered on the motion paper, as it was opposed to the practice of the court, and the judge had no power so to order, and it was not necessary to have the order rescinded. *Black* v. *Sangster* (1). In fact being a nullity it could not be rescinded. *Sellars* v. *Dawson* (2). See also on this point *Clarke* v. *Manns* (3) ; *Lander* v. *Gordon* (4) ; *Woosnam* v. *Price* (5) ; *The King* v. *The Inhabitants of Diddleburry* (6) ; *The Queen* v. *The Inhabitants of St. Pancras* (7).

Again, we should have been allowed to answer the new matter in the respondent's affidavits opposing our motion in the court below. Admitting that our application was properly made, it is clear that we had such right under sec. 173 of the Con. Stats. And it is not a matter of discretion with the court, but they are bound to grant such an application.

It is submitted that your Lordships should hear our affidavits in reply and decide on the merits of the case, or failing that, that the case should be remitted to the court below to be heard on the merits there.

Tuck Q.C. respondent in person, submitted the case to the court.

(1) 1 C. M. & R. 521.
(2) 2 Dick. 738.
(3) 1 Dowl. 656.
(4) 7 M. & W. 218.
(5) 1 C. & M. 352.
(6) 12 East 359.
(7) 3 Q. B. 347.

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Sir W. J. RITCHIE C.J.—To the court below belongs the right to say whether, in their discretion, the parties should be allowed to produce affidavits in reply; therefore as affidavits in reply could only be properly before the court below, or before this court, after the court below had determined that the defendant's affidavits introduced new matter, and had given permission to plaintiffs to produce affidavits in reply, and no such permission having been given or affidavits read in reply, but on the contrary the court having refused that permission, we have no right now to look at any affidavits or other material not before the court below upon the mere statement of the party that he would have read them in reply if he had been permitted to do so. The question of the preliminary objections being now put aside, the case, in my opinion, should be fully heard on the merits in the court below, but I think we are not to anticipate what the court will or will not do on the hearing on the merits, still less to assume that the court will improperly refuse to allow affidavits to be read in reply if the case is such as to entitle the plaintiffs to that privilege.

I think there is nothing in the objection that the case should have been heard on the motion paper, and that it was not open to the court to hear it on the special paper (where, according to the rules and practice of the court, it clearly belonged), but that it should have been heard on the motion paper, (where, according to the rules and practice of the court, it clearly did not belong). If called on that paper it would seem to me the court, of its own motion, should have refused to hear it, but have ordered it to be placed on its proper paper, viz., the special paper in accordance with the 48th sec. of chap. 12, 44 *Vic.*

In the Supreme Court of New Brunswick there are

two papers; one called the motion paper, on which is entered cases where the party moving has fourteen days before the court served on the opposite party copies of the motion he intends making and of the affidavits on which he bases his motion, and when the motion comes on the party opposing is heard, and the motion is granted or refused.

There is also a special paper on which are entered all cases where cause is to be shown, and in which rules *nisi* have been granted or demurrers are to be heard.

Formerly, in cases of motions for new trials, the practice was to move on the first Friday or Saturday in term for a rule *nisi* to set aside the verdict or to enter a non-suit; if granted it was entered on the special paper of the next term, and if no sufficient cause shown, was made absolute (except in the county of York, where the motion for a rule *nisi* was made on the first day of term, and, if granted, was entered on the special paper of the same term).

Formerly, motions for new trials were motions *nisi*, and the causes in which rules *nisi* were granted were in the following term set down by the party to show cause on the special paper.

Now, motions "to set aside verdicts or for judgments *non obstante veredicto*," or for a repleader, are regulated by Act of Assembly, 44 Vic. cap. 12, sec. 3, which dispenses with rules *nisi* and allows the party seeking a new trial to give notice of the motion to the judge who tried the cause, and to the opposite party; also a statement of grounds of motion with the authorities relied on, and file statement with the Clerk of the Pleas; whereupon such causes shall be entered on the special paper without any rule *nisi* having been granted. But under neither the old nor the new system were motions for new trials ever entered on the motion paper.

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But I am doubtful (very) as to the propriety of the court refusing to allow affidavits in answer. Had a majority of the court in their discretion thought affidavits in answer should not have been received, on the ground that defendant's affidavits disclosed no new matter entitling the plaintiff to produce affidavits in reply, I should have hesitated before interfering with such an exercise of their discretion, because a Court of Appeal ought not to differ from the court below on a matter of discretion, unless it was made absolutely clear that they had exercised their discretion wrongly (1); but instead of this being the case, two of the learned judges—the Chief Justice and Judge Fraser—were of opinion that new matter was disclosed, and that plaintiffs should have an opportunity of answering such new matter; the other three judges expressed no opinion on this point, Judge Weldon being of opinion that there cannot be a postponement to permit affidavits in answer to be produced on motions for new trials; but in my opinion, the statute applies as well to motions for new trials, where the grounds on which the motion is based is supported by affidavits, as in other cases. The Cons. Stats., ch. 37, sec. 173, makes no distinction; but applies to all "motions founded on affidavits." Judge Palmer appears to base his judgment on the preliminary objection that the case should have been heard on the motion paper, but, on the question of allowing affidavits in answer, intimates that, in his opinion, it is not new matter arising out of the affidavits. Judge Wetmore, without expressing any opinion as to the granting of time, says, "I agree with the views of Mr. Justice Palmer as to the effect of the stay of proceedings."

So that in fact the question as to the propriety of plain-

(1) *Hugh* v. *Beal*, 44 L. T. 131.

tiffs being allowed to answer those affidavits has never been adjudicated on, the majority of the court having decided against the plaintiffs on other grounds, which I do not think tenable, and which did not involve the exercise of a discretion on this point; and this case should be remitted to the Supreme Court of New Brunswick, and there heard as if no preliminary objection had been raised, or rather that the preliminary objection should be overruled, and the hearing proceeded with on the merits.

STRONG J.—As regards the point of practice raised by this appeal I feel bound to follow the Supreme Court of New Brunswick, not merely because I incline to think the judgment of Mr. Jnstice Fraser and those of the other judges who agreed with him was correct, but also because I consider this court ought not to interfere to reverse a decision upon a mere question of practice, and that, too, a practice regulated by rules peculiar to the court appealed from.

Upon the merits also, at it appears to me, the appeal fails. The affidavits contain ample evidence to show that what Mr. DeForest did in inspecting books, and in making further inquiries of witnesses who had been examined, was authorised by agreement.

I need not enter more fully into the case, as it does not involve any question of law of general interest, and I am a single dissentient from the present judgment. It suffices therefore to say, that I, in all respects, agree with and adopt the reasens given in the judgment of Mr. Justice Fraser.

FOURNIER J.—I entirely agree with the views expressed by the Chief Justice.

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HENRY J.—Perhaps, under all the circumstances of the case, this matter had better be referred back to the court below. I have prepared no written judgment. The court below did not decide upon the matter of discretion in regard to the receipt of the affidavits on the part of the appellants against the validity of the award, and I think they should have done so; and if they had done so I think this court would have no right to interfere with the exercise of that discretion. Not having done so the affidavits are not in evidence, and not being in evidence, the judgment ought, consequently, to be, on the grounds stated by my brother Strong, in favor of the respondent. I think, however, under the circumstances of the case, the ends of justice would be better served by requiring, in all these cases where discretion is to be used by the courts below, the exercise of that discretion one way or the other, before this court decides upon the merits. It is with that view I consent to have the case referred back, but I think it should be without any costs whatever as far as this court is concerned.

GWYNNE J.—The circumstances under which the appeal in this case arises are somewhat peculiar, and the point raised by the appeal appears to have originated in a question of procedure. It appears that by the practice in New Brunswick there are two papers upon which all motions are entered in order to be heard in court, without any rule *nisi* being required, the one called the "special paper," upon which all motions for setting aside verdicts and for new trial are put, and the other simply the "motion paper" upon which all other motions are put. In the present case the action was referred to arbitration by a rule of reference at *nisi prius*, which directed that the award should be entered on the record as a verdict. An award was

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made in favour of the defendant, and as it was to be treated as a verdict for the defendant, the plaintiffs, in moving to set it aside, and for a new trial upon the ground that, as was alleged, the arbitrators had, after the close of the case taken further evidence behind the plaintiffs' back, must needs, according to the practice of the court, proceed by giving notice to the defendant and setting down the case for argument upon the special paper. The 184th section of ch. 37 of the Consolidated Statutes of New Brunswick, provides for staying proceedings in the case of an award ordered to be entered as a verdict, as follows:—

In any case in which a reference to arbitration shall be made at *nisi prius*, and it shall be ordered that the award of the arbitrators shall be returned on the *postea* as a verdict of a jury, the officer returning the *postea* shall set down on the margin thereof the day on which the award shall be so filed with him; and judgment on the *postea* shall not be signed until the expiration of twenty days after the day so set down; and any judge in any such case in which justice may appear so to require, may, either upon summons or not according to the circumstances of the case, order the returning of the *postea* and the signing of judgment to be stayed, until the court shall make order in the matter at the next succeeding term.

The award was made on the 12th July, 1883; on the 4th August the defendant served the plaintiffs with notice of taxation of costs, for the purpose of entering up judgment, for the 6th of August. On that day Mr. Justice Weldon, to whom an application was made for an order to stay proceedings under the above 184th section of the act, made an *ex parte* order, entitled in the Supreme Court and in the cause, as follows:—

Upon reading the affidavit of J. G. Forbes, the plaintiffs attorney in this cause, I do order that all further proceedings in this cause be stayed until an opportunity be afforded the said plaintiffs of moving this honorable Court in the ensuing Michaelmas Term. And I do further order that the said cause be set down in the motion paper at said ensuing Michaelmas Term for argument without any further order of this honorable court.

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This order was served, and thereby the entry of judgment was stayed until term. In the meantime, however, the plaintiffs being of opinion or advised that it was necessary to the practice of the court, that the case should be set down for argument on the special paper, as a motion for a new trial, and that the last clause of Mr. Justice Weldon's order should be treated as inserted by mistake and inadvertence, or as a false designation of the paper on which the case should be entered, and might, therefore, be disregarded or abandoned, gave notice to the defendant on the 6th October, according to the requirements of the rule of practice for setting down motions for new trial on the special paper as follows, entitled in the court and cause: "The plaintiffs will move to set aside the award and *postea*, and for a new trial in this cause, at the ensuing Michaelmas term of this honorable court, on the following grounds:

"The improper reception of evidence and explanations, by the arbitrators or some of them, in the absence of the plaintiffs and their counsel, and after the testimony for both sides had been submitted to the said arbitrators, and the case closed and given to them for their final order, determination, arbitrament and award.

"The following authorities will be relied on." Here follows a list of the cases relied upon by the plaintiffs.

Upon the 8th October, the plaintiffs gave to the defendant the further notice following in like manner, entitled in the court and cause:

Take notice that the plaintiffs on the motion to set aside the award and *postea* and for a new trial in this cause, will use the affidavits, copies of which were served upon you with the notice of said motion, and also the evidence taken before Amon A. Wilson, Esq., a barrister, under the order of His Honor Mr. Justice Palmer, in this cause, a copy of which was also served upon you, and that the plaintiffs will also use the order of His Honor Mr. Justice Weldon, made in this cause on the 6th August, A.D. 1883, a copy of which is

herewith served upon you. And take notice that the plaintiffs abandon so much of said last mentioned order as relates to this cause being set down on the motion paper without any further order of this honorable court.

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Upon the coming on of the motion upon the special papers for argument in Michaelmas term in the latter end of the month of October, the defendant took the preliminary objection following to the motion for new trial being heard, namely:

That all proceedings in the cause were stayed by the order of Mr. Justice Weldon dated 6th August, 1883, and the plaintiffs could not give any notice of motion for new trial, but were bound to act upon Mr. Justice Weldon's order which had not been set aside.

The force of the contention involved in this objection, assuming it to prevail, would seem to be that as a motion for a new trial could not properly be entered upon the "motion" paper, and as Mr. Justice Weldon had ordered that the motion by his order authorised should be entered on the "motion" paper, the plaintiffs had no right to move for a new trial at all; and that all that could have been moved for, under Mr. Justice Weldon's order, would have been to set aside the award, and that in such case the plaintiffs would take nothing by their motion, inasmuch as the award having been entered as a verdict, could only have been set aside by setting aside the verdict, which could only have been done upon a motion entered on the special paper, thus impaling the plaintiffs inextricably upon the horns of a dilemma. The court, however, ordered the motion for setting aside the award and *postea*, and for a new trial, to be proceeded with, subject to the preliminary objection. In the course of the argument defendant's counsel produced and read affidavits to the effect that what had been objected to by the plaintiffs as having been done by the arbitrators after the close of the case, had been done in pursuance of leave for that purpose, given by the parties and their counsel to the arbitrators

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at the close of the case, if they should desire to apply to any of the witnesses already examined for any further information before making their award. Upon this affidavit being read, on behalf of the defendant, the plaintiffs applied to the court, under the provisions of section 173 of ch. 37 of the Consolidated Statutes, for leave to file affidavits in answer to these affidavits, which contained, as was contended, new matter which plaintiffs had a right to contradict. That the matter was new and of such a character, that if not true, the plaintiffs should have been given an opportunity to contradict them by affidavits in reply, cannot, I think, admit of a question; but although the court had already ordered that the motion should be heard subject to the preliminary objection, which order involved a full hearing upon the merits reserving the consideration of the preliminary objection until the close of the argument upon the merits, they disposed of the plaintiffs application for leave to file affidavits in reply, as follows:

The court consisted of five judges. Of these the Chief Justice and one other were of opinion that the plaintiffs should be permitted to file affidavits in reply; two others were of opinion that the preliminary objection was fatal, and that Mr. Justice Weldon's order of the 6th August could not be abandoned after service, and that therefore the plaintiffs had no right to set down the motion upon the special paper, and for this reason they refused leave to the plaintiffs to file affidavits in reply.

The effect of the judgment of the two learned judges was, that although the court was proceeding with the argument upon the merits, subject to the preliminary objection, there was no use in proceeding with the argument, as in their opinion the preliminary objection was fatal, and the fifth learned judge was of opinion

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that the court could not grant leave to file affidavits in reply upon a motion for a new trial. Why the court could not grant leave to file affidavits in reply to new matter upon motions for new trials, as well as upon other motions, no reason is suggested.

The result was that the leave was refused, and the case was reserved for the consideration of the court upon the affidavits already filed, and the court, after taking time to consider the case, pronounced judgment as follows: The two learned judges, who, upon the plaintiffs application for leave to file affidavits, in reply to the affidavits filed on the defendant's behalf, were of opinion that the preliminary objection was insurmountable, adhered to that opinion, and expressed no opinion upon the merits. The Chief Justice was of opinion that there was no force in the preliminary objection, and that the motion was properly before the court He was of opinion however, that the application had been answered on the merits, although he was of opinion that the plaintiffs should have been given the opportunity, which was refused them, to answer the defendant's affidavits. The learned judge who, upon the application for leave to file affidavits in reply, had agreed with the Chief Justice that the leave should be granted, gave a long judgment terminating in the conclusion that the preliminary objection was well founded, and that the plaintiffs could not take any proceeding in the cause while the order of Mr. Justice Weldon, of the 6th August, remained in force, and consequently could not give the notice they had given, and which was necessary to be given to support the motion. He, however, expressed his opinion also, that the motion was sufficiently answered upon the merits; although the court, by refusing leave to the plaintiffs to file affidavits in reply, can scarcely be said to have been in a position to pronounce upon the merits of a case in which the

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statement of both parties as to the facts were not permitted to be brought before the court, and the other learned judge, while he thought that the case was properly before the court, expressed his opinion to be in favour of the award as valid, and that the rule to set it aside, and for a new trial, should be refused on that ground, although this was the point upon which the plaintiffs had been refused leave to file affidavits in reply.

He added, however, "the majority of the court do not decide upon the merits, but that my order was not carried out." But from the above analysis of the judgment it appears that although three out of the five judges constituting the court did pronounce the preliminary objection to be sufficient, yet only two proceeded upon that point alone, and that the other and the remaining two (also constituting three in a court consisting of five) pronounced their judgment against the plaintiffs upon the merits, which, in point of fact, were only half heard if the plaintiffs should have been given leave to file their affidavits in reply. The arguments upon which the preliminary objection was maintained, appear to me to be altogether too technical and refined. The better course would have been to have treated Mr. Justice Weldon's order as a stay only of proceedings by the defendant within the meaning of the 184th sec. of the ch. 37, which was all the plaintiffs wanted, so as to have given them an opportunity to make the proper motion which the circumstances of the case and the practice of the court required; or, as it is admitted, that the special paper was the proper paper for a motion of the particular character of that which the plaintiffs had to make to appear upon, to have read that part of Mr. Justice Weldon's order, as to the motion being put on the "motion paper," not as a vital part of the order, but as a *falsa demonstratio* inserted by error

or inadvertence ; and that, in treating it as not vital, and that in giving notice of motion as the plaintiffs did, and in setting down their motion on the special paper—they being in strict accord with the practice of the court, as to a motion of this character—the case was properly before the court, and should have been adjudicated on upon its merits, for which purpose, as it appears to me, the ends of justice required that the court should have received and read the affidavits offered by the plaintiffs in reply, and that in refusing to do so there has been a miscarriage ; and as those affidavits have been brought before us, the motion should, I think, be disposed of by us upon its merits, instead of remitting the case to be reheard by the court below at great, and as I think, unnecessary expense.

Upon an appeal from a rule refusing to grant a new trial, such as this appeal is, our duty under the statute, I think, is to do what the court below ought to have done, and that, in my opinion, was to receive the affidavits tendered in reply, and to adjudicate upon the merits, whether or not the verdict should be set aside and a new trial granted. As a majority of the court, however, is of a different opinion, I express no opinion upon the merits.

Appeal allowed.

Solicitor for appellants : *J. G. Forbes.*

Solicitor for respondent: *W. H. Tuck.*

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*Oct. 16. 17
1883
*Jan. 12.

SAMUEL CALDWELL AND SARAH CALDWELL (Plaintiffs)..... } APPELLANTS.

AND

THE STADACONA FIRE AND LIFE INSURANCE COMPANY (Defendants)..... } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Fire Insurance—Policy—Termination by Company—Surrender—Waiver—Estoppel—Husband and wife—Insurable Interest in wife's property—Tenant for life—Damages.

A. effected insurance on C.'s property, on which he held a mortgage, under authority from and in the name of C., with loss payable to himself. During the continuance of the policy the company notified A. that the insurance would be terminated, and advised him to insure elsewhere. Such notice also stated that unearned premiums would be returned, but no payment or tender of same was made according to conditions of policy. A. took policy to agent of insurers, who was also agent of the W. Ins. Co., and left it with him, directing him to put risk in latter company. No receipt was given, and property was destroyed by fire immediately after. Company resisted payment on the ground that policy was surrendered, and contended on the trial, in addition, that C. had parted with his interest in the property by giving a deed to one B. who had re-conveyed to C.'s wife, and that proper proofs of loss had not been given, claiming, in reply to a plea of waiver in regard to such proofs, that such waiver should have been in writing, according to a condition in the policy. They had refused to return policy on demand.

Held—reversing the judgment of the court below, Fournier J. dissenting, that C. had an insurable interest in the property at the time of the loss, as the husband of the owner in fee and tenant by the courtesy initiate, and having had also an insurable interest when the insurance was effected, the policy was not avoided by the deed to B.

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

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That the company, by wrongfully witholding the policy, were estopped from claiming that proofs of loss had not been given according to endorsed condition, and were equally estopped from setting up the condition requiring waiver of such proofs to be in writing if such condition applied to waiver of proofs of loss.

That the measure of damages recoverable by tenant for life of the insured premises is the full value of such premises to the extent of the sum insured.

Per *Fournier* J. dissenting, that the sending of the circular by the company, and compliance with its terms by the assured in giving up the policy to the company's agent, was a surrender of said policy, and plaintiff therefore could not recover.

Under the practice in Nova Scotia, where the wife is improperly joined as co-plaintiff with the husband the suit does not abate, but the wife's name must be struck out of the record and the case determined as if brought by the husband alone.

APPEAL from a decision of the Supreme Court of Nova Scotia, setting aside a verdict for the plaintiffs and ordering a non-suit. The facts of the case are fully stated in the judgments delivered by the court.

J. Gormully for the appellants:

The respondents are estopped from setting up the defence of want of proof of loss within time specified. First, by their wrongful act in witholding our policy. They cannot take advantage of a delay caused by their own delay. Secondly, having based their refusal to pay upon the ground of cancellation of the policy they cannot now resist on other grounds. *Dimock* v. *New Brunswick Mar. Ins. Co.* (1); *Bowes* v. *National Ins. Co.* (2).

If the defence is open to them, it was waived by agent asking appellants to delay putting in proof, and court below was wrong in deciding that waiver should have been in writing. *Post* v. *Etna Ins. Co* (3); *Bowes* v. *National Ins. Co.* (4); *Van Allen* v. *Farmer's Ins. Co.* (5); *Priest* v. *Citizen's Mut. Fire Ins. Co.* (6). The twelfth

(1) 3 Kerr 654.
(2) 4 P. & B. 437.
(3) 43 Barb. N. Y. 351.
(4) 4 P. & B. 437.
(5) 4 Hun. N. Y. 413.
(6) 3 Allen Mass. 602.

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condition does not affect proofs of loss. *Priest* v. *Citizen's Ins. Co.* (1); *Bowes* v. *National.*

The damages were not excessive. *Woodhouse* v. *Whitley* (2); *Alsager* v. *Parker* (3). If they were the court below should not have considered them, the ground not being in the rule *nisi.*

P. B. Casgrain Q.C. for respondents:

By the deed from Caldwell to Bayers his interest in the property insured ceased and never revived. The contract being one of indemnity, is strictly personal. *Wood* on Fire Ins. (4). The policy does not attach to the building, but merely secures the owner from damage by fire.

At the time of the loss Caldwell held only in right of his wife, and could neither have insured himself or continued the original insurance. *Wood* on Fire Ins. (5). It may be claimed that Caldwell had a life interest as tenant by the courtesy, which is insurable. Admitting that to be so, it was not the interest insured by the respondents. Caldwell having been divested of his interest in the property during the continuance of the policy, it could only revive in his own name and favor. *Res perit domino* is the maxim applicable to the case. *McCarty* v. *Commercial Ins. Co.* (6); *Wood* on Fire Ins. (7) and cases there cited.

But in any case the respondents are not liable. The act of Anderson in giving the policy to Greer with instructions to put it in the Western, was a release of any claim against the respondents and an acceptance of another company as insurers. The contract with the Western was complete. *Robertson* v. *Dudman* (8). We rely too on the failure to give proofs of loss within five

(1) 3 Allen, Mass. 602.
(2) 4 F. & F. 1086.
(3) 10 M. & W. 576.
(4) P. 535.
(5) P. 558, sec. 331.
(6) 2 Bennett 60.
(7) Sec. 247 p. 470.
(8) I. R. & C. 50.

days. The agent had no authority to waive a forfeiture. *Wood*, sec 393.

The appellants claim that having refused payment on a special ground, we must be held to waive other objections. I submit that is not so. *Wood*, p. 723, sec. 417; p. 705, sec. 414.

The action should have been brought by Anderson either in his own name or in the name of Caldwell for his benefit. The latter would be the best course. *Wood*, p. 818, sec. 88.

The damages are excessive. At the most the appellant only had a life interest in the policy, and evidence of value of that interest should have been given to the jury. The judgment of the court below should be sustained.

J. Gormully in reply.

Sir W. J. RITCHIE C. J.—This was an action upon a policy of insurance under seal against fire, dated 10th August 1875, whereby defendants' company, after reciting that Samuel Caldwell had paid them $25 for insuring against loss by fire $4,000.

On a one and-a-half storey wooden building, situate on the west of the Kempt road, at corner of the street leading to Willow park, in the city of Halifax, N.S., owned and occupied by the assured as a dwelling, in the sum of four thousand dollars.

The building is isolated, being over 100 feet to nearest building.

Loss, if any, under this policy payable to George R. Anderson, Esq. Halifax N. S., for a year from the said tenth day of August 1875; and had agreed to pay to the company on the 10th day of August in every succeeding year during the continuance of said policy the like sum of twenty-five dollars; it was declared that subject to the conditions endorsed on said policy and which constituted the basis of said insurance, the said Samuel Caldwell, should be paid out of the capital stock and funds of said company, and the funds and property of the said company, except the funds for the time being of the life department thereof as defined by the Act of incorporation, should be subject and liable to pay and make good to the said Caldwell the amount of all such loss or damage by fire as should happen to the

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property in the said policy mentioned, not exceeding the amount insured thereon as aforesaid, during the said year from the said tenth day of August A.D. 1875, or at any time afterwards, so long as the plaintiffs should pay the said sum of twenty-five dollars yearly as aforesaid, and the directors of the said company for the time being should accept the same.

And the declaration alleged:—

That the only condition on said policy endorsed, material to the plaintiff's cause of action or essential to the said contract of insurance, is as follows:—"All persons insured by this company sustaining any loss or damage by fire, are immediately to give notice to the company or its agents, and within five days after such loss occurred are to deliver as particular an account of their loss or damage as the nature of the case will admit of, and make proof of the same by their declaration or affirmation and by their books of account, or by such other proper evidence as the directors of this company or its agents may reasonably require, and until such declaration, account and evidence are produced the amount of such loss, or any part thereof, shall not be payable or recoverable;" and that the plaintiffs at the time of the making of the said policy, and thence and until and at the time of the damage and loss hereinafter mentioned were, or one of them was, interested in said premises so insured as aforesaid to the amount so insured thereon, and after the making of the said policy and whilst it was in force the said premises so insured as aforesaid were burnt, damaged and destroyed by fire, whereby the plaintiffs suffered damage and loss on the said dwelling-house to the amount insured on as aforesaid, and all conditions were fulfilled and all things happened and all times elapsed necessary to entitle the plaintiffs to maintain this action, and nothing happened or was done to prevent the plaintiffs from maintaining the same.

The conditions of the policy as set out in the case, are as follows:—

No. 2. And if by reason of such alteration or addition, or from any other cause whatever, the company or its agents shall desire to terminate the insurance effected by this policy, it shall be lawful for the company or its agents so to do by notice to the insured or his representative, and to require this policy to be given up for the purpose of being cancelled, provided that in any such case the company shall refund to the insured a ratable proportion for the unexpired term thereof of the premium received for the insurance.

No. 8. Damage to buildings not totally destroyed shall be ap-

praised by disinterested men mutually agreed upon by the assured and the company or its agents, and where merchandize or other personal property is partially damaged the assured shall forthwith cause it to be put in as good order as the nature of the case will let, assorting and arranging the various articles according to their kinds, and shall cause a list or inventory of the whole to be made naming the quantity and cost of each kind. The damage shall then be ascertained by the examination and appraisal of such damage on each article by disinterested appraisers mutually agreed upon, whose detailed report in writing shall form a part of the proofs required to be furnished by the assured, who shall pay all fees and expenses incurred in the substantiation of the claim. A copy of the written portion of this policy to be given in the affidavit of the assured in all cases.

No. 9. All persons insured by the company sustaining any loss or damage by fire, are immediately to give notice to the company or its agents, and within five days after such loss or damage has occurred are to deliver as particular an account of their loss or damage as the nature of the case will admit of, and make proof of the same by their declaration or affirmation, and by their books of accounts or such other proper evidence as the directors of this company or its agents may reasonably require; and until such declaration or affirmation, account and evidence are produced, the amount of such loss, or any part thereof, shall not be payable or recoverable; no profit or advantage of any kind is to be included in such claim; and if there appear fraud in the claim made for such loss, or false declaring or affirming in support thereof, the claimant shall forfeit all benefit under the policy.

No. 11. It is furthermore hereby expressly provided that no suit or action against the company for the recovery of any claim upon, under, or by virtue of this policy shall be sustainable in any court of law or equity, unless such suit or action shall be commenced within the term of six months next after any loss or damage shall occur; and in case any suit or action shall be commenced against the company after the expiration of six months next after such loss or damage shall have occurred, the lapse of time shall be taken and deemed as conclusive evidence against the validity of the claim thereby so attempted to be enforced.

No. 12. None of the foregoing conditions or stipulations, either in whole or in part, shall be deemed to have been waived by or on the part of the company, unless the waiver be clearly expressed in writing, by endorsement upon this policy signed by the manager of this company for Canada.

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Second count that defendants converted the policy to their own use.

To this declaration the defendants pleaded thirteen pleas :—

1st. *Non est factum*, to first count.

2nd. *Non assumpsit*, to first count.

3rd. That house was not burnt, to first count.

4th. That plaintiffs were not, nor was either of them interested in house as alleged, to first count.

5th. And for a fifth plea to said count, defendant company says that the said insurance was effected, and the said policy applied for by the said Samuel Caldwell, who was then owner of said dwelling house, and the loss, if any, under said policy, was by said policy made payable to one George R. Anderson, and that after the date of said policy and before such alleged loss the said Samuel Caldwell conveyed all his interest in said dwelling house to one Thomas Bayers, and the defendants had no interest therein and sustained no loss or damage from the burning of said dwelling house as alleged.

6th. That plaintiffs did not within five days deliver account of loss according to conditions.

7th That the plaintiffs delivered a false and fraudulent account.

8th. False representations on application for insurance.

10th. That before loss defendants by notice terminated insurance according to conditions.

11th. Same as last, and that plaintiffs delivered up policy to be cancelled, and it was cancelled before loss.

12th. Numbered 13 in case. Plea to second count that defendants did not convert policy.

13th. Numbered 14 in case. Plea to second count that policy was not property of plaintiff, but of defendants.

Replication :—

1st. To all pleas plaintiff joins issue.

2nd. To fifth plea.

2nd. And for a second replication to the fifth plea by like leave,

plaintiffs say that they or one of them was at the time of their making said insurance the owner of said house and premises, and although the said building and premises were afterwards formally conveyed to one Thomas Bayers, yet before the said loss the said Thomas Bayers reconveyed the same to the said Sarah Caldwell, then and still being the wife of the said plaintiff, Samuel Caldwell, and the said Sarah Caldwell from thenceforth and from the making of said policy, and until and at the time of the said fire and the said loss was the owner thereof and interested therein.

3rd. As to sixth plea plaintiffs say that defendants waived and dispensed with further or more particular account of loss.

4th. As to sixth plea plaintiffs did furnish due proof of loss, which defendants accepted as sufficient.

5th. To sixth plea defendants, by their agent, for good consideration, waived necessity to furnish within five days from loss particular account of said loss, and defendants accepted as sufficient the account furnished within a reasonable time and notified plaintiffs that they would resist loss solely on the ground that the policy had been cancelled.

Rejoinder:

The defendant company, as to the replications of said plaintiffs, joins issue thereon.

And for a second rejoinder as to the second, third, fourth and fifth replications, defendants say that the alleged waivers were not clearly expressed in writing by endorsement on said policy, signed by the manager of said company for Canada, as required by the conditions endorsed on said policy.

This second rejoinder has no application to the second replication.

SURREJOINDER:

And the plaintiffs join issue upon the second rejoinder to the second, third, fourth and fifth replications, pleaded to the defendants fifth and sixth pleas.

And for a second surrejoinder to the defendant's said second rejoinder, plaintiffs say that the defendants at the time of the happening of the loss of the premises in the declaration mentioned, were in possession of the policy of insurance in this action declared

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on and kept and detained the said policy ever since, and refused to deliver up the same, although the plaintiff demanded the same within the time limited to make and give the proofs of loss herein and for the purpose of enabling the plaintiffs to make and furnish the said proofs, and plaintiffs were not aware of the conditions on said policy endorsed requiring waivers of proof of loss to be in writing endorsed on said policy and signed by the manager of the defendant company for Canada, and they were prevented, by reason of the wrongful detention of said policy by the defendant company, from acquiring knowledge of the said conditions, and from complying therewith.

Nor has the surrejoinder any application, so that, in fact, the fifth plea remains unanswered, except by the second replication to that plea, which is clearly bad, and upon which no issue is joined.

The following entry appears at the end of Greer's evidence. "I offer to allow plaintiff to file surrejoinder. Accepted." But I can find in the case no surrejoinder filed, nor any intimation of the nature of the surrejoinder which the judge says he allowed to be filed.

At the end of the case I also find this: "I allow and minute amendment." But I cannot find in the case the amendment or any minute thereof.

Motion for non-suit on the following grounds:—

1. Anderson should have been plaintiff.
2. Policy cancelled under condition 2.
3. No interest in plaintiff, Caldwell had conveyed.
4. Ninth condition not complied with. Proof not put in in time.
5. None of these can be waived—waiver not in writing.
6. Under 11th condition, six months a bar, action not brought for a year or more.
7. Under 9th condition, affidavit of Caldwell not true as to ownership, also as to amount of loss.

The dates are as follows:—

Suit commenced 15th February 1878. Tried on May 1880. Judgment for plaintiffs. Policy dated 10th August 1875. Loss 4th July 1877.

Deed McKenzie to Caldwell 26th Nov. 1874. Registered 27th Aug. 1875.

Deed of confirmation, Letson to Caldwell, dated 26th Aug. 1875, and recorded 27th Aug. 1875.

Deed from Caldwell to Bayers 2nd Feb. 1876. Registered 14th Feb. 1876.

Deed from Bayer to Sarah Caldwell, wife of Samuel Caldwell, dated 3rd Feb. 1876. Registered 10th April 1877.

Renewal receipt on policy from 10th Aug. 1876, to 10th Aug. 1877.

From these dates it appears that the renewal of the policy for the year in which the premises were destroyed was after the deed to Caldwell's wife, though before the same was registered, and, therefore, while Caldwell was interested by reason and in virtue of his marital rights.

On the 28th June 1877, the following circular was sent to Anderson, the mortgagee, to whom the insurance money was payable in case of loss, and who had effected the policy for and at the instance of Caldwell.

Halifax June 28 1877.

Sir:

I have to inform you that the Stadacona Insurance Company has ordered me to notify policy holders to insure elsewhere, as the company has decided to wind up. You will, therefore, take notice that your policy of insurance is cancelled from this date. Unearned premiums will be returned hereafter.

Yours, &c.,

(Sgd.) G. M. GREER,

Agent.

It is abundantly clear that this did not terminate the insurance effected by the policy, being neither in accordance with the letter or spirit of the condition, which expressly provides that "in any such case the company shall refund to the insured a ratable proportion for the unexpired term thereof of the premium received for the insurance," which was by no means complied with by inserting in the notice to insured "unearned premiums will be returned hereafter," instead of paying or tendering them.

But it is contended that Anderson, after receipt of

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this notice, having left the policy with Greer, the agent of the defendants, and likewise the agent of the Western Insurance Co., that this was an acceptance of the special condition and amounted to a surrender of the policy.

With respect to this Greer, Anderson, and Caldwell thus speak.

Greer, agent of the defendant, says on this point:

Immediately after the fire all the papers in my possession were sent to head office at Quebec. After fire M. H. Richey called and asked for policy. Anderson came also and demanded it. Caldwell was with him. I asked local board after fire if I should give it to them, and they referred me to head office. I applied by writing to head office. They did not answer, but the manager came down. I submitted all the facts to him, and asked him if I should give up the policy, and he said "we must hold on to it and not give it up." His name was George J. Pyke. He took it away with him, and I never saw it until to-day. Letter from Pyke, 14th December 1877, put in and read, marked J. A. J.

I think the only ground urged was that it was transferred to the Western. Pyke said to me "we are not liable, it is transferred to the Western," or to that effect. The company did not object to the proofs of loss. I don't remember if the proof of loss came to me before Pyke left. He was off and on here a few weeks after the fire. The St. John fire was 28th June. I received the proofs of loss and did not object to them. I know of no other objection except the transfer. My agency continued a month or two months after proofs were received. I made no objection to them.

When he brought the policies there was no return premium paid, nor at any time to my knowledge. Return premiums were paid 12 or 18 months after. Can't say Anderson got any. The only reason for sending the notices, so far as I know, was that company were in financial difficulties.

GEORGE R. ANDERSON.—I received this circular 28th June, 1877. This was before, and on same day I took the policy there.

Cross-examined, Rigby—I insured premises under authority of Caldwell, and charged him premium. Never authorized me to surrender policy. Never agreed to surrender it. I left it with Greer to enable him to take description of property, not for purpose of surrendering it. Never informed Caldwell up to time of fire of the notice I had received. After fire, probably next month, called on Greer with Caldwell. I told him he held policy in trust for Caldwell and me. I demanded it first and he refused to give it up. No

return of premium offered me before action. I received this paper from Greer 9th April 1878. Before that I received no offer of return premium.

Re-examined, Ritchie—I told Greer when I got notice he was acting unfairly by compelling us to change the policies on a half holiday. I said I must have them changed; he said the Western was the best office in Canada. I told him I would leave the policies for him to get the description. I did not get the other Stadacona policies back. Did not ask for them. I am positive I told Greer I left policies for him to get description.

Caldwell says:

Mr. George R. Anderson effected the insurance for me. I authorized him to do so. I never instructed any person to put an end to the insurance. I did not know the policy had been handed to the company until after the loss. Anderson had a mortgage on the property. I told him to insure in any office he wished; gave him no other instructions.

Re-examined.—I knew before fire that it was insured in Stadacona. Anderson had whole management of insurance. I did not interfere.

George M. Greer, agent of defendant company.—Remember fire. Was agent then and for about two months after. I was then and am still agent of Western Insurance Company. There was a board of local directors for defendant company. John S. McLean and H. H. Fuller were two of them. I issued this policy, I think. I sent it to Mr. G. Anderson. Just before fire on 30th June 1877, I obtained the policy from Mr. Anderson's own hands. I sent him a notice on 28th. He came to my office with this and two other policies, and said, "Put those in the Western." That was all he said. It was not put in Western before fire. Gave no receipt or policy and received no premium. Made no contract. This was the only conversation with him before fire. No conversation with Caldwell until after fire. Sent no notice to Caldwell same as I did to Anderson mentioned above. Did not know Caldwell in the transaction, but knew, of course, that his name was in policy and who he was.

M. H. Richey, sworn—Was retained to collect the insurance after fire. Immediately after. Waited at once on Greer to ascertain position, as policy was not in the hands of plaintiff, and found that Greer had already notice of loss. He said he supposed I had called on him in reference to that. I gave him notice. Asked him if he had policy. He said he had. I asked him to give it to me to make the necessary proofs. He declined, without communication with his directors, and requested me to wait as there was no necessity for my doing so. At his request I delayed making any proofs until he

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should communicate with his directors. I called very shortly again, and was informed by him that the directors here would not authorize delivery without communicating with the head office at Quebec. I called frequently to ascertain the decision of the head office, and received no satisfactory answer, until finally thinking sufficient time had been afforded, I put in such proof as I could without the policy. I did not put the proof in before because I was awaiting the decision of head office whether the defendant company would return the policy to us or not, or whether the transfer of the risk to the Western was effected. I did not receive payment of the claim; payment was refused on the ground that the company had ceased to be liable, not on any other ground. I conversed with others beside Mr. Greer. I conversed with H. H. Fuller and J. S. McLean. Had no direct communication with general manager, except by a letter. This is the letter I received from him. Date, 14th Dec. 1877. Letter read. No objection was ever offered except that contained in the letter.

* * * * Greer asked me to delay putting in proofs. He said I had better wait until he had corresponded with the company. The ground of delay was largely to hear whether the Western would recognize the claim so as to know what company to put it into.

From all this it is, I think, abundantly clear that the policy never was surrendered. In the first place, while Anderson had authority to effect the insurance, he had no authority to destroy it, and in the second place, it is, I think, quite clear that the policy was only left with Greer, the agent of both companies, to get the description so as to put the risk in the Western, and when so placed, it was, no doubt, the intention that the risk in the Stadacona should cease; but I fail to see the slightest evidence of any intention that the liability of the Stadacona should be at an end until the risk was assumed by the Western; in other words, that it was ever contemplated by any party that the property should, for a moment, be without insurance.

Then, the policy never having been cancelled or surrendered, as to the objection that the proofs of loss required by the conditions of the policy were not put in within the time limited, it is abundantly clear that

this was not by or through the act or default of the plaintiffs or their agents, but their not being put in, was at the instance of the defendants and their agents, and the plaintiffs were hindered and prevented from putting them in by the defendants and their agents withholding the policy from the plaintiffs, when they had no right to do so, claiming that the same was cancelled and surrendered, and resting their sole objection to pay the claim on this ground; for which reasons, in my opinion, the defendants were estopped by their own acts and conduct and those of their agents in preventing and hindering the plaintiffs from making and putting in the proofs in accordance with the conditions, and cannot set up the failure to comply with the conditions, caused by their wrongful acts, as a non-compliance with such conditions. But defendants contend that none of the conditions can be waived by reason of the waiver not being in writing, and they invoke the twelfth condition, which says:—

No. 12. None of the foregoing conditions or stipulations, either in whole or in part, shall be deemed to have been waived by or on the part of the company, unless the waiver be clearly expressed in writing, by endorsement upon this policy, signed by the manager of this company for Canada.

And the Supreme Court of Nova Scotia rest their judgment on this, that though they think there was evidence of a waiver, a conclusion fully justified by the conduct of the company through their agents, yet they thought a parol dispensation would not answer to act as a waiver against a written condition of the policy.

But if condition No. 12 applied to the conditions, as to proofs of loss, I think the court erred in treating this as a waiver, but should have held the defendants estopped by matter in *pais* from setting up the non-compliance with the condition.

There can be no doubt that a husband has an insur-

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able interest in his wife's property. The husband has a freehold estate in the land and the exclusive right of occupation; an indefeasible title to the land which no one can defeat or disturb, which gives him a full and perfect title to the rents and profits of his wife's real estate during the coverture, and, in the event of the birth of a child, after the death of his wife during his life, and he is the proper party to insure the property, for the wife can make no contract in her own name to her own use, and if she could insure the property, in case of loss the insurance money, so soon as paid, would belong to the husband, inasmuch as the wife can acquire no personal property in her own right, as any she may obtain becomes immediately the property of the husband.

All that is required is that the insured should have an interest at the time of the insurance and at the time of the loss; and as to that interest, while there can be no doubt the party insured must have an insurable interest in the subject insured, or he can sustain no loss, and therefor if the insured parts with his interest before loss happens so that he has no interest left at the time of the loss, he cannot recover, yet if, pending the continuance of the policy and before loss, he acquires an interest, the policy suspended while he had no interest revives.

And as to the nature and extent of the plaintiff's interest, it need not be stated when the risk is taken.

In *Crowley* v. *Cohen* (1) Lord Tenterden C.J. said:

> That in a policy of insurance, although the subject-matter of the insurance must be properly described, the nature of the interest may in general be left at large.

Littledale J. makes the same observation.

Parke J. says:

(1) 3 B. & Ad. 478.

The particular nature of the interest is a matter which only bears on the amount of damage; it is never specially set out in a policy.

And Patteson J. says:

It is only necessary to state accurately the subject-matter insured, not the particular interest which the assured has in it.

In *Simpson* v. *The Scottish Union Fire and Life Insurance Company* (1), Sir W. P. Wood V.C. says:

It appears to me that a tenant from year to year, having insured his premises for 500, has, if his house is burnt down, a right to have the £500 applied in rebuilding, for the purpose of reinstating him in premises which have a value to him, as distinguished from their value to his landlord. He may have a good trade, and there may be a number of other things which concern him, and which render the premises worth to him the amount for which he has insured them. It does not appear to me that I ought to contract his rights to the narrow interest that he may be supposed to have merely as tenant of so many buildings from year to year, but that I ought to consider him as having a substantial right to stand upon the policy, and insist upon having the house rebuilt. Beyond this, the landlord has a right, in respect of the tenant's interest, to have the property, which the latter insured, rebuilt, in order to avoid the possible consequence of fraudulent insurance contemplated by the statute.

And in *Collingridgee* v. *Royal Exchange Ass. Co.* (2), (when the terme of the policy were, that the corporation should be liable to pay to the assure any loss or damage by fire to the buildings which should or might happen before 25th March then next ensuing £1,600.)

Lush L. J. says:—

The contract is not to make good any loss to the plaintiff, but any damage to his building.

But whatever may be said as to the insurable interest of a yearly tenant, there is a great distinction between a tenant from year to year, or for years, and a tenant for life in this that in the case of the former he is in no sense the owner of the property, while, in the latter case, the tenant for life during the continuance of

(1) 9 Jur. N. S. 711.

(2) 3 Q. B. D. 173.

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the tenancy, is the absolute owner entitled for the time being to the whole interest in the property, and the rents and profits thereof, and if so, the observations in *Laurent* v. *Chatham Fire Ins. Co.* (1), which states the effect of the contract, when the owner insures, would apply; in other words, the whole interest and possession for the time being is in the tenant for life.

There certainly is nothing unjust or inequitable in holding the insurers liable for the value of the building to the extent of the sum insured; the insured has paid the premium on the whole sum, and he insures for the entire risk of the property to that amount during the whole term of the policy.

This is in no way analogous to the case of a mortgagee, who merely insures his own interest in the property, that is, his debt. In this case there was no specified interest. Here the party insured was, for the time being, interested in the property not only as tenant for life, but as mortgagor to Anderson, and the contract was neither confined to his interest as owner or mortgagor liable for the payment of the debt secured by the mortgage, but the insurers for the consideration of the premium on $4,000 have covenanted if the property is destroyed to pay the amount insured, whereby the assured may indemnify himself by restoring the building, and thereby replacing himself in the exact position he stood in relation to the property, and the full enjoyment of his rights therein that he had before and at the time the fire occurred.

It cannot be denied that a tenant for life receives a substantial benefit from the continued existence of the property, and I know of no law prohibiting him from protecting by insurance his interest in the preservation of the buildings erected on the property in which he has an actual interest, or securing their re-erection by the

(1) 1 Hall (N. Y.) 4.

proceeds of such insurance, the interest being "a real interest in, and issuing out of, the thing insured, and so connected with it as to depend on the subject matter of the thing insured and the risk insured against," and which it would require the amount insured to restore to the condition it was at the time of the fire, whereby he would be placed in a position to receive the rents and profits of the property as he was doing before the fire.

As to the question of damages, as Mr. Mayne remarks, there is a great dearth of authority in the English reports, but not so in the American reports. In the latter, cases can be found deciding that a lessee of a house from year to year, or for years, cannot recover its entire value on its destruction by fire upon a policy insuring it for its value. In England the same view does not seem to prevail to the same extent, for the contract of insurance being in no way limited either as to nature or amount of interest, when the assured establishes an insurable interest in the property, he is entitled to recover the amount assured, and he is entitled to receive what would restore the property and make it what it was when he insured it, or at any rate what it was at the time of the loss, or as near as the amount insured will do it.

I am of opinion the appeal should be allowed.

STRONG J.—This was an action in the Supreme Court of Nova Scotia brought by Samuel Caldwell and his wife against the Stadacona Assurance Company. The policy of insurance sued upon as originally issued was for one year, namely, from the 10th August, 1875, to 10th August, 1876, but, as is proved by the renewal receipt in evidence, it was subsequently renewed and continued until 10th August, 1877. It was under the seal of the respondent company, and purported to be effected in favor of the appellant, Samuel Caldwell. It con-

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tained, however, a provision in the following words: "Loss, if any, under this policy, payable to George R. Anderson, Esq., Halifax N.S." The policy was subject to conditions, of which those material to the questions which have arisen in this action are the following. The second condition provides that the company might require the policy "to be given up for the purpose of being cancelled, provided that in any such case the company shall refund to the insured a ratable proportion for the unexpired term thereof of the premium received for the assurance."

The 9th condition requires particulars and proofs of loss to be delivered "within five days after such loss or damage has occurred;" and it also provides that "if there appear fraud in the claim made for such loss, or false declaring or affirming in support thereof, the claimant shall forfeit all benefit under the policy."

By the 11th condition "any action to be brought on the policy is required to be commenced within the term of six months next after any loss or damage shall occur."

The 12th condition is in these words:

> None of the foregoing conditions or stipulations, either in whole or in part, shall be deemed to have been waived by or on the part of the company, unless the waiver be clearly expressed in writing by endorsement on this policy, signed by the manager of this company for Canada.

The declaration, in addition to a count framed in the usual manner in covenant for the recovery of the amount of the loss, contained a count in trover for the policy. The defences pleaded were, substantially, that the amount of loss was payable to Anderson; that there had been a breach of condition requiring proofs of loss to be delivered within five days; that the proofs of loss were false and fraudulent, within the meaning of the 9th condition; that the plaintiff had, on his application for the policy, been guilty of misrepresentation as to

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the value of the house; that the policy had been delivered up and cancelled, and the risk terminated. And to the count in trover the defendants pleaded not guilty and not possessed.

To the plea of non-delivery of proof according to condition the plaintiff replied a waiver of the condition in that respect, to which the defendants rejoined that the waiver was not in writing, as required by the conditions. Upon the other defences issue was taken.

At the trial before Mr. Justice James without a jury the following facts appeared in evidence: On the 2nd February, 1876, the appellants conveyed the property on which the insured building was erected to Thomas Bayers in fee, who, on the next day, conveyed the same to the appellant, Sarah Caldwell, in fee. On the 30th June, 1877, the respondents' agent at Halifax, George M. Greer, sent to Anderson, who held the policy for his security as mortgagee, a circular to the effect that the company had cancelled the policy, adding that "unearned premiums will be returned hereafter." Upon receiving this notice, Anderson, without any communication with Caldwell, handed the policy to Greer, and the respondents from that date held it, until it was produced by them on the trial, having, although it was frequently demanded by Caldwell's attorney, positively refused to deliver it, insisting that it was cancelled. The unearned premium was never returned or offered to be paid to either Anderson or Caldwell. Anderson positively swears that his object in leaving the policy with Greer was to enable him to get the description of the premises, so as to enable him to effect a new policy in the Western Insurance Company, for which Greer was also the agent. Greer does not prove that the policy was delivered up by Anderson for the purpose of cancellation, or that anything was agreed to, either as surrender or cancellation. The proof was also clear

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and distinct that the delivery of the policy by Anderson to Greer was wholly unauthorized by Caldwell, and without the knowledge of the latter. There was no evidence of any misrepresentation of value by Caldwell in his application for the policy. Greer himself says that Anderson told him that the house cost Mr. Fishwick, a former owner, $6,000, and there is nothing to show that this statement was untrue. The house insured was destroyed by fire on the 4th July, 1877. Notice of a total loss was promptly given to the agent of the company at Halifax, and application was made to him to deliver up the policy which was in his possession, and for instructions as to the proof of loss required. At his suggestion the putting in of proofs was deferred, to allow him time to communicate with his head office regarding the policy, and ultimately, on the 25th of July, the proofs of loss were furnished by the appellant's solicitor to the agent, who received them without objection, and retained them. Accompanying the proof of loss was a letter from the appellants' attorney, Mr. Ritchie, to Mr. Greer, the respondent's agent, in which he wrote as follows:

> Herewith I hand you proof of loss in the case of Samuel Caldwell, prepared with as close conformity to the requirements of your office as we can attain without the policy, which is now, I understand, in your custody, and I have thus far been unable to obtain it. It is, however, not convenient for my client to longer delay making his claim in this formal manner, and I shall be obliged by your acquainting me, on receipt of this, whether any objection exists to either the claim or the form in which it is prescribed.

No objection was ever made, in any particular, to the proofs of loss furnished, and the only contention ever raised by respondents prior to their pleadings to the action was, that they were not liable, because the policy had been cancelled. A letter, dated the 11th December, 1877, from Mr. W. J. Pyke, the general manager of the respondent's company, to Mr. Richey, the plaintiff's

attorney, which was put in evidence, leaves no doubt of the fact that this was the only ground on which the company based their denial of liability.

The refusal of the respondents to give up the policy for the purpose of preparing the proofs, upon an application being made to their agents for that purpose, was proved by Mr. Richey, the plaintiff's attorney, and also by Mr. Anderson, and the fact was admitted by the respondents' agent, Mr. Greer. Evidence of the value of the house was given by the appellant, Samuel Caldwell, and also by Anderson, who stated that he had advanced $4,500 on mortgage on the property on a valuation of the land at $2,000 and the house at $4,500. There was no testimony to contradict this evidence, and consequently, nothing to establish the alleged fraudulent over-valuation in the proofs of loss.

A non-suit having been moved for on several grounds included in the numerous list of objections hereafter to be considered, it was refused by the learned judge, who thereupon found a verdict for the plaintiff for $4,000 and interest. A rule *nisi*, which was granted to set aside this verdict, on the general ground that it was against law and evidence, and on the specific points which were urged at the trial on the motion for non-suit, was, after argument before the court in *banc*, made absolute.

The judgment of the court below, in granting this new trial, appears to have been founded exclusively upon the single ground that, although a waiver of the requirements of the 9th condition as to delivering proofs or particulars of loss within five days, had been sufficiently made out, if parol evidence had been admissible, yet, that the 12th condition, requiring waiver to be expressed in writing, by endorsement on the policy, applied to and excluded all proof to that effect other than such as was required by the terms of the

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condition referred to. Upon this appeal no less than nine distinct objections to the appellant's rights to recover have been set up. These may be stated as follows:—1st. It is said the action should have been brought by Anderson. 2nd. That the misjoinder of the appellant's wife is fatal to the action. 3rd. That the appellant had been guilty of fraudulent misrepresentation as to the value of the assured house in his application for the policy, 4th. That the action not having been brought within six months after the loss, the stipulations of the 11th condition constituted a bar to the appellant's right to recover. 5th. That there was fraudulent over-valuation in the appellant's affidavit delivered to the respondents' agent as proof of loss. 6th. That the appellant Caldwell had not at the time of loss any insurable interest in the property, or had, by reason of his change of interest arising from the alienation in favor of his wife, by means of the conveyance to Bayers, and the re-conveyance of the latter, become disentitled to the benefit of the policy. 7th. That the policy had been duly cancelled and rescinded, pursuant to the terms of the 2nd condition. 8th. That the proof had not been furnished within the five days, as required by the 9th condition, and that all evidence of waiver, otherwise than in writing, was excluded by the 12th condition. Lastly, it was said that, failing all other defences, the measure of the damages which the appellant Samuel Caldwell was entitled to recover, was not the intrinsic value of the house, but only the actual value of his estate or interest during the continuance of the marriage, and subsequently, in the event of his surviving his wife, as tenant by the courtesy; and that as no proof had been given of the value of such interest, there must, in any event, be a new trial, for the purpose of ascertaining what amount the appellant was entitled to recover in respect of it. Some

of these objections were urged as grounds for the non-suit at the trial, but others appear to have been raised for the first time, either in the respondents' factum or on the argument of this appeal; and as the judgment under appeal was on an application for a new trial, it may therefore be doubted if any objection not taken at the trial is now admissible. As it appears, however, that the appellants will not be prejudiced by a consideration of the several points taken on their merits, I proceed to consider them.

The first six objections are so ill-founded—some in point of fact, others in point of law—that it is not too harsh a criticism upon the line of defence adopted by the respondents to say that they are frivolous.

The policy contains, it is true, the provision already mentioned, that the loss shall be payable to Anderson, but the contract of insurance is in terms embodied in a covenant under seal with the appellant; and the old and well known rule is, therefore, exactly applicable, that if a person covenants with another to pay money to a third person not a party to the covenant, the covenantee alone can sue; and the person to whom the money is payable, being a stranger to the covenant, can maintain no action. It is true that there are some American authorities which, in cases where the policy is not under seal, have recognized a right of action in the person to whom the loss is payable, but these have proceeded upon the principle, inapplicable here, that the person to whom payment is appointed to be made is to be considered a party to the contract. The joinder of Mrs. Caldwell as a co-plaintiff, could only be taken advantage of by a plea in abatement, and constituted no ground of non-suit. The action is to be regarded as that of the husband alone, and the judgment to be entered must be for or against him, disregarding the wife, whose name must be struck out of the record.

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The defence set up by the eighth plea, that the appellant misrepresented the value of the insured premises in his application for insurance, as I have already pointed out, fails for want of proof. The only evidence in this respect is that of Greer, the agent, who swears that the appellant told him that the house had cost Fishwick $6,000, and there is nothing to show that this statement was not perfectly true. It appears, therefore, that the charge of fraud contained in this 8th plea, was too lightly made by the respondents. The failure to bring the action within six months, as required by the 11th condition, has not been pleaded, which is alone conclusive against such a defence. Moreover, it is apparent that the respondents have, by their conduct in withholding the policy, and insisting on the surrender, estopped themselves from insisting on the benefit of any defence founded on this condition. At all events, it is sufficient to say that the defence is one which should have been pleaded, that the respondents have not asked to be allowed to amend the record by adding the plea, and even if they had, no court, in view of the course of conduct they pursued in the interval, between the loss and the commencement of the action, could, with justice to the appellants, grant them such an indulgence. The allegation of fraudulent over-valuation in the appellant's affidavit delivered in proof of loss, is not only unsubstantiated by any proof on the part of the respondents, but is conclusively disposed of by the evidence of Anderson, who swears that he lent the appellant $4,500, on a valuation of the land and house apportioned as already mentioned. The contract of fire insurance being one of indemnity, requires that the insured should have an interest at the date of the insurance, and also at the time of the loss. In the absence of any express stipulation or condition against alienation, there is,

however, nothing to invalidate the contract in the fact that, during the currency of the risk, the insured has alienated his interest, provided he has acquired it again before the loss. There is nothing in such a temporary alienation which can, in any way, injuriously affect the rights of the insurers—their liability is, as it has been observed, made less burdensome, as for a portion of the time for which they have been paid the premium, they are without any risk (1). In no way has any greater liability been imposed upon the respondents by reason of the change of interests in the present case; and as to the argument founded on the *delectus personæ*, there is no room for its application. The appellant, under the conveyance from Mr. Bayers to Mrs. Caldwell, which was to the latter in fee, without any limitation to her separate use, became also seized of an estate in fee simple in right of his wife, which estate he became entitled to during the continuance of the coverture, and was actually in the enjoyment of it, and in possession by his tenant, when the loss occurred; so that in all respects material to the interests of the respondents, the appellant stood in the same relation to the property at the time of the loss, as he did at the date of the insurance. I am not prepared, however, to accede to the proposition, that insurance is so far a personal contract that any change in the possession and control of the property will vitiate the policy. No authority can be produced to show that a policy effected by the owner of the freehold in possession would, in the absence of any condition providing against a change of possession, become void, merely because during the pendency of the policy, the property has been demised to a tenant, in whose occupation it remained at the time of the loss.

(1) May on Insurance, 2nd ed. sec. 101; *Worthington* v. *Bearse*, 12 Allen (Mass) 382.

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Such cases must be, and are, of frequent occurrence, yet no one ever heard of a mere change of possession being admitted as a good defence to an action on the policy. There is, therefore, no pretence for saying, in the present case, that the appellant had not at the time of the loss, an interest in the insured property covered by the policy. Next, it is insisted that there was a good surrender or cancellation of the policy under the 2nd condition. The material words of that condition have been before stated. There can be no question as to the proper construction of this provision. The condition is a most unreasonable and one-sided stipulation, as it enables one party to a contract to rescind or put an end to it at his pleasure, whilst the other party is not entitled to a like privilege. Moreover, it is grossly unfair, in not providing that notice should be given a reasonable time before the cancellation should take effect, so that the assured might have the opportunity of covering himself by another insurance. These considerations alone ought to induce a court to construe so unjust and harsh a condition with more than ordinary strictness. It is, however, doing no violence to the language of the condition itself, to hold that the repayment of the unearned proportion of the premium is to be a condition precedent to the exercise of the right of rescission, which the company, at its own arbitrary election, is entitled to subject the assured to. The words are in the form of a proviso, which ordinarily imports a condition precedent. And the language thus permitting it, no one could hesitate to adopt a construction which has at least the merit of attributing to the cancellation the character of a rescission, by requiring that the insured shall, as nearly as possible, be put in *statu quo*, rather than that of a forfeiture, which it would be, in fact if not in form, if the condition justified a cancellation such as that pro-

posed by the circular sent by the respondents' agent to Anderson, namely, a cancellation taking place at the arbitrary will of the company, without any return of premium, the insured being bound to rest content with the assurance that "unearned premiums will be returned hereafter." That the effect just attributed to this second condition is its true meaning, is so clear, that authorities need scarcely be referred to to justify that interpretation. It may be as well, however, to refer shortly to a standard treatise on the law of insurance, and a few decided cases, to show that I have not placed an unduly strict construction on the terms of the condition. Mr. May, treating of this question of cancellation in the last edition of his work (1) says :—

> And the right can only be exercised by a strict compliance with the terms and conditions upon which it is admissible. If refunding the premium, or a portion of it, be one of the terms, there must be a payment or tender. An agreement with the insured, that he shall return his policy to be cancelled and receive his premium, is no cancellation.

It is, therefore, abundantly clear that there never was a cancellation in the present case, for the reason that the terms of the condition were never complied with, for it is not pretended that there was any payment or tender of the premium, the intention being as stated by Mr. Pyke, the general manager of the respondents' company, in his letter of the 14th December, 1877, to Mr. Richey, that the premium should be returned "hereafter." Further, it cannot be said that Mr. Anderson had any power to dispense with the preliminary of repaying the premium, thus accepting what Mr. Pyke is pleased to call a "special condition," whatever that may mean, for it is distinctly sworn to by Anderson that the appellant never authorized him to surrender

(1) May on Insurance, ed. 2 sec. 574; Citing *Runkle* v. *Citizens' Ins. Co.*, (C. Ct. Ohio) 11 Rep. 599; *Chase* v. *Phœnix Ins. Co.*, 67 Me. 85; *Hathorn* v. *Germania Ins. Co.*, 55 Barb. (N. Y.) 28.

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the policy. Again, Mr. Anderson also states that he never did surrender the policy under the condition in question, but merely handed it to Greer to get the description from it, in order to effect a new policy in the Western Company, and the evidence of Greer in no way contradicts these statements. The result is, that the ground upon which the respondents, up to the date of the action, placed the denial of liability, was without foundation, and that there never has been any surrender, cancellation or rescission of the policy, which is therefore, still a valid and subsisting instrument.

There is as little color for the next pretension of the company as there was for the last. The 9th condition requires proofs of loss to be put in within five days, another very rigorous and unreasonable stipulation. It is, however, only upon a strict enforcement of this very illiberal provision as to time, that the appellants have been able to succeed in the court below.

It was contended by Mr. Gormully, on behalf of the appellant, that the condition requiring waiver to be in writing did not apply to the provision limiting the time for the delivery of preliminary proofs, but only to such conditions as were essentials of the contract.

Some American cases may, at first sight, seem to countenance this objection, but it will be found, on careful examination, that they turned on the construction of words referring to the conditions generally as the "conditions of the policy," and not to specific conditions endorsed, but in the present case, in the body of the policy, the liability of the company is expressly made subject "to the conditions herein endorsed;" and endorsed upon the policy, under the heading "conditions on which this policy is granted," appears this 9th condition, requiring the delivery of proofs within five days. It is therefore plain that the right to recover is as much subject to a compliance with this condition, as if it had been incorporated

in the policy itself, instead of being endorsed as a condition of liability. Again, I think no legal importance is to be attached to the fact that the proofs were not objected to as being after time, or to the objection to pay being confined to the surrender. It is no doubt the law, as decided by several American authorities, that if imperfect proofs are filed before the expiration of the time allowed, and no objection is made to them until the prescribed time is elapsed, but the refusal to pay is put on other grounds, that constitutes an estoppel, as the imperfections might have been remedied in due time if the objection had been promptly made; but here the proofs were not presented until long after the lapse of the time fixed by the conditions.

It was further argued that the respondents were estopped from insisting on the 9th condition, and this appears to be the true ground on which to rest the defendant's right to be relieved from any obligation to comply strictly with its terms. The evidence of Mr. Richey, the appellants' attorney, shows that the policy was demanded by him from Greer immediately after the fire, he thinks the next morning, that Greer refused to deliver it, that he demanded it for the express purpose of preparing the proofs, and that Greer was told at the time that it was required for this purpose. The witness says: "I asked him to give it to me to make the necessary proof;" and he adds that Greer asked him to delay putting in the proofs. Mr. Richey also says that he was under the impression that a much longer time than five days was allowed for the purpose.

These statements, so far from being contradicted, are corroborated by Greer's evidence. Upon these facts it is plain that the illegal retention of the policy by the respondents, and the conduct of their agent in reference to it, were the true and only reasons why the proofs were not furnished in due time. Had Mr. Richey

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known the terms of the condition, as he would have done if the policy of which his client was entitled to the possession had not been wrongfully withheld, it must be presumed against the respondents that the proofs would have been furnished within the prescribed time. Again, had Greer, instead of misleading Mr. Richey, by asking that the proofs should be delayed, stated to him that the condition required their presentation within five days, it must be presumed that a similar result would have followed. This conduct, therefore, constitutes an estoppel, and disentitles the respondents to the benefit of the 9th condition, which must, for the purposes of this action, be considered as struck out of the policy. This is, of course, an entirely distinct ground from that of waiver under the 12th condition. Had the appellant had the policy in his possession, or had the facts regarding the limitation of time been truly stated to his attorney by Greer, the mere request of the latter that the proofs should be delayed would have been nothing more than a dispensation with the terms of the condition, by agreement, which would have required endorsement on the policy in the terms of the condition excluding proof of waiver unless so evidenced. As it is however, it is apparent that the respondents, by their unjustifiable conduct, caused the non-compliance with the terms of the policy, which they now insist on as constituting a defence to the action. To allow them thus to avail themselves of their own wrong, would be to assist them to commit a fraud, and whenever such is the case an estoppel arises.

There remains only the question of damages. Whatever doubts may be raised by text writers, it is clear, from the language of judges used in delivering judgments in cases of authority, that provided the assured had an interest at the time of the execution of the policy,

and at the date of the loss, he is entitled to recover upon a fire policy the full value of the property destroyed, provided the whole interest in the property was insured, although his interest may have been a limited one merely.

In the case of *Franklin Insurance Company* v. *Drake* (1), the facts were similar to those in the present case. A husband had insured houses of which his wife was sised in fee, and in which his own interest was like that of the present appellant's, a right to the permanency of the profits during the coverture, and an estate in the courtesy, if he should survive the marriage. The court says :—

It the assured had an insurable interest at the time of the assurance, and also at the time of the loss, he has a right to recover the whole amount of damage to the property, not exceeding the sum insured, without regard to the value of the assured's interest in the property. The amount of the recovery will depend on the interest intended to be insured, provided it is covered by the policy. A mortgagor who has mortgaged to the full value of the property, and whose equity of redemption has been sold under execution, provided he has, at the time of the loss, a right to redeem ; or a lessee for years, whose lease is upon the eve of expiring at the time of the loss, is entitled to recover the full value of the property destroyed, not exceeding the sum insured.

In *Simpson* v. *Scottish Union Insurance Company* (2), Vice-Chancellor Page Wood says :—

I agree that a tenant from year to year, having insured, would have a right to say that the premises should be rebuilt for him to occupy, and that his insurable interest is not limited to the value of his tenancy from year to year.

And in *Waters* v. *Monarch Insurance Company* (3), in an action upon a fire policy on goods in the plaintiff's warehouse described as "goods in trust or on commission therein," it was objected that the plaintiff could only recover in respect of goods of

(1) 2 B. Mon. 47.
(2) 1 H. & M. 618 ; 9 Jur. N. S. 711.
(3) 5 E. & B. 870.

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which they were thus bailees to the extent of their lien and liability over to their bailors. The court refused so to restrict the right to recover.

Lord Campbell says:—

The last point that arises is, to what extent does the policy protect those goods? The defendants say that it was only the plaintiffs' personal interest. But the policies are in terms contracts to make good "all such damage and loss as may happen by fire to the property hereinbefore mentioned." That is a valid contract, and as the property is wholly destroyed, the value of the whole must be made good, not merely the particular interest of the plaintiffs. They will be entitled to apply so much to cover their own interest and will be trustees for the owners as to the rest. The authorities are clear that an assurance made without orders may be ratified by the owners of the property, and then the assurers become trustees for them.

Wightman J. also says:—

Then comes the question, can the plaintiffs recover their value? It seems to me that they may, unless there be something making it illegal to insure more than the plaintiffs own interest.

Mr. Lush does not contend that any statute applies:

It has been decided that, if no statute applies, a person insured may recover the amount contracted for, and that being so, I think the plaintiffs entitled to recover the whole value.

The policy in the present case covers "all such loss or damage by fire as shall happen to the property above mentioned," and upon the authorities quoted the appellant is, therefore, entitled to recover the full amount of loss caused by the destruction of the property, and is not limited to the value of his life interest. A contrary conclusion would cause great inconvenience to insurers of property, the title to which is, as in the present case, in the wife in fee simple, the husband having merely his marital interest, with the contingency of being tenant by the courtesy if he should survive his wife. If the law were not as we find it to have been settled to be by the above cited authorities, it would be requisite, in all such cases, to effect two separate

contracts of insurance, and pay two premiums, although nothing in the policy or the law would have called for such a distinction, and although, upon a loss happening, the money recoverable under the wife's assurance would belong to the husband. I am of opinion that the appeal must be allowed, and the rule for a new trial in the court below discharged, with costs to the appellant in both courts.

FOURNIER J.—I think that the sending of the circular by the company, and the compliance with the terms of such circular by the assured in giving up the policy to the company's agent, was a surrender of the policy, and the appeal should therefore be dismissed.

HENRY J.—The court below, apparently in very few words, gave judgment against the plaintiff in the action on the ground that there was not a legal waiver of the fifth condition, and that the damages were excessive. Now, if we look at the issues to be tried, I think it will be seen that the interest of the plaintiff Caldwell is admitted by the pleadings at the time of the policy. There is no plea denying his right at the time he obtained the policy, and I think the fifth plea, when criticized, raises the only issue :—

And, for a fifth plea to the said count, the defendant company says that the said insurance was effected, and the said policy applied for, by the said Samuel Caldwell, who was then the owner of the said dwelling-house, and the loss, if any, under said policy was made payable to one George Anderson, and after the date of said policy, and before such alleged loss, the said Samuel Caldwell conveyed all his interest in said dwelling-house to one Thomas Bayers.

That is merely pleading evidence so far, but the whole substance of the plea, and the issue raised under it, are as follows :—

And the plaintiffs had no interest therein and sustained no loss or damage from the burning of the said dwelling-house as aforesaid.

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We are to consider whether the plaintiffs or either of them—for under the law of Nova Scotia either of the plaintiffs can recover—had any interest at the time of the loss, and I think that Samuel Caldwell had an insurable interest, as the husband of Mrs. Caldwell; that he held the fee, and he held an insurable interest; and, if no policy had issued, he would have been entitled to ask for a policy from an insurance company for the full value of the property, and according to the English authorities, that title would have been good for him to obtain a policy for the full value of the house that was insured, and entitled him to have recovered for the loss of that house. He had, then, under the evidence in this case, at the time of the issuing of the policy, a title; we need not enquire what it was, if it amounted to an insurable interest. The parties granted a policy upon it, and it was for them to allege and prove that he had not an insurable interest at the time he effected the policy. This they have not done. On the contrary, they admit he was the owner. But, they say, afterwards he transferred the property, and at the time of the loss had no interest therein. That is the sole question, and it is not necessary for us to enquire and trace out was done with the property through half a dozen different transfers, and this policy might have stood there for years and the party might not have had a right to recover because he had not an insurable interest at the time of the loss. If it were burned at the time when the title was out of him, of course he could not recover, but the only issue for the jury to try was: Had he any interest at the time of the loss? I think he had a good interest. Then one of the conditions required that proof should be put in within five days. What is the evidence? That it was not put in till from fifteen to sixteen, or eighteen days after the time. But, when we look at

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the circumstances of the case, we find the real defence and objection to pay was not for want of preliminary proofs. It was in the very first start the plaintiff was told, "Your policy is cancelled." That is the defence; and if you look at the letter of Mr. Pyke, the general agent of the company, he puts it altogether on that. He says: "Whether you are insured with the Western or not, I am certain you are not with us, because your policy is cancelled." I do not think it was the intention of Anderson, when he went there, to cancel that policy. There is no evidence of the payment of the premium by the company, or when it was to be paid back, or that it was offered to be paid back, and Mr. Pyke says it was to be paid some time thereafter. No time was settled or arranged for. We can then fairly conclude that the parties were bound to return the premium when they attempted to cancel the policy on a certain day. It might have been only a few dollars or several hundred dollars, according to the value of the property insured, but law and justice require them to pay back the unearned premium, just as much as it did the other parties to respect their right to cancel the policy. I dispose of that by saying that the policy was not cancelled. Further, that policy was delivered to Greer, as the agent of the Western Insurance Company. Anderson knew the position of the Stadacona Insurance Company, and it was not as the agent of that company that he placed the policy in Greer's hand, but as the agent of the Western. Then there is not the slightest ground for saying the policy was cancelled. If it was not done, then, by the act of Caldwell, it could not be done by anybody. Now, although Anderson was the agent of Caldwell to effect the insurance, there is no evidence whatever that he authorized him to cancel that policy. Caldwell would not be bound. True, Anderson was his creditor, and there was an arrangement that the

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money should be paid to him in the case of loss, but the action must be brought in the name of Caldwell, who is entitled to the whole amount, and then his liability to Anderson arises. There are some cases to support the opposite view, but I think it is confined to the case when it is stated in the body of the instrument that the party mortgaged all the property to the extent of his interest in the policy and the value of the property. Under the circumstances then, I am of opinion that Anderson had no authority whatever to cancel the policy.

Then we come to the story of the waiver. I do not consider the matter as a matter of waiver at all. I think from the evidence of what took place, that the particular special objection that was made to the settling of this policy was that it was cancelled. They would give no satisfaction, and put it upon that ground, and I think they had no other ground in view, or they might take it to lead the party off the track, as has been done since I have had the honor of a seat on this bench; plead one thing, and then come in and prove another. Whether it was in time or not, it would operate fraudulently against the interests of Caldwell. I think the parties, after placing their defence solely on the ground of the cancellation of the policy, should not be allowed to come in now and say, you did not produce the proofs in proper time. Moreover they had the policy in their possession, and Mr. Richey had not the means of making out the claim. I think the parties are estopped from setting this up. There are other issues raised—fraudulent loss, the insurance company to have an account, and so on. There is no evidence, to my mind, that creates any difficulty against the plaintiff's right to recover. We have a replication here, the second replication to the plea I have just been referring to—the fifth plea. The plaintiffs say:

That they or one of them was, at the time of their making said

insurance, the owner of said house and premises, and although the said building and premises were afterwards formally conveyed to one Thomas Bayers, yet before the said loss the said Thomas Bayers reconveyed the same to the said Sarah Caldwell, then and still being the wife of the said plaintiff Samuel Caldwell, and the said Sarah Caldwell from thenceforth and from the making of said policy, and until and at time of the said fire, and the said loss, was the owner thereof and interested therein.

That brings back the title in answer to this plea, and sufficiently specifies the legal requirements to entitle the parties to recover. I think, therefore, the judgment ought to be in favour of the appellant Of course the wife's name, if necessary, may be struck out of the record.

GWYNNE J.—This is an action wherein Samuel Caldwell and Sarah his wife declare as plaintiffs upon a policy of insurance against loss or damage by fire, executed under the common seal of the defendant company, whereby the defendants insured the plaintiff Samuel Caldwell against loss or damage by fire to a certain dwelling-house described in the policy. The policy contained the following clause: "Loss, if any, under this policy, payable to George R. Anderson Esq., Halifax N.S." The declaration contained also a count that the defendants wrongfully deprived the plaintiffs of the use and possession of the policy, and the plaintiffs claimed $5,000, the amount insured by the policy being $4,000.

To this declaration the defendants pleaded several pleas, and the parties having eventually joined issue, the record came down for trial before Mr. Justice James without a jury. The material points, relied upon by the defendants against the plaintiffs recovery at the trial were:—

1st. That Anderson, to whom the loss, if any, was declared by the policy to be payable, was the person insured, and that he should have been the plaintiff.

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2nd. That the policy had been cancelled before loss under the provisions of a condition in that behalf endorsed on the policy.

3rd. That Samuel Caldwell named in the policy had no interest in the property insured at the time of the loss, having sold the property, whereby, as was contended, the policy became void.

4th. That proof of loss was not put in within the time prescribed by a condition in that behalf endorsed on the policy. The plaintiffs contended that this condition was waived, but in answer to this contention the defendants insisted that the waiver was not in writing endorsed on the policy and signed by the company's manager, as alleged to be required by a condition endorsed on the policy. The plaintiffs also insisted that they were entitled to recover the full amount of the loss under the second count, upon the ground that the defendants had wrongfully deprived plaintiffs of the policy, and prevented their making proof as required by the conditions endorsed thereon.

The learned judge before whom the case was tried without a jury, rendered a verdict in favor of the plaintiffs for the whole amount of the policy and interest thereon.

A rule *nisi* having been obtained to set aside this verdict as against law and evidence, and upon the points taken at the trial upon motion for a non-suit, the Supreme Court of the Province of Nova Scotia made the rule absolute upon the ground, that although the court was of opinion that a waiver by the defendants of the obligation upon the plaintiffs to make proof of their loss within five days, as required by a condition on the policy, had taken place, still that such waiver was ineffectual as not being in writing endorsed on the policy as required by the twelfth condition in that behalf, and that for this reason the plaintiffs could not recover.

Against this rule absolute the present appeal is brought, and the whole matter has been opened before us, and a point has been made, which does not appear to have been suggested in the courts below, namely, that Sarah, wife of Samuel Caldwell, is improperly joined as plaintiff, she not having been named in the policy, and having, in fact, acquired any interest she has in the property insured subsequently to the execution of the policy. This objection, however, is disposed of by the ninety-fourth section of the revised statutes of Nova Scotia, 4th series, ch. 94, which provides that the joinder of too many plaintiffs shall not be fatal to any action, but the plaintiff or plaintiffs entitled may recover. We may treat the action, therefore, as having been brought in the name of Samuel Caldwell alone.

Now, that Samuel Caldwell, and not Anderson, was the person insured by this policy, and that he, therefore, was the proper person to sue upon the policy, cannot, in my opinion, admit of a doubt, and in fact this court has so decided in *McQueen* v. *The Phœnix Insurance Co.* (1) A case was cited from the Supreme Court of Nova Scotia in support of the contrary contention, *Brush* v. *Ætna Insurance Co.* (2). Whether or not we should concur in that decision if the precise point before the court should arise, it is not necessary to express any opinion, because the material facts upon which, in that case, the judgment of the court was rested, do not exist in the case before us. That was an action of assumpsit, and not, as this is, an action of covenant upon a policy under seal, and the expression in the policy upon which the right of the plaintiff there to sue turned was—"loss if any payable to the order of Peter Brush (the plaintiff), his interest therein being as mortgagee," and it appeared that the policy was obtained by the mortgagor in pursuance of a covenant entered into by him with Brush,

(1) 4 Can. S. C. R. 660. (2) 10 Old. 459.

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that he, the mortgagor, should insure the premises in the name of and for the benefit of Brush. These circumstances were rested upon as distinguishing that case from *Nevins* v. *Rockingham Fire Insurance Co.* (1), cited by the court as deciding that where a policy provides that the insurance, in case of loss, shall be paid to a third person, that is, not describing him as mortgagee, the action should be in the name of the party to the policy. The case of *Brush* v. *Ætna Insurance Co.* is therefore quite distinguishable from the present case. It is clear to me, also, that the defendants must fail upon their contention that the policy was cancelled before the loss occurred. By the second condition endorsed on the policy, it was provided, that if from any cause whatever the company or its agents should desire to terminate the insurance effected by the policy, it should be lawful for the company or its agents so to do by notice to the insured or his representative, and to require the policy to be given up for the purpose of being cancelled, provided that in any such case the company shall refund to the insured a ratable proportion, for the unexpired term, of the premium received for the insurance. On the 28th June, 1877, while the policy was in full force, the company's agents sent to Mr. G. Anderson, the person named in the policy, as the person to whom the loss, if any, was to be payable, a circular in the words following:—

Halifax, June 28th, 1877.

Mr. I have to inform you that the Stadacona Insurance Company has ordered me to notify policy holders to insure elsewhere, as the company has decided to wind-up. You will, therefore, take notice that their policy of insurance is cancelled from this date; unearned premiums will be returned hereafter.

Yours &c.

(Sgd.) G. M. GREER,
Agent.

(1) 5 Foster (N. H.) 22.

No circular was sent to Caldwell. Anderson, to whom the above circular was sent, and who had no instructions from Caldwell authorizing him to surrender the policy, although he had authority to effect insurance upon the property, upon receipt of the above circular took the policy, which, from the time of its being effected, was in Anderson's custody, and left it with Greer, who was also agent of the Western Insurance Company, for the purpose, as I think may be inferred from the evidence, of enabling Greer to take a description of the property, so that he should transfer the policy from the defendants to the Western, upon which being done, the cancellation contemplated by the defendants' circular might be consummated, but no proportion of the premium for the unexpired term having been paid or tendered, and no substitutional policy in the Western having been effected and accepted, it is plain that no cancellation of the policy executed by the defendants ever was consummated, even assuming Anderson to have been competent to bind Caldwell by accepting a policy in the Western in lieu of that in the defendant company (1).

As regards the point of waiver, the ninth condition endorsed on the policy provides that :—

All persons insured by the company sustaining any loss or damage by fire, are immediately to give notice to the company, or its agents, and within five days after such loss or damage has occurred, are to deliver as particular an account of their loss or damage as the nature of the case will admit of, and make proof of the same by their declaration or affirmation, and by their books of account, or such other proper evidence as the directors of this company or its agents may reasonably require, and until such declaration or affirmation, account, and evidence are produced, the amount of such loss, or any part thereof, shall not be payable or recoverable.

And the twelfth condition provides that—

None of the foregoing conditions or stipulations, either in whole or

(1) *Hollingsworth* v. *Germania Insurance Co.* 12 Am. Rep. 579.

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in part, shall be deemed to have been waived by or on the part of the company, unless the waiver be clearly expressed in writing by endorsement on the policy signed by the manager of this company for Canada.

It was contended upon the authority of *Blake* v. *Exchange Mutual Insurance Co.*, decided by the Supreme Court of the State of Massachusetts (1), that the twelfth condition endorsed on the policy, related to a waiver of provisions of the contract, and not to a waiver of the performance of provisions, which a waiver of proofs of loss is, and so that in this case a verbal waiver, which was abundantly proved, was sufficient. I do not think it necessary to express any opinion upon this point. It would be unreasonable and unjust in the extreme that the defendants, who by their agent refused, immediately after the occurrence of the loss, to return to the insured his policy for the purpose of enabling him to see, and comply with, its provisions as to proof of loss, and who have ever since insisted upon their right to retain the policy as cancelled before the loss occurred, should be heard to insist that the policy was not cancelled, but made void by default of the assured in making proof of his loss within five days, a default which but for the defendants wrongful detention of the policy might never have occurred; a stronger case could not, I think, be well conceived for a good answer by way of estoppel in *pais* to a pleading setting up such a defence, and this is what is in substance done by the surrejoinder, to which the defendants do not demur, but merely join issue in fact, an issue, which, upon the evidence, must be found against them. I am, moreover, of opinion that the defendants' wrongful detention of the policy entitles the plaintiff to recover to the full amount of his loss within the amount insured by the policy, under the count for wrongfully depriving the plaintiff of his

(1) 12 Gray 266.

policy. If, upon the demand made by Mr. Richey upon behalf of the plaintiff, immediately after the occurrence of the loss, the defendants had given up the policy to the plaintiff, the latter could, by giving proof of his loss within the time prescribed by the condition in that behalf upon the policy, have entitled himself to recover, and could have recovered under the policy, the amount of his loss within the amount insured by the policy, and such amount as it appears to me upon the authority of *Woodhouse* v. *Whitely* (1), (which, although a *nisi prius* decision, seems a sound one,) is the proper measure of damages recoverable under the second count, if, which is really the sole material point in this case, the plaintiffs interest in the policy did not absolutely cease and determine upon the sale by him of the insured premises to Bayers by the deed dated 2nd February, 1876. By deed of that date Samuel Caldwell, the plaintiff, conveyed the insured premises in fee simple to one Bayers, who, by deed dated the 3rd of February, 1876, conveyed the same premises in fee simple to Sarah, the wife of the assured, who then had and still has living, a child born of her marriage with the plaintiff. These conveyances have the appearance of having been adopted merely as means of transferring the property from Samuel Caldwell to his wife Sarah in fee, but whether that was their object, or that the deed to Bayers was intended to operate as conveying, as it purports, the beneficial interest as well as the legal to him absolutely, and that the conveyance by him to the plaintiff's wife was a wholly independent sale, subsequently contracted for, the evidence fails to give any indication; nor is it necessary that it should for the purposes of the defendants' contention, which is that immediately upon the execution of the deed of the 2nd February, 1876, to Bayers, all the plaintiff's interest in the policy ceased, and that

(1) 4 F. & F. 1086.

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he cannot recover thereunder for the loss subsequently occurring to the insured property.

The usual mode of averring the interest of the insured in a declaration upon a policy of insurance against loss by fire is:—

> That the plaintiff, at the time of making the policy, and thence until and at the time of the damage and loss hereinafter mentioned, was interested in the said premises so insured as aforesaid to the amount so insured thereon.

But in no decided case is it held that the interest which the assured had at the time of the insurance being effected continued thence continuously until the loss, should appear in evidence to entitle the assured to recover. In *Sadlers Co.* v. *Badcock* (1), Lord Hardwick held merely that the insured should have an interest in the property at the time of insuring, and at the time the loss happens, and the usual form of plea to the above averments of interest in the declaration traversing such interest is, as is the fourth plea to the declaration in this case, that the plaintiff was not at the time of the alleged damage and loss interested in the said dwelling-house as alleged.

The question as to the revival of a policy in favor of the assured upon a reconveyance to him after a sale by him of the insured property does not appear, so far as my research has enabled me to find, ever to have come up for decision in the English courts. The case of *Reed* v. *Cole* (2), cited in the argument before us, is not the case of a revival of a policy upon a reconveyance after a sale by the assured, but of an interest reserved by the assured at the time of the sale, which the court held to be sufficient in that case to enable him to recover under the policy, notwithstanding the sale. The action was one upon the case upon articles of agreement constituting a society for the mutual assurance of each other's

(1) 2 Atk. 554. (2) 3 Burr. 1512.

ships, and which was executed by the plaintiff and the defendant, whereby the parties thereto engaged that when and so often as any of the ships wherein any of the members of the society had property should be lost, the rest should contribute to such loss. Every member was obliged to prove a property of £500 in the ship, and if he would cease to be a member, he was obliged to give six months' notice. The defendant pleaded that the plaintiff had parted with his interest in the ship before the loss happened. To this plea the plaintiff replied that by articles of agreement with the purchaser of the ship, the plaintiff had agreed to pay £500, if a loss happened within three months, and therefore that he was interested during the voyage in which the loss occurred; to this the defendant demurred, and it was held, that in virtue of this agreement, the plaintiff still had an interest in the safety of the ship, and that he had not parted with all his interest in it, but continued to be interested quoad his loss; and that, as he continued contributory to the losses of others at the time when his loss happened, it was but just and equitable, and within the words and meaning of the agreement, that they should contribute to his.

The American courts do, however, furnish cases bearing upon the question.

Now, the policy declared upon in this case upon its face, is stated to be upon a building "owned and occupied by the assured as a dwelling," but there is nothing in the terms of the policy, or in the conditions endorsed thereon, to the effect that in the event of any alienation, sale or transfer of the property insured, or any change in the title thereto, the policy shall become void; the case stands, therefore, upon the general law affecting a contract of insurance against loss by fire, without any such stipulation expressed therein, and the obligation of the contract is to make good to the assured

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any loss or damage to the property by fire occurring within the time for which the policy protects it, within the amount named in the policy, and such loss or damage, as is laid down in *Laurent* v. *The Chatham Insurance*, by the Superior Court of the state of New York (1), is to be estimated according to the actual value of the property at the time the loss occurs, and not upon the probable value to the plaintiff of his enjoyment of his interest in the property.

In Phillips on insurance, paragraph 93, it is said that mortgaging the insured premises is not an "alienation" within the provision of the charter of an Insurance Co. making void an alienation by sale or otherwise, citing as authority *Conover* v. *Mutual Insurance Co., of Albany* (2), in which one ground stated for the decision is that the assured still retained his insurable interest to the amount of the full value; and in paragraph 187, Phillips says that a change of an absolute ownership to an interest as mortgagee or other interest, not required to be specially described in the policy, does not defeat a policy on the subject which does not specify the kind of interest which is insured, and he gives the case in Burrowes above noted and *Stetson* v. *Massachusetts Mutual Fire Insurance Co.* (3), as authority for this proposition. The latter case was one where, to an action upon a fire insurance policy, the defendants pleaded that the plaintiff, being the owner of a dwelling-house, insured it in the defendant company (of which by insuring he became a member), and that after effecting the policy, and before the fire, he conveyed one-half in value of the dwelling-house to one T. H. to hold in fee simple, saving a term of seven years which the plaintiff reserved therein, which term he immediately assigned to the said T. H.

(1) 1 Hall N. Y. 44. (2) 3 Denio 254.
(3) 4 Mass. 330.

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and one L. G., so that at the time the house was consumed, he, the plaintiff, was not the owner of the house according to the form and effect of the policy and the rules of the company. To this plea the plaintiff replied that at the time of making the deed to T. H., he, the said T. H., conveyed back the same premises to the plaintiff by way of mortgage conditioned for the payment of a sum of money which the plaintiff averred was not paid pursuant to the condition, nor at any time. The plaintiff then set forth a lease from him to T. H. and L. G. of the premises comprised in the mortgage for the term of seven years, reserving a rent to be paid quarterly, with a right of re-entry reserved in case of non-payment; to this replication the defendants demurred, and it was held that taking all the writings together, the sale of the moiety was substantially to be considered as a conditional sale after the expiration of seven years, and it was held that the replication was a good answer in law to the plea, and that the plaintiff was entitled to recover the full value of the building destroyed, within the amount for which it was by the policy insured. In *Bell* v. *Firemens Insurance Co.* (1), the Supreme Court of Louisiana in 1843 seems to have entertained a contrary opinion, but in the same case, upon its coming up again on a bill of exceptions after a second trial, and in *Bell* v. *Western Marine and Fire Insurance Co. of New Orleans* (2), which was an action upon a policy covering the same property, the court cites and follows the cases above cited (3) and expressly held that it is not necessary that the interest of the insured at the time of the insurance, and at the time of the loss, should be identical, when the policy contains no clause forbidding sale or change of interest without the assent of the insurers. In the same court in 1841, in the case of

(1) 3 Rob. La. 423. (2) 5 Rob. La. 443.
(3) Mass. 330 and 3 Burr. 1512.

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Macarty v. *The Commercial Insurance Company* (1), where the owner of property insured had made a donation *inter vivos* of the insured property by authentic act in full property to the donee without any restriction or qualification whatever, except against alienation otherwise than by last will and testament, it was upon a very clear principle decided that evidence could not be received to show that it was agreed orally between the donee and the donor that the latter was to receive and enjoy the rents and profits of the premises during his lifetime, pay the taxes, and make all necessary repairs, with a view to establishing that he had a qualified interest or right of property amounting to an insurable interest sufficient to enable him to recover, under a policy effected before the donation, for a loss by fire occurring after it. The court, however, proceeded to say, that even if the evidence could have been received, the right to receive the rents which it was said the donee had agreed to let the plaintiff enjoy was an interest of a character and value so different from that which the assured had at the time of the insurance being effected, that he could not recover under the policy, at least, not to the full amount of the damage done to the insured property: whatever weight we should feel disposed to give to this expression of opinion is materially diminished by the consideration that it was quite unnecessary to the determination of the case before the court, which proceeded upon the inadmissibility of the evidence which was offered to contradict the authentic instrument, and which evidence had been, and rightly as the court held, rejected. The opinion seems at variance with the rule as laid down by Mr. Phillips in his 187th paragraph above quoted, and with the cases cited by him in support of that rule, and with other cases, for a reservation of a right to receive and enjoy the rents,

(1) 2 Bennet's Ins. Cas. 60.

issues and profits of an estate for the life of the grantor of the fee simple to a stranger, subject to such reservation effected by a legal instrument, seems to entitle the owner of the estate so reserved for life, to insure to the full value of the property; and to recover upon a policy which had been effected by himself, when seized in fee simple, equally as in the case of a change from absolute ownership to an interest as mortgagee, or to any other interest not required to be specifically described in the policy.

In *Franklin Insurance Co.* v. *Drake* (1), the Court of Appeal for the state of Kentucky, in 1841, held that a husband, having by his wife a living child, had a right to insure in his own name a building of which his wife was seized in fee, and upon loss by fire occurring, to recover the full value of the building destroyed not exceeding the amount insured by the policy. The court said:

> Drake (the husband) had unquestionably an insurable interest and a right to effect the policy; he had a right to the use and enjoyment of the premises or their rents during the joint lives of himself and wife, and he would be tenant by the courtesy after the death of his wife. If the assured had an insurable interest at the time of the insurance, and also at the time of the loss, he has a right to recover the whole amount of the damage to the property not exceeding the amount insured, without regard to the value of the assured's interest in the property.

Worthington v. *Bearse* (2), decided by the Supreme Court of the state of Massachusetts in 1866, is an express authority that in the case of an absolute sale of property insured, and the subsequent reconveyance of the property to the assured, a policy effected before the sale becomes revived upon the reconveyance so as to entitle the person insured by the policy to recover for a loss occurring after the reconveyance. The property nsured in that case was a ship, and Bigelow C.J.,

(1) 2 B. Mon. 48. (2) 12 Allen 382.

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delivering the judgment of the court, declares the law to be that, although for a time, namely, while the property in the vessel should be in another, the assured had parted with his insurable interest, still his rights to recover on the policy was not gone for ever, that it was only suspended during the time that the title of the vessel was vested in the vendee, and was revived again on the reconveyance to the assured during the term specified in the policy. Although that was the case of a reconveyance of the same estate as had been previously sold by the assured, and it is contended here that the estate of the assured at the time of the loss was quite different from that which he had at the time the insurance was effected, still, the reasoning upon which the judgment in that case was rested, appears to be equally applicable to the present case. The Chief Justice there says :

> The insurance was for one year. There was no stipulation or condition in the policy that the assured should not convey or assign his interest in the vessel during this period. The contract of insurance was absolute to insure the interest of a person named in a particular subject for a specific time—for this entire risk an adequate premium was paid and the policy duly attached, because the assured at the inception of the risk had an insurable interest in the policy. So too at the time of the loss all the facts necessary to establish a valid claim under the policy existed. No fact is shown from which any inference can be made that by the alienation of the title to the vessel, the risk of the insurers upon the subsequent re-transfer of the vessel to the assured was in any degree increased or affected, or that any loss, injury, or prejudice to the underwriter was occasioned by the fact that the absolute title to the vessel was temporarily vested in a third pers n.

And again :—

> The sole effect would be to suspend the risk for the time during which, by reason of the transfer, the assured had no interest in the subject insured and to revive it as soon as the original interest was re-vested in him. The transfer of the vessel rendered the policy inoperative not void. It could have no effect while the assured had no interest in the subject insured; but when this interest was revived

or restored during the term designated in the policy without any increase or change of risk or other prejudice to the underwriter, there seems to be no valid reason for holding that the policy has become extinct—inasmuch as neither the person nor the subject insured is changed and the risk remains the same, the intermediate transfer is an immaterial fact which can in no way affect the claim under the policy.

In the case before us it is however contended that, although neither the person nor the subject insured is changed, still the interest of the person in the subject was wholly changed, and became of quite a different character from what the interest of the assured was when the policy was effected; but the interest of Samuel Caldwell, after the re-conveyance by Bayers to Samuel's wife, Sarah, was of such a nature as entitled him to insure to the full value of the property, and he retained such interest at the time of the loss. There is nothing in the evidence from which any inference can be drawn that, nor is there any suggestion even that, the risk was increased after the transfer to the wife, nor that the insurers had not the same security arising from the nature of the interest of Samuel Caldwell after the execution of the deed to his wife by Bayers that he would use all the precautions to avoid the calamity insured against equally as if his interest had remained identically as it was when the policy was effected. The insurable interest, then, of Samuel Caldwell in the property insured after the conveyance to his wife by Bayers, being such as to entitle him to ensure to the full value of the property equally as the interest which he had when the policy was effected, and such interest existing at the time of the loss, and there being nothing in the policy prohibiting any change of title during the time designated in the policy for its continuance, the condition of the policy was, as it appears to me, satisfied, and there being no suggestion of any increase of risk or prejudice to the insurers by reason of the change which

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has occurred in the interest of the assured, as well upon principle as upon the express authority of *Worthington* v. *Bearse*, which appears to me to be founded on sound reason, and upon the authority of the text of Phillips, supported as it is by authority, I am of opinion that the plaintiff, Samuel Caldwell, is entitled to recover, under the policy to the full value of the house destroyed within the amount insured. He was entitled to the uncontrolled possession and enjoyment of the property, or of its rents and profits, during the joint lives of himself and his wife, and he was tenant by the curtesy initiate, and entitled to payment of the full amount of damage done to the property insured by the risk ensured against within the amount stated in the policy, unless the defendants should avail themselves of the benefit of the condition endorsed on the policy, enabling them to re-instate the house so that the insured should have the full benefit of his right of possession and enjoyment.

As to the contention of the defendants, that the policy is avoided by fraudulent representation of the value of the house and of the amount of loss, I can see nothing in the evidence in support of this contention. What the plaintiff paid for the house, where it stood upon the lot from which he removed it, can afford no criterion of its value as it stood upon the lot where it was rebuilt. The learned judge before whom the case was tried, without a jury, does not appear to have thought the amount stated in the policy to be in excess of the value of the house destroyed, nor does such a contention appear to have been brought under his notice at the trial, and in the rule taken out in the Supreme Court of Nova Scotia to set aside the verdict, the ground that the verdict is for excessive damages, is not taken. I see no sufficient reason, therefore, to justify the setting aside of the verdict and send-

ing the case down for a new trial. I think, therefore, that this appeal should be allowed with costs, and that the rule *nisi* for a new trial in the court below should be discharged with costs, and that the name of Sarah Caldwell as a plaintiff should be erased from the record, and judgment entered for Samuel Caldwell as sole plaintiff.

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Gwynne J.

Appeal allowed with costs.

Solicitor for appellants: *M. H. Richey.*

Solicitor for respondents: *P. B. Casgrain.*

JOHN INGS (Defendant) .....APPELLANT;

AND

THE PRESIDENT, DIRECTORS AND COMPANY OF THE BANK OF PRINCE EDWARD ISLAND (Plaintiffs) ..... RESPONDENTS.

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*Feb'y.24,25.

*June 23.

ON APPEAL FROM THE SUPREME COURT OF PRINCE EDWARD ISLAND.

Demurrer—Shareholder or contributory of bank—Action against—Right of set-off—45 Vic., ch. 23, sec. 76—Construction of.

An action was brought by the bank of P. E. I. against the appellant on a promissory note, to which he pleaded set-off of a draft made by the plaintiffs and endorsed to him; to this there was a replication that the defendant was a contributory on the stock book of the bank, and knew that the bank was insolvent when the draft was purchased; the defendant demurred on the ground that the replication did not aver that the debt for which the action was brought was due from the defendant in his capacity as shareholder or contributory:

Held, reversing the judgment of the court below, that the replication was bad in law (1).

J. I., the appellant, gave to one Q. his note for $6,000, which was en-

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

(1) 45 Vic. ch. 23 sec. 76.

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dorsed to the bank of P. E. I.; the Union Bank of P. E. I. at the time held a check or draft, made by the bank of P. E. I., for nearly the same amount, and this draft the appellant purchased for something more than $200 less than its face value; being sued on the note he set-off the amount of such check or draft, and paid the difference. On the trial he admitted he had purchased it for the purpose of using it as an off-set to the claim on his note, which he had made non-negotiable, and he also admitted that if he could succeed in his set-off and another party could succeed in a similar transaction, the Union Bank would get their claim against the bank of P. E. I., which had become insolvent, paid in full. The judge on the trial charged that if the draft was endorsed to the defendant to enable him to use it as a set-off, he could not do so, because he was a contributory within the meaning of the 76th section of the Winding-up Act, and that the Act which came into force on the 12th May, 1882, was retrospective as regards the endorsements made before it was passed, but within thirty days before the commencement of the proceedings to wind up the affairs of the bank. The jury under the direction of the judge, found a general verdict for the plaintiff for the amount of the note and interest, which the Supreme Court refused to disturb. On appeal to the Supreme Court of Canada:

Held, reversing the judgment of the court below, that appellant having purchased the draft in question for value and in good faith prior to 26th May, 1882, the Canada Winding-up Act, 45 Vic. ch. 23, was not applicable, and therefore the appellant was entitled to the benefit of his set-off, and that the Winding-up Act was not retrospective as to this endorsement.

By sections 75 and 76 Vic. ch. 23, it is provided that if a debt due or owing by the company has been transferred within 30 days next before the commencement of the winding up under that Act, or at any time afterwards, to a contributory who knows, or has probable cause for believing, the company to be unable to meet its engagements or to be in contemplation of insolvency under the act, for the purpose of enabling such contributory to set up by way of compensation or set off the claim so transferred, such debt cannot be set up by way of compensation or set off against the claim upon such contributory.

Held, that the sections in question only apply to actions against a contributory when the debt claimed is due from the person sued in his capacity as contributory.

APPEAL from a judgment of the Supreme Court of

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Prince Edward Island, refusing to set aside a verdict for the plaintiff and order a new trial.

The facts of the case and the pleadings are sufficiently set out in the above head note.

L. H. Davies Q. C. for appellant:

When appellant purchased for value the draft, he had a perfect right to do so, unless the statute 45 Vic. ch. 23 interferes.

But it is contended that sect. 76 of the Act respecting Insolvent Banks deprives the appellant of the ordinary right of set off as respects this draft, because he was placed on the list of contributories as the holder of some shares in the insolvent bank, and although it is not alleged he made any default in paying the calls on him as such shareholder.

I maintain that this section does not touch the present case or take away his right of set off under the 60th section.

The note sued on is dated 1st May, 1882. The draft pleaded as set off was endorsed to the appellant 5th May, 1882.

The Act respecting Insolvent Banks was passed 17th May, 1882.

The commencement of the winding up was not till 26th May, 1882. And therefore the purchase of the draft by the appellant could not be in contravention of the Act, for the Act had not been passed at the time of the purchase.

The right of the parties must be determined by the state of facts existing at the time of the transfer of the draft. See remarks of Smith J. in *Watson* v. *Midwales Railway Company* (1).

Again, the appellant was placed or the list of contributories for one reason and one reason only, viz: Because he was a holder of some shares of Bank of P. E.

(1) L. R. 2 C. P. 601.

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Island Stock of the orignal value of £10 or $32.44 each, and in respect of which he was liable to a call for $64.88 on each share. He has paid all calls and is not sued as a contributory.

This is a right to prove for a debt, and statutes affecting such rights are held not to be retrospective. *Re Joseph Suche & Co.* (1).

The right of set off is liberally allowed by the court, unless expressly taken away by statute, and in case of doubt will be allowed to prevail. The right of set off having been given by statute the onus of proof is on the party denying the right. Lindley (2).

This is shewn by Blackburn L.J. in *Bailey* v. *Finch* (3).

The fact that a statute provides that assets of a company being wound up shall be divided *pari passu*, does not deprive the defendant of the right of pleading set off in an action for calls by liquidators of a company being voluntarily wound up. *Brighton Arcade Co., limited*, v. *Dowling* (4); per Lindley L.J. in *Mersey Steel Co.* v. *Naylor* (5).

There were no equities attaching to this draft, nor is there any equity to prevent the holder of an overdue draft from indorsing it away to avoid set off. *Re Commercial Bank* (6); *Oulds* v. *Harrison* (7).

Right of set off is never an equity attaching to a bill, and even in the case of debentures it must be:—

1. An equity subsisting at date of assignment.

2. Not subject to a debt which arose afterwards on a previous contract. *Re China S. S. Co.* (8).

R. R. Fitzgerald Q.C. and *F. Peters* for respondents contended that this set off cannot be allowed:—

(1) 1 Ch. D. 48.
(2) Pp. 1321-3.
(3) L. R. 7 Q. B. 43-5.
(4) L. R. 3 C. P. 175.
(5) 9 Q. B. D. 667.
(6) L. R. 1 Ch. App. 538.
(7) 10 Exch. 572.
(8) L. R. 7 Eq. 243.

First—Because this transaction was only a contrivance to obtain a preference for the Union Bank over other creditors of the insolvent bank, and that appellant was not the real beneficial holder of the draft sought to be set off.

Fair v. *McIver* (1); *Lackington* v. *Combes* (2); *Foster* v. *Wilson* (3); *Watson* v. *Mid Wales Railway Co.* (4); *London, Bombay and Med. Bank* v. *Narraway* (5); *Bailey* v. *Finch* (6); *Ince Hall Rolling Mills Co.* v. *The Douglas Forge Co.* (7).

Secondly—Under the Winding-up Act, 45 Vic. ch. 23, this set off is taken away by section 76.

The appellant comes clearly within this section; he was a contributory, and he knew that the insolvent bank was unable to meet its obligations, and that it would go into insolvency under this Act so soon as it passed, and he had the draft transferred to him within the prohibited time, and for the purpose of enabling him to set it off against the claim upon him.

The word "claim" in the 76th section, is general, and includes all claims no matter whether for contribution or otherwise.

The object of this section was to prevent contributories from using the knowledge they had as shareholders to obtain a preference over other creditors. The disablity is personal to the contributory, and its object is to prevent the possibility of his using his position to secure an inequitable distribution of the assets of the insolvent company.

The respondents also contend that if the word "claim," in section 76, means only (as the appellant contends) a claim against the contributory in his capacity as contributory, then it would follow that in an

(1) 16 East 130.
(2) 6 Bing. N. C. 71.
(3) 12 M. & W. 191.
(4) L. R. 2 C. P. 593.
(5) L R. 15 Eq. 93.
(6) L. R. 7 Q. B. 34.
(7) 8 Q. B. D. 179.

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ordinary case a contributory would be allowed to set off any debt due by the insolvent company to him against calls made on him as a contributory, otherwise it was unnecessary to prevent it in the one case mentioned in the 76th section.

Such a conclusion cannot be correct, as it is contrary to the whole spirit of the statute, and to all the English authorities, which clearly establish that there is no right to set off as against calls on contributories. *Grissell's* case (1); *Calisher's* case (2); *Gill's* case (3); *In re White House & Co.* (4).

As to the transaction having taken place before the Winding-up Act was passed, and that the Act is not retrospective, we contend that it is unnecessary to claim any retrospective effect. The note sued on did not become due until after the Act passed, and no right of set off existed until it became due, our statute relating to set off being a transcript of the English statute. *Smith, Fleming & Co.'s* case (5).

The respondents also contend that set off is a matter of procedure only, and as a general rule statutes regulating procedure are retrospective in their effect. Maxwell on Statutes (6).

STRONG J.—I think it was very clearly and satisfactorily proved that the appellant acquired the draft which he seeks to set off *bonâ fide* and for a valuable consideration, and that he does not hold it as a trustee for the Union Bank; nor was it indorsed to him in order to carry out any fraudulent or colorable contrivance to enable the Union Bank to obtain a preference.

If the 76th section does not apply to the case, there can be no doubt but that under the second part of the

(1) L. R. 1 Ch. App. 528.
(2) L. R. 5 Eq. 214.
(3) 12 Ch. D. 755.
(4) 9 Ch. D. 595.
(5) L. R. 1 Ch. App. p. 538.
(6) 2nd Ed. page 271.

60th section it was perfectly legal for the appellant to purchase this draft, and he was entitled to set it off against his promissory note given to Quirk and indorsed by the latter to the respondents, and now sued on in this action.

I am of opinion that the 76th section does not apply for two reasons: In the first place, as the appellant bought the draft before the Act passed, to make it applicable to the appellant would be manifestly to give it an *ex post facto* effect, an objection which is not answered by calling the right of set off a mere matter of procedure. The rule being that an *ex post facto* construction will never be adopted when substantial rights are affected, even in respect of matters of procedure.

Next, the 76th section, in terms, is, as plainly as words can make it so, confined to cases of set off by contributories against claims for contributions, and this is not such a claim. The only argument against this interpretation, which the language of the clause manifestly calls for, is that so to construe it, implies that in respect of all claims other than those transferred within the time limited in sec. 75, the contributory would have a right of set off against his liability for calls; whether such a consequence would follow or not, it is not necessary now to decide, but certainly such an argument is entirely insufficient to warrant a construction which would place a contributory, who has paid up his calls but who is also liable to the bank as an ordinary debtor, in a worse position than other debtors; there is nothing in the statute depriving a debtor of the bank sued upon a promissory note from purchasing a negotiable instrument upon which the bank is liable, and setting it off; and a person who may happen to be a contributory, stands in no worse position in this respect than any other debtor of the bank, unless indeed we are to import by implication into the statute a prohibitory clause making

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Strong J.

a distinction between a debtor, who happens also to have been a contributory, and one who was not so liable; such a mode of construction I never before heard of, and no principle can be suggested, nor authority cited, to warrant it.

I think, therefore, the respondent wholly fails in supporting the judgment of the court below which must be reversed, both as regards the refusal to grant a new trial and on the demurrer, and the rule for a new trial must be made absolute in the court below as being against the weight of evidence and for mis-direction, and judgment entered for the appellant on the demurrer, with costs to the appellant in both courts.

Sir. W. J. Ritchie C.J. and Fournier and Taschereau JJ. concurred.

HENRY J.—I have no doubt that the party was entitled to take the note that he did, and that having taken it before the call was made upon him, he had a right to set it up against the claim of the bank. If he had purchased it after the call was made, he would stand in a different position. Here the call is of a certain and definite nature, and not a mere matter of account between the parties. If a call is made upon a contributory he is bound to pay it, unless the bank owes him at the time, in which case he has a right to a set off. I therefore agree in the judgment of my brother Strong.

Appeal allowed with costs. Judgment to be entered for defendant on demurrer, and rule for a new trial made absolute.

Solicitor for appellant: *M. McLeod.*

Solicitor for respondents: *R. R. Fitzgerald.*

AUSTIN J. ROBERTS (Defendant).....APPELLANT; 1884

AND

*Feb'y. 25.
*June 23.

LORENZO H. VAUGHAN, THOMAS A. VAUGHAN, ROBERT M. VAUGHAN (Plaintiffs)..... } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

Bill of exchange—Not stamped by drawer—Affixed by drawee before being discounted—Double duty affixed at trial—Knowledge of law relating to stamps—42 Vic. ch. 17—Plea that defendant did not make draft—Cons. Stats. N. B. ch. 37 sec. 83 sub-secs. 4 & 5—Evidence of want of stamp under—Special plea.

R. remitted by mail to *V.* a draft on Bay of Fundy Quarrying Co., Boston Mass., in payment of an account of the Co. of which *R.* was Superintendent. The draft, when received by *V.*, was unstamped, and *V.* affixed stamps required by the amount of the draft, and initialed them as of the date the draft was drawn, which was at least two days prior to the date on which they were actually affixed. The draft was not paid, and an action was brought against *R.*, who pleaded, according to provisions of Cons. Stats. New Brunswick ch. 37 sec. 83 sub-sec. 4, "that he did not make the draft." On the trial the draft was offered in evidence and objected to on the ground that it was not sufficiently stamped, the plaintiff having previously testified as to the manner in which the stamps were put on, and having also sworn that he knew the law relating to stamps at the time. The draft was admitted, subject to leave reserved to defendant to move for a non-suit, and at a later stage of the trial it was again offered with the double duty affixed.

The trial resulted in counsel agreeing that a non-suit should be entered with leave reserved to plaintiffs to move for verdict, Court to have power to draw inferences of fact.

On motion, pursuant to such leave reserved, the Supreme Court of New Brunswick set aside the non-suit and ordered a verdict to

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

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be entered for the plaintiffs on the ground that the defect in the draft of want of stamp should have been specially pleaded.

On appeal to the Supreme Court of Canada:—

Held, Strong and Gwynne JJ. dissenting, that double duty should have been placed on the note as soon as it came into the hands of the drawee unstamped, and that it was too late at the trial to affix such double duty, the plaintiff having sworn that he knew the law relating to stamps, which precludes the possibility of holding that it was a mere error or mistake.

Held also, that under the plea that defendant did not make the draft, he was entitled to take advantage of the defect for want of stamps.

Per Strong J.—That the note was sufficiently stamped and plaintiffs were entitled to recover.

Per Gwynne J.—That if the note was not sufficiently stamped the defence should have been specially pleaded.

APPEAL from a judgment of the Supreme Court of New Brunswick making absolute a rule to set aside a non-suit and enter a verdict for the plaintiffs, according to leave reserved.

The facts of the case are sufficiently set out in the judgments of Ritchie C.J. and Gwynne J.

Weldon Q.C. for the appellant.

Straton for the respondents.

Sir W. J. RITCHIE C.J.—The bill of exchange sued upon in this case is dated 25th July, 1881, and payable four months after date to L. H. Vaughan & Bros., at Pacific National Bank, Boston Mass., for $577.30. At the trial Mr. Weldon proposed to call witnesses to show that the draft was not properly stamped, and this was objected to.

The defendant was then called and examined, and says :—

I never put these stamps on or authorized any one to do so. I sent this paper to Mr. Vaughan to pay an account of the Bay of Fundy Quarrying Company. I was then at Mary's Point. Account was not due by myself.

L. H. Vaughan, one of the plaintiffs, says :

Received this draft in latter end of July, 1881. No stamps then on it. Stamped it myself. Cancelled them myself by figures 25-7-'81 on 25th July, 1881. Cannot give exact date of receipt; will not swear I got it on 25th July. A letter from Mary's Point ought to come in a day. Got it in a letter. Have not letter here.

Cross-examined :—

I stamped draft before using it at bank. May have stamped it at time or not before using it at bank. General course of business is to stamp note—sometimes immediately on receipt—other times when used. I think this was stamped on day received.

Re-cross examined :—

Can't tell without referring to books when it was used. Will not undertake to swear when this was stamped. Mary's Point is, by one road, six miles, by another, eight or ten miles from Harvey, Don't known when mail comes down. (I admit draft subject to leave to defendant to move to enter a non-suit, Mr. Palmer to be at liberty to supply further evidence bearing on the point).

Mr. Palmer offers protest, proving presentation.

Other witnesses are called, but no further evidence relating to the stamping was offered.

It is clear, from plaintiff's letters to W. J. Roberts, that draft was not received by them on the 25th July. The letter of 26th July to defendant so says,—and on the next morning they wrote again—"Since writing you last evening have received a letter from A. J. Roberts (defendant), enclosing the draft;" and L. H. Vaughan, in his evidence after close of plaintiff's case, says, "Will swear they were put on between 27th and 29th."

The following are the sections bearing on the question: 42 Vic. ch. 17 s. 10 :—

The stamps shall be cancelled by writing thereon the signature or part of the signature or the initials of maker or drawer, or of the witness attesting signature of maker or drawer, or if drawn out of Canada, &c., &c., to identify each stamp with the instrument, to show it has not before been used, and to prevent it being again used.

Persons or witness affixing stamp shall write or stamp thereon the

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date at which it was affixed, and stamp shall be held *primâ facie* to have been affixed at that date.

If no signature or initials, nor any date stamped or written; "or if date do not agree with that of the instrument, such stamp shall be of no avail; and any person wilfully writing a false date shall incur a penalty of $100."

Section 11:

Stamp shall be affixed by maker or drawer. Such maker or drawer failing to affix stamp at the time of making, or affixing insufficient stamps, "shall thereby incur a penalty hereinafter imposed;" and the duty payable on such instrument, or the duty by which the stamps affixed fall short of the proper amount, shall be doubled.

Section 12:

Penalty for drawing bill without affixing proper stamps to be $100, and save only in the case of double duty, as in the next section provided, instrument so drawn shall be invalid and of no effect in law or equity.

No party shall incur any penalty, provided that at the time it came into his hands it had affixed to it stamps to the amount of the duty apparently payable upon it, that he had no knowledge that they were not affixed at the proper time and by the proper party or parties, and that he pays the double or additional duty, as in the next section provided, as soon as he acquires such knowledge.

Section 13:

Any holder may pay double duty by affixing stamps to amount of double the sum the stamps affixed fall short of the proper duty, and by writing his initials on such stamps, and the date on which they were affixed; and where, in any suit or proceeding in law or equity, the validity of any such instrument is questioned by reason of proper duty not having been paid at all, or not paid by proper party, or at the proper time, or any formality as to the date or erasure of the stamps affixed having been omitted, or a wrong date placed thereon, and it appears that the holder thereof, when he became such holder, had no knowledge of such defects, such instrument shall be held to be legal and valid if it appears that the holder thereof paid double duty, as in this section mentioned, so soon as he acquired such knowledge, even though such knowledge shall have been acquired only during such suit or proceeding; and if it shall appear in such suit or proceeding, to the satisfaction of the court or judge, as the case may be, that it was through mere error or mis-

take, and without any intention to violate the law on the part of the holder, that any such defect as aforesaid existed in relation to such instrument, then such instrument shall be held legal and valid if the holder shall pay the double duty thereon as soon as he is aware of such error or mistake, but no party who ought to have paid duty shall be released from penalty.

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The facts in this case are undisputed. The bill was transmitted by drawer to drawees unstamped. Bill was stamped by drawees and cancelled, as of the day of the date (obviously not on day of date, but between the 27th and 29th), with full knowledge of the law relating to stamps, for L. H. Vaughan says in his evidence: "I know the law relating to stamps."

These were not only not the proper stamps to be put on by the drawees after neglect by a drawer, and after bill came to their hands, but they should have been for double the amount, and they were not dated the day they were affixed, but on the day of the date of the bill. They were received in evidence without double stamps, and it was only after being so received, and on the day after, that the bill is produced in court, with the double stamps on, and nothing whatever to show that it was proved to the satisfaction of the judge, &c., as provided in the Act.

The plaintiff's statement, when re-called, that he "believed he had authority to affix the stamps on behalf of the drawer," amounts to nothing whatever. In the first place, there is not the slightest evidence of any such authority, but if he had any such authority, affixing the stamps as he did, supposing he claimed to do so under such authority, would be clearly contrary to the Act. The drawer having issued the bill without stamps, he could not, on a subsequent day, affix the original amount of stamps and initial them as of the day of the date of the bill, and the day of issuing, and if he could not do so, *a fortiori* nobody could do it for him. The Act was clearly violated by the drawer issuing the bill to

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the drawees without stamps; and it was violated by the drawees, after receiving the bill, in affixing the amount of stamps which ought to have been affixed by the drawer, instead of double the amount.

It was likewise violated by writing a false date as to the time of affixing, viz., the date of the draft, and not the date of the actual affixing, and all this, as plaintiff proves, with a knowledge of the law relating to stamps.

And yet he says, when re-called at the close of defendant's case: "Yesterday afternoon, in court, was the first I heard that draft was insufficiently stamped." It may be the first he heard of it, but not the first he knew of it.

There was no evidence offered to show any mere error or mistake, or no intention to violate the law; and no finding of the judge, that any such fact was made to appear to his satisfaction; then as to the double stamping, it was entirely too late.

Then as to the point not noticed in the judgments of the court below: If the address was insufficient on the notice of dishonor, who is to blame? The drawer of the bill must be taken to know that the statute permits notices to be addressed in accordance with the bill or note, unless he stipulates for a more particular address. What had the holder to do with there being or not being a post office at St. Mary's Point? The drawer chose, in fact, to say (having reference to the statute) "put in the post office a notice addressed as I have headed this bill, and I will take the responsibility of its reaching me. "No doubt, the drawer knew full well that if a notice was addressed to St. Mary's Point he would find the letter in the Harvey post office; but whether so or not, he named the place to which the notice was to be mailed, and cannot now complain of this direction being followed.

The note not being properly stamped, the judge

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should not have received it in evidence, the statute declaring that this instrument, not being properly stamped, should be invalid and of no effect in law or equity. There was no necessity for a special plea.

I think the appeal should be allowed and a non-suit entered, agreeably to leave reserved.

STRONG J. was of opinion that, as a matter of fact, the note was sufficiently stamped, and agreed with the court below that the plaintiff was entitled to recover.

FOURNIER J.—The appellant disputes the validity of the draft on account of its not being stamped when it was drawn.

L. H. Vaughan (one of the respondents and the person who received and stamped the draft) says he knew the law in regard to stamps, yet he insufficiently stamped this draft when it came into his hands, by affixing single, where he should have affixed double, duty.

Judgment has been given against the defendant, who was only an agent for the Quarrying Company, and known to be such by the respondents. If he should have pleaded that the note was not properly stamped, and he asks to be allowed to add this to his plea, I am of opinion that such leave should be granted and the appeal allowed.

HENRY J.—This action was brought by the respondents to recover from the appellant the amount of the draft made by him in their favor, hereinafter set out.

The appellant pleaded that he did not make the draft.

The respondents were merchants dealing in iron at St. John N. B. The Bay of Fundy Quarrying Company was a company incorporated in Massachusetts, having their principal office in Boston, and operating in quarries at St. Mary's Point, Albert County, in New Brunswick.

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The appellant was their superintendent at St. Mary's Point, having no interest in the quarries or the company. The respondents sent up goods to the quarries for the company, charging the same to the company, and it appears that the mode of payment was by appellant giving his drafts on the company to respondents, which drafts were accepted and paid, with the exception of the one upon which this action was brought.

To pay for goods furnished to the company in July, 1881, the appellant drew a bill, as he had several times before done for other goods furnished to the company by the respondents on the company, as follows:—

$577.30. St. Mary's Point, July 25th, 1881.

Four months after date, pay to order of L. H. Vaughan & Bros., five hundred and seventy-seven dollars and thirty cents, Pacific National Bank, Boston Mass., value received, and charge to account of

Austin J. Roberts,
Superintendent.

To The Bay of Fundy Quarrying Company,
119 Devonshire street, Boston Mass.

On back of note are the following Canada bill stamps, with dates and initials cancelling: 3ct., *L. H. V.*, 19-1-'83; 7ct., *L. H. V.*, 19-1-'83; 8ct., *L. H. V.*, 19-1-'83; 9ct., *L. H. V.*, 19-1-'83; 9ct., *L. H. V.*, 19-1-'83.

The draft was discounted by the bank of New Brunswick on the 29th July, and L. H. Vaughan, one of the respondents, proved that when the draft was received by the respondents, it was not stamped, but that between the 27th and the day it was so discounted he stamped it and cancelled the stamps by figures 25-7-'81, *i.e.*, the 25th July, 1881. It is shown that the stamps so affixed amounted to but a single rate. It is suggested that he had authority from the appellant so to place and obliterate such stamps, but I can find no evidence to sustain that suggestion. It is true that in the bill of goods for which the draft was given there is a charge of fifteen cents, which is explained, but it

having been shown that the charge was for stamps used on a previous draft, that fact is no evidence of authority to obliterate stamps for the appellant on the draft now in question.

The evidence shows that, during the trial, the stamps above mentioned as appearing on the back of the draft were affixed by L. H. Vaughan, one of the respondents.

The questions that arise under such circumstances are—

1st. Was the appellant bound to plead specially the fact that the draft was not stamped as required by the provisions of the statutes relating thereto?

2nd. Was the affixing of the stamps by L. H. Vaughan, before the draft was discounted, sufficient? and

3rd. If not, was the affixing of the stamps subsequently during the trial sufficient?

The appellant pleaded, as before stated, that he did not make the draft declared on. If the draft, as it passed from his hands, was, in contemplation of law, a binding draft, then the decision should be against him. Sec. 12 of ch. 17 of 42 Vic. provides that—

If any person in Canada makes, draws, accepts, indorses, signs, becomes a party to or pays any promissory note, draft or bill of exchange chargeable with duty under this Act, before the duty (or double duty, as the case may be) has been paid, by affixing thereto the proper stamp or stamps (or by making it on stamped paper, or both), such person shall thereby incur a penalty of one hundred dollars, and save only in case of the payment of double duty, as in the next section provided, such instrument shall be invalid, and of no effect in law or in equity, and the acceptance, or payment, or protest thereof, shall be of no effect.

Section 13 provides that:—

Any holder of such instrument, including banks and brokers, may pay double duty, by affixing to such instrument a stamp or stamps to the amount thereof, or to the amount of double the sum by which the stamps affixed fall short of the proper duty, and by writing his initials on such stamp or stamps, and the

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date on which they were affixed; and where, in any suit or proceeding in law or equity, the validity of any such instrument is questioned by reason of the proper duty thereon not having been paid at all, or not paid by the proper party, or at the proper time, or of any formality as to the date or erasure of the stamps affixed having been omitted, or a wrong date placed thereon, and it appears that the holder thereof, when he became such holder, had no knowledge of such defects, such instrument shall be held to be legal and valid, if it shall appear that the holder thereof paid double duty, as in this section mentioned, so soon as he acquired such knowledge, even although such knowledge shall have been acquired only during such suit or proceeding; and if it shall appear in any such suit or proceeding, to the satisfaction of the court or judge, as the case may be, that it was through mere error or mistake, and without any intention to violate the law on the part of the holder, that any such defect as aforesaid existed in relation to such instrument, then such instrument or any indorsement or transfer thereof, shall be held legal and valid, if the holder shall pay the double duty thereon as soon as he is aware of such error or mistake; but no party who ought to have paid duty thereon shall be released from the penalty by him incurred as aforesaid.

By sec. 12, just partly quoted, it will be seen that unless the prescribed duty be paid either by the maker or drawer, or by double duty paid by the holder, as prescribed by sec. 13, the instrument is declared to be "invalid and of no effect in law or in equity." To constitute an instrument not invalid it is a necessary part of its due execution that it should be properly stamped, and the stamp or stamps obliterated as prescribed. The penalty in this case attached as soon as the bill or draft was made and sent to the payees without being stamped; and by the same section the same is declared "invalid and of no effect in law or in equity." It was therefore, in law, no draft as such, and being so, the plea that the appellant did not make the draft declared on, puts in issue the making of a legally binding draft. If it never was a draft by legal intendment, the plea raises the proper issue. A valid and binding instrument is what the declaration sets out, and if,

for any reason, it was *ab initio* void, then, under the plea in question, the alleged drawer can show the necessary facts to have it so adjudged. Delivery is necessary to the validity of an instrument in all other respects duly executed. The possession of the document by the payee, or others through him, is *primâ facie* evidence of delivery, but under a plea that the defendant did not make the instrument, he could show that he never delivered it. It, in legal acceptation, was not his instrument, and was therefore void as against him. The statute makes the draft in this case void, as wanting in one of the essentials to a valid instrument. To make a valid instrument, the proper stamping of it by the maker or drawer is as necessary as the delivery of it, and when it is shown not to have been stamped it stands in the same position as if it had been shown not to have been delivered.

When, then, the draft in this case came to the hands of the respondents, it was a void instrument. It remained so when negotiated with the bank, when accepted by the company, when protested for non-payment, and when notice of such protest was sent to the respondent, as I shall hereafter show. All this time the draft was void by law, and, it appears to me, not a document to be negotiated, accepted or protested.

Sec. 11 requires the stamp or stamps to be affixed by the maker or drawer of the instrument, and not by any one else, even with his authority, at a time subsequent to the delivery of the instrument out of his possession. It is said that ruling would create inconvenience, but it is not the less the plain prescription of the law, and it cannot be disregarded from any suggestion of inconvenience. Besides, provision is made to remedy the defect by the holder paying double duty. This latter mode of supplying the deficiency or defect

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is the only one provided by law, and unless adopted, the instrument continues to be invalid and of no effect. The first stamps affixed to the draft in question were not so affixed before the 27th of July—two days after it was drawn—although they were marked as having been affixed on the 25th—the date it was drawn. The fifth clause of sec. 10, however, requires that the person affixing the same should "write or stamp thereon the date at which it was affixed." The respondents, to make the draft good, were bound, when it came to their hands, as it did, without any stamp, to have paid double duty by adhesive stamps, and to have cancelled them, by causing to be written the initials of the party affixing them, "and the date on which they were affixed." The stamps affixed on the draft in July, 1881, in my judgment, were wholly useless. They were so affixed as the act of the drawer, without, as he swears, any authority from him (which is not contradicted), and two days after the draft was made—when the law requires such to be done at the time.

Having considered two of the three questions referred to, I will deal with the third and only remaining one, which refers to the stamping during the trial. Stamping instruments at the trial is provided for on the part of holders under the circumstances referred to in the 13th section. The first provision for the double stamping, however, is based upon the want of knowledge of defects when he became the holder, but he is required to pay the double duty "as soon as he acquired such knowledge." The respondents in this case acquired such knowledge as soon as the draft came into their hands. They were bound, then, immediately to have paid double duty, and to have affixed and properly marked the necessary stamps, which they did not do. Not having done so, they cannot claim the benefit of a provision they did not comply with. The concluding provision of

the 13th section goes further, and it is necessary to consider its bearing upon and applicability to the circumstances of this case. It provides that:

If it shall appear, in any such suit or proceeding, to the satisfaction of the court or judge, as the case may be, that it was through mere error or mistake, and without any intention to violate the law on the part of the holder, that any such defect as aforesaid existed in relation to such instrument, then such instrument, or any indorsement or transfer thereof, shall be held legal and valid, if the holder shall pay the double duty thereon as soon as he is aware of such error or mistake, &c.

The learned judge who presided at the trial was not called upon or requested by the counsel of the respondents to, and did not, find whether there was any error or mistake on their part or on the part of any of them, in regard to the stamping of the draft. Without taking that position, it was:

Agreed that a non-suit be entered, plaintiffs to have leave reserved to move to have a verdict entered for them by the court for any amount that court may think plaintiffs entitled to. Court to have power to draw such inferences of fact as a jury might draw, or as I might draw in reference to facts respecting the stamping.

In the reasons for judgment given by the learned Chief Justice, in which Weldon, Wetmore and Fraser JJ. concurred, the matter of error or mistake is not considered, and such is not found directly in the reasons given by Mr. Justice Palmer. If found at all, it must be by this court.

I have examined carefully the evidence of the respondent who affixed both sets of stamps, and he does not particularise any error or mistake he made. He says he did not discover, before the time of the trial, the insufficiency of the stamps, but he did not explain what the mistake or error was that he made. He says he knew the law as to stamps, and so knowing he affixed only a single duty in July 1881, when the law required double the amount. To obtain the benefit of

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the provision in question, I think the party desiring to do so should show on the trial wherein the error or mistake consisted, and satisfy the presiding judge or court on the point; and not having done so, I think this court should not be expected to consider the matter. There is, besides, another objection to the legality of the stamping during the trial in this case. The trial took place in November 1882, and the Stamp Act then in force (the 42nd Vic) was repealed on the 4th of the preceding month of March (1). The repealing Act, however, contained a provision that—

> All things lawfully done, and all rights acquired under the said Act, or any Act repealed by it, shall remain valid, and all penalties incurred under them, or any of them, may be enforced and recovered; and all proceedings commenced under them, or any of them, may be continued and completed, as if this Act had not been passed.

The operation of the provision was to continue all rights as then existing, but not to acquire any new ones. It preserved and continued all penalties then incurred, and provided for enforcing them, but created no new ones, and for the continuance of proceedings then previously commenced. When that statute was passed the draft in question was incapable of being recovered. It was, in the words of the statute, invalid and of no effect. The statutory provisions in regard to payment of double duty by a holder were repealed, and the process of the stamping, during the trial, was without legal authority, and therefore ineffectual. I have fully considered the matter of pleading suggested by the learned judges in the court below, and the references made by them to the 4th and 5th sub-sections of sec. 83, of ch. 37, of the Consolidated Statutes of New Brunswick, but cannot reach the same conclusions as they appear to have done. The 4th, as to bills of exchange and promissory notes, abolishes the pleas of

(1) 45 Vic. ch. 1.

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non assumpsit and never indebted, and requires a special traverse of some matters of fact, "for example, the drawing, or making, or indorsing, or accepting, or presenting, or notice of dishonor of the bill or note." The plea in this case is a denial of the making of the draft, and surely is, as to that provision, a good plea.

The 5th is expressly confined to matters in confession and avoidance, and does not apply to cases where the party confesses nothing. Here the appellant is charged as the maker of a legal draft and one capable of enforcement. His answer is, substantially, "I did not make such legal draft." The principles of pleading applicable to such a case are wholly different from those in confession and avoidance, the examples of which are given in that sub-section.

I think, for the reasons given, the law is in favor of the appellant, and that the equities are also with him. The respondents gave the credit to the company, of which the appellant was the mere servant to the full knowledge of the respondents. He would, no doubt, have been answerable for the amount of the draft but for the imperfect stamping of it; but he evidently did not contemplate such responsibility, nor did, I assume, the respondents either when giving credit to the company.

I think the appeal should be allowed and judgment given for the appellant with costs.

GWYNNE J.—I am of opinion that this appeal must be dismissed, and that the plaintiffs are entitled to recover. The bill upon which the action is brought against the defendant as drawer, was, to all appearances, sufficiently stamped, having affixed to it stamps to the amount required for single duty, and I know of no mode by which the defendant can call in question the sufficiency of such stamping but by plea stating the facts relied

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upon by him as establishing the contention, that what to all appearance is good, valid and sufficient, is, in truth, invalid and insufficient. For the reasons given by me in *Chapman* v. *Tufts* (1), I am clearly of opinion that the defendant's plea, that he did not draw the bill, does not raise any question as to the invalidity of the bill on the ground of its not being sufficiently stamped, whether the defect intended to be relied upon by him consisted in the stamps, although affixed at the proper time and by the proper person, and to the proper amount, not having been properly erased, or not having been affixed by the proper person, or at the proper time, or for the proper amount, which latter varies according to the time when, and the person by whom, and the circumstances under which, the stamps upon the bill were affixed.

The onus lies upon the defendant to state specifically which of the above grounds is that which he relies upon as invalidating a commercial instrument of such importance as a negotiable bill of exchange, which, to all appearances, is good and valid; and the only mode of stating these facts in an action at law, is by a special plea, averring the particular fact intended to be relied upon. But upon the other point also, assuming that the question had been sufficiently raised upon the record by a special plea, I am of opinion that the plaintiffs are entitled to recover, for, by the agreement entered into at the trial, the whole case, both upon the facts and the law, was submitted to the judgment of the court, with power to draw inferences of fact as a jury, and the court to which the case was so submitted has unanimously found, as matter of fact, that the plaintiffs affixed stamps to the amount of double duty as soon as they became aware of the previous defect in the stamping. As a court of appeal we cannot interfere with such

(1) 8 Can. S. C. R. 543.

a finding on pure matter of fact, consistently with the principle upon which this court has, upon different occasions, announced that it proceeds in such a case.

I confess I am unable to preceive any distinction in principle between this case and that of *Chapman* v. *Tufts*, or anything which justifies a different judgment in this case from the judgment which was rendered in that case in favor of the plaintiff. There, the learned judge who tried the case being of opinion that double stamps were affixed by the party whose duty it was to affix them as soon as he became aware that double stamps were necessary, this court held that the plaintiff was entitled to recover. Upon the same principle the plaintiffs here are entitled to recover, as the whole of the members of the Supreme Court of New Brunswick, which court was, by agreement at the trial, substituted for court and jury, have unanimously found a like fact in favor of the plaintiffs here. The distinction appears to me to be one without a difference. I am of opinion also, that by reason of the provisions of the Dominion Statute, 45 Vic. ch. 1, the validity of the bill of exchange sued upon is not, in this action, open to any such objection as that suggested, this action having been commenced after that Act came into operation. The Act enacts that—

> The 42nd Vic. ch. 17, intituled "An Act to amend and consolidate the laws respecting duties imposed on Promissory Notes and Bills of Exchange," shall be repealed from and after the 4th day of March 1882, the day after the passing of the Act: Provided always, that all Acts repealed by the said Act, shall remain repealed, and that all things lawfully done and all rights acquired under the said Act, or any Act repealed by it, shall remain valid, and all penalties incurred under them or any of them, may be enforced and recovered, and all proceedings commenced under them, or any of them, may be continued and completed as if this Act had not been passed.

It is not, in my opinion, necessary for the determination of this case, but if it be, I am prepared to

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hold that the privilege of a defendant in any action to be commenced after the time fixed for the Act to come into operation, to dispute the validity of his own note, draft or acceptance, by reason of his own default in not having stamped the note, draft or acceptance at the proper time or in the proper manner, or with the proper amount, as directed by 42 Vic. ch. 17, was not, at the time of the passing of 45 Vic. ch 1, a right acquired under 42 Vic. ch. 17, within the meaning of the proviso contained in 45 Vic. ch. 1.

The defendant's liability to pay the penalties imposed by 42 Vic. may be, and perhaps is, preserved in force by the express words of the proviso, but there is nothing in the Act which, in my opinion, is sufficient to maintain in force, or indicates the intention of the legislature to maintain in force, the provisions of 42 Vic. ch. 17 for calling in question the validity of any promissory note, draft or acceptance in any action which should be commenced after the coming into operation of 45 Vic. ch. 1, whatever may be the date of the draft, note or acceptance. For all of the above reasons, I am of opinion that the unanimous judgment of the Supreme Court of New Brunswick should be sustained, and that this appeal therefrom should be dismissed with costs.

Appeal allowed with costs.

Solicitors for appellant: *Weldon, McLean & Devlin.*

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

THE GRIP PRINTING AND PUBLISHING CO., OF TORONTO, (PLAINTIFFS) ..... } APPELLANTS;

AND

HARMON BENJAMIN BUTTERFIELD (DEFENDANT)..... } RESPONDENT.

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*Mar. 18, 19.

*Nov. 16.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Patent—Assignment of interest in—Subsequent infringement—Estoppel—Utility of invention.

C. obtained a patent for an alleged invention styled "The Paragon Black Leaf Cheque Book," and in his specification claimed as his invention;

In a black leaf cheque book of double leaves (one-half of which are bound together while the other half fold in as fly-leaves, both being perforated across so that they can be readily torn out) the combination of the black leaf bound into the book next the cover and provided with tape across its ends, the said black leaf having the transferring composition on one of its sides only.

A half interest in this patent was assigned to the defendant, with whom C. was in partnership, and on the dissolution of such partnership said half interest was re-assigned to C., who afterwards assigned the whole interest to the plaintiffs.

Prior to the said dissolution the defendant obtained a patent for what he called "Butterfield's Improved Paragon Cheque Book," claiming as his invention the following improvements on cheque books previously in use:—

1. A kind of type. 2. The membrane hinge for a black leaf, the whole bound by an elastic band to the ends or sides of the lower cover. 3. A totalling sheet.

After the dissolution he proceeded to manufacture cheque books under his patent.

The plaintiffs instituted proceedings to restrain such manufacture, claiming that their patent was thereby infringed, and, on the hearing before the Chancellor, obtained the relief prayed for;

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

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the Court of Appeal reversed this judgment holding, that although the plaintiff's patent was infringed by the act of the defendant, yet, that the patent itself was void for want of novelty and could not be protected. On appeal to the Supreme Court of Canada.

Held,—That the patent of the plaintiffs under which they claimed was a valid patent, and, as there was no doubt that it was infringed by the manufacture and sale of the defendant's books, the judgment of the Court of Appeal should be reversed and that of the Chancellor restored.

APPEAL from a decision of the Court of Appeal for Ontario (1) reversing a judgment of the Chancellor in favor of the plaintiffs.

One J. R. Carter, in 1882, became the sole patentee of an alleged invention bearing the name of "The Paragon Black Leaf Cheque Book." In his specifications Carter stated that he claimed as his invention: "A Black Leaf Cheque Book composed of double leaves, one-half of which are bound together, while the other half folds in as fly-leaves, both being perforated across so that they can readily be torn out; the combination of the black leaf bound into the book next the cover and provided with tape bound across its end; the said black leaf having the transferring composition on one of its sides only." By the letters patent Carter was to have the sole right to manufacture and sell these books for five years.

In anticipation of the patent Carter had sold half his interest in the invention to the defendant, with whom he had entered into partnership, and after the issue of the letters patent the one-half interest was formally assigned to the defendant. The partnership between the defendant and Carter only continued for a few months, and on its being dissolved the defendant reassigned the half interest in the patent to Carter, and on the same day the whole interest was assigned by Carter to the plaintiffs.

(1) 11 Ont. App. R. 145.

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Shortly before the dissolution of partnership the defendant had obtained a patent for an alleged improvement on Carter's invention, to which he gave the name of "Butterfield's improved Paragon Cheque-book;" in his specification he claimed the following as his invention:

1. A kind of type effecting a saving in the labor and expense of printing in connection with counter cheque-books and other duplicating fly-leaf books.

2. A membrane hinge binding the black leaf between the lower leaf of the book and the lower cover, and attached to the upper or clean side of the leaf at a point near the stub perforation (when said leaf is in position for use), and passing around the end of the carbon leaf to its lower or black side where it hangs loosely, preventing the soiling of the stub and forming a strong and pliable hinge for the bleak leaf.

3. In a counter cheque-book provided with a hinged black leaf as described, totalling sheets printed on the inside of the covers of the book.

The defendant continued, after the dissolution, to make and sell cheque-books under his said patent, and the plaintiffs, claiming that their patent was thereby infringed, instituted proceedings to restrain such manufacture and sale, and the Chancellor who heard the cause gave judgment in their favor. This judgment the Court of Appeal reversed, on the ground that the plaintiffs' patent was void for want of novelty, holding also, that the dealings between the defendant and Carter did not estop the latter from questioning the patent. The plaintiffs then appealed to the Supreme Court of Canada.

W. Cassels Q.C. for the appellants.

It is not necessary for the plaintiffs, who obtained a patent prior in point of date to that of defendant, to impeach the defendant's patent by *scire facias*, as was

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contended for by him in the court below. The plaintiff's case is established by the simple production of the patent referred to in the statement of claim. The judge who tried the case found the defendant's patent was an infringement of the plaintiff's. It may be his patent is an improvement, but then he is entitled to nothing more than the improvement, and cannot appropriate the invention of the plaintiffs.

The question of the patent being void for want of utility is not pleaded. There being no evidence on the part of the defence the patent is sufficient evidence of the utility. And if the question of evidence be looked at, the evidence is conclusive in favor of the plaintiff's contention.

By the specifications of the patent, Carter states that the object of the invention is to provide a check book, in which the black leaf used for transferring writing from one page to another need not be handled. The specification states that the leaf has a transferring composition on its bottom side only, and is provided with a tape, &c.

Furthermore, it states that the patentee is aware that black leaves are used in other forms of books used in transferring writing from one page to another, but they are either loose in the book, and are therefore easily lost, and are dirty to handle, or are placed in the centre of the book, &c.

The learned judge in appeal says that it is even "left to be inferred that the leaf is to be bound in the book with the blackened side undermost." The learned judge has omitted to consider that the specifications expressly state that the leaf has a transferring composition on its bottom side only. Furthermore, the plan put in shows this to be the case, and the plan must be looked at to explain and illustrate the patent. The learned judge is also in error in considering that

the only object of having a transferring composition on one side is to prevent the fingers from being soiled. The specification states that black leaves hitherto in use are dirty to handle. The learned judge seems to think that relates merely to the fingers in turning over the leaf. It is obvious that if there were a tape on either side of the leaf, it is immaterial whether it were black on one side or both, so far as this point is concerned, but the evidence in the case demonstrates that not merely by means of the leaf being blackened on one side only is it cleaner for the person using the book, but one important benefit arrived at is in regard to the goods purchased. The back of the customer's bill is not defaced, and this is shown to be a considerable benefit. In the case where the leaf is blackened on both sides, of necessity when the entry is made by the clerk selling the goods the paper resting upon the darkened side receives a certain amount of dirt from the carbon leaf. If this paper is then taken off, as is customary in shops, and placed upon the goods of the customer, it would have a tendency to dirty such goods; but in the case in question, with the leaf blackened on one side only, the paper upon which the memo. is written for the customer does not come in contact with the carbon, and cleanliness is thereby attained; and it is shown by the evidence that this is a matter of considerable moment. When the specifications state that the leaf is dirty to handle, they should be considered in a fair and liberal manner, and the patent should not be destroyed by a narrow scrutiny, and a meaning placed not intended and not contemplated. See *Otto* v. *Linford* (1). There is an additional use in having the carbon blackened on one side, viz., that by virtue thereof the leaf given to customers can be written on both sides—not being blackened by the carbon, it can

(1) 46 L. T. N. S. 40.

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be turned over and the other side utilized; and this is also shown by the evidence to be of considerable benefit.

It was argued by the defendant in the court below that by reason of the omission of the tape in the books manufactured by him the infringement was not proved. The learned Chancellor has disposed of this by his judgment, and it would appear that during the time that Carter and Butterfield were in partnership the books were manufactured without this tape, and the omission of this tape would not prevent the defendant from being liable. See *Clarke* v. *Adie* (1); *Dudgeon* v. *Thomson* (2); and *Harrison* v. *Anderston Foundry Co.* (3).

Furthermore it is contended that by the double use of the leaf the defendant substitutes an equivalent for the tape. It is quite clear that the use of an equivalent would not prevent the defendant from being an infringer, and in this particular case it is not contended that the appellants omit an element, but the fact is that they use one element in a double capacity. In one capacity it is an equivalent for the tape. The appellants refer to *Latta* v. *Shawk* (4); *Curtis* (5); *Seymour* v. *Osborne* (6); and numberless cases in the United States to the same effect, and *Smith* v. *Goldie* (7) in this court.

R. E. Kingsford for respondent.

It is urged by the plaintiffs that the ground of the decision of the Court of Appeal is want of utility, and that this question was not raised in pleading, and that therefore the judgment should not have been given on this ground. A perusal of the judgment shows that this is not the ground, or the only ground—besides, the point is sufficiently raised by the pleadings. At any rate the point arises upon the evidence for the plaintiffs,

(1) L. R. 2 App. Cas. 320.
(2) L. R. 3 App. Cas. 34.
(3) L. R. 1 App. Cas. 574.
(4) 1 Bond 259.
(5) P. 393.
(6) 11 Wallace 516.
(7) 9 Can. S. C. R. 46.

and if any technical difficulty arises in regard to the pleading, the court has power to amend, and it should be exercised in a case of this kind where the whole case rests on the evidence adduced by the plaintiffs.

I contend that the appellant's alleged invention was not patentable, and there is no infringement.

The plaintiff's patent is for a combination, of which the tape is the distinctive feature. The alleged equivalent is, as pointed out in judgment of Court of Appeal, no equivalent. The combination is an entirety; if one element be given up, even if immaterial, the combination disappears. *Vance* v. *Campbell* (1). A patent for a combination is not a patent for all and each of the parts. *Treadwell* v. *Bladen* (2). A patent for a combination of three things cannot be a patent for a combination of two. Curtis on Patents (3); Bump on Patents (4).

No one can, by combining several devices,—each of which is old, (which is what the plaintiffs do when they abandon their tape) deprive others of the right to use them separately, or of the right to use them in new combinations, or of the right to use some of them in combination omitting others. *Hailes* v. *Van Wormer* (5); referred to in *Yates* v. *G. W. R.* (6).

The plaintiff does not claim a black leaf check book, nor perforated leaves, nor the binding of the leaves, or the black leaves as part of his invention. His claim is for a combination of the black leaf bound into the book next the cover, and provided with a tape across its end Of what then can there be an infringement? Not of the books nor the leaves, nor the black leaves, nor the binding. It is abundantly clear that the defen-

(1) 1 Fish. 483; 1 Black S.C.U.S. 427.
(2) 4 Wash. C. C. 703.
(3) P. 289, sec. 249.
(4) P. 216.
(5) 20 Wall. 353.
(6) 2 Ont. App. R. 232.

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dant's article does not, nor does his patent infringe upon what is covered by the plaintiff's patent, if anything is covered by it at all.

Although patentee is the inventor of one part of a combination, still it is only claimed in combination with the other parts. A party does not infringe the patent unless he uses the whole combination. *Foster* v. *Moore* (1).

Then as to the equivalent.

If the defendant uses an article that was not known as an equivalent at the date of the patent in substitution for another in a compound there is no infringement. *Gould* v. *Rees* (2); *Seymour* v. *Osborne* (3).

I also rely on the fact that the plaintiffs (who are now the appellant's) did not, by their pleadings or evidence, impeach the validity of the defendant's (respondents) patent, although they had express notice by the pleadings that the defendant intended to rely upon his said patent, yet they did not attack the same nor set up that the defendant's patent was void, as being in any way an infringement of the plaintiff's patent, nor did they seek to avoid it, nor show that the defendant was not making according to his patent, or infringing the plaintiffs' combination; and contend that so long as his patent was not impeached, and it was shown that in manufacturing the books claimed to be an infringement of plaintiffs' alleged patent he was working in accordance with his patent, the plaintiffs were not in a position to succeed as against him. See *Copeland* v. *Webb* (4).

W. Cassels Q. C. in reply.

Sir W. J. RITCHIE C.J.—I agree with the Chancellor that there was an infringement of the plaintiffs' patent, and that the defendant is making substantially the

(1) 1 Curt. C.C. 279.
(2) 15 Wall. 187.
(3) 11 Wall. 516.
(4) 11 W. R. 134

same kind of books as those of the plaintiffs, with some slight modifications which may or may not be improvements.

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THE GRIP PRINTING AND PUBLISHING CO. OF TORONTO v. BUTTERFIELD.

Ritchie C.J.

I think there was evidence of the utility of the invention, but that question was not tried in the Court of Appeal, and does not appear to have been raised in the pleadings; on the contrary, the statement of defence appears to me substantially to admit the utility of the invention.

I think the judgment of the Court of Appeal should be reversed and the Chancellor's judgment restored.

STRONG J.—I think that the appeal should be allowed with costs.

HENRY J.—The patent under which the appellants claim was a valid patent of a useful invention, and there can be no doubt that the respondent infringed that patent. I think, therefore, the appeal should be allowed

FOURNIER and TASCHEREAU JJ. concurred.

Appeal allowed with costs.

Solicitors for appellants: *Edgar & Malone.*

Solicitor for respondent: *R. E. Kingsford.*

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*Mar. 20,21.
*Nov. 16.

THOMAS HUNTER (PLAINTIFF) ..... APPELLANT;

AND

MARGARET ANN CARRICK (DEFENDANT) ..... } RESPONDENT

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Patent—Infringement of—Combination—New Result.

H. obtained a patent for an oven, claiming to have discovered a way of building the same so as to economise fuel; the patent consisted of a combination of five parts, none of which were claimed to be new, the alleged invention consisting merely of the result.

Held, affirming the judgment of the Court of Appeal, Strong J. dissenting, that the combination, being a mere aggregation of parts not in themselves patentable, and producing no new result due to the combination itself, was no invention, and consequently it could not form the subject of a patent.

APPEAL from a decision of the Court of Appeal for Ontario (1) setting aside a verdict for appellant (plaintiff below). In August, 1880, the appellant applied for and obtained a patent for a baker's oven (a patent having been previously granted to him, the specifications for which he had discovered to be defective) the object of which, as stated in the specification, was to economize fuel and allow the fire to be kept in the oven during the whole process of baking. The improvement for which the patent was applied for was stated to consist in placing a fire-pot within the oven but below the sole. Separate doors and dampers were provided for the fire-pot, and it was so arranged that it could be fed with coal during the whole process of baking.

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

(1) 10 Ont. App. R. 449.

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The appellant stated in his evidence that what he claimed as his invention was as follows:—

1. A fire-pot or furnace placed within a baker's oven below the sole thereof, and provided with a door situated above the grate.

2. A fire-pot or furnace placed within a baker's oven, provided with a door above the level of the sole of the oven, and connected to the said furnace by an inclined guide.

3. In a baker's oven, a flue leading from below the grate to the main flue.

4. A baker's oven provided with a circular tilting grate, situated below the sole of the oven and provided with a door.

5. In a baker's oven, a cinder grate placed beneath the fire grate, in combination with a flue leading from below the grate to the main flue.

And in his specification he said: "What I claim as my invention is: In combination with a baker's oven, a furnace set within the oven but below the sole."

The Respondent, who carried on a bakery business in Toronto, having had occasion to build a new oven in connection with her business, the appellant brought suit against her for an injunction, alleging that such oven was made from the description in the specification for the above patent and was an infringement of the same. The respondent, in her statement of defence, denied that her oven contained the improvements set out in such specification, or any of them, or that it was an infringement of such patent, and the defence was also set up, that appellant's alleged improvements were not new and that the patent was void.

The cause was heard before Proudfoot V. C. who granted the injunction prayed for, and ordered a reference to the master to ascertain the damages sustained by the appellant. The Court of Appeal reversed this

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judgment, the majority of the Court holding that the subject of the appellant's patent was a mere aggregation of parts not new in themselves and producing no new result due to the combination itself, and therefore was not an invention, and, consequently, not patentable.

W. Cassels Q.C. for appellant.

The patent in question was a patent re-issued, and although the elements of it are old, we claim the combination as new. It is the simultaneous action of all the parts working jointly together that creates the result.

The learned counsel then reviewed the evidence, contending that the combination obtained a new result, and relied on the following cases: *Smith* v. *Goldie* (1), and cases therein cited; *Murray* v. *Clayton* (2); *Spencer* v. *Jack* (3).

Christopher Robinson Q.C. and *Dr. McMichael* Q.C. for respondent.

The evidence in this case clearly shows that the patent brought out no new element or factor; that there is neither novely nor utility in the invention, and that, as a combination, it produces no new results, but is simply an aggregate of separate results. The learned counsel cited and commented on the following cases, *inter alia*. *Harriston* v. *Anderston Foundry Co.* (4); *Hinks* v. *Safety Lighting Co.* (5); *Adie* v. *Clark* (6); *Pickering* v. *McCullough* (7); *Cropper* v. *Smith* (8).

W. Cassels Q.C. in reply cited:

Otto v. *Linford* (9); *Fay* v. *Cordesman* (10).

Sir W. J. RITCHIE C.J.—(After stating the particulars

(1) 9 Can. S. C. R. 46.
(2) L. R. 7 Ch. App. 570.
(3) 2 L. T. N. S. 242.
(4) 1 App. Cases 574.
(5) 4 Ch. D. 612.
(6) 3 Ch. D. 134.
(7) 104 U. S. R. 310.
(8) 26 Ch. D. 704.
(9) 46 L. T. N. S. 35.
(10) 109 U. S. R. 408.

of the alleged invention, and referring to the judgments of the court below.)

I agree with the majority of the Court of Appeal that the patent claimed by the plaintiff cannot be supported, and I think the appeal should be dismissed, on the ground that the plaintiff's invention was not properly the subject of a patent for the reasons given by the Court of Appeal.

STRONG J.—The appeal should be allowed with costs and the judgment of the Chancellor restored.

FOURNIER J.—I agree with His Lordship the Chief Justice that the appeal should be dismissed.

HENRY J.—The appellant seeks to recover from the respondent damages for the infringement of a patent right claimed by him under letters patent issued to him on the 26th August, 1880, for what is called "Hunter's Improved Oven." His claim in the specification is: "In combination with a baker's oven a furnace D set within the oven but below the sole A," and the patent right granted is for that combination. He claims nothing for any one or more of the several parts mentioned in the specification, which are employed merely to show the combination, and therefore we are to conclude none of them was new. They are described as follows:—

"In the drawing A is the sole of the oven; B its door, and C the raising over; in none of these do I claim anything peculiar, but instead of making the fire on the sole A, as is customary, I construct a fire-pot or furnace D within the oven, the grate E being below the level of the sole A. The fuel is fed through the door E, which can be made in any usual way; G is a cinder grate, either perforated as shown, or in any other form thought most desirable; an ash pit H, completes the furnace. The flues in the oven are of the usual kind, but in addition to that I make a special flue beneath the grate E, which is connected with the main flue of the oven E in any suitable manner; this flue has naturally a tendency to check the fire, and may be provided with dampers similar to those placed in the

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Henry, J.

other flues. As is well known to those familiar with baker's ovens, a fire is made in the sole, and when the required temperature is obtained it is withdrawn, and the bread or other article to be baked inserted."

The respondent pleaded, amongst other things, as follows:

2. In answer to the fourth paragraph of the said bill I admit that I have lately built a new oven, but I deny that such oven contains the improvements claimed by the plaintiff in his patent in the said bill referred to, or any of them, or that my oven is an infringement upon the alleged patent of the plaintiff.

5. I am informed and believe, and charge the fact to be, that the means of heating ovens claimed by the plaintiff in his patent have been in public use in this Dominion for many years prior to the plaintiff's patent, and that there was and is no novelty and improvement on any other invention in the plaintiff's alleged invention.

6. I submit that there was not, prior to or at the date of the said patent, any novelty in the plaintiff's alleged invention, and that the same was not, nor was any part thereof, a new or useful invention or improvement upon a prior invention within the meaning of "The Patent Act of 1872." And that the improvements claimed by the plaintiff in his said patent are trifling and insignificant, and that the said alleged invention of the said plaintiff is not, and was not the subject of a patent, and could not be patented. And I further submit that the said patent is invalid and void.

7. I submit that the specifications filed by the plaintiff on his application for the said patent do not clearly and distinctly state the contrivances and things which the plaintiff claimed as new, and for which he obtained the said patent, and that they claim more than the said plaintiff could in any event obtain a patent for, and I therefore submit that the said patent is void.

8. I also submit that the said patent is void, because the same includes as new a contrivance which was, I believe, and charge the fact to be, well known and publicly used prior to the plaintiff's said patent.

The pleas therefore, put in issue all that was necessary to entitle the respondent to deny the infringement of the appellant's rights under the patent, and also to contest its validity.

By the evidence it is shown that all the combinations were used before the issue of the patent, except per-

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haps, one flue which is referred to in the specifications as before shown, and is as follows :—

"The flues in the oven are of the usual kind, but in addition to that I make a special flue beneath the grate E, which is connected with the main flue of the oven in any suitable manner ; this flue has, naturally, a tendency to check the fire, and may be provided with dampers similar to those placed in the other flues."

It will be observed on referring to the patent and specifications, that the first does not grant, and the latter does not claim, any right for the combination of the flue in question. They are both limited to a combination of "a furnace D set within the oven below the sole A." The erection therefore, of such a flue by the respondent, would have been no infringement of the patent right, and it is shown also that in the erection of the oven by her no such flue was constructed and therefore there could be no infringement of the right. The evidence establishes the fact, to my mind very conclusively, that the combination claimed by the appellant was not new when he obtained his patent, and that furnaces set within the oven and below the sole had previously been made and used.

I am therefore of opinion that the appeal should be dismissed and the judgment of the court below affirmed with costs.

TASCHEREAU J. concurred with Ritchie C. J.

Appeal dismissed with costs.

Solicitors for appellant: *Blake, Kerr, Lash & Cassels.*

Solicitors for respondent: *McMichael, Hoskin & Ogden.*

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*Mar. 24, 26.
*Nov. 16.

THE CANADA PUBLISHING COMPANY (LIMITED) AND SAMUEL GEORGE BEATTY (DEFENDANTS).. } APPELLANTS;

AND

WILLIAM JAMES GAGE (PLAINTIFF) ...RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Trade mark—Copyright—Head-line copy book—Name "Beatty"—Right of party to use his own name—Goods sold to deceive public.

G. carried on business in partnership with B., a part of the business being the sale of a series of copy books designed by B., to which was given the name "Beatty's Head-line Copy Book." The partnership was dissolved by B. retiring and receiving $20,000 for his interest in the business.

After the dissolution B. made an agreement with the Canada Pub. Co. to prepare a copy book for them, which copy book was prepared and styled "Beatty's New and Improved Headline Copy Book" which the said Co. sold in connection with their business.

G. brought a suit against B. and the Co. for an injunction and an account, claiming that the sale of the last mentioned copy book was an infringement of his trade mark. He claimed an exclusive right to the use of the name "Beatty" in connection with his copy book, and alleged that he had paid a larger sum on the dissolution than he would have paid unless he was to have the exclusive sale of these copy books.

Held, Affirming the judgment of the Court of Appeal, Henry and Taschereau JJ. dissenting,—That defendants had no right to sell "Beatty's New and Improved Head-line Copy Book" in any form, or with any cover, calculated to deceive purchasers into the belief that they were buying the books of the plaintiff.

APPEAL from a decision of the Court of Appeal for Ontario (1) dismissing a motion to set aside a judgment of Mr. Justice Ferguson in favor of the plaintiff (2).

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

(1) 11 Ont. app. R. 402. (2) 6 O. R. 68.

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In May, 1877, the plaintiff entered into partnership with the defendant Beatty, to carry on business under the name of Adam Miller & Co. A considerable part of the business was the manufacture and sale of head-line copy-books, and during the partnership Beatty designed a valuable copy-book which had a large sale, and to which was given the name "Beatty's Head-line Copy-Book."

In August, 1879, the partnership was dissolved by Beatty retiring, and he received $20,000 for his interest in the business. After the dissolution, in August, 1881, plaintiff registered the name "Beatty" in connection with Beatty's head-line copy-book.

Subsequently to this Beatty entered into an engagement with the Canada Publishing Company, by which he was to prepare head-line copy books for the company. Such books were prepared and sold under the name of "Beatty's New and Improved Head-line Copy-books."

The plaintiff instituted proceedings against both Beatty and the company, alleging that the last mentioned copy-books infringed his trade mark, and that the public were deceived in purchasing such books, supposing they were the books of the plaintiff. The bill prayed for an injunction and an account.

Mr. Justice Ferguson, who heard the cause, gave judgment for the plaintiff, which was sustained by the Court of Appeal. From the judgment of the last-mentioned court the defendants appealed.

The facts are fully stated in the report of the case in 6 O. R. 68.

Christopher Robinson Q.C. and *J. Maclennan* Q.C. for the appellants, the Canada Publishing Company.

W. Barwick for the appellant Beatty.

In addition to the points raised by counsel for appellants, and cases cited which appear in the report of the case in 6 O. R. 68, the learned counsel relied

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on the following case and authorities. *Pearson* v. *Pearson*, (1) *Sebastian* on the Law of Trade Marks (2).

S. H. Blake Q.C. and *Z. A. Lash* Q.C. for the respondents.

The publication by the defendants of their book was conceived in fraud, for the purpose of having the defendants' book sold as and for the plaintiff's book. The defendants, knowing what the public wanted and demanded was a book called "Beatty's," made use of the name Beatty for this fraudulent purpose.

In preparing the cover for the defendants' book, the name "Beatty" was put in a prominent position because of its great value, and the name was made valuable in connection with copy books solely by the efforts and at the expense of the plaintiff and his firm. (The learned counsel then reviewed the evidence and contended that it was unquestionable that the book published by the defendants was meant to deceive, was calculated to deceive, and did deceive the public.)

The principle upon which the court should act in a case like the present, appears from the cases cited in the judgment in the court below (3).

The learned counsel also argued that the plaintiff had a right to restrain the defendants from infringing his trade mark, which consisted in the word "Beatty" and was a valuable asset of the firm.

Sir W. J. RITCHIE C.J., after reviewing the facts presented on the appeal, and the judgments of the court below, proceeded as follows:

In my opinion the plaintiff had the exclusive right to use the name "Beatty" in connection with, and as denoting, copy books of his manufacture, and no one has the right to the word for the purpose of passing off his books as those of the plaintiff, or even when innocent

(1) 27 Ch. D. 155. (2) 2 Ed. pp. 25 & 279.
(3) 11 Ont. App. R. 402.

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Ritchie C.J.

of that purpose, to use it in any way calculated to deceive, or aid in deceiving the public, to the detriment of the plaintiff; but, claiming the interference of the court, they must be prepared to show that the public are deceived, and purchasers misled, or that there is a reasonable probability of parties being deceived. This, in my opinion, has been shown in the present case.

I think the book, as published by the defendants, was calculated to deceive, and did deceive, and was intended to deceive purchasers. I adopt as perfectly applicable to the same the language of James and Thesiger L. JJ., in *Metzler* v. *Wood* (1); James L. J. says:—

> There is really no question of law in this case, no question of the right of a man to the use of his own name, or anything of the kind. The simple question is: Did the defendant dishonestly pass off his work as the work of the plaintiffs? That really is the sole issue, and the Vice-Chancellor has found in favor of the plaintiffs. It appears to me impossible to doubt the correctness of his conclusion.

And Thesiger L. J. says:—

> This is still more plain when we think of the class of persons who would be purchasers of this book, probably mothers of families, or governesses instructing young children, and who were told that "Beatty's" (substituting "Beatty's" for "Hemy's") was the best work for the purpose of so instructing children.

There is not a person that would not, unless thoroughly acquainted with both the works in dispute, be satisfied when he was presented with a copy of the defendants work, that he was receiving the well-known and popular copy book of Beatty as published by the plaintiff.

I think, therefore, that the appeal should be dismissed.

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

FOURNIER J. concurred.

HENRY J.—I am sorry to differ from my learned

(1) 8 Ch. D. 606.

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brethren, but after a great deal of consideration have come to an opposite conclusion. The claim here is not made on a copyright, but merely to use a name as a matter of common law right in connection with "head-line copy-books." There is nothing peculiar in "head-line copy books;" all copy-books have a printed "head line" and are so called—they have been in use for a number of years in the United States, Scotland and England, and imported and sold as such in this country. The first series Beatty issued was printed as "Beatty's System of Practical Penmanship," and had no reference whatever to "head-lines," for such could form no distinctive character;—subsequently Beatty, who had been in partnership with Gage the respondent, sold out his interest in the partnership, including his interest in the copy-book printed and published by Gage and him, to his partner, and on the dissolution the right to sell remained in Gage. Beatty subsequently prepared, and the appellants published copy-books under the name of "Beatty's New and Improved Head-line Copy-Books." This title sufficiently distinguishes them from the respondent's book, printed and published as "Beatty's System of Practical Penmanship." Under these circumstances what right had Gage to the sole use of Beatty's name? True, at first Beatty was a partner with him, and when they dissolved partnership Gage had, no doubt, a right to continue to use his name, but could he stop Beatty from using his own name on a different work? The appellants' company, a publishing firm, wanted a superior work to what was in use, and applied to Beatty, who had earned for himself a reputation as a penman, and he furnished the new work, and they published it as "Beatty's New and Improved Head-Line Copy Books." These books are as different in general appearance from those published by respondents as two copy books could be, and they

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were made so as to prevent anybody acquainted with the subject matter from taking one for the other. Then the question arises: Did the appellant's adopt Beatty's name for the purpose of deceiving the public, and in order to palm off their goods for the plaintiff's goods? In my opinion there is no evidence to support that contention. There was no copyright of Gage's book, and it was admitted by all the judges that the law as to copyright did not govern the case, but the fact merely that appellants were using Beatty's name when selling their books was sufficient to give a right to plaintiffs to stop them from using it and interfere with their business. Suppose Beatty had patented a plough known as Beatty's plough, and sold his patent, and afterwards patented an improved article, not infringing the old, and called it Beatty's new and improved plough, could the owner of the original patent sue the maker of the improved article for infringement? I do not think he could. Here the copy book of the appellants did not infringe any right in the book published and sold by Gage. It appears to me the appellants did not usurp anything sold by Gage and they gave sufficient notice, by the title and appearance of those they published, to parties not to buy their books as being those sold by Gage. The respondent's case, in my opinion, has not been sustained by the facts in evidence. I think, therefore, the appeal should be allowed with costs.

TASCHEREAU J.—Such would have been my opinion also; I would have allowed the appeal.

Appeal dismissed with costs.

Solicitors for appellants, Canada Publishing Co.: *Macdonald, Davidson & Patterson.*

Solicitors for appellant, Beatty: *Moss, Falconbridge & Barwick.*

Solicitors for respondent: *Blake, Kerr, Lash & Cassels.*

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*May 6
*Nov. 16.

ROBERT A. CHAPMAN AND WILLIAM J. ROBINSON..... } APPELLANTS;

AND

SILAS W. RAND..... .....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

Can. Temp. Act—Election under—Scrutiny—Powers of County Court Judge—Matters affecting the election.

A Judge of the County Court, in holding a scrutiny of the votes polled at an election under the provisions of the Canada Temperance Act, has only to determine the majority of votes cast, on one side or the other, by inspection of the ballots used in the election, and has no power to inquire into offences against the Act, and allow or reject ballots as a result of such inquiry. (Henry J. dubitante.)

APPEAL from a decision of the Supreme Court of New Brunswick making absolute a rule *nisi* for a mandamus.

An election was held in the County of Westmoreland, N.B., on a petition for a repeal of an order in council declaring the second part of the Canada Temperance Act in force in the said county. The election resulted in the defeat of the petition, and the present respondent applied to the Judge of the County Court for the said county for a scrutiny of the votes. The petition presented to the judge for an order for such scrutiny contained the following, among other matters, into which he was requested to inquire:—

That at one or more polling places in the parish of Botsford there was not a sufficient number of ballot

*PRESENT—Sir W. J. Ritchie C.J., and Fournier, Henry, Taschereau and Gwynne JJ.

papers provided by the Returning Officer at said poll, and that in consequence thereof many electors who attended at said polling places, were unable to vote at said poll and were refused liberty to vote, because of such deficiency of ballot papers.

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That divers persons were admitted to vote against the petition who were not qualified to vote, some of whom personated others who were entitled to, but did not vote, and that persons were induced to vote against the petition by bribery and other corrupt practices.

That many persons entitled to vote and desirous of voting in favor of the adoption of the petition, were deceived by the nature and form of the ballot papers used thereat, and in consequence of such deception voted against such petition unwittingly.

The learned judge declined to enter into the consideration of the above matters, whereupon the respondent obtained from the Supreme Court of New Brunswick a rule *nisi* for a mandamus to direct him so to do. This rule was subsequently made absolute.

The parties against whom the petition was directed to be brought appealed from the judgment making absolute the rule *nisi* for mandamus, to the Supreme Court of Canada.

A. G. Blair, Atty. Gen. for N. B., for appellants.

The principal question in the case is what is meant by a scrutiny of votes under sections 61 and 62 of the Canada Temperance Act, 1878? What are the powers of the judge, and what is the extent of the enquiry into which he may enter?

Sections 61 and 62 show clearly that the scrutiny intended by the Act is a scrutiny of the ballot papers only. The ballot papers, not the votes, are to be the subject of the scrutiny. In fact, unless reasonable grounds are shown to the judge by affidavit for a scrutiny of the ballot papers, he cannot proceed with

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the enquiry. The legislature, if intending to provide for a general enquiry into the validity of the election, would have required the affidavit to support the grounds, whatever they might be, on which the election was to be voided.

Section 70 should not be read as throwing any light upon sections 61 or 62. That section is to be found classified under the head of penalties. The section does not create a tribunal nor enlarge the powers of any tribunal already existing. Its object was, no doubt, to provide, out of an abundance of caution on the part of the draftsman of the Act, against any proceedings bringing the election into question which might possibly be taken in the Supreme Court.

I also contend that the writ of mandamus could not properly issue to compel Judge Botsford to enquire into the allegations in the third paragraph of section 8 of the petition.

(*a.*) Because such an enquiry is not within his jurisdiction.

(*b.*) Because he could not, if the allegations were proved, on such material, determine that the majority of votes was in favor of the petition.

(*c.*) Because it is not alleged, and it does not appear, that there were votes enough refused in consequence of such want of ballot papers, to alter the result if all such votes had been cast for the petition.

The allegations in the fifth paragraph of section eight of the petition are covered in part by the allegations in section four, and the writ could not properly issue to compel the judge to enquire as to those matters.

R. Barry Smith for respondent.

The county court judge, in addition to the powers conceded by the other side, is given the power to scrutinize the polling of votes so far as to ascertain

if the poll has been conducted in accordance with the principles laid down in the Act, and if, on the evidence, he finds it has not been so conducted, to declare the polling of votes invalid See Canada Temperance Act, secs. 61, 62, 63, 64, 70, 86 and 89; 41 Vic. ch. 6 s. 14 (D), and Allen C.J. in *ex parte Boyne* (1).

It will be observed, in the first place, that in sec. 61 the word scrutiny is used, not recount. This word implies a looking into, an investigation, an enquiry and a result of the same. In law it is used in connection with elections in the sense of an investigation into the mode of carrying on the election, and of ascertaining whether it has been done in accordance with the law applicable to it, and a subsequent judicial determination of the question of its validity. This is the ordinary legal meaning of the word, and in the 61st and 62nd sections of this Act there is nothing to show that it is not used in the ordinary legal sense. On the contrary, the provision of the 62nd section for the taking of evidence shows that it is intended to be so used. For why, if the powers of the judge are limited to a mere recounting of the votes as shown on the ballot papers, should he take evidence? It is not necessary to take evidence to show that two and two make four, or what the number of ballot-papers before the judge may be. It is clear he can hear some evidence. Where is the line to be drawn, and what right has he to restrict the evidence when the Act does not do so?

By construing the 62nd section in the way contended for by the respondent, it is made perfectly consistent with the 70th section of the Act. If the 62nd section is construed to give the judge only the power to recount and declare the numerical majority of ballots, this section is meaningless, because there would be no tribunal having cognizance of the question, *i.e.*, of the

(1) 22 N. B. Rep. 241.

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validity or otherwise of the poll. It will be noticed that in the 80th section of the Dominion Elections Act of 1874 this section is found, though with substantial differences. There the election is not to be declared invalid, &c., and the word election is used throughout, while here it is the polling of votes. The tribunal there referred to applies to any court which may have cognizance of the question, and by the very next Act, that relating to controverted elections, a tribunal is given cognizance of the question. Could it be reasonably contended that the 80th section referred to did not apply to the election court so erected? Here we have a tribunal established by the Act itself, and yet it is contended by the appellants that the 70th section does not apply to that tribunal. It is said that the word used would have been "judge" not "tribunal" if the reference had been to the county judge, but it will be remembered that in different provinces different judges are to enter on the scrutiny under sec. 61, and it was convenient to refer to the judge who might sit, according to locality, by some general name. If the judge is not meant, what tribunal is referred to? To what other tribunal is given the cognizance of the question? And it is important to note the wording of the section. No polling of votes shall be declared invalid by reason of a non-compliance, &c., as to the counting of the votes, &c. Now the judge is made the final tribunal as to counting, at least, sec. 63, and so no appeal or *certiorari* would lie, if he acted within his jurisdiction, from his decision. Then the declaring the polling invalid must have reference to his decision since he only is given the cognizance of the counting of votes.

Now, if the poll has not been taken, or if the votes have not been counted, in accordance with the principles laid down in the Act, and the result has been

affected by such defective counting or taking of votes, the judge shall declare the polling invalid. That is the obvious effect of section 70. But to ascertain the defect, and to learn whether it is one that affects the result, and whether it is or is not in accordance with the rules and principles of the Act, requires evidence to be taken by the judge and the hearing of the parties or their counsel. Thus the 70th section and the 62nd are rendered harmonious, and the provision for taking evidence is at once made clear and effective. On the other hand the amendment to the Elections Act, providing for a recount, as has been said already, provides for application to a judge on affidavit of a credible witness, instead of a petition and affidavits which are commonly used in cases of scrutiny and are expressly required by this Act; it provides that the grounds of the application shall be, that such witness believes that a deputy returning officer has improperly counted or rejected ballot papers, or that the returning officer has improperly summed up the votes, while this Act provides that the petition shall shew "reasonable grounds for entering into a scrutiny;" it defines the duties and powers of the judge, and expressly limits them to taking care of the ballots, counting them, correcting the statements, sealing up the ballots and certifying them to the returning officer, while this Act says he shall hear evidence and hear the parties or their counsel, and may determine whether the majority of votes given was or was not in favor of the petition, and that no polling shall be declared invalid, &c., as by the 70th section. The difference between the powers given to the judge by the two Acts is very marked and it is submitted that the 62nd and 70th sections of this Act bear out fully the proposition contended for, that the judge has power, not only to recount, but to take evidence, and if it appears to him that the poll has not been con-

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ducted in accordance with the principles laid down in the Act, to declare such poll invalid. For these reasons the judgment of the majority of the court below ought to be affirmed.

Sir W. J. RITCHIE, C. J.—Mr. Justice Palmer thus states the contentions in the court below. He says:—

The applicant's contention is that the judge has jurisdiction, and ought to enquire into the number and the validity of the votes on both sides, and of the validity of the election itself, including the question whether it has been properly held, and all proceedings therein properly and fairly carried on in pursuance of the provisions of the Act; and in case it has not, to declare it void.

The other side contends that all such judge has power to do is, "to inspect the ballots, and, from such inspection, to decide, from what appears on their face, whether they are good or not; then counting them, determine which side has a majority of votes."

With reference to the term "scrutiny," Mr. Justice Palmer says:—

It is a word commonly used in reference to elections and with reference to a full enquiry to determine both their result and validity.

That may, or may not, be so, but whatever may be the signification usually attached to the term in a general sense, when applied to elections the scrutiny provided for by the express terms of the Act is limited to a scrutiny of the ballot papers, and the duty of the County Court Judge to such a scrutiny, that is, to a critical examination of the ballot papers, and he is required, upon an inspection of the ballot papers and hearing such evidence as he may deem necessary in respect to such an examination, in a summary manner to determine whether the majority of the votes given as indicated by the ballots was or was not in favour of the petition. And section 66 provides that:—

In case of such a scrutiny being entered into, then forthwith after the judge has determined whether the majority of the votes given

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was or was not in favour of the petition, the returning officer shall transmit his return to the Secretary of State, and shall send with it a report of his proceedings, in which he shall make any observations he may think proper, and to the state of the ballot boxes or ballot papers as received by him; and in the event of a judge having determined, after a scrutiny of the ballot papers, that the majority of the votes given was or was not in favour of the petition, such returns shall be based upon, and shall be conformable to, such decision.

But no power or authority is given to the County Court Judge, that I can discover, to try and determine the validity of the election apart from and beyond scrutinizing the ballot papers. With reference to section 70, so much relied on, I think it is only necessary to say that that clause, in my opinion, confers no such power on the County Court Judge, however applicable it may be to a tribunal having power to supervise the proceedings of the election, and determine whether it has been properly held and all proceedings rightly carried out in pursuance of the provision of the Act, and generally to deal with the validity of the election. If the legislature intended to give this power to the County Court Judge, they have failed to do so in express terms or to make such an intention apparent by any reasonable inference.

I concur generally in the view expressed by Mr. Justice King in the court below, and also with the conclusion which has been arrived at by Mr. Justice Rose in a case lately decided in Ontario (1).

FOURNIER and TASCHEREAU JJ. concurred.

HENRY J.—I am not very positive on this matter, and have formed no very decided opinion; and as the majority of the court take a different view, I will not express myself strongly in favor of the respondents.

An appeal is made to the people to decide by their votes whether or not they will adopt the second part

(1) *In re* Canada Temperance Act, 9 Ont. R. 154.

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of the Canada Temperance Act in a particular locality. After the election, the returning officer transmits to the government the ballot boxes and a list of the votes cast, with a report of the result of the election, whereupon, if the result is in favor of the Act, a proclamation is issued declaring the second part of the Act in force in that locality.

In the conduct of these elections there is something more than a mere executive power; there are penalties imposed by the Act for unlawful practices, such as bribery, treating, &c.; there are qualifications of voters required; and a question is sometimes raised as to these qualifications. In trying a cause under the Controverted Elections Act the judge supervises the whole proceedings, takes evidence in regard to the qualifications, &c., and decides whether a vote shall be struck off or not; and he may declare the election void.

Under the Canada Temperance Act the judge has power to decide whether the vote shall remain or be altered, but there is no power given to void the election, unless it be implied from the words of the Act.

The result is that bribery and all sorts of corruption may be practised, but the election will not thereby be avoided, unless power is given to somebody to inquire into such acts, and alter or not the result of the election accordingly.

The Act uses the word "scrutiny," and I think Mr. Justice Palmer very properly defines it, as used in reference to elections. Scrutiny, in law, has a broad, definite meaning; it means anything and everything connected with an election.

There is no such thing as a scrutiny of the ballot papers spoken of, to be exercised by the County Court Judge, and I take it there is something more than mere counting of the ballots intended by the word scrutiny.

Whether the ballot is right or wrong; whether par-

ties are guilty of corruption or not, are matters into which there is no provision made by the Act to enquire, unless it can be done under the scrutiny.

The Act requires that on the day and at the place appointed by the judge, the returning officer shall attend before him with the ballot papers, and the judge on inspecting such papers, and on hearing such evidence as he may deem necessary, and, on hearing the parties or their counsel, shall, in a summary manner, determine whether the majority of the votes given was, or was not, in favor of the petition to the Governor General in Council.

Now, what is the meaning of that? Nobody else has any authority to try out the question. Parties may prosecute under the Act, but that has no reference to the result of the election. On which side is the majority of votes? Does not that mean the majority of legal votes? Was it not the intention of the legislature that this judge should decide on the legality of the votes?

In this case it is in evidence, that in two balloting places the returns were wanting, there was no list got by the returning officer of the votes given at those polling places, nor did he ascertain the voting at those places before summing up as required by the Act. I take it that it came within the authority of the judge to include that as a part of the scrutiny provided by the Act, and to remedy any defects in that respect by the returning officer. If there was no list the returning officer was bound to get other evidence. That was not done by him in this case. Suppose that came before the judge, would he not have a right to ascertain the true number of votes cast at these polling places, that is to do what the returning officer omitted to do?

If the judgment of the court below is wrong, then corrupt or irregular practices will not avoid an election

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such as this. How can I come to the conclusion that the legislature intended this? I do not say that the judgment of the court below was right, but I very much doubt that the legislature did not intend that the County Court Judge should have the right to determine the election on the majority of legal votes cast.

GWYNNE J.—I am of opinion that the appeal in this case should be allowed with costs, upon the ground that the Canada Temperance Act does not give to the County Judge, upon entering into a scrutiny of ballots, jurisdiction over the points which he refused to entertain for the want of such jurisdiction, and the rule *nisi* for a mandamus in the court below should be discharged with costs.

Appeal allowed with costs.

Solicitor for appellants: *H. R. Emerson.*

Solicitor for respondent: *R. Barry Smith.*

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*May. 21.

*Nov. 16.

DENIS O'SULLIVAN (by original bill) (PLAINTIFF)..... APPELLANT.

AND

WILLIAM HARTY AND CHARLES W. WELDON (DEFENDANTS)..... RESPONDENTS.

AND

By order of Revivor.

JOHN KEHOE, EXECUTOR OF THE LAST WILL AND TESTAMENT OF DENIS O'SULLIVAN, DECEASED (PLAINTIFF)..... APPELLANT.

AND

WILLIAM HARTY AND CHARLES W. WELDON (DEFENDANTS)..... RESPONDENTS.

Administrator, acts of—Acting by agent—Next of kin—Costs.

The plaintiff wished to administer to the estate of his brother in the County of Westmoreland and Province of New Brunswick,

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* PRESENT.—Sir W. J. Ritchie C.J. and Fournier, Henry, Taschereau and Gwynne JJ.

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but was unable to give the necessary administration bond until the defendant W. and one J. agreed to become his bondsmen, securing themselves by having the estate placed in the hands of the defendants. A portion of the estate consisted of some English railway stock which the defendants wished to convert into money, but plaintiffs would not assist them in doing so.

In passing the accounts of the estate in the Probate Court of Westmoreland County, it was found that there were several persons entitled to participate as next of kin of the deceased, and the respective amounts due the several claimants were settled by the court.

Owing to the plaintiff's refusal to join in realizing the stock, however, the defendants were unable to pay some of these parties their respective shares, and finally, the plaintiff filed a bill to compel the defendants to pay him his portion of the estate, with $1,000 which he claimed as commission, and also to hand over to him the shares of the next of kin.

At the hearing a decree was made directing the estate to be disposed of by the defendants, and that they were entitled to their costs, as between solicitor and client, which could be retained out of the plaintiff's share of the estate.

On appeal Proudfoot J. reversed that portion of the decree which made the plaintiff's share of the estate liable for the defendant's costs, but the Court of Appeal restored the original judgment.

On appeal to the Supreme Court of Canada:

Held, affirming the judgment of the court below, that as the misconduct of the plaintiff had caused all the litigation, the Court of Appeal had acted rightly in refusing to compel any of the other next of kin to bear the burden of the costs.

APPEAL from a decision of the Court of Appeal for Ontario (1) reversing a judgment of the Chancery Division of the High Court of Justice.

The facts are sufficiently set out in the above headnote, and more fully in the report of the case in the Court of Appeal.

O'Sullivan for appellant contended that the suit was virtually an administration suit, and that the costs should not have been borne entirely by the plaintiff.

J. MacLennan Q.C. and *Whiting* for respondents, con-

(1) 10 Ont. App. R. 76.

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tended that the respondents had not been guilty of any breach of duty, and they could not in justice be saddled with the costs of a defence of a suit which was not necessary in their interest, and to which they were not parties. The construction put on the decree by the Court of Appeal gave justice to all parties. *Stevens* v. *Banks* (1); *Creigh* v. *Hedrick* (2).

Sir W. J. RITCHIE C.J.—I had not on the argument, and have not now, any doubt in this case. I think the Court of Appeal was quite right; the whole difficulty and litigation in this case, arose from the unreasonable and unjust conduct of the original plaintiff. The next of kin are no parties to this proceeding, and as for the two suits with the estate, with them they have no concern; and so, from no principle that I can conceive, can the amount adjudged to them in New Brunswick be now reduced by charging them with the costs of this proceeding. The case of *Boynton* v. *Boynton* (3) clearly shows that the court did quite right in directing that the costs should be paid by the plaintiff, the executor of the original plaintiff (who also instituted this appeal).

I do not think it necessary to add anything to what was said in the court below.

FOURNIER, HENRY and TASCHEREAU JJ. concurred.

GWYNNE J.—This appeal is founded wholly upon a misconception, namely, that the bill filed by the plaintiff in the Chancery Division of the High Court of Justice in the Province of Ontario was a bill for the administration of the estate of one John F. O'Sullivan, deceased, who died intestate in the Province of New Brunswick, leaving property there to be administered.

(1) 10 Wall. 583.
(2) 5 West Va. 140.
(3) 4 App. Cas. 733.

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The bill of complaint states that the plaintiff claiming to be sole next of kin of the said John F. O'Sullivan, and residing himself at Montreal, in the Province of Quebec, and being unable to procure the requisite bail to enable him to procure letters of administration of the estate and effects of his deceased kinsman, to be granted to him in the Province of New Brunswick, entered into an agreement with the defendants, bearing date the 2nd Sept., 1876, whereby, after reciting that the said John F. O'Sullivan had then lately departed this life at Moncton, in the Province of New Brunswick, leaving personal property amounting to upwards of nine thousand dollars, and that the plaintiff, claiming to be brother and only next of kin of the said deceased, had applied for letters of administration of his estate, and that the Honorable Thomas R. Jones and the defendant Weldon had agreed to become sureties for the said plaintiff as such administrator upon being indemnified by the defendant Harty and one Patrick Brown, and that the plaintiff would hand over to the said Harty and Weldon the said personal property to be held by them until the final distribution of the estate, it was agreed as follows:

1st. That the said plaintiff would, as soon as letters of administration should be granted to him, have the said personal property converted into money and deposited in the Bank of British North America at Montreal to the credit of the said defendants.

2nd. That the said defendants should proceed to invest the said monies in good securities to the best advantage, and authorise and empower the said plaintiff to receive the interest and monies arising therefrom.

3rd. That upon the final decree of distribution being made, and no other person successfully disputing the right of the said plaintiff as the next of kin of the said deceased, the said defendants would deliver and pay over to the said plaintiff all the said monies and the securities in which the same might be invested, less expenses.

4th. That the said defendants should not each of them be accountable for the other, or for any loss or damage arising from any invest-

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ments or any depreciation thereof, but that each should be liable only for his own wilful neglect or default.

5th. That in order to ascertain whether there were any other persons next of kin of the deceased, the plaintiff should use all diligence in making enquiries for such persons as the defendants might direct.

The bill then alleges the granting of letters of administration of the personal estate and effects of the deceased to the plaintiff out of the proper court in that behalf, being the Westmoreland Court of Probate in the Province of New Brunswick; it then sets forth the placing in the defendants' hands certain personal estate of the deceased, in pursuance of the above agreement; it then alleges that upon the basis of the accounts rendered to the plaintiff by the defendants of their dealings with estate so placed in their hands, the plaintiff as administrator of the said estate passed his account in the said Court of Probate. The bill then alleges that on the taking of the said account the plaintiff was charged with the sum of $10,098.08 and was allowed the sum of $2,152.31 on account of disbursements, charges, expenses, and compensation in the winding-up of the said estate, and that the said sum of $2,152.31 included a sum of $1,000 allowed to the plaintiff by the said court for his commission and other reasonable and necessary expenses as said administrator, leaving a balance chargeable to the plaintiff as said administrator of $7,945.77, as money in his hands to be divided among the next of kin, consisting of seven persons, including the plaintiff, who were found by the said Court of Probate to be the sole next of kin of the deceased. That immediately after the passing by the plaintiff of his account, the said Court of Probate, by a final order of distribution dated the 16th day of July, 1878, declared that the plaintiff was entitled as one of the next of kin as aforesaid to retain the sum of $1,135.11 out of the said sum of $7,945.77, and that the said six other next

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of kin, naming them, were each entitled to receive the sum of $1,135.11 out of the said sum of $7,945.77, and ordered and decreed distribution of the said last mentioned sum accordingly. That the plaintiff being desirous of receiving his said compensation of $1,000, so allowed to him as aforesaid, and of receiving his said share of $1,135.11, and also being desirous of paying the said several next of kin their respective shares so ordered and decreed as aforesaid and of winding-up the said estate, has applied to the defendants to pay over to the plaintiff the said monies in their hands, and the profits thereof, but that the defendants have refused and neglected, and still refuse and neglect, so to do, and the bill prayed that an account might be taken of all sums of money received by, or come to the hands of, the defendants for or on account, or for the use, of the plaintiff, and of the profits thereof and of all dealings and transactions of the defendants respecting the said monies and profits, and that the defendants might be decreed to pay to the plaintiff what, on taking such accounts, should be found due from the defendants to the plaintiff; that the defendants might be ordered to pay the costs of the suit, and for further relief such as the nature of the case might require. The short substance of the defendants' answers to this bill was that they had fulfilled their agreement with the plaintiff set out in the bill in every particular, that they had rendered him full account of all their dealings with the estate of the deceased come to their hands, that, in fact, it was upon such account that the plaintiff had passed his account with the other next of kin in the Probate Court, and that the sole impediment to the decree of that court being executed was that the plaintiff refused to execute a power of attorney to enable certain railroad stock of an English company, part of the deceased's estate, to be realized;

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that they claimed, as sureties of the plaintiff in his administration bond, to be entitled to relief from all liability upon the monies in their hands under the said agreement passing out of their hands, and the defendant Harty claimed a lien upon the plaintiff's share in the said estate for monies advanced by him to the plaintiff, and disbursed by the defendant Harty at the plaintiff's instance, and due by the plaintiff to him as remuneration for services performed by the defendant Harty in connection with the said estate, at the request of the plaintiff, and by way of cross relief the defendant prayed that the plaintiff might be ordered to specifically perform the said agreement upon his part, and to do and perform all acts, matters and things necessary to have said railway scrip converted into money; that the defendant Harty might be declared entitled to a lien on plaintiff's share of said estate for such remuneration as aforesaid, and that the plaintiff should be ordered to pay the costs of the suit, and that the defendants should have a lien therefor upon the plaintiff's share in the said estate, and that they should be relieved from all liability in respect of the administration bond executed on the letters of administration being granted to the plaintiff.

It will be seen from these pleadings that the subject-matter of this suit was wholly personal between the plaintiffs and the defendants alone, arising out of their contract set out in the agreement of the 2nd of Sept., 1876, and with which the other persons who proved to be next of kin to the deceased had no concern, and whose rights therefore could not be prejudiced by any decree to be made in this suit, to which they were no parties. The bill not only did not contemplate the taking under a decree to be made in this suit an account of the administration of the intestate's estate, for which purpose the other next of kin would be

necessary parties, but on the contrary proceeded upon the basis that that administration account had been taken in the New Brunswick Probate Court, and sought relief personally in aid of the plaintiff against the defendants as his agents in respect of their dealings under the said agreement of the 2nd September, 1876, for the purpose, as was alleged, of enabling the plaintiff as administrator of the intestate's estate to comply with the terms of the order of distribution of the said estate made by the New Brunswick Probate Court. Now the decree made in this suit was to the effect that it should be referred to the Master to take an account of the dealings and transactions of the defendants with the trust estate in the pleadings mentioned since the first day of May, 1878 (that being the day on which the plaintiff passed his administration account in the New Brunswick Probate Court), and to find and state the balance coming to the plaintiff; and the court did order that in passing their said account the defendants should be allowed to retain out of any money in their hands their costs of this suit as between solicitor and client; and the court did further order and decree that the plaintiff should facilitate and assist the defendants in making sale of the railway scrip in the pleadings mentioned, and that all necessary papers and documents for that purpose should be executed, and that the amount realized from such sale should be accounted for in taking the account by the decree directed And the court did further order and decree that the defendants should within two months after the taking of the said account, settle the claims of the next of kin of the intestate John F. O'Sullivan, other than the plaintiff, and that in default of their so doing the balance of the funds of the intestate's estate in the hands of the defendants should be forthwith, after the expiration of the said two months, paid by

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them into court to the credit of the cause, subject to the further order of the court, and that if, upon the defendants settling with the said next of kin other than the plaintiff as aforesaid any balance of the said estate, after deducting the costs by the decree given to the defendants and making the allowances found in their favor by the Master, should remain in their hands, the said defendants should forthwith thereafter pay such balance to the plaintiff. The Master by his report found, among other things, that the defendant Harty was entitled to be allowed, and that the Master therefore allowed him, the sum of $500 as a compensation for his personal services in the management of the estate. That he had taxed and allowed to the defendants the sum of $858.75 for their costs of suit. That on or about the 22nd day of June, 1881, the railway scrip in the decree mentioned was, without the assistance of the plaintiff, sold or otherwise disposed of by the defendants, and that the Master had in the account taken before him charged the defendants with the proceeds thereof, and that on or about the same 22nd of June the defendants had settled with the next of kin of the intestate other than the plaintiff, and had paid to each of them the sum of $1,135.11 being the amount coming to them respectively on the 1st of May, 1878.

The plaintiff appealed from this report to the Vice-Chancellor Proudfoot, because the Master had, in taking the accounts directed by the decree, deducted from the amount with which the defendants were chargeable the sums paid to the next of kin other than the plaintiff before the taking of the said accounts, and had charged the defendants' costs and the allowance of the $500 made to the defendant Harty, against the balance thereafter remaining in the hands of the defendants, whereas, as the plaintiff contended, the shares of all of the next

of kin should have been made to bear a proportion of the said costs and of the said allowance, and because the said Master had by his said report improperly certified that the claims of the next of kin other than the plaintiff were settled by the defendants. The Vice-Chancellor allowed the appeal and made an order to that effect; from that order an appeal was taken to the Court of Appeal for Ontario, which court reversed the order of the Vice-Chancellor and affirmed the Master's report, and it is from this judgment and order of the Court of Appeal for Ontario that this present appeal is taken. In my opinion the appeal must be dismissed with costs. It was contended that upon the true construction of the decree, as it stands, and which, until reversed on appeal, must bind, the defendants' costs of this suit, and the allowance to the defendant Harty, as to the amount of which there is no contest, should be charged rateably to the shares of the whole of the next of kin and not to the share of the plaintiff alone. I have already pointed out that from the frame of the suit no such order could properly have been made, which would have been prejudicial to the interests of the next of kin other than the plaintiff, who were no parties to the suit; but the decree, in my opinion, is not open to any such construction. It contemplated, as it was proper that it should, that the next of kin other than the plaintiff should be paid the full amount found due to them respectively upon the plaintiff having passed his administration account in the New Brunswick Probate Court, and it enabled the defendants, or rather recognized the right of the defendants for their own protection, as sureties for due administration of the intestate's estate by the plaintiff, to settle directly with such next of kin, and all that the decree directed to be paid by the defendants to the plaintiff was the

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balance, if any, there should be after settling with said next of kin other than the plaintiff, and after deduction of the defendants' costs of suit and such allowances as should be made to them by the Master; and this is precisely what has been effected by the Master's report. Neither is there, in justice, any reason, even if the next of kin other than the plaintiff were parties to this suit, why they should contribute to the payment either of the defendants' costs of this suit or of the allowance of the $500 to the defendant Harty. The defendants do not appear to have committed any default in the performance of the agreement of the 2nd September, 1876, upon their part. The suit, therefore, was not occasioned by any fault of theirs, a fact sufficiently apparent by the decree, which gives to them their costs of suit as between solicitors and client in a suit which was purely personal on the part of the plaintiff and arising wholly out of a contract entered into between him and the defendants. Then as to the $500 allowed to the defendant Harty, it appears that the plaintiff agreed to give him this amount for services rendered by him, which, if he had not rendered, the plaintiff must needs have rendered himself or have gotten some other competent person to render, to enable him to discharge efficiently the office of administrator which he had assumed. The proper time and place to have had determined whether the other next of kin should contribute to this sum was when the administrator was passing his account in the New Brunswick Probate Court, when the sum of $1,000, which appears to have been an exceptionally liberal allowance, was made to the plaintiff for all services, commission, &c., which could be claimed by an administrator for the administration of so small an estate as that of the intestate was, and as the defendant Harty acted in such administration solely as the agent of, and under contract with, the

plaintiff, he is the sole person by whom services rendered under such a contract should be paid.

Appeal dismissed with costs.

Solicitor for appellant: *Edward Mahon.*

Solicitors for respondents: *Britton & Whiting.*

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THE TOWN OF PORTLAND (DEFENDANTS)..... .... } APPELLANTS;

AND

MIRIAM GRIFFITHS (PLAINTIFF)..... RESPONDENT.

1885

*May 7.

*Nov. 16.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

Negligence—Defective sidewalk—Lawful use of street—Contributory negligence.

In an action against the town of Portland for damages arising from an injury caused by a defective sidewalk, the evidence of the plaintiff showed that the accident whereby she was injured happened while she was engaged in washing the window of her dwelling from the outside of her house, and that in taking a step backward, her foot went into a hole in the sidewalk, and she was thrown down and hurt; she also swore that she knew the hole was there. There was no evidence as to the nature and extent of the hole, nor was affirmative evidence given of negligence on the part of any officer of the corporation.

The jury awarded the plaintiff $300 damages, and a rule *nisi* for a new trial was discharged.

Held, Per Taschereau and Gwynne JJ., that there was no evidence of negligence to justify the verdict of the jury, and there must be a new trial.

Per Henry J.—That there was evidence of negligence on the part of the officers of the corporation, but the question of contributory negligence was not properly submitted to the jury and there should, therefore, be a new trial.

Per Ritchie C.J. and Fournier J.—That the plaintiff was neither walking nor passing over, travelling upon, nor lawfully using the said street as alleged in the declaration, and she was therefore not entitled to recover.

*PRESENT—Sir W. J. Ritchie C.J., and Fournier, Henry, Taschereau and Gwynne JJ.

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TOWN OF PORTLAND v. GRIFFITHS.

APPEAL from a judgment of the Supreme Court of New Brunswick, discharging a rule *nisi* for a new trial.

The declaration in this case, after alleging that it was the duty of the defendants to keep in repair the streets in the town of Portland, stated that the plaintiff was walking and passing over and along Main street in said town, and, owing to the negligence of the defendants, was injured; and, in the second count, that she was travelling upon the said street and was injured; and, in the third count, that she was lawfully using the said street and was injured.

The evidence of the plaintiff at the trial showed that she was engaged on a certain day in washing the windows of her house on Main street; that being on the street in order to wash them from the outside, she had occasion to step back, and in doing so her foot went into a hole in the sidewalk and was caught there; her slipper came off, and she fell with her shoulder on the sidewalk adjoining the gutter; she also swore that she knew the hole was there.

This fall caused the injury to the plaintiff for which the action was brought, and the jury awarded her $300 damages; a rule *nisi* for a new trial was granted by the Supreme Court of New Brunswick, which was afterwards discharged. The defendants then appealed to the Supreme Court of Canada.

Dr. Stockton for the appellants:

It was misdirection in the learned judge telling the jury that it was the duty of the town to keep the streets in repair so that all persons could pass in safety. The sidewalk where respondent says accident happened was put there by the parish; it was there when the town was incorporated. The street was not recorded. There was no proof that it was fifty feet wide, and unless recorded and fifty wide, by 38 Vic. ch. 92, the

town could not spend money on it. In *Dwyer* v. *The Town of Portland* (1) it was held that no greater duty is cast upon the town since incorporation than existed before when the district was a parish.

I contend also that the corporation is not liable because the Act 34 Vic. ch. 11, secs. 83, 84 and 85, only transferred to the corporation the powers formerly vested in the general sessions and commissioners and surveyors of highways on the streets in question, and left it discretionary with the town to make and repair the streets. The town only possesses the powers formerly exercised by the parish authorities.

This case is different from *Borough of Bathurst* v. *Macpherson* (2). The municipality there had original powers, and it was authorized to levy tolls as well as rates and taxes, and it does not appear there was any limit to that power. Yet in that case it is distinctly laid down that liability attaches only for misfeasance, not for non-feasance. In the present case the town did nothing; there was no duty by law cast upon it to do anything. On the contrary, it was prevented by law from expending money at the place where the accident is alleged to have happened. See also *McKinnon* v. *Penson* (3); *Gibson* v. *Mayor of Preston* (4); *Blackmore* v. *Vestry of Mile End Old Town* (5); *Hill* v. *City of Boston* (6); *Burns* v. *City of Toronto* (7); Dillon on Mun. Cor. (8).

I further contend there was contributory negligence on the part of respondent. She knew full well, as she states, of this defect in the sidewalk. She was not using the street for the purpose of passing to and fro, but for washing the windows by splashing water on

(1) 4 P. & B. (N. B.) 423.
(2) 4 App. Cas. 256.
(3) 8 Ex. 319.
(4) L. R. 5 Q. B. 219.
(5) 9 Q. B. D. 451.
(6) 122 Mass. 344.
(7) 42 U. C. Q. B. 560.
(8) 3 Ed. sec. 981.

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them. She says: "I knew the cracks were there, and stepped back quickly, and my foot went into the hole." In this case the respondent's want of thought or negligence concurred to bring about the accident and she cannot recover. *Tuff* v. *Warman* (1). The question to be considered in every case is not whether the plaintiff's negligence caused, but whether it contributed to the injury. See Shearman & Redfield on Negligence (2).

R. C. Skinner for the respondent.

The respondent held the right to use the sidewalk for the purpose for which she did, and she was not bound to remember there was a hole; it cannot be urged there was any contributory negligence because she forgot there was a hole at that particular spot.

As to the liability of the corporation I contend, outside of the question as to whether the doctrine in *Dwyer* v. *The Town of Portland* (3), by reason of the defence made at the trial of this cause, is applicable or not, that the evidence, at all events, shows that the appellants continued the planked sidewalk on the street, and repaired it from time to time; and that it therefore became their duty to keep it in a reasonably safe condition, just as if they had originally constructed it; and that the law would cast on them the duty of keeping it in such a state, as to prevent it causing danger to persons using it; that the appellants had by their charter the care and management of the street; and that this sidewalk was under their control, and they had no right to leave it (as they did leave it, under the evidence and finding of the jury) in a dangerous condition.

The learned counsel cited the following cases:

Whitehouse v. *Fellows* (4); *Fletcher* v. *Rylands* (5);

(1) 5 C. B. N. S. 585.
(2) 3rd Ed. 39.
(3) 4 P. & B. (N. B.) 423.
(4) 10 C. B. N. S. 765.
(5) L. R. 3 H. L. 330.

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White v. *The Hindley Local Board of Health* (3); *Clarke* v. *The Town of Portland* (4); *Borough of Bathurst* v. *Macpherson* (5); *Blackmore* v. *Vestry of Mile End Old Town* (6); *Kent* v. *Worthing Local Board of Health* (7).

Dr. *Stockton* was heard in reply.

Sir W. J. RITCHIE C.J.—The declaration in this case alleges:

1. That the town of Portland had the care, control, &c., of the public streets of the said town, and it was the duty of the town to keep the same in a safe and proper condition for the passage to and fro over and along the same of the citizens of the said town; that among the streets of said town is one known as Main street; that plaintiff was, on the 23rd of May, 1878, a resident of said town, and was then walking and passing over and along the said street; yet the said defendants, not regarding their said duty in that behalf, negligently, illegally and improperly left the said street in an unsafe, dangerous and improper condition for the passing to and fro over and along the same of the said citizens and other subjects, and thereupon the said plaintiff, Miriam Griffiths, whilst so walking and passing over and along said street, without any fault of her own, but by reason of such negligence and improper conduct of the said defendants, accidentally fell into a hole negligently and unlawfully left by the said defendants in said street, and thereby became and was greatly bruised, wounded and injured, so that the said plaintiff became sick and permanently disabled, and suffered great pain and distress for a long time.

2. And for that the plaintiff says there is, in the town of Portland aforesaid, a certain other public street called Main street, leading from the city of Saint John to Indiantown, which said defendants are bound to keep in repair; that the same was negligently suffered by defendants to be out of repair, whereby the plaintiff, travelling thereon, and using due care, was hurt.

3. And for that the plaintiff says there is, in the town of Portland, a certain other public street called Main street, leading from the city of Saint John, which said defendants undertook to repair and keep in repair, but did so in so negligent a manner that a certain hole was allowed to be and remain therein, whereby the said plain-

(3) L. R. 10 Q. B. 219.
(5) 4 App. Cas. 256.
(6) 9 Q. B. D. 451.
(7) 10 Q. B. D. 118.
(4) 3 P. & B. (N. B.) 189.

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tiff, lawfully using said street, and without negligence on her part, was hurt.

And the plaintiff claims two thousand dollars.

The evidence of the plaintiff directly negatives the allegations of the said declaration; her statement is that:

> On the 23rd of May, 1878, I went to wash the windows and was outside, and there was a hole, and as I stepped back my foot went into the hole and held my foot fast. My foot went into the hole in the sidewalk. My slipper came off, and I fell with my shoulder on the sidewalk adjoining the gutter. Somebody helped me into the house; I don't know who.
>
> On cross-examination:
>
> The holes were opposite our house. I knew the cracks were there, and stepped back quickly, and my foot went into the hole. About twelve or fifteen inches; I cannot say how long or how wide; they were wide enough for my foot to enter. The window was the far side. I came out of the shop door. The window was between the shop door and the hall door.
>
> (I was washing the room window. To the judge.)

It is quite clear from this that the plaintiff was not walking or passing along the street, nor, in the language of the second count, travelling thereon, nor, in the language of the third count, lawfully using the street in the way in which streets are provided to be kept in repair, namely, for the passing to and fro of citizens and subjects.

The witness says she knew the cracks were there, and while washing her windows stepped back quickly and her foot went into the hole; if this resulted in any injury to the plaintiff such as she complains of, which to my mind is extremely doubtful under the evidence, I think the accident was the result of her own negligence. Had she been passing along the street, or using it in a legitimate way, as she knew the hole was there, it would have been her duty to have avoided it and the accident would not have happened; as it was, if she chose to avail herself of the use of the street for

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the convenience of washing her windows, and, with the knowledge of the existence of the hole, carelessly stepped back into it and suffered injury thereby, I think she cannot hold the town liable therefor.

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Chief Justice Allen was of opinion that if plaintiff was entitled to recover the damages were excessive, and I agree with him.

Mr. Justice Weldon, who tried the cause, and Mr. Justice Wetmore were of opinion that the evidence did not justify the finding of the jury, and I agree with them.

FOURNIER J.—I think the evidence shows that the plaintiff is not entitled to retain her verdict, and that the appeal should be allowed.

HENRY J.—The plaintiff seeks to recover damages for injuries sustained by a defective sidewalk in the town of Portland. The sidewalk was for the use and accommodation of the people, not merely to go along to and fro, but to use for any lawful purpose. The plaintiff had a right to wash windows, which is a necessary act, and for that purpose could legally use the sidewalk. She was therefore engaged in a lawful act, but required to take proper precautions against accidents. It would be a question of fact for the jury whether due care was used or not. The town would not be liable if the plaintiff, by using ordinary care, could have avoided the accident.

A person walking along the street should, in every case, use ordinary diligence, but if the plaintiff was doing something lawful, with her back to a hole in the sidewalk, was she called upon to reflect upon what was not within her view at the time? I think the evidence sustains the allegations of negligence against the corporation, but the question of contributory negligence was not submitted to the jury as I think it should have

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been; and therefore, they not having decided upon it, I think a new trial should be granted.

TASCHEREAU J.—I think the appeal should be allowed and a new trial granted.

GWYNNE J.—This is an appeal from a rule absolute issued out of the Supreme Court of the Province of New Brunswick discharging a rule *nisi* for a new trial issued at the suit of the defendants.

From the report which is presented to us of opinions of the judges of the New Brunswick Court, it appears that the issue of a rule absolute granting a new trial would have been more in accordance with the opinions of the majority of the court. The rule *nisi* was moved upon several grounds, namely: that the verdict was against the weight of evidence; that the plaintiff was guilty of contributory negligence; that the verdict was against law and evidence and for excessive damages.

The learned chief justice was of opinion that the damages were excessive and that the evidence of the injury, of which the plaintiff complained, was not satisfactory, as she did not appear to have made any complaint about it for nearly two years.

Mr. Justice Weldon, who tried the cause and who was of opinion that the plaintiff's own evidence showed her to have been plainly guilty of contributory negligence, and he so charged the jury, was also of opinion that the evidence did not at all justify the verdict of the jury, and that the case should therefore be submitted to another jury. In this opinion Mr. Justice Wetmore concurred. There are thus three judges out of five of opinion that a new trial should be granted. I am of opinion, also, that this is the mode in which the rule *nisi* should have been disposed of.

The action is for a peculiar injury alleged to have been sustained by the plaintiff by reason of a negligent

breach by the defendants of a duty which it is alleged they owed to the public.

The declaration alleges that the defendants had the care, control and management of the public streets of the town of Portland, and that it was the duty of the defendants to keep the said streets in a safe and proper condition, for the passage to and fro over and along the same, of the citizens of the town of Portland, and of other good and worthy subjects of Her Majesty, and that the plaintiff on the 23rd May, 1878, a resident of the said town, was then walking and passing over and along a street called Main street in the said town, yet that the defendants, not regarding their said duty, negligently, illegally and improperly left the said street in an unsafe, dangerous and improper condition for the passing to and fro, over and along the same, of the said citizens and other subjects, and that thereupon the plaintiff, whilst so walking and passing over and along the said street, without any fault of her own, but by reason of such negligence and improper conduct of the defendants, accidentally fell into a hole, negligently and unlawfully left by the defendants in the said street, and thereby was bruised, injured and permanently disabled.

The gist of this species of action is negligence upon the part of the defendants in committing such a breach of a duty which they owed to the public as subjected them to conviction on an indictment as for a public nuisance, from which breach of duty the plaintiff suffered the peculiar private damage complained of, without any negligence on her own part contributing to the happening of the injury. The defendants pleaded the general issue, and at the trial it was agreed between the parties that under this plea the defendants should be at liberty to adduce any evidence, and urge any defence, which they might adduce or urge under any

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plea they could have properly pleaded. The object of this was, I presume, to enable the defendants to contest the alleged duty, the general issue having opened up every other ground of defence. At the trial the plaintiff, who was herself the only witness called to establish the breach by the defendants of the duty alleged to have been owed by them to the public, and of the happening of the injury of which the plaintiff complained, said merely that when washing the windows of the house in which she lived on Main street, from the outside, she stepped quickly backwards and her foot caught in a crack, or aperture, in the plank sidewalk, of the existence of which crack she was aware, but of the length and breadth of the crack, save that it was wide enough for her foot to catch in it, or of its being at all dangerous to persons walking along the sidewalk in the ordinary manner, or that it was of such a nature as to be a defect in the sidewalk, constituting a public nuisance, or that the plaintiff herself or any person had ever complained of the existence of the crack, or that any officer of the defendants had any knowledge of its existence, or that it had existed in the sidewalk for any length of time, there was no evidence whatever. It might, for all that appeared, have been a space between two planks not more than two inches wide and eight or ten inches long, which to any person seeing it would not appear to be at all dangerous to the public, or a nuisance. In short, the fact of the occurrence of the accident as stated by the plaintiff herself (when stepping quickly backwards where she knew the crack was), constituted the sole evidence of the negligence and breach of duty which constitute the foundation of the action.

Maule J. in delivering the judgment of the court in *Brown* v. *Mallett* (1) says :

(1) 5 C. B. 620.

The duty of the defendants (for the breach of which, causing damage to the plaintiff, the action was brought) is of a public nature, and the plaintiff, in order to succeed, must show a breach of a public duty as well as special injury to himself.

To the like effect are the observations of Park J. when delivering to the House of Lords the opinion of the judges in *Lyme Regis* v. *Henley* (1).

In order to make the declaration good it must appear: 1st. That the corporation lay under a legal obligation to repair the place in question; 2nd. That such obligation is a matter of so general and public concern that an indictment would lie against the corporation for non-repair; 3rd. That the place in question was out of repair; and lastly, that the plaintiff sustained some peculiar damage beyond the rest of the Queen's subjects by such want of repair.

So in the *General Steam Navigation Co.* v. *Morrison* (2) Williams J. asks:

Is there an instance of an action sustained for a specific injury to a plaintiff from the breach by the defendant of a duty imposed on him by statute where the party could not have been indicted for a misdemeanor?

And Jervis C.J., delivering judgment in that case, says:

It was contended that here is a statutable duty cast upon the defendant for the breach of which an action lies against him; no instance, however, could be shown of an action for a breach of duty imposed by a statute for which the party might not have been made responsible in another form.

That is by indictment.

The breach of duty therefore which gives to a plaintiff a private action for peculiar damage arising therefrom sustained by him, must be such as to warrant a conviction of the party guilty of the breach of duty upon an indictment.

In *Merrill* v. *Inhabitants of Hampden* (3) it is laid down as a principle of general application that such a state of repair as would exempt the defendants from liability in an indictment, will also exempt them from

(1) 1 Bing. N. C. 235. (2) 13 C. B. 591.
(3) 26 Maine 234.

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liability in a civil action. See also to the like effect *Howard* v. *The Inhabitants of North Bridgewater* (1). And this, indeed, is the natural consequence, resulting from the fact that the private action is founded upon the breach of a duty owed by the defendants to the public, for the breach of such duty being cognizable upon an indictment, if the facts adduced in evidence be insufficient to sustain a conviction on the indictment, there cannot be said to have been any breach of duty committed, and so the foundation necessary to support the private action is removed.

Now, in this case, the mere happening of the accident not being even *primâ facie* evidence of negligence, nor indeed of the alleged defect being of that nature and magnitude to constitute a public nuisance, it was necessary for the plaintiff to have given affirmative evidence upon both of these particulars. *Cotton* v. *Wood* (2); *Hammack* v. *White* (3). This she did not attempt to do.

In the American courts the rule, which is a very reasonable one, appears to be that in an action of this nature against a corporation, it is necessary to bring home to some of the officers of the corporation actual notice of the existence of the defect which is relied upon, prior to the happening of the accident, so as to affect them with implied knowledge thereof, by showing the defect to have been so notorious that it is reasonable to fix the corporation with notice of it. See the cases collected in *Castor* v. *Uxbridge* (4), where that rule is followed, and it was held that to make a corporation liable they must have actual knowledge through their servants of the existence of the nuisance, or it must be shown to the satisfaction of the jury that their ignorance of it can be only explained by attributing it to

(1) 16 Pick. 189.
(2) 8 C. B. N. S. 568.
(3) 11 C. B. N. S. 588.
(4) 39 U. C. Q. B. 127.

negligence. In *Boyle* v. *The Town of Dundas* (1), the present Chief Justice of the Court of Appeal for Ontario, then Chief Justice of the Court of Common Pleas, says:

> I cannot understand that it follows necessarily that because there may be a hole in a plank sidewalk, and a person accidentally trips or steps into it and is injured, that damages are recoverable. There must be some clear dereliction of duty, some unreasonable omission to fulfil a statutable requirement.

And again:

> Everyone using a sidewalk must take on himself a certain amount of risk. To acquire a cause of action he must show an injury resulting from the walk being left in a dangerous state of non-repair.

And again he says (2):

> We all know that small breaches in the surface of sidewalks are of every-day existence in every town. It is unreasonable to hold that a corporation neglects its duty, merely because such a breach or hole may be found in some street. The question should, I think, always be as to the general performance of their duty rather than an isolated instance of fault.

In that case a new trial was granted, and upon the second trial questions were submitted to the jury specially pointing to the questions whether the defect complained of constituted a nuisance—whether the corporation had notice of it if it was—and whether when the accident happened the plaintiff, from the knowledge she had of its existence, might have escaped the accident, and have prevented its occurrence if she had been looking where she was going. Similar questions appear to me to have been peculiarly appropriate in the present case, and if they had been put to the jury, and they had found in favor of the plaintiff, it appears to me to be impossible to have sustained such a verdict. So utterly defective was the evidence given by the plaintiff to entitle her to recover, that in my opinion she should have been non-suited if a non-suit had been moved for. To establish the defect in the

(1) 25 U. C. C. P. 424. (2) P. 426.

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sidewalk which was spoken of to be a public nuisance, upon the evidence as given, is a proposition, in my opinion, incapable of being sustained, and upon the point of negligence in the defendants, I am of opinion there was no evidence to go to a jury; while upon the question of contributory negligence, I agree with the learned judge who tried the cause that it was almost conclusive. Upon the question, whether the statute of the corporation of the town of Portland imposes upon the corporation the duty of keeping the streets and sidewalks in a sufficient state of repair, I am of opinion that the effect and intent of the statute creating the municipality, and placing under its exclusive control the public streets and highways, does impose upon the corporation the correlative duty of keeping them in repair. I think it is well laid down in *Castor* v. *Uxbridge* (1), upon the authority of the English and American cases there cited, that:

> Where a public body is clothed by statute with authority to do an act which concerns the public interest, the execution of the power may be insisted upon as a duty, though the statute creating it be only permissive in its terms.

Upon the whole, therefore, I am of opinion that a new trial should be granted, and that if the evidence upon the second trial should not remove the defects existing in that given in the former trial, the plaintiff should be non-suited.

Appeal allowed with costs and new trial granted.

Solicitor for appellants: *A. A. & R. O. Stockton.*

Solicitor for respondent: *C. N. Skinner.*

(1) 39 U. C. Q. B. 121.

JOHN TAYLOR (DEFENDANT).....APPELLANT;

AND

ROBERT G. MORAN, BENJAMIN WISHART, ROBERT GALLAWAY AND DAVID SMITH (PLAINTIFFS) } RESPONDENTS.

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*May. 8.

*Nov. 16.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

Marine Insurance—Voyage policy—Sailing restrictions—Time of entering Gulf of St. Lawrence—Attempt to enter.

In an action on a voyage policy containing this clause "warranted not to enter or attempt to enter or to use the Gulf of St. Lawrence prior to the 10th day of May, nor after the 30th day of October (a line drawn from Cape North to Cape Ray and across the Strait of Canso to the northern entrance thereof shall be considered the bounds of the Gulf of St. Lawrence,)" the evidence was as follows:—

The Captain says: "The voyage was from Liverpool to Quebec and ship sailed on 2nd April. Nothing happened until we met with ice to the southward of Newfoundland. Shortened sail and dodged about for a few days trying to work our way around it. One night ship was hove to under lower main top-sail, and about mid-night she drifted into a large field of ice. There was a heavy sea on at the time, and the ship sustained damage. We were in this ice three or four hours. Laid to all the next day. Could not get further along on account of the ice. In about twenty-fours hours we started to work up towards Quebec."

The log-book showed that the ship got into this ice on the seventh of May, and an expert examined at the trial swore that from the entries in the log-book of the 6th, 7th, 8th and 9th of May, the captain was attempting to enter the Gulf of St. Lawrence.

A verdict was taken for the plaintiffs by consent, with leave for the defendants to move to enter a non-suit, or for a new trial; the court to have power to mould the verdict, and also to draw inferences of fact the same as a jury. The Supreme Court of

* PRESENT—Sir W. J. Ritchie C.J. and Fournier, Henry, Taschereau and Gwynne JJ.

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New Brunswick sustained the verdict. On appeal to the Supreme Court of Canada,

Held, reversing the judgment of the court below, Henry J. dissenting, that the above clause was applicable to a voyage policy, and that there was evidence to go to the jury that the captain was attempting to enter the gulf contrary to such clause.

APPEAL from a decision of the Supreme Court of New Brunswick (1) refusing to enter a non-suit or order a new trial.

The facts of the case sufficiently appear in the head note and in the report of the case in the New Brunswick reports.

C. W. Weldon Q.C. for respondent.

My first point is that the evidence shows that prior to the tenth of May the said vessel was attempting to enter the Gulf of St. Lawrence, and there was therefore a breach of warranty.

The whole of a policy of insurance, as well as any contract, must be construed together and every part thereof given its full legal construction and meaning. Mr. Justice King seems to think this clause not applicable to this insurance, and in effect, in his judgment, strikes it out and considers it inconsistent. But the learned judge is wrong in this particular. This is a portion of the contract that cannot be rejected; whatever may be conjectured cannot alter its effect. It is reasonable on a voyage policy to warrant a vessel shall not use a certain sea before a certain time. For instance, a vessel might be insured on a voyage from Liverpool to San Francisco, with a warranty that she should not round or attempt to round Cape Horn during certain months, and clearly if she did so it would be a breach of warranty. In this case the vessel was in Liverpool, the underwriter in Canada; he had no knowledge of her sailing, and the underwriter might say: "Yes, I will take the risk at $2\frac{3}{4}$ per cent., provided you warrant

(1) 24 N.B. Rep. 39.

your vessel will not enter or attempt to enter the Gulf of St. Lawrence before the tenth May." We can fairly infer what is referred to by the House of Lords in the case of *Birrell* v. *Dryer* (1), and it would seem the very damage the underwriter wished to be avoided was encountered in this case. The words "enter or attempt to enter," apply to two different acts—the one, the actual entering the gulf, the other, the attempt to enter—and it is immaterial whether it is successful or not; in either case it is a breach of warranty. Had the words been merely "enter the gulf" it is not disputed that a vessel sailing with the intention to enter would not commit a breach of warranty until the intention was carried out. Here the words are "attempt to enter," pointing to something more than actual entry, *i.e.* the intention to enter and an effort to carry that intention into effect. Here the master evidently intended to enter the gulf, and prior to the 10th of May was endeavoring to carry out that intention. *Birrell* v. *Dryer* (1); *Colledge* v. *Harty* (2).

Dr. Stockton for respondents.

There was no breach of warranty in this case. A line drawn from Cape North to Cape Ray and across the Strait of Canso to the northern entrance thereof, shall be considered the bound of the Gulf of St. Lawrence seaward. The "Prince Eugene" did not enter or attempt to enter the gulf before the 10th of May. If the vessel were attempting to enter the gulf because sailing towards that line, then there was a breach of warranty under the policy from the moment the vessel set sail from Liverpool to Quebec. The policy covered a voyage from Liverpool to Quebec; it would be singular, if not absurd, to hold the prosecution of that voyage a breach of warranty of the very policy issued to cover that voyage. It is submitted the fair meaning

(1) 9 app. cas. 345. (2) 6 Ex. 205.

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of the clause is, that the vessel would not cross the line, or attempt actually to do so, until after the 10th of May. The attempt to enter the gulf would only be when the vessel reached the line and attempted to cross. It is not pretended the vessel crossed the line before the 10th of May, but was sailing towards it. The vessel sailed on the 2nd April; the policy was effected on the 3rd April. She was sailing towards the line at the time policy issued.

What purported to be a chart was produced by appellant on the trial, and attemped to be used to show the position of the vessel at certain dates. There was no proof what kind of a chart it was, or by whom compiled; no evidence that it was accurate, or published by authority of the Admiralty, or any other competent authority (1). The judge offered to admit chart, subject to objection, but it was not pressed. The rejection of questions put by appellant, and also the offer to admit chart, are fully alluded to in the judgment of King J. in the court below.

C. W. Weldon Q.C. was heard in reply.

Sir W. J. RITCHIE C.J.—The warranty is in the policy, the parties have not chosen to strike it out or reject it, and we have no right to do so, but are bound to give it due effect if it is capable of being acted on, which I think it is quite as much in a voyage as in a time policy. I cannot see that the warranty is at all inconsistent with a voyage policy; the same reasons which would induce an insurer to prohibit the entering, attempting to enter or usage of the gulf within the times limited, would apply with equal force to, and was as necessary in, a voyage, as a time policy when the insurer is unwilling to take on himself the risk of the insured entering, or attempting to enter or use the Gulf of St. Lawrence prior to the 10th of

(1) See Roscoe N. P. Ev. Vol 1 (Ed. 1884) p. 47.

May, or after the 30th of October; for, if the entering or attempting to enter or use, would be dangerous in the case of a time policy, it would be equally so in that of a voyage policy. Why should the assured not as well thus limit himself as to entering, attempting to enter, or using the gulf before or after the days named, in a voyage policy as in a time policy? In either case, the limit he puts on himself is precisely the same, and if he can make a warranty good in the one case, I can see no reason why he may not do so in the other; and if he chooses so to pursue his voyage as to amount to a breach of his warranty, clearly the underwriter may avail himself of it; and therefore, in my opinion, the real and only point in the question here is: Was there a breach of the warranty? That is to say: Did the vessel enter, or attempt to enter, or use the Gulf of St. Lawrence prior to the 10th day of May? The vessel did not actually enter the gulf until after the 10th of May, so that the only breach, if any, was: Did she, before the 10th of May, attempt to enter the gulf? And this, in my opinion, is a pure question of fact, which should have been submitted to the jury.

The respondent contends that the fair meaning of the clause is that the vessel should not cross the line, or attempt actually to cross, until the 10th of May; that the attempt to enter the gulf would only be when the vessel reached the line and attempted to cross.

But surely, if she had not reached the line, but there was ice between her and the line, and while, in attempting to force her way through the ice to reach and cross the line and enter the gulf, in so doing she received damage, could it be said she was not attempting to enter? Or could it be said that it and while so attempting she received damage, it was not the very damage from which the warranty was intended to protect the underwriters?

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The contention that "attempting to enter" means attempting to cross the line, and that there can be no "attempt to enter" until the vessel is at the line, appears to me to render the words "attempting to enter" meaningless; it is tantamount to saying that the vessel must come up to the line and actually cross (for it is difficult to see how, practically, she could just reach the line and not cross) which would not be an attempt to enter, but an actual entry. It is clear the warranty contemplates two distinct contingencies, one attempting to enter, the other actually entering.

Judge Palmer says:

> It must be borne in mind that this was a voyage policy, and under such a policy the vessel would have a right to sail on the voyage according to the representation made, or, if nothing said, then at any time; and when she arrived at the place where she would have to enter the gulf he would have to delay, and not attempt to enter until the time named.

I cannot assent to this as good law. The duty was cast on insured to pursue his voyage, once entered on, without unnecessary delay or deviation; if he wished to prevent a breach of his warranty, he should have taken care to have started on his voyage late enough to prevent the necessity of attempting to enter or entering before the 10th of May. It would not do, in my opinion, for the vessel to lay at, or beat about, the mouth of the gulf, waiting until the 10th, to enable her then to enter and save her warranty. I think the evidence shows that the vessel, while pursuing her voyage, was attempting to enter the gulf, and would have done so but for the ice. This, in my opinion, was the very risk the warranty was intended to protect the underwriters from, viz., beating about in the ice attempting to enter the gulf. If, as suggested by Judge King, it could have been shown that at the time of the accident the vessel was so far from the line of the gulf, as fixed by the policy, that she could not have reached it by the

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10th of May, or that she was so far from it that she could not reasonably, in the opinion of the jury, be said to be attempting to enter the gulf at the time of the loss, under such circumstances, the jury would be fully justified in finding that she was not attempting to enter, and so there had been no breach of warranty.

Mr. Justice King says:

Capt. Thomas stated where the line was, but Capt. Smith might have a different opinion; or as, according to Capt. Thomas, the ship was about sixty miles from the line of the gulf at noon on the 7th May, and with an ordinary wind could run that distance in about eight hours, and with such winds as prevailed could have got to the line in twenty-four hours from where she was at noon of the 7th, but was hove to and was drifting, and was farther from the line on the 10th than on the 7th; the master might possibly have shown that if he had wished to enter the gulf, he could have done so, and that not doing so, and being prevented by no physical obstacle, as for instance by the ice, from doing so if he had so wished, he could not be said to be attempting to enter the gulf. In any point of view the plaintiffs were entitled to his evidence on the point, and the amendment should have been made only upon terms of postponement of the trial.

But it must be remembered that unnecessary delay in pursuing the voyage would vitiate the policy, such delay being tantamount to deviation, it being the clear duty of the master, having commenced the voyage, then to proceed to the place of destination by the shortest and most direct course usually taken by ships on the same voyage; this is a stipulation implied in all contracts of affreightment and all policies of marine insurance, liable, however, to be modified in respect of particular voyages by evidence of usage when common and established, or by express agreement when the language is clear and unambiguous (1).

The warranty certainly could not prevent him from completing the voyage, but if he entered, and so was guilty of a breach of his warranty, it would certainly be at owner's risk, for the simple reason that by the terms of his policy he assumed that risk.

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(1) MacLachlan on Shipping 3 ed. p. 424.

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Per Tindal C.J. in *McAndrews* v. *Adams* (1); *Davis* v. *Garrett* (2); *Freeman* v. *Taylor* (3); *Mount* v. *Larkins* (4); *Palmer* v. *Marshall* (5).

This being the captain's duty, and he being within such a short distance of the mouth of the gulf and continuing on his voyage, he must, I think, be taken to be attempting to enter the gulf, and he only failed to do so by reason of the ice which he encountered in such attempt, and which caused the injury from which it was the object of the warranty to protect the insurers.

The appeal must be allowed, and the parties having made an agreement to that effect a non-suit will be entered, otherwise we could only have ordered a new trial.

FOURNIER J.—I am of opinion that the appeal should be allowed.

HENRY J.—The respondents' ship sailed from Liverpool to Quebec on 2nd April. She was under an obligation not to enter the Gulf of St. Lawrence before 10th May, or to attempt to enter. Some two or three days before that date the vessel got into the ice several miles south of the gulf, and was injured. A claim is made for particular average for damage sustained by the ice three or four days before the time. She met it on the sixth of May, and got into it that night or the night following, and sustained the damage for which the action is brought.

Now, where did she meet the ice? To the southward of the coast of Newfoundland, the distance not being stated. She sailed for four or five days after, when she got into a field of thin ice, and after going through that,

(1) 1 Bing. N. C. 39.
(2) 6 Bing. 716.
(3) 8 Bing. 124.
(4) 8 Bing. 108.
(5) 8 Bing. 317.

proceeded without meeting any more, and arrived at Quebec on the 30th or 31st of May. She did not enter the gulf before the tenth and the question is as to an attempt to do so.

The pleas of the defendants did not originally contain any allegation of breach of covenant. The captain was examined under commission, and there appears to have been no question raised as to the breach of covenant before the trial. At the trial an application was made to add this plea. The presiding judge to whom this application was made not only granted it, but required the parties to proceed with the trial.

There was no necessity to ask the captain when examined any question as to his intention, or as to his action from which such could be ascertained. The amendment having been made, we look for the testimony, and find there is no evidence as to the question at all. The defendant sets up an attempt to enter the gulf before the time mentioned as a defence. He says: "You are entitled to recover in this case on all other points, but your right to recover in every other respect is of no avail because, on or before the 10th of May, you attempted to enter the gulf."

This is the defence, where is the evidence? If there is none, the defence should fail. If the captain intended and meant, and did attempt to break through this line before the 10th of May, the appellant is bound to give evidence of it. But does the fact of meeting the ice away to the southward of this line prove that he started from Liverpool too soon, and that he necessarily throughout the passage was making the illegal attempt? The captain is under legal liabilities, and is bound to sail when the ship is loaded and ready for sea. What evidence is there to show the court or jury, that if he had waited two days longer he would not have met the same ice. Then how can it be said that it was sailing

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too soon that caused the damage? The defendant is bound to prove his defence and to make out a reasonably strong case. He must remove every reasonable doubt as to the fact alleged in defence. I think that courts should interpret conditions of this kind strictly.

But we are told that if he had not been attempting to enter the gulf he would not have been where he was. What evidence is there of that? I must say in this case that we should have some proof that the party did make the attempt. When did he attempt it? On what part of the voyage? When he left Liverpool, on the 10th of May, or when? If we are to decide upon the rights of parties on evidence as slim as this, I think we are not performing our legitimate functions.

I think, therefore, that the appeal should be dismissed and the judgment of the court below affirmed with costs.

TASCHEREAU J.—I would have come to the same conclusion as my brother Gwynne. I think the appeal should be allowed, without costs.

GWYNNE J.—I think there can be no non-suit upon the point as to there being, as was contended, no proof of damage on the voyage to Quebec to the amount of five per cent. upon the declared value of the ship. There was evidence upon that point to go to the court below acting as a jury, therefore there can be no non-suit; and as against the finding of the court upon that evidence, the point to be established by the appellant before us sitting in appeal is, that on this matter of fact they were clearly wrong. The appellant has failed to establish that point to my satisfaction. As to the breach of warranty the respondents having waived all claim to a new trial upon this point, leave to have which was reserved to them if they desired it, as a condition subject to which the plea was allowed to be added at the trial

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and consenting to have the question on the warranty determined by us upon the evidence as it stands, I am of opinion that a verdict and judgment thereon should be entered for the defendant in the court below upon the plea of warranty and breach thereof. I cannot entertain a doubt that according to the ordinary understanding of the language used in the warranty the evidence shows a clear attempt to enter the Gulf of St. Lawrence prior to the 10th of May, and that it was by reason of this very attempt, against the consequences resulting from which the appellant was by the warranty protecting himself, that the injury to the insured vessel, for which this action is brought, occurred. Unless the evidence shows a breach of the warranty that the vessel should not attempt to enter the Gulf of St. Lawrence prior to the 10th day of May, the warranty as to the attempt would be quite illusory, in fact a dead letter. No doubt that by using a printed form for time policies to frame a voyage policy thereon, there are matters appearing in the policy, as framed, which are inappropriate to a voyage policy and insensible, but this cannot justify us in expunging from the policy the warranty that the ship shall not attempt to enter the Gulf of St. Lawrence prior to the 10th of May; for by so doing we should be plainly depriving the insurer of the benefit of a clause which is apparently a most reasonable one, upon which he relied for his protection from the injury to the vessel which has occurred. Judgment must, therefore, be for the appellant on the plea of breach of warranty, with costs in the court below.

Appeal allowed with costs.

Solicitors for appellant: *Weldon, McLean & Devlin.*

Solicitors for respondents: *A. A. & R. O. Stockton.*

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*May. 15.
*June 23.

JOHN O'DONOHOE (DEFENDANT).....APPELLANT;

AND

SAMUEL JAMES STAMMERS (PLAINTIFF).....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Vendor and purchaser—Specific performance—Contract not signed by vendor, but subsequently admitted by his letters—Statute of frauds.

Where property was sold by auction, the particulars and conditions of sale not disclosing the vendor's name, and the contract was duly signed by the purchaser, but was not by the vendor or the auctioneer acting in the matter of sale, and subsequently, in consequence of delays on the part of the purchaser, the attorneys for the vendor (one of whom was the vendor himself) wrote in the course of a correspondence which ensued: "*Re* S.'s purchase, we would like to close this:" And referring to certain representations made in the advertisements of the sale: "They were not made part of the contract of sale. * * Have the goodness to let us know whether the vendee will pay cash or give mortgage. If the latter, we will prepare it at once and send you draft for approval; and on a subsequent occasion: "*Re* S.'s purchase. Herewith please receive deed for approval," and on another occasion the vendor himself wrote "I shall take immediate steps to enforce the contract."

Held, affirming the judgment of the courts below, that the conditions of sale together with the correspondence were sufficient to constitute a complete and perfect contract between the vendor and purchaser within the Statute of Frauds.

APPEAL from the judgment of the Court of Appeal for Ontario (1) affirming the decree of Blake, V.C., in favor of the respondent.

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

(1) 8 Ont. App. R. 161.

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The respondent, on the 28th day of August, 1880, filed a bill of complaint, in the late Court of Chancery for Ontario, alleging that he was the purchaser at a sale by auction on the 15th day of May, 1880, of a parcel of land in the township of East Gwillimbury, containing 81¼ acres, and that the appellant was the owner and vendor, and prayed *inter alia* for the specific performance of the contract of sale.

The defence was that neither the agreement alleged in the bill for the purchase and sale of the lands and premises in said bill mentioned, and of which the respondent sought to have the benefit, nor any memorandum or note thereof was ever reduced into writing and signed by the appellant or any person lawfully authorized thereunto within the meaning of the Statute of Frauds, and the appellant claimed the benefit of the statute and pleaded the same as a defence to the action.

The circumstances under which the sale of the lot in question was made, and the subsequent correspondence which took place between the parties in reference thereto, are fully set out in the judgment of Ritchie C.J., hereinafter given.

O'Donohoe Q.C. for appellant

The following authorities were referred to:

Potter v. *Duffield* (1); *Dobell* v. *Hutchison* (2); *Munday* v. *Asprey* (3); *Vandenberg* v. *Spooner* (4); *Wilmot* v. *Stalker* (5); Fry on Specific Performance (6); *McClung* v. *McCracken* (7); *Smith* v. *Surman* (8); *Archer* v. *Baynes* (9); *Boydell* v. *Drummond* (10); *Fitzmaurice* v. *Bayley* (11); *Holmes* v. *Mitchell* (12); *Harnor* v.

(1) L. R. 18 Eq. 4.
(2) 3 A. & E. 371.
(3) 13 Ch. D. 855.
(4) L. R. 1 Ex. 316.
(5) 2 Ont. Rep. p. 78.
(6) Sec. 334, p. 92, 149.
(7) 2 Ont. Rep. 609.
(8) 9 B. & C. 561.
(9) 5 Ex. 625; 20 L. J. Ex. 54.
(10) 11 East. 142.
(11) 9 H. L. Cas. 78.
(12) 7 C. B. N. S. 361; 6 Jur. N. S. 73.

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Groves (1); *Kaitling* v. *Parkin* (2); *Hinde* v. *Whitehouse* (3); *Kenworthy* v. *Schofield* (4); *Peirce* v. *Corf* (5); *Peek* v. *North Staffordshire Railway Co.* (6).

Bain Q.C. for respondent.

In addition to the cases referred to in the judgments, the learned counsel relied on:

Emmerson v. *Hellis* (7); *Glengall* v. *Barnard* (8) *Bland* v. *Eaton* (9); *Ogilvie* v. *Foljambe* (10); *Owen* v. *Thomas* (11); *Catling* v. *King* (12); *Jones* v. *Victoria Graving Dock Co.* (13); *Long* v. *Millar* (14); *Gillattley* v. *White* (15).

Sir W. J. RITCHIE C.J.—The bill sets out that defendant, being the owner of a lot of land as therein described, offered the same by public auction, when plaintiff became the purchaser, and an agreement for such purchase was signed by defendant and plaintiff, and plaintiff, thereupon, paid defendant $50, as the first payment, in accordance with the conditions of sale, under which the said property was sold, the balance of the said purchase money being payable as follows, namely: such other sum as with the said first payment will make one-third of the purchase money within fifteen days after the day of sale, and the remaining two-thirds in three years, secured by mortgage, bearing interest at the rate of seven per cent. per annum, payable half-yearly.

That at the time of the plaintiff's said purchase the

(1) 15 C. B. 667; 24 L. J. C. P. 53.
(2) 23 U. C. C. P. 569.
(3) 7 East 558.
(4) 2 B. & C. 945.
(5) L. R. 9 Q. B. 210.
(6) 10 H. L. Cas. 472-569.
(7) 2 Taunt. 38.
(8) 1 Keene at p. 787.
(9) 6 Ont. App. R. 83.
(10) 3 Mer. 53.
(11) 3 M. & K. 353.
(12) 5 Ch. D. 660.
(13) 2 Q. B. D. 314.
(14) 4 C. P. D. 450.
(15) 18 Gr. 1.

said lands and premises were covered by a mortgage to one A. J. Broughall, on which about two hundred and seventy-five dollars was due and payable, and it was subsequently agreed by and between the plaintiff and defendant that the said defendant should procure a discharge and release of the said mortgage, and that the plaintiff should thereupon pay to the defendant the whole balance of the purchase money without giving a mortgage.

That the plaintiff has accepted the title to the said lands and premises subject to the discharge of the said mortgage being procured as agreed, and has otherwise been ready and willing to carry out his said purchase.

That in the advertisement of the sale of the said property the said lands and premises were described as a farm of eighty-one and one-quarter acres, having twenty acres cleared and fenced. The said advertisement was read to the plaintiff and others who were present at the said auction at the time and in the course of said sale, and it was on the faith of the correctness of the said description that the plaintiff bid for and became the purchaser of such property; the plaintiff having no previous knowledge of the state or condition of the said lands.

That the plaintiff, shortly after the said sale, discovered that a small part of the said lands had been cleared, but the greater portion having been cut over and the best of the trees removed, but leaving brush-wood and logs lying thereon, and that no portion of the said lands were fenced, nor was there any trees or lumber on the place to make the fence.

That the defendant has threatened, and still threatens, to re-sell the said lands and premises and thereby deprive the plaintiff of the amount he has paid as aforesaid, and also of any profit or advantage he may be able to make out of the said purchase.

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The plaintiff therefore prays :—

1. That the defendant may be ordered specifically to perform his said contract, the plaintiff hereby offering to perform the same on his part.

2. That an allowance by way of compensation for the said fencing may be made to the plaintiff and the said purchase money applied towards payment thereof, and the defendant ordered to pay and make good any additional sum that may be required.

3. That the defendant may be ordered to pay and procure a discharge of the said mortgage now existing on the said lands and premises.

4. That the defendant may be ordered to pay the cost of this suit.

5. That for the purposes aforesaid all necessary accounts may be taken and directions given, and that the plaintiff may have such further and other relief as the nature and circumstances of the case requires, and to your Lordships may seem just.

The defendant's only answer is as follows :—

"That neither the agreement, which is alleged by the said bill, for the purchase and sale of the lands and premises in the said bill mentioned, and of which the plaintiff, by the said bill, seeks to have the benefit, nor any memorandum or note thereof, was ever reduced into writing or signed by me, or any person lawfully authorized thereunto, within the meaning of the statute passed in the twenty-ninth year of King Charles the second, for the prevention of frauds and perjuries, and I claim the benefit of the said statute, and I plead the same as a defence to this suit."

Two questions were raised by the defendant on the argument, viz. :—

1st. That the agreement to purchase was signed by Oliver, the auctioneer, not as auctioneer, but as a witness to the signature of the plaintiff, Stammers. I think

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there is nothing whatever in this point; the signature of Oliver was, in my opinion, unquestionably as auctioneer under the fifth condition of sale, viz.: "The auctioneer signing these sale deeds shall bind both vendor and purchaser to these conditions and terms," and in my opinion there is nothing on the face of the paper to indicate that he signed as a witness, but rather that in witness of his signing as a party, he placed his name to the document. The second point is that there was no binding contract in writing under the Statute of Frauds, the vendor's name not being mentioned in the agreement so signed by the auctioneer. It was conceded on the argument that the title to the property was in the defendant, a member of the firm of O'Donohoe & Haverson, which gave the instructions to the auctioneer to sell this property. The defendant attended the sale. Defendant paid the deposit.

After the sale a correspondence took place between Messrs. O'Donohoe & Haverson and A. H. Meyers, who was acting on behalf of the plaintiff. The first letter appears to have been written on the 7th June, 1880, by O'Donohoe & Haverson to A. H. Meyers, as follows:

7th June, 1880.

Re Stammers's Purchase,

A. H. Meyers, Esq.

Dear Sir,—We would like to close this. Please state a time that you will be here, and oblige, yours truly,

O'DONOHOE & HAVERSON.

On the same day A. H. Meyers writes to O'Donohoe & Haverson enquiring if O'Donohoe & Haverson have the probate of will of the late William Hawkins, and on the same day O'Donohoe & Haverson reply in the negative. On the next day O'Donohoe & Haverson write A. H. Meyers, heading the letter:

You require $366.25
Deposit paid, 40.00

$406.25

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enclosing an estimate and stating that it occurred to them that the probate might be found in papers of court to which extract refers. There is then a letter from A. H. Meyers to O'Donohoe & Haverson, which appears to have created the difficulty which resulted in this suit; it is as follows:

June 14th, 1880.

Re Stammers.

Messrs. O'Donohoe & Haverson,

Barristers, Toronto.

Sirs,—Now I am prepared to complete this transaction. Mr. Stammers has apparently three years to pay the balance, and I think for cash he should be allowed a deduction, as the mortgage at three years would not sell at all, etc.

The adv. says that there are twenty acres cleared and fenced, and that it was a material part of the contract that it should be so, but when Mr. Stammers goes out to see it, there is not a fence or rail on it. Of course you will make some compensation for that. I hav'nt any idea of what the fencing would be worth, but it must be considerable. Please let me hear from you on the different subjects.

Yours, &c., ADAM H. MEYERS.

No notice appears to have been taken of this letter, and, on the 18th June, A. H. Meyers again writes:

June 18th, 1880.

Re Sale, O'Donohoe and Stammers.

Messrs. O'Donohoe & Haverson.

Please let me hear from you in reply to my letter in this matter. Mr. Stammers is now and has for some time been prepared to close the matter up. I am ready at any time.

Yours, &c.,

ADAM H. MEYERS.

On the 18th June, O'Donohoe & Haverson replying to both letters thus:—

18th June, 1880.

Stammers's Purchase.

Adam H. Meyers, Esq.

Dear Sir,—We beg to acknowledge your letters of the 14th and 18th inst. We have no authority to make any allowance for the money. The mortgage is as good as money at the stipulated rate of interest. As to what you say of fencing and clearing, they were not made any part of the contract of sale, and cannot be allowed for.

Have the goodness to let us know whether the vendee will pay cash

or give the mortgage. If the latter, we will prepare it at once and send you draft for approval.

Hoping to hear from you soon, we are, dear sir, yours,

O'DONOHOE & HAVERSON.

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On the 21st June, 1880, Adam H. Meyers writes O'Donohoe & Haverson thus:—

21st June, 1880.

Re Stammers.

Messrs. O'Donohoe & Haverson.

Sirs,—In reply to yours of 18th, received by me on Saturday, I have to say that I am prepared to close the purchase by Mr. Stammers from Mr. O'Donohoe at once, and pay the balance of the purchase money in cash. At the sale it was represented that twenty acres of the land were cleared and fenced, as set out in the advertisement. As this was an inducement to buy, in fact Mr. Stammers would not have bought if he had not expected it to be as advertised and represented, this not being correct he is entitled to compensation, and I would suggest that the amount of it be settled out of court. Please prepare the deed and let me see it before execution. The money is ready now, but the purchaser must have compensation, even if he files a bill to get it, although I would rather not do so if possible.

Yours truly,

ADAM H. MEYERS.

In reply to this on the same day O'Donohoe & Haverson send Adam H. Meyers a deed for approval:—

21st June, 1880.

Re Stammers' Purchase.

A. H. Meyers, Barrister, Toronto.

Dear Sir,—Herewith please receive deed for approval.

Yours, &c.,

O'DONOHOE & HAVERSON.

This Indenture, made in duplicate the day of the year of Our Lord one thousand eight hundred and eighty-

In pursuance of the Act respecting short forms of conveyances:—

Between John O'Donohoe, of the city of Toronto, in the county of York, Esquire, of the first part, and Samuel James Stammers, of the said city of Toronto, in the said county of York, accountant, of the second part.

Witnesseth, that in consideration of four hundred and six dollars and twenty-five cents of lawful money of Canada, now paid by the said party of the second part, to the said party of the first part, (the receipt whereof is hereby by him acknowledged), he the said party

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of the first part doth grant unto the said party of the second part, his heirs and assigns, for ever:

All and singular that certain parcel or tract of land and premises, situate, lying and being in the township of East Gwillimbury, in the county of York, being parts of a block of land consisting of broken lots numbers one hundred and eleven, one hundred and twelve, one hundred and thirteen, and one hundred and fourteen, formerly on the first concession west of Yonge street, of the township of West Gwillimbury, in the county of Simcoe, afterwards annexed to the county of York, laid out and subdivided into lots according to a plan of survey of said block by F. F. Passmore, of the city of Toronto, Esquire, Provincial Land Surveyor, which said parcels of land hereby conveyed consist of the lots or blocks numbers six and seven on said plan, containing together eighty-eight acres of land, less a parcel of six and three-fourth acres of land of said block number six, which has been sold for taxes to one Isaac Grayson, and which is known and described as follows:—Commencing at the north-west angle of block number six; thence along the northern limit of said block seventy-four degrees east six chains; thence along said limit south nine degrees east eleven chains twenty-five links south seventy-four degrees west six chains; thence north nine degrees west eleven chains twenty-five links to the place of beginning.

To have and to hold unto the said party of the second part, his heirs and assigns, to and for his and their sole and only use for ever, subject, nevertheless, to the reservations, limitation, provisoes and conditions expressed in the original grant thereof from the Crown.

The said party of the first part covenants with said party of the second part that he has the right to convey the said lands to the said party of the second part, notwithstanding any act of the said party of the first part.

And that the said party of the second part shall have quiet possession of the said lands, free from all encumbrances.

And the said party of the first part covenants with the said party of the second part, that he will execute such further assurances of the said lands as may be requisite.

(TITLE DEEDS.)

And the said party of the first part covenants with the said party of the second part, that he hath done no act to encumber the said lands.

And the said party of the first part releases to the said party of the second part, all his claims upon the said lands.

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(DOWER.)

In witness whereof, the said parties hereto have hereunto set their hands and seals.

Signed, sealed and delivered, in the presence of } [Seal.]

Received on the day of the date of this indenture from the said party of the part the sum of four hundred and six $\frac{25}{100}$ dollars mentioned.

Witness.

COUNTY OF YORK, TO WIT: } I. of the city of Toronto, in the county of York, make oath and say:

1. That I was personally present and did see the within Instrument and Duplicate duly signed, sealed and executed by John O'Donohoe, one of the parties thereto.

2. That the said Instrument and Duplicate were executed at the city of Toronto.

3. That I, know the said party.

4. That I am a subscribing witness to the said Instrument and Duplicate.

Sworn before me at the city of Toronto, in the county of York, this day of in the year of our Lord 1880.

A Commissioner for taking Affidavits in B. R.

On the 24th June A. H. Meyers writes O'Donohoe & Haverson acknowledging receipt of draft deed and saying he would do his utmost to close the matter to-morrow, and asking what about the compensation for non-clearing and fencing. Not having received any reply, on the 28th June, 1880, A. H. Meyers addresses the defendant as follows:—

Toronto, 28th June, 1880.

(Without prejudice.)

John O'Donohoe, Esq., Barrister, City.

Dear Sir,—You have not replied as to the question of compensation to the purchaser. I must have a reply in this positively before I pay any money at all. If you don't want to compensate the purchaser he will give up the bargain on payment of what he is out of pocket and my charges. One thing or the other must be settled before any money is paid, so we may as well agree now as any time. If litigation must be let me know; I don't want it put to compensation.

Yours, ADAM H. MEYERS.

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On the same day, evidently before receiving this, O'Donohoe & Haverson write A. H. Meyers thus:

June 28th, 1880.

Dear Mr. Meyers,—If the deeds have not turned up, give the correct name, etc., of Mr. S. and we will at once fill up a new deed and send it to you for approval. Meantime let me have $225 to send for discharge of the mortgage, and oblige

Yours, O'DONOHOE & HAVERSON.

A. H. Meyers, Esq.

On the 29th June, 1880, defendant writes A. H. Meyers thus:

June 29th, 1880.

Re Stammers.

A. H. Meyers, Esq.

Dear Sir,—I am unable to find any authority for such compensation as you speak of. I think if you look at the subject in Sugden's V. & P., you will abandon any claim of the kind.

I have to state explicitly that no such claim will be entertained, and that on your refusal any longer to complete the purchase, I shall take immediate steps to enforce the contract. Hoping to have a definite reply to this at once,

I am, dear sir, your obedient servant, J. O'DONOHOE.

(written across) without prejudice.

On July 3rd, 1880, A. H. Meyers writes:

3rd July, 1880.

Re Stammers' Purchase.

Messrs. O'Donohoe & Haverson, Barristers, Toronto.

Gents,—I am quite at a loss to know why Mr. Stammers should not get all he bargained for when he agreed to purchase the land as advertised and represented. I have no doubt but what he is entitled o compensation which he must have. I will file a bill if necessary to convince you of it, but would much prefer not doing so. I think if you consider the matter you will agree with me. Please let me hear from you as Mr. Stammers is ready with the cash to pay you when he gets what he is entitled to.

Yours, &c., ADAM H. MEYERS.

And again on the 9th July, 1880:

9th July, 1880.

Re Stammers.

Messrs. O'Donohoe & Haverson:

I sent your last letter to Mr. Stammers and only received a reply this morning. He says that "as regards the statement of forty acres

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of land cleared, I have written to the owner of the adjoining land, who is an old resident, for a corroboration of the fact. My own impression derived from actual inspection is, it is true, only in the sense of all wood having been stripped from the property, leaving the stumps fallen making rotten logs on the ground, and that it has never been brushed or logged; so far from this being an advantage it detracts from the value, as were there any timber it would be utilized for fencing in the process of clearing." Mr. Stammers also says he thinks you never could have seen the land and he has. You will notice how widely different your respective views are, but they must be reconciled in some way. Mr. Stammers is willing to give up the sale, you paying my charges and what he has paid to visit the land, and return the deposit, or he will go to the land with any competent person to view it, and see if a solution of the difficulty can't be made on the premises; or he will early in the week make you a counter proposition.

Yours, &c., ADAM H. MEYERS.

to which O'Donohoe & Haverson reply :

July 22nd, 1880.

Re Stammers' Purchase.

A. H. Meyers, Esq.

Dear Sir,—In your last letter you said that in about a week you would let us know your ultimatum in this matter. We have now to request you will do so, as we must get the sale closed without further delay. Hoping you will favor us with a prompt reply,

We are, dear sir, yours truly,

O'DONOHOE & HAVERSON.

to which A. H. Meyers replies:

5th August, 1880,

Messrs. O'Donohoe & Haverson.

I have had an interview with Mr. Stammers; he says to fence the land will cost nearly if not quite $200. But to settle it he is willing to be allowed one hundred dollars for the fencing. This offer is without prejudice; he says he will go with either of you on the 16th and see the land, and try if an arrangement can be come to; he is prepared to pay cash when he can get what he purchased.

Yours truly, ADAM H. MEYERS.

On the 10th August, 1880, O'Donohoe & Haverson write A. H. Meyers.

August 10th, 1880.

Re Stammers.

Answer at once and oblige. Without prejudice.

A. H. Meyers, Esq.,

Dear Sir,—Your letters indicate that your client, Mr. Stammers,

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would rather not carry out his contract. We will take $150 damages and rescind the contract. We must now close the matter, and unless you accede to this we shall at once issue a writ.

Yours, &c., O'DONOHOE & HAVERSON.

Ritchie C.J.

On the same day A. H. Meyers replies :

Re Stammers.

10 August, 1880.

Messrs. O'Donohoe & Haverson,
Barristers, Toronto.

I am at a loss to know in what respect my letter indicated that Mr. Stammers would either not carry out his contract; I never intended it so, nor do I think you can read it so. I have always asked to carry it out, and he is ready and willing now to do so. I am instructed to file a bill for specific performance, which I will do to-morrow, and ask the court for compensation. It is childish to ask him to pay you $150 damages because you cannot complete your contract. Mr. Stammers has had no desire for law, and has not now; but he had no intention of being imposed upon. I reserve to myself the right to read all the letters to the court to show our anxiety to settle the matter out of court.

Yours, ADAM H. MEYERS.

August 11th, 1880.

A. H. Meyers, Esq., (Without prejudice.)

Dear Sir—We think that any attempt at agreeing upon facts would be futile. Therefore let the conversation of this a. m. stand cancelled. We would sooner than have any more trouble, make an abatement of say $25 in the price; this of course without prejudice. Hoping this may be acceptable, we are, dear sir, yours, &c.,

O'DONOHOE & HAVERSON.

On the 12th August, A. H. Meyers writes :

Toronto, 12 August, 1880.

Re Stammers.

O'Donohoe & Haverson, (Without prejudice.)
Barristers, Toronto.

Gents—Mr. Stammers claims he should have $200 (two hundred dollars) for the fencing; but as I wrote before he will close the matter up by your reducing the price one hundred dollars. Now, this is quite reasonable; or, if you like to pay him back the deposit and say $25 for disbursements; which will you do? Let me know and oblige

ADAM H. MEYERS.

And O'Donohoe & Haverson close the correspondence as follows:

August 21, 1880.

Stammers v. Corbett.

A. H. Meyers, Esq.,

Dear Sir—We must decline acceding to the proposal of your last letter in this matter. We wrote you, not having before us the conditions of sale, that we would issue a writ; but now having these before us we have to intimate that unless the purchase-money is paid without any reduction on or before the 25th inst., we shall pursuant to said conditions proceed to re-sell and look to your client, the purchaser, for all damages, &c., &c., occasioned by his default.

Your obed't servt,

O'DONOHOE & HAVERSON.

The signatures of O'Donohoe and Haverson throughout this correspondence are in the handwriting of O'Donohoe. The head of this letter, *Stammers* v. *Corbett*, is explained by what Mr. O'Donohoe asserts in his evidence, that though the legal estate in the land in question was conveyed to him by Corbett, he held it only for Corbett's benefit and for convenience of sale and transfer.

The contract signed by the auctioneer and vendee was full and explicit, wanting only the vendor's name, the vendor subsequently recognizes this contract and admits receiving the deposit money, and in a correspondence which ensues, growing out of a claim by the purchaser for compensation, by reason of there not being on the premises the clearing and fencing represented, the vendor, while denying his liability to make such compensation, so far from repudiating the character of vendor, or in any way impugning the contract or sale as made by him, insists on its fulfilment, and, with a view to its being carried out, transmits to plaintiff's solicitor a deed purporting to be made in pursuance of the act respecting short forms of conveyances, between John O'Donohoe, of the city of Toronto, in the county of York, Esquire, of the first

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part, and Samuel James Stammers, of the said city of Toronto, in the said county of York, accountant, of the second part, whereby O'Donohoe, &c., &c., grants to the plaintiff and his heirs, the land in question, and, on compensation being still insisted on, threatens proceedings at law for the enforcement of the contract. This correspondence supplies, in my opinion, any deficiency in the original agreement read in connection with the advertisement, conditions of sale and contract signed by the auctioneer and deed transmitted by the defendant, to all which the letters clearly refer. The subject of sale, the price and conditions of sale, and identification of vendor and purchaser, and all particulars connected with the sale are clearly set forth and thereby establish a complete and perfect contract between the defendant as vendor and plaintiff as purchaser, within the statute of frauds. I cannot understand how the vendor can claim that his name is wanting on this contract, when in writing as vendor he insists on the validity of the contract, and claims its performance. *Dobell* v. *Hutchison* (1) seems very analogous to this case. Denman C.J. thus states the facts of that case and the law governing it.

Three questions arose: 1st. Whether there was a contract binding upon the defendants within the statute of frauds; 2nd. Whether the defect of title was the subject of compensation within the terms of the ninth condition of sale; 3rd. Whether, in case the special contract was not proved, an action for money had and received would lie against these defendants.

As to the first question the facts were, that the plaintiff had signed a written contract on the back of written conditions of sale, in which conditions the names of the vendors appeared as solicitors only, and not as vendors. Nothing was signed by the vendors or by the auctioneer. An abstract of title was sent, on the face of which it appeared that a yard, which was proved to be an essential part of the premises, was held from year to year at a separate rent of $21, in addition to a rent of $551, at which the conditions described the

(1) 3 A. & E. 355.

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whole premises to be held for a term of twenty-three years. The plaintiff's attorney wrote and rejected the title, demanding a return of the deposit. The defendants wrote in answer, and several letters passed between the parties, the letters of the defendants insisting that the defect was matter of compensation within the condition of sale, calling on the plaintiff to perform the contract, speaking of our sale to Mr. Dobell, and mentioning the premises by name and the price contracted for, and threatening to file a bill for a specific performance; they were signed by one of the defendants (they being attorneys) for both. They now contend that there is no contract binding them with the Statute of Frauds

The cases on this subject are not at first sight uniform; but, on examination, it will be found that they establish this principle, that, where a contract in writing or note exists which binds one party, any subsequent note in writing, signed by the other, is sufficient to bind him, provided it either contains in itself the terms of the contract or refers to any writing which contains them. Here the letters of the defendants refer expressly and distinctly to the conditions of sale, and they had in their hands, or the hands of the auctioneer, at that very time, the conditions of sale signed by the plaintiff, to which reference is made, so that no parol evidence of any kind was requisite to show a contract binding both parties, except of the handwriting of each, which must be adduced in all cases. In the case of *Boydell* v. *Drummond* (1), the book signed by the defendant did not refer to any prospectus or contract. In *Richards* v. *Porter* (2) the letter of the buyer referring to the invoice sent by the seller expressly repudiated the contract.

If it could for a moment be doubted that the contract was not sufficiently made out without the introduction of parol evidence to identify the documents referred to in the correspondence, the evidence of the defendant himself places beyond all doubt the identity of the documents which he referred to in his letters as being the terms of the contract, and himself the vendor referred to, he says:

John O'Donohoe, of the City of Toronto, sworn:—

By *Mr. Meyers*—I am the defendant; I have no copy or draft of the advertisement of the sale of the lands in the pleadings mentioned; I believe I drafted the advertisement; I don't remember

(1) 11 East. 142.

(2) 6 B. & C. 437.

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whether it was published in more papers than one; I believe Exhibit A is a copy of it; I believe the land was sold on the day mentioned in the advertisement; it was purchased by the plaintiff Stammers; I don't remember whether that or any advertisement was read out at the sale; I don't remember any one then asking me if the land or any part of it was fenced; it was offered just as the advertisement stated. At the time of the sale I believed that it was fenced, but when I went to see it a month or six weeks after the sale, there was no fence on it, and I was then informed that there had been a fence upon it, but that it had been stolen and carried away. I won't swear that Exhibit A was not read over at the sale; I don't remember either Mr. Stammers or one of the Mr. McLeans asking if twenty acres were cleared and fenced; I am quite sure that if I had been asked I would have said that I believed it was. I think I intended to sell the property according to the advertisement. It was not given out by me, or by any one on my behalf, that the sale would be different from what it was advertised; I don't remember the terms of the sale. There was a mortgage to a man named Broughall, which afterwards became the property of Mrs. Whitty; I employed the auctioneer to sell the lands in the bill mentioned; there was a conveyance made of the lands by the owner to me to enable me to sell them and convey them when sold, in his name; I was intended to be the conduit of conveyance; it was after the conveyance to me that I employed the auctioneer; I did not tell the auctioneer that the lands were not mine, and I don't know what he knew about it. The land was to be sold free from the mortgage; it was sold at $5 an acre; there were 81¼ acres; I never sold any other land to Mr. Stammers; I had no transaction between Stammers and Corbett during this year, 1880. The auctioneers employed to sell this land were Coate & Co., the firm was composed of Coate & Oliver, as I believe; I gave them no authority to sign any contract for me; I did not reserve to myself the right to sign the contract myself, and never at any time informed them that I had done so. I authorized them to sell the land; I don't remember giving them instructions as to the terms; I suppose I did; I don't remember hearing the terms read out at the time of the sale. There was no other transaction with Stammers that I had anything to do with except the Stammers purchase. When I refer to the matter of "Stammers' purchase" or "Stammers and Corbett transaction" I refer to this land. I don't know that Mr. Stammers paid any deposit, but I believe he did; if I didn't get it, I got credit for it, which is the same as if it was paid to me. Exhibit B is written by me; the figures at the top refer to the purchase of this land, and so does the letter; $406.25

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is the amount of the purchase money, the $40 is the deposit paid, and the $366.25 is the balance still unpaid. Exhibit C is a letter written by me and relates to this transaction, the $225 asked for there is a part of the purchase money to discharge the Whitty mortgage. Mr. S. refers to Mr. Stammers, and I wrote to you (Mr. Meyers) as you were acting for him. Exhibit D is written by me and relates to this matter; Exhibit E is written by me and refers to this matter. When I employed the auctioneers I took no authority away from them that they had to sign a contract for me and the purchaser. I don't remember whether the conditions were read at the sale; I was present at the sale and so was Mr. Archibald McLean; there were a large number of others, but I don't remember any names. I don't remember signing the contract of sale myself; I don't remember seeing it since the sale; I won't swear I didn't sign it.

By Mr. Haverson—All the Exhibits, B, C, D and E, were written by me, but for the firm.

J. O'DONOHOE.

Certified a true copy.

GEO. M. EVANS,
Special Examiner.

Numerous authorities might be referred to, I think it only necessary to cite one. *Ridgway* v. *Wharton* (1) The Lord Chancellor says:

The authorities lead to this conclusion, that if there is an agreement to do something, not expressed on the face of the agreement signed, that something which is to be done being included in some other writing, parol evidence may be admitted to show what that writing is, so that the two taken together may constitute a binding agreement within the statute of Frauds.

* * * * * *

Then, my Lords, there was a case of *Dobell* v. *Hutchison*, (2) which went exactly upon the same principle. There, the defendant having put up a thing for sale by auction, the plaintiff entered into a written agreement, signed by himself, to purchase it upon certain specified terms. It turned out that Hutchison, the defendant, had not a title which authorized him to sell, and consequently, that he could not complete the sale; but, in the correspondence which took place afterwards, several letters referred to the terms which had been signed by Dobell, the plaintiff, as being the terms which were then subsisting between them, and the Court of Queen's Bench held that,

(1) 6 H. L. 257. (2) 3 A. & E. 355.

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parol evidence being given to show what the terms were to which Hutchison referred in his letters, the two might be taken together, so as to bind Hutchison, and to show that that was the written paper, signed by the plaintiff, to which he referred as being the terms of the contract.

I am clearly of opinion that this appeal should be dismissed.

STRONG J.—I am of opinion that a contract in writing sufficient to satisfy all the requirements of the statute of Frauds is made out by the correspondence taken in conjunction with the conditions of sale. In *Ridgway* v. *Wharton* (1) when that case was before the Court of Chancery, Lord Cranworth said:

> The statute is not complied with unless the whole contract is either embodied in some writing signed by the party, or in some paper referred to in a signed document, and capable of being identified by means of the description of it contained in the signed paper. Thus a contract to grant a lease in certain specified terms is of course good. So, too, even if the terms are not specified in the written contract, yet if the written contract is to grant a lease on the terms of the lease or written agreement under which the tenant now holds the same, or on the same terms as are contained in some other designated paper, then the terms of the statute are complied with. The two writings in the cases I have put become one writing. Parol evidence is, in such a case, not resorted to for the purpose of showing what the terms of the contract are, but only in order to show what the writing is which is referred to. When that fact,—which is to be observed—is a fact collateral to the contract, is established by parol evidence, the contract itself is wholly in writing signed by the party.

Subsequent cases so far from having shown this statement of the law by Lord Cranworth to be too loose have, on the contrary, much relaxed the principle as to the admissibility of parol evidence for the purpose of identification (2). Then proceeding to apply this rule to the correspondence in evidence in the present case,

(1) 3 DeG. M. & G. 693.

(2) See *Baumann* v. *James* L. R. 3 Ch. 508.

we find, in my opinion, some of the letters written by the appellant or by the firm in which he was a partner, and which, for this purpose, is to be considered his agent, so referring to the conditions of sale as to make out a sufficient contract in writing, signed by the appellant within the provisions of the statute. The conditions of sale are insufficient by themselves to constitute a contract, because they fail to show who the vendor was. This defect is, however, fully supplied by the letters. In a letter of the 21st June, 1880, Mr. Meyers, the solicitor of the respondent, writes to Messrs. O'Donohoe & Haverson, the firm of solicitors in which the respondent is a partner, a letter which is headed *Re* "Stammers," in which he says: "In reply to yours of the 18th received by me on Saturday, I have to say that I am prepared to close the purchase by Mr. Stammers from Mr. O'Donohoe at once, and pay the balance of the purchase-money in cash." The same letter concludes with this request: "Please prepare the deed, and let me see it before execution." The same day, the 21st June, 1880, Messrs. O'Donohoe & Haverson wrote to Mr. Meyers a letter entitled "*Re* Stammers purchase," saying "herewith please receive deed for approval," thus recognizing the matter in negotiation, designated as *Re* Stammers, to have reference to a purchase of land by Mr. Stammers from Mr. O'Donohoe, and what the land so sold consisted of, was also made to appear in writing from the deed enclosed in the letter of Messrs. O'Donohoe & Haverson and showed this as well as the price to be paid for the land, which must be presumed to be that mentioned as the consideration in the purchase deed. The heading already referred to is sufficient to identify the letters as referring to the same matter of a contract for the sale of a particular piece of land by Mr. O'Donohoe to Stammers, but even without this heading, I should have been of opinion that this sufficiently ap-

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peared, for where a contract is to be made out from letters, the reference to previous letters in the line of correspondence need not be express but may be shown by inference arising from the contents and terms of the letters.

Lord Justice Fry, in the last edition of his learned treatise on Specific Performance (1), says on this head:

> Whether the reference must be express and on the face of the paper containing the signature, or whether it is enough that a jury or judge of fact would conclude from the circumstances and contents that the two papers are parts of one correspondence, may be open to doubt. The latter is probably the better view.

Here if these two letters of the 21st of June had not been entitled as they were, the fact that by one of them Mr. Meyers asked for a draft deed of land sold by O'Donohoe to Stammers and that in the other O'Donohoe enclosed to him such a deed would have been sufficient to connect them. Had the matter stopped here, however, there might have been difficulties in saying that the contract was sufficiently made out. But on the 29th of June, 1880, the respondent writes to Mr. Meyers a letter signed by himself and in his own name, which is also entitled *Re* Stammers, in which he says *inter alia* "on your refusal any longer to complete the purchase I shall take immediate steps to enforce the contract." This letter, in addition to being entitled like those before referred to, in *Re* Stammers, is sufficiently connected by its contents with those of the 21st of June, for in the interval, two letters dated respectively the 24th and 28th of June had been written by Mr. Meyers, claiming compensation, to which claim of compensation Mr. O'Donohoe refers in his letter of the 29th of June in these words, "I am unable to find any authority for such compensation as

(1) P. 240.

you speak of." We have then here an express admission by Mr. O'Donohoe, signed by him, that there was a contract relating to land sold by O'Donohoe to Stammers. It may be said, however, and was argued by the appellant that the reference must be to a written contract, and that it is consistent with the admission of "a contract" contained in this letter, that it may relate to a contract the terms of which were in parol merely. At the argument it appeared to me that such was the law, and that to bring a case within the propositions of Lord Cranworth in *Ridgway* v. *Wharton* (1), there must be a reference not merely to a general contract but to some specified written paper embodying such contract, parol evidence being then, and only then admissible to identify the writing referred to. This proposition was, however, strenuously controverted by Mr. Bain on behalf the respondent, who cited *Baumann* v. *James* (2), as an authority showing that when the reference was to a contract or agreement generally, without saying or implying that such contract was in writing, parol evidence was admissible to identity the contract so referred to with the terms of an agreement set out in some prior unsigned or imperfect writing,—and subsequent consideration of this case of *Baumann* v. *James* has convinced me that the learned counsel was entirely right in his contention. In this case of *Baumann* v. *James* it was held that an agreement by letters for a lease of 14 years, "at the rent and terms agreed upon" was sufficient to warrant the admission of a report of a surveyor containing the terms which had been previously agreed to, except as to the duration of the term. The case of *Baumann* v. *James* is, therefore, as was held by the court below, alone a sufficient authority to show that the conditions of sale signed by the auctioneer were, upon being as they were sufficiently

(1) 3 DeG. M. & G. 577. (2) L. R. 3 Ch. 508.

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identified, admissible in evidence, and being admitted they, taken in conjunction with the correspondence down to and inclusive of the letter of the 29th of June, make out a sufficient contract in writing satisfying all the requirements of the Statute of Frauds. I confess, however, that *Baumann* v. *James* seems to me to sanction a much greater infringement upon the enactment and policy of the Statute of Frauds, than previous authorities had admitted, and particularly to overstep the limitation as to the admissibility of parol evidence laid down by Lord Cranworth in *Ridgway* v. *Wharton*. It is, however, the decision of a Court of Appeal and has not so far as I have been able to discover been questioned by any late judicial decision, although it is true that it has been strongly disapproved of by text writers. I think, however, we ought to follow it, and, if we do, it concludes the present appeal.

Were we, however, to disregard *Baumann* v *James* altogether and apply the far stricter rule already stated laid down by Lord Cranworth in *Ridgway* v *Wharton*, the result would as it appears to me be the same, for on the 21st August, 1880, a letter signed by Messrs. O'Donohoe & Haverson, was written to Mr. Meyers, which is as follows:—

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A. H. Meyers, Esq.

Dear Sir.—We must decline acceding to the proposal of your last letter in this matter. We wrote you, not having before us the conditions of sale, that we would issue a writ; but now having these before us we have to intimate that unless the purchase money is paid without any reduction on or before the 25th inst., we shall pursuant to said conditions proceed to re-sell, and look to your client, the purchaser, for all damage, &c., &c., occasioned by his default.

This letter of the 21st August, is connected with the letters contained in the correspondence previously remarked upon, written on, and previously to the 29th June, by several intermediate letters, by which

the correspondence was continued in the interval between the last mentioned date and the 21st of August, and the letter of this last date is sufficiently identified as referring to the same matter as the previous correspondence related to, viz, to the sale and purchase mentioned in the two letters of June 21st, by the terms and contents of these intermediate letters without requiring the aid of any extrinsic evidence for that purpose. Therefore, finding in this letter of the 21st August, a reference not to some agreement or contract, which might or might not be in writing, but a distinct reference to a particular document embodying conditions of sale which the writer of the letter had then before him, the Court below was entitled to receive parol evidence, not for the purpose of showing what the contract was, but in order to establish the identity of this document produced by the auctioneer, and proved to have been signed by him, as the agent of the appellant, with that referred to in Mr. O'Donohoe's letter—which, as Lord Cranworth says, was to admit parol evidence, not to make out the contract, but to establish a fact altogether collateral to it. Then reading the conditions of sale together with the correspondence, we have a perfect contract in writing, signed by the appellant, containing all the terms of the sale and complying with all the requirements of the Statute of Frauds.

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

Fournier J. concurred.

HENRY J.—The action in this case was brought to enforce specific performance of a contract for the sale of a lot of land by the appellant to the purchaser. The bill sets out the contract and described the land and set forth the price thereof, and the terms of the

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sale, and prays that specific performance of the contract may be adjudged with costs. The land belonged at the time of the sale to the appellant, and he caused the same to be sold at auction on the 15th of May, 1880, and the respondent being the highest bidder became the purchaser, and signed an agreement to become such purchaser on the conditions and terms contained in the printed conditions of sale upon which the said agreement was written. The name of the vendor does not appear in either of those documents, nor does it appear satisfactorily that the auctioneer signed the agreement as such under the authority given to him by the fifth article of the conditions. His name was signed to it, but it is merely under the word "witness," and the evidence does not show in which capacity he so signed. Nor will I say it would have been sufficient had he signed it as the auctioneer, without giving the name of the vendor for whom he sold. As a general rule a contract for the sale of land must, according to the provision of the statute of Frauds, show the subject, terms and names of the parties. It is not necessary, however, that the names or terms should appear in any single paper. The contract may be collected from several connected papers. If a document properly signed does not contain the whole agreement, yet, if it refers to a writing that does, it will be sufficient, though the latter is not signed, and oral evidence is admissible to identify the writing referred to, and where a contract in writing exists which binds one party to it under the statute, any subsequent note signed by the other is sufficient to bind him. If an offer be made by one party in writing stating the subject and terms to sell or to purchase, he is bound thereby if the offer be accepted by a writing signed by the other referring to the offer. If, therefore, the appellant, by any writing signed by him,

adopted the agreement which was signed by the respondent at the instance and request of the agent or auctioneer who was authorized by the appellant to sell, it appears to me that according to binding decisions on the subject, no objection can be raised under the statute. The appellant, in his answer, denies that neither the agreement nor any memorandum or note thereof was ever reduced into writing or signed by him, and that is the only issue raised by the pleadings.

It is shown that the appellant was the owner of the lot of land in question and was present at the sale of it to the respondent. That sale was made at the instance of the legal firm of O'Donohoe & Haverson, of which the appellant was the head or leading partner. He says in his cross-examination on his answer that he believes he drafted the advertisement, and that he believes Exhibit A (Exhibit I of the case) is a copy of it, and the land sold on the day and on the terms mentioned in the advertisement and that the respondent became the purchaser. He acknowledges therein that Exhibit B (Exhibit 4 of case) was written by him. It is dated the 8th of June, 1880, and addressed to A. H. Meyers, who was then acting as the solicitor of the respondent, and was signed O'Donohoe & Haverson. "The figures at the top," he says, "refer to the purchase of this land and so does the letter; $406.25 is the amount of the purchase money, the $40 is the deposit paid, and the $366.25 is the balance still unpaid." That letter bears his firm's signature and includes his. If he had signed it "O'Donohoe" only it would still be his signature made as it was by himself, and the adding the name of his partner could not lessen the effect of it. He therein admits that he wrote and signed Exhibit C (Exhibit 12 of the case) dated 28th June, 1880, and directed to A. H. Meyers, in which he refers to deeds which were apparently mislaid. He says in it: "If the deeds have not

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turned up give the correct name of Mr. S. (referring to the respondent) and we will at once fill up a new deed and send it for your approval. Meantime let me have $225 to send for discharge of mortgage." He further, in his cross-examination, says that the letter related to the transaction in question and that the $225 asked in the letter was a part of the purchase money. He also says that "Mr. S." in the letter refers to the respondent. In reference to a claim for compensation put forward by Mr. Meyers on behalf of the respondent, because the fences referred to in the advertisement as being on the land were not there as ascertained after the sale, the appellant addressed to him a letter as follows:—

June 29, 1884.

Re Stammers.

A. H. Meyers, Esq.:—

Dear Sir,—I am unable to find any authority for such compensation as you speak of. I think if you look at the subject in Sugden's V. & P., you will abandon any claim of the kind. I have to state explicitly that no such claim will be entertained, and that on your refusal any longer to complete the purchase, I shall take immediate steps to enforce the contract. Hoping to have a definite reply to this at once.

I am, dear sir, your obedient servant,

J. O'DONOHOE.

Across the letter was written the words "without prejudice," but I do not see how these words can lessen the effect of what was previously written. Again, on the 22nd July the appellant addressed another note to Mr. Meyers, as follows:—

July 22, 1880.

Re Stammers Purchase.

A. H. Meyers, Esq.:—

Dear Sir,—In your last letter you said that in about a week you would let us know your ultimatum in the matter. We have now to request you will do so, as we must get the sale closed without delay. Hoping you will favor us with a prompt reply.

We are, dear sir, yours truly,

O'DONOHOE & HAVERSON.

With a full knowledge of the advertisement, the sale

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Henry J.

and purchase by the respondent and the agreement giving the description of the property, and the terms and conditions of the sale, and of the execution of it by the respondent, and by Oliver the auctioneer, as such, as stated by the latter, or as a witness, the appellant writes and signs the several letters I have referred to and quoted, and they, in my opinion, are quite sufficient to satisfy the requirements of the statute and to bind the appellant as well as the respondent. I think, therefore, the respondent was entitled to the decree for specific performance, and inasmuch as the advertisement was drafted by the appellant, and was referred to by Mr. Meyers in his correspondence with the appellants firm, and tacitly, if not expressly, admitted by the latter, as constituting a part of the terms and conditions of the sale. I think that part of the decree which refers the matter of compensation to the Master may, also, be sustained, and that the decree and the judgment of the court below should be affirmed with costs.

GWYNNE J. was also of opinion that the appeal should be dismissed.

Appeal dismissed with costs.

Solicitor for appellant: *Adam H. Meyers.*

Solicitor for respondent: *John O'Donohoe.*

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*May

*Nov. 16.

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

AND

WILLIAM DUNN (SUPPLIANT).....RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Petition of Right—Provincial debt—Liability of Dominion for—Order in Council—Account stated—Consideration—Demurrer—Right to Petition.

Prior to confederation one T. was cutting timber on territory in dis-

* PRESENT—Sir W. J. Ritchie C.J., and Fournier, Henry, Taschereau and Gwynne JJ.

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pute between the old Province of Canada and the Province of New Brunswick, the former having granted him a license for the purpose. In order to utilize the timber so cut, he had to send it down the St. John River, and it was seized by the authorities of New Brunswick and on y released upon payment of fines. T. continued the business for two or three years, paying fines to the Province of New Brunswick each year, until he was finally compelled to abandon it.

The two Provinces subsequently entered into negotiations in regard to the territory in dispute which resulted in the establishment of a boundary line, and a commission was appointed to determine the state of accounts between them in respect to such territory. One member of the commission only reported finding New Brunswick to be indebted to Canada in the sum of $20,000 and upwards, and in 1871 these figures were verified by the Dominion Auditor.

Both before and after confederation T. frequently urged the collection of this amount from New Brunswick with the object of having it applied to indemnify the parties who had suffered by the said dispute while engaged in cutting timber, and finally by an order in council of the Dominion Government (to whom it was claimed the indebtedness of New Brunswick was transferred by the B. N. A. Act), it was declared that a certain amount was due to T., which would be paid on his obtaining the consent of the governments of Ontario and Quebec therefor. Such consent was obtained and payments on account were made by the Dominion Government, first to T. and afterwards to the suppliant to whom T. had assigned the claim. Finally the suppliant, not being able to obtain payment of the balance due by said order in council, proceeded to recover it by petition of right, to which petition the defendant demurred on the ground that the claim was not founded upon a contract and was not properly a subject for petition of right.

Fournier J. sitting in the Court of Exchequer, over-ruled the demurrer and gave judgment for the suppliant. On appeal to the Supreme Court of Canada.

Held,—Reversing the judgment of Fournier J., (Fournier and Henry JJ. dissenting,) that there being no previous indebtedness shown to T. either from the Province of New Brunswick, the Province of Canada or the Dominion Government, the order in council did not create any debt between T. and the Dominion Government which could be enforced by petition of right.

APPEAL from the judgment of Fournier J. in the

Exchequer Court, over-ruling the demurrer of the appellant.

The petition of right, pleadings and facts are set out at length in the judgments of the Exchequer Court and of the Supreme Court of Canada.

The case was argued in the Exchequer Court by *Laflamme* Q.C., (*A. F. McIntyre* with him) for the suppliant, and by *Gregory* (*W. D. Hogg* with him) for the defendant.

The following is the judgment of the Court of Exchequer:—

[TRANSLATED.]

FOURNIER J.—"The suppliant, as transferee of a claim of James Tibbits, claims from Her Majesty the sum of twenty-five thousand dollars, established by an order in council, passed by the Dominion Government, as being the amount of said James Tibbits's claim against the late Provinces of Canada and New Brunswick.

"The facts which gave rise to the present petition relate as far back as 1842, and originated in a conflict of authority between the governments of Canada and New Brunswick with respect to certain territory around the sources of the rivers St. John and Cabaneau, each government claiming the said territory as being part of its province. James Tibbits, having obtained from the government of the province of Canada a license to cut timber upon a part of the disputed territory, cut a large quantity of timber which could only reach the market by being floated down the river St. John and other rivers flowing through New Brunswick. The government of New Brunswick caused the timber to be seized as it passed through their province, contending that it had been cut, contrary to the law, on their public domain. The timber was released to Tibbits only upon payment by him of fines and penalties.

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"Notwithstanding this hostile intervention on the part of the government of New Brunswick, Tibbits continued to work the limits for two years, but heavier fines and penalties being again imposed by the government of New Brunswick, thereby absorbing all profits, Tibbits was compelled to cease his operations.

"The two governments interested in this conflict having referred the matter in dispute to arbitrators, the latter made an award, the provisions of which were incorporated in an Imperial statute, 14 and 15 Vic. ch. 63. By that act it was amongst other things enacted that the net proceeds of the funds arising from the disputed territory should be applied: 1st, to defray the expenses of arbitration: 2nd, to defray expenses of running the boundary line: 3rd, the balance of the funds to be applied towards the improvement of the land and water communications between the rivers St. John and the St. Lawrence. The commissioners appointed to run the boundary line between the two provinces having finished their work others were required to strike a balance between the two provinces on the transaction. No report was ever made by the commissioners jointly, but Mr. Dawson, one of the two, by his report, dated the tenth day of August, eighteen hundred and sixty-three, found that the sum of twenty thousand and two hundred and sixty-three dollars and thirty-one cents was due by New Brunswick to Canada as a balance of all the transactions in reference to the territory in dispute. Afterwards Mr. Langton, Dominion auditor, to whom this matter was referred, came to the same conclusion, as appears by his memorandum upon the matter made on the thirty-first day of May, 1871.

"Tibbits frequently requested the government of Canada and of the provinces of Ontario and Quebec to obtain and be paid the balance found to be due by

New Brunswick, in order that it might be paid over to himself and others who had been licensees of the territory by way of compensation to them for the serious losses they sustained in consequence of the action taken by the government of New Brunswick.

"The suppliant, in his petition, alleges that under the British North America Act the indebtedness of the province of New Brunswick to the late province of Canada became a liability of and was assumed by the Dominion of Canada, which has thereby become bound to recover the said amount from New Brunswick and to credit the same to the old province of Canada, now the provinces of Ontario and Quebec respectively.

"By the 14th, 15th, 16th, and 17th paragraphs of his petition, which are so important that I quote them at length, the suppliant alleges that:—

"14. The honorable the Privy Council of Canada, on the thirtieth day of August, eighteen hundred and seventy-seven, passed an order in council which was duly approved, to which said order your suppliant craves leave to refer at the trial of this petition, whereby it was acknowledged and declared that the said sum of twenty thousand two hundred and sixty-three dollars and thirty-one cents, with interest thereon at six per cent. per annum from the twelfth day of November eighteen hundred and fifty-six, was then due by the province of New Brunswick to the late province of Canada in respect of the matters aforesaid, which said sum with interest amounts to forty-five thousand four hundred and ninety-one dollars and thirteen cents.

"15. The said order in council declared that the province of Quebec had consented, as was in fact true, that the amount coming from the province of New Brunswick should be paid to the parties entitled to the same, and mentioned in the statement thereunto annexed, and agreed with the said Tibbits and the other licensees

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that upon the consent of the governments of Ontario and Quebec being given thereto the said amounts should be paid to the parties entitled to the same and mentioned in the statement thereunto annexed, and agreed with the said Tibbits and the other licensees that upon the consent of the governments of Ontario and Quebec being given thereto the said amounts should be paid to the respective claimants *pro ratâ* according to the amounts of their respective claims, subject to certain special conditions therein mentioned. By a statement annexed to the said order in council, it appeared that one James Tibbits was one of the said claimants for and in respect of a certain sum or balance of twenty-seven thousand eight hundred and ninety-seven dollars and ninety-four cents, as therein set forth and which was thereby awarded to him.

"16. The said order in council was duly communicated by the said government to the said Tibbits, and at his and the other claimant's request and solicitation the governments of Ontario and Quebec, to whom the said order in council had also been duly communicated, by the government of Canada, respectively, by orders in council duly passed and communicated to the said government, ordered the payment by the government of Canada of the said sum of money and interest to the said James Tibbits.

"17. In and by the said order in council of the thirtieth day of August, eighteen hundred and seventy-seven, it was provided that so much of the said amount as might be payable to the said James Tibbits as should be necessary to meet a certain alleged claim of the province of Quebec against the said James Tibbits, should be retained until the amount of his alleged indebtedness to the government of Quebec be ascertained either by agreement of the parties or by some process of law, but, as your suppliant alleges, all matters of account between

the said government of Quebec and your suppliant have long since been settled by the payment by your suppliant of all amounts due by him to the said government of Quebec, so that the said government has no longer any claim to such moneys or any part thereof.

"The suppliant then avers that he obtained from the provinces of Quebec and Ontario by orders in council, dated the 3rd November and the 2nd January, their consent to the payment of the sum mentioned in the order in council of the 30th August, 1877, and that the Government of New Brunswick, although requested to pay the said sum, has refused to give any answer; and that the government of Canada, acting upon the said order in council, have paid on account of the amount so payable the following sums: five hundred dollars on the twenty-third day of August, eighteen hundred and seventy-nine, two thousand dollars the tenth of December, eighteen hundred and seventy-nine, to the said James Tibbits, with the consent of the suppliant, which consent was required by the government, two thousand dollars to the suppliant on the twenty-seventh of November, eighteen hundred and eighty, and five thousand seven hundred and twenty-nine dollars and thirty-two cents to the suppliant on the seventh of June, eighteen hundred and eighty-one. He further alleges that on the thirtieth day of August, eighteen hundred and seventy-seven, there was a settlement by said order in council between the said James Tibbits and the government of Canada, whereby the sum of twenty-seven thousand eight hundred and ninety-seven dollars and ninety-four cents was established as the amount then due to said Tibbits, and that the government agreed and consented to pay it to him with interest from the 12th August, 1877, so soon as authority thereunto should have been received from the governments of Ontario and Quebec, which authority was

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obtained in accordance with the order in council above mentioned. That the government of Canada have frequently admitted the justice of the suppliant's claim and promised to pay the amount, but that they have so far neglected to do so with the exception of the payments on account as aforesaid.

"The suppliant then alleges the circumstances under which he, upon the security of the said orders in council and with the knowledge of the government, advanced large sums of money, and that he subsequently obtained for the same a formal transfer from James Tibbits of his claim admitted by said order in council, and that the transfer was communicated to the government and accepted, and that they paid to the suppliant sums of money on account in accordance with the said order in council, and concludes by praying for the balance due after deducting the above payments, viz.: a sum of $25,400 and interest.

"In answer to suppliant's claim the Crown has filed two pleas, the first is a demurrer and the second is a plea to the merits of the claim.

"I have only to consider for the present the demurrer.

The grounds upon which the claim for the sum of money prayed for by the suppliant's petition is demurred to are:—

"1. That the claim of James Tibbits, of which the suppliant is the assignee, does not arise upon contract, and, therefore, is not a claim such as to give the suppliant any remedy against the Crown under the Petition of Right Act, 1876.

"2. That the order in council of the 30th of August, 1877, mentioned in the fourteenth paragraph of the petition, does not make a settlement and account stated between the government of Canada and the said James Tibbits, nor make any liability on the part of Her

Majesty to answer to the said James Tibbits or the suppliant, because the said accounting is alleged to be of moneys claimed by the said James Tibbits not upon contract.

"3. That the order in council of the 30th of August, 1877, does not establish any sum as due from the province of New Brunswick to the late province of Canada, for want of the assent of the Province of New Brunswick.

"4. That as the order in council provided that the amount payable to the said James Tibbits should be retained until the amount of his indebtedness to the government of Quebec should be ascertained, it is not alleged that such indebtedness has been either ascertained or paid.

"5. That the British North America Act does not create any liability on the part of the Dominion directly to creditors of a province for debts due by the province at the time of the union; and lastly, that any payments made to the suppliant on account of his claim were acts of bounty of Her Majesty, and not the payment of a legal debt.

"From this statement of the suppliant's petition and of the demurrer it is evident that the principal question which arises in this case is: Whether a petition of right lies under the above circumstances. As to the existence of the claim how can it be denied, after the passing of the order in council of the 30th of August, 1877, formally and finally determining the amount of the claim, it seems somewhat strange, after such recognition on behalf of the government of this claim, that the suppliant should be compelled to have recourse to this court in order that the claim be adjudicated upon. The defences which have been set up, on behalf of the Dominion Government, would surprise me still more were it not perfectly well known that, as a matter of

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fact, it is the province of New Brunswick which is opposing the payment of the suppliant's claim, and, the crown is here represented by counsel chosen by New Brunswick, and the objections now relied on were made more in the interest of the province than of the Dominion, for the order in council passed by the Dominion Government made a settlement of account with regard to this claim, and a portion of it has already been paid.

"As appears by the above statement of facts, the origin of this claim arose, as already stated, from a conflict between the late province of Canada and that of New Brunswick, and in consequence thereof the latter province was interested in the settlement of this matter. Yet, as it is alleged in the petition, the province does not seem to have taken any heed of the matter until the suppliant was forced to have recourse to this court to claim what he alleges is due to him, and even now the province does not appear as a respondent, Her Majesty, as representing the Dominion Government, being the only respondent in the case now before me.

"It cannot be denied that, under the 111th section of the British North America Act, the Dominion of Canada is liable for the debts and obligations of each province existing at the time of the union. It may be that this section alone would not give, to a creditor of the province, the right of action against the Dominion government. But in this case the government of Canada, in the exercise of the duties imposed upon them by section 111, have thought proper to have a settlement made, and an account stated by order in council of the 30th of August, 1877, of this claim which was pending against the government of New Brunswick and that of Canada since 1842. The Constitutional Act has not provided for any particular procedure to be followed in adjudicating upon such claims. I cannot presume that

the province of New Brunswick was not called upon to defend her rights; on the contrary, admitting the averments of the petition to be true, I must take it as proved that the same procedure was adopted with regard to the province of New Brunswick as was followed with the provinces of Ontario and Quebec. A frequent and lengthy correspondence took place between the Dominion government and the provinces; the latter were requested to give their consent, but the province of New Brunswick appears to have kept aloof, and not to have wished to be a party to the proceedings.

"Should this abstention, on the part of New Brunswick, prevent the Dominion government from effecting a settlement of this matter? Certainly not, and, especially if we take into consideration that the Imperial statute has not provided any particular procedure to be followed in settling such claims, the course which has been adopted by the Dominion government was, in my opinion, the only one left to them. It was impossible for the suppliant to proceed or take action against a province which had ceased to exist, and the Petition of Right Act, such as the one now in force, was not then in operation. The suppliant had therefore but one course left to him, and that was to petition the Dominion government, relying on section 111 of the British North America Act.

"It might be said, if the order in council passed on the 30th of August, 1877, founded upon the above section of the statute, was due to the initiative of the government, and passed simply in the ordinary discharge of a public duty, that it would not have given a right to the suppliant to claim his balance by petition of right, as was contended by the counsel for Her Majesty. But it is evident that the order in council was only passed after frequent and pressing solicitation on the part of those who were interested, and that it

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contained conditions to be complied with by these interested parties, and these conditions being accepted and performed by them a valid contract subsisted between the government and themselves, and it is upon such a contract that the question arises: Does a petition of right lie against Her Majesty? This, in my opinion, is the sole question to be decided on this demurrer.

"The government of the Dominion of Canada, interested in the settlement of this claim, stipulated by their order in council that the suppliant or his grantor (*auteur*) should first obtain the consent of the Provinces of Ontario and Quebec in order to be paid the amount due to the suppliant by the old province of Canada, as stated in the order in council. The suppliant avers that he has obtained the consent stipulated; now does not the time occupied and necessary expenses incurred to obtain this consent constitute a valid consideration given by the suppliant and accepted by the government to induce them to pay the claim in question?

"This order in council has, in my opinion, created a contract for which the government have obtained a legal consideration, and although the consideration for the amount which the government had to pay may appear small, still the following passage from Addison on Contracts is an authority that it is sufficient (1):

"By the civil law if any one agreed to perform or effect anything, (whether that consisted in giving or doing something) on the understanding that another in his turn should do something, or give or deliver something, or *vice versa*, the person in whose favor the thing had been so delivered or done, was not permitted to be deficient in performing what was stipulated on his part, but was compelled to performance, so that, if there was a cause or consideration *facti vel traditionis*,

(1) 8 Ed p. 5,

a corresponding obligation or duty arose. So, by the common law, if anything is performed which the party is under no obligation to perform, or if anything is given or done at the request of the promissor as the consideration or inducement for this promise, whereby the promissor, or party making the promise, has obtained or secured for himself some benefit or advantage, or where, by the promisee, or party to whom the promise has been made, has sustained *some trouble or loss, or suffered some injury or inconvenience, there is a sufficient consideration* to render this promise obligatory in law and capable of sustaining an action. The mere surrender or delivery of a letter or other written document which the promisee has a right to keep and retain in his possession, is a sufficient consideration for the promise, although the possession of it may turn out eventually to be of no value in a pecuniary point of view, or no benefit may have resulted to the one party nor prejudice to the other from the surrender and delivery of the document."

The suppliant and his grantor certainly come within the case mentioned in the above authority. They were under no obligation to the Dominion government to take the necessary steps with the Ontario and Quebec governments to obtain the required consent. They took these steps at the request of the Dominion government, and the necessity to take them was imposed upon them as a condition precedent to their getting paid the amount of their claim, In executing this condition they necessarily incurred trouble and expense, and all this is sufficient, under the above authority, to render the promise on the part of the government obligatory in law, and to form a contract which, between subject and subject, would be capable of being enforced by a suit at law, and which, as between a subject and the government, is a good cause for a

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petition of right. The objection founded on the want of consent of the province of New Brunswick cannot be entertained.

The province of New Brunswick could not, by refusing to recognize this claim, or by neglecting to take part in the proceedings adopted by the federal government in order to effect a settlement, prevent the latter from doing justice to the suppliant. This settlement having been effected between the suppliant and the government by means of the order in council above mentioned, it cannot now be in the power of the Province of New Brunswick to nullify its effect by simply stating that she never consented to this settlement.

"The question at present to be determined is not whether the province could have had or not the means of proving that there was nothing due on this claim, but the question is whether the Federal Government has made a settlement and stated an account, and having done so whether it is not obligatory on both the parties to the settlement. This I have endeavored to show they have by what I have already said.

"The defence has also attempted to derive an advantage from the fact that there is a clerical error in a copy of the petition and to rely upon it as a ground of demurrer to the petition. The order in council imposed on Tibbits the obligation to pay off an alleged indebtedness which the Province of Quebec claimed for certain dues on timber cut on the disputed territory and in the 17th paragraph of the petition, the suppliant avers, by error of the copying clerk no doubt, that he, the suppliant, had paid whatever was owing to the Province of Quebec, instead of stating that the same had been settled by Tibbits. This is clearly an error, for there is no allegation in any of the paragraphs of the petition that the suppliant Dunn had ever been indebted to the

Province of Quebec. There is only a reference that Tibbits owed certain sums for timber dues which had not been settled pending the settlement of this claim. We must therefore read paragraph 17 as alleging that James Tibbits, and not the suppliant, whose name is inserted by error, has fulfilled the obligation of satisfying the Province of Quebec. Notwithstanding this error the purport of the paragraph is easily ascertained and the objection founded on this error has no value.

"I cannot either entertain the objection founded on the fact that because a transfer has been made by Tibbits of his claim to the suppliant, of which the government received due notice, Her Majesty is not answerable to the suppliant therefor. No doubt it was in the Crown's option to refuse its consent to such a transaction, but so far from doing so, the Crown has formally acquiesced in the same by paying to the suppliant large sums of money on account after the transfer had been communicated to it.

"As upon demurrer all facts alleged must be considered as duly proved I am of opinion for the reasons above stated that the allegations in the petition are sufficient in law to justify the prayer, and I therefore dismiss the demurrer with costs."

From this judgment the Crown appealed to the Supreme Court of Canada.

A. G. Blair Atty. General of New Brunswick, (*W. D. Hogg* with him) for appellant.

Laflamme Q.C. (*A. F. McIntyre* with him) for respondent.

The points relied on by counsel sufficiently appear in the judgments.

The following authorities and cases were cited and relied on:

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For appellant: *Chitty* on Contracts (1); *Evans* v. *Verity* (2); *Lemere* v. *Elliott* (3); *Rustomjee* v. *The Queen* (4).

For respondents: *Grant* v. *Eddy* (5); *Canada Central Railway Co.* v. *The Queen* (6); *Isbester* v. *The Queen* (7); Addison on Contracts (8).

Sir W. J. RITCHIE C.J.—After giving a synopsis of the petition continued as follows:—

Tibbits, without alleging or showing any indebtedness to him from the Province of New Brunswick, the old Province of Canada, or the Dominion, claims a right to recover from the Dominion an amount alleged to be due from the Province of New Brunswick, not to himself, but to old Canada. This claim is based on an order in council in which the Dominion Government admit and declare there is an amount due from the Province of New Brunswick to old Canada, the said order declaring that the Province of Quebec had consented that the amount coming from the Province of New Brunswick should be paid to the parties entitled to the same and mentioned in the statement thereto annexed, and agreed with Tibbits and the other licensees that upon the consent of the Government of Ontario and Quebec being given thereto, the said amount should be paid to the respective claimants *pro ratâ* according to the amounts of their respective claims, subject to certain special conditions therein mentioned, that by a statement annexed to said order it appeared that Tibbitts was one of the said claimants for a sum of $20,897.14 which was thereby awarded to him. That the order in council was communicated by the Government to Tibbits and at his and the other claimants'

(1) Pp. 601, 604.
(2) 1 Ry. & M. 239.
(3) 6 H. & N. 656.
(4) 2 Q. B. D. 69.
(5) 21 Gr. 588.
(6) 20 Gr. 273.
(7) 7 Can. S. C. R. 696.
(8) 8 Ed. p. 5.

request and solicitation the Governments of Ontario and Quebec, to whom also said orders had been duly communicated by the Government of Canada by orders duly passed and communicated to said governments, ordered the payment by the Government of Canada of said sum of money to Tibbits.

The order in council provided that so much of the amount payable to Tibbits as should be necessary to meet a certain alleged claim of the Province of Quebec against Tibbits should be retained until the amount of his indebtedness to the Government of Quebec should be ascertained.

It is then alleged that all matters of account between the Government of Quebec and the suppliant have long since been settled by the payment by suppliant of all amounts due by him to Government of Quebec, so that government has no longer any claim to such moneys. Unless Tibbits could show that he had a valid claim against New Brunswick, Canada or the Dominion, I am at a loss to understand what right he has to this money, or how, in the absence of any indebtedness of New Brunswick or the others to him, he can make out a legal claim enforceable against the Crown to the money in question.

Apart from the orders in council and the statement of the report of Mr. Dawson and Mr. Langton, none of which could establish an indebtedness from New Brunswick to Canada, no indebtedness of New Brunswick to Canada is shown, still less is any indebtedness of New Brunswick, Canada or the Dominion to Tibbits alleged or shown. The learned judge who heard this case thus states the question:

> The question at present to be determined is not whether the province could have had or not the means of proving that there was nothing due on this claim, but the question is whether the Federal Government has made a settlement and stated an account, and

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having done so whether it is not obligatory on the both parties to the settlement. This I have endeavored to show they have by what I have already said.

In the absence then of an indebtedness from New Brunswick, or Canada, or of the Dominion, to Tibbits, where is there any foundation for a legal liability of or right in the Crown to hand over this money to Tibbits, or any contract capable of being judicially enforced alleged in the petition of right? Or, in the absence of any such indebtedness, how could an indebtedness of New Brunswick or Canada to Tibbits for the sum claimed be incurred by reason of the orders in council set out in the petition? The learned judge says the federal government made and settled and stated an account, but of what and with whom? Certainly not with Tibbits, with whom there was no pre-existing indebtedness so far as the petition of right is concerned, none is alleged to have existed, and consequently neither the province of New Brunswick, or the province of Canada, or the Dominion of Canada, had any account to settle or state with Tibbits. The cases are very clear that without a debt or liability no account could be stated or settled. An account stated must refer to to a debt due.

It is only necessary to refer to a few authorities to prove this conclusively.

Thus in *Bates* v. *Townley* (1), Platt B. says:

> An account stated is the settlement of account, in which both parties or their agents agree upon the amount due from one to the other.

In *Kirton* v. *Wood* (2), per Tindal L. J.:—

On account stated you must show some precise sum. See also *Lane* v. *Hill*, (3); *Wayman* v. *Hilliard*. (4); *Wilson* v. *Marshall*, (5); *Lemere* v. *Elliott* (6).

(1) 2 Ex. 160.
(2) I. M. & R. 253.
(3) 18 Q. B. 256.
(4) 7 Bing. 101.
(5) 2 Ir. R. C. L. 356.
(6) 6 H. & N. 656.

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In *Wilson* v. *Marshall* (1):

The defendant promised the plaintiff orally, that if certain goods were supplied to A. a third party, he would see the plaintiff paid for them. The plaintiff accordingly supplied the goods, and A. left the country without having paid for them. The defendant subsequently orally acknowledged his liability to the plaintiff for the price of the goods.

Held, that the plaintiff was not entitled to recover in any action upon the account stated founded upon the acknowledgment; for, although the admission of liability to pay a liquidated sum is *primâ facie* evidence of an account stated, evidence had been properly given to show the nature of the consideration upon which it was founded, and it appearing that the sum acknowledged was not the subject of a direct liability from the defendant to the plaintiff, a verdict for the defendant had been rightly entered.

Although an accout stated may be founded upon a mere equitable liability, it must be a direct liability from the defendant to the plaintiff.

In that case Pigott C. B. says:—

Although, however, the account stated may be founded upon a debt or liability, as an equitable liability, (2) still there must be such debt or liability from the defendant to plaintiff. *French* v. *French* (3); *Petch* v. *Lyon* (4); *Lubbock* v. *Tribe* (5); see the judgment of Parke B., *Hopkins* v. *Logan* (6); *Lewis* v. *Elliott* (7); *Gough* v. *Findon* (8); Chitty on contracts (9).

The admission of a liability to pay a liquidated sum is *primâ facie* evidence of an account stated. But the consideration of an account stated, (as in the case of *French* v. *French* and in the other cases of this class above cited) is always examinable, and it appears to me that if the sum acknowledged be not the subject of a direct liability from the defendant to the plaintiff, but the result of a collatral liability, for which only an action for damages would lie then consistently with the nature of the action upon an account stated such an action cannot be sustained as upon an account stated founded upon such a demand.

I need not further refer to the peculiar nature of that action. It is explained in several of the cases cited at paragraph 4 especially

(1) 2 Ir. R. C. L. 356.
(2) See judgment of Blackburn J., 4 B. & S. 506.
(3) 2 M. & G. 644.
(4) 9 Q. B. 147.
(5) 3 M. & W. 607.
(6) 5 M. & W. 241.
(7) 6 H. & N. 656.
(8) 7 Exch. 46.
(9) Ed. 1863, P. 589.

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in Mr. Justice Blackburn's judgment, *re Laycock Pickles* (1), and in the judgment of Parke B., *Lubbock* v. *Tribe* (2), and *Hopkins* v. *Logan* (3).

In *Lemere* v. *Elliott* (4) Martin B. says :—

The old form of a count on an account stated was this :

"And whereas the said C. D. afterwards, to wit, on, &c., accounted with the said A. B. of and concerning divers sums of money from the said C. D. to the said A. B. before the time due and owing and then in arrear and unpaid. And upon that account the said C. D. was then and there found to be in arrear and indebted to the said A. B. in the sum of &c."

Wilde B.—

In *Porter* v. *Cooper* (5) Parke B. said :—"I agree with what has fallen from my brother Alderson in the course of the discussion, that in the later cases the courts have deviated far from what was the original meaning of an account stated. I take the rule to be this: that if there is an admission of a sum of money being due for which an action will lie, that will be evidence to go to the jury on the count for an account stated."

Pollock C. B. :—

An I O U professes to be the result of an account stated in respect of a debt due, and it is important not to make fiction supply the place of truth and say that an account has been stated in respect of a debt, when in reality there was none.

Martin B. :—

An account stated as that stated in the old form of declaration to which I have referred. No doubt what is said by Parke B, in *Porter* v. *Cooper* is the essence of it namely, that there must be an admission of a debt due. In *Whitehead* v. *Howard* (6), it was also said that there must be a real existing debt due.

Wilde B. —

I am of the same opinion. There was no sum admitted to be due for which an action would lie, and upon the substance of the transaction there was no debt to support an account stated.

I am constrained to the conclusion that on the facts alleged in the petition the Crown entered into no legal

(1) 4 B. & S. 507.
(2) 3 M. & W. 664.
(3) 5 M. & W. 248.
(4) 4 H. & N. at p. 657.
(5) 1 C. M. & R. 387, 394.
(6) 5 Moore 105.

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or binding contract with Tibbits to pay him the money claimed enforceable by petition of right. I have had an opportunity of reading a carefully prepared judgment in the case by my brother Gwynne, in which he has discussed the question raised so fully and exhaustively that it would be waste of time to add anything further.

I am therefore of the opinion that the appeal should be allowed.

FOURNIER J.—I am sorry to say, that after hearing the reasons given for allowing the demurrer I am not yet convinced that the petition is not sufficiently framed to allow the parties to be heard on the merits.

The origin of the claim has not been referred to in the reasons I have heard. Now, this claim arises out of a license to cut timber by the Crown. That was a perfect contract between Tibbits and the Crown, and when the latter could only get his timber upon paying penalties, he was obliged to give up, and subsequently tried to get relief for the damage and loss he had sustained through the breach of contract. The Quebec government were willing to pay, but New Brunswick would not take any part in a settlement, and prevented, as much as it was in their power, a settlement.

Now, the Dominion Government, in view of the power given to it by the 111th section of the British North America Act, took upon itself to settle this claim, as I think they had power to do. I am very willing to admit that before a settlement is made the party must show he has a claim. Now, I adhere to my former opinion, that the petition has alleged enough to show that the suppliant has a claim not only by alleging all and setting out all the facts since it originated, but also by stating, in the most positive way, that there has been an account stated and settled, and in support of

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that allegation he relies on the order in council, in virtue of which it is admitted he received payments on account. The New Brunswick Government is not represented in the case, but is acting as if it were. I do not think the Dominion Government would have ever consented to deny their liability under the most solemn Act they can pass, had it not been urged to do so in the interests of New Brunswick. In settling with Tibbits, I am of opinion that the Government of Canada, in case New Brunswick refused to proceed, had, under the British North America Act, a right to proceed *ex parte*. There is, it is true, no procedure provided by the Act, but if a province refused to settle, simply because they have no desire to pay, I think power is given to the Dominion to settle. The Dominion has admitted there was a debt and they bound themselves to pay it. Now, I do not say that because the Dominion have agreed to pay that the Province of New Brunswick is bound to recoup the Dominion Government. That is a matter which may be discussed hereafter. The suppliant in this case has furnished the consideration he was bound to furnish, viz., the obtaining of the consent of the provinces, which cost him time and expense, and that is a legal consideration for a contract. I cannot understand how the government can relieve itself from such a solemn obligation. I gave a written judgment in the court below to which I adhere, and the appeal, in my opinion, should be dismissed.

HENRY J.—We often hear the maxim repeated "That the Crown can do no wrong." But if the Crown is to be judged by the action of the government in this case I think we can come to the conclusion that the Crown can do wrong. That they can solemnly promise to pay and then refuse to pay is *primâ facie* evidence that the Government, at all events, can do wrong. This is involved in this case, and what is it founded on?

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Plaintiff was engaged in cutting timber and had obtained a license from the Province of Quebec and entered upon the business. New Brunswick, alleging claim to land upon which the timber was cut, had it seized, and it was released only on payment of fines. The respondent's assignor continued business for some years and then abandoned it. Finally the line between New Brunswick and Quebec was settled. After this it became a question as to how the accounts stood between the provinces on account of this land. A commission was appointed to ascertain this. One of the commissioners did not report, the other did and reported a large sum due by New Brunswick, and the account was subsequently investigated by the Auditor General and approved. Under these circumstances we can fairly assume that there was a debt, although there was no binding obligation on New Brunswick.

Setting out with that, when confederation took place, the Dominion was saddled with the responsibility of paying the liability of each of the provinces. That being the case and the Government of Quebec finding that Tibbits had a legal claim and that New Brunswick had so much to pay, were willing that the Dominion Government should appropriate that amount to pay him and others similarly situated.

Here then was a debt and liability admitted by the Province of Quebec to Tibbits which they requested the Dominion Government to pay, and they gave an order to the Dominion Government to pay the money. Now suppose the Dominion Government were in a position to say to Quebec "we have paid that money." Could Quebec object to it? Could it be said the money had been paid illegally? It is admitted they paid portions of this amount and made a statement of account showing a balance due Tibbits, but through some influence the Government of New Brunswick have been mixed up

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with the case and raised objection to the payment of the balance. Why New Brunswick should have interfered and object to the Dominion paying what, at the request of Quebec, they had undertaken to pay, I cannot understand. The Dominion Government say that New Brunswick was opposed to the demand, and they, therefore, declined to pay the balance due to Tibbits. I am of opinion that it is too late to allege that as a defence. I cannot conceive any immediate interest New Brunswick had in the transaction or any right to interfere. We all know that an equitable consideration is sufficient on an account stated. We are told that there must be an indebtedness. The amount is not in doubt here. It has been well ascertained and fixed and the documents in the department shows the amount due. I think there was a good account stated. If a party is liable merely for damages but an account is stated and payments made on account would it not be a good account upon which an action would lie? I think there was a good claim and I am very much inclined to think that if a private individual had stated that account he would have been told "Sir, you understood the matter and accepted an order from one party to pay money to another, you paid a part of it and stated an account showing a balance due and have entered into a binding contract to pay it."

I think the respondent has a good claim against the Dominion Government for that balance and that demurrer should not be set aside.

TASCHEREAU J.—I am of opinion to allow this appeal. The petition of right shows no ground for a recovery against the Crown. There is no allegation that the Province of New Brunswick was indebted to the suppliant at the date of confederation. Even then it is doubtful if under section 111 of the British North

America Act, he would have had a right of action against the government. Then there is no allegation that the seizure of the timber by New Brunswick was a wrongful act on the part of that government, for it is not averred that the timber was not cut on these lands of New Brunswick, and if cut on such lands it would then have been legally seized and legally taken out of the suppliant's possession; and if not cut on its lands then the seizure of this timber by New Brunswick would have been a tort, and not a debt or liability of the province under section 111 of the British North America Act.

The order in council embodies no contract between the Crown and the suppliant, but merely an arrangement between the Dominion and the Provinces of Quebec and Ontario.

I fully concur in Mr. Justice Gwynne's notes of which I have had communication.

GWYNNE J.—I am of opinion that this appeal must be allowed, and that judgment must be ordered to be entered in the Court of Exchequer, allowing the demurrer. I find it difficult to understand upon what foundation it is that the suppliant's claim is intended to be rested, for Mr. Laflamme, as I understood him, at one time contended that the order in council of the 30th of August, 1877, operated as an acceptance by the Dominion Government of an order of the provinces of Quebec and Ontario to pay Tibbits a sum of money due by those provinces to him, out of their moneys in the hands of the Dominion Government, and their undertaking with Tibbits to pay him such sum. At another time he contended that the order in council operated as an adjudication by the Dominion Government which, as was contended, they were competent to make of a sum of money as being due from New Bruns-

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wick to old Canada and by the latter to Tibbits, and as a promise to Tibbits, founded thereon, to pay him; at another time, while expressly admitting that the petition of right must fail if it asserted a claim against the Dominion Government by way of indemnity for the original loss sustained by Tibbits in the exercise of his license rights, still he contended that the Dominion Government, as representing old Canada, was originally liable to Tibbits to pay him the amount claimed as a debt due to him by old Canada, and that the Dominion Government, by the order in council, ascertained and determined, as it is contended it was competent for them to do, that the amount claimed was such a debt. Again, he contended that the Dominion Government, in passing the order in council, acted in the double capacity of being itself the representative of the old provinces prior to confederation, and as being an arbitrator between the government of the province of New Brunswick and the governments of Ontario and Quebec, as representing old Canada; and as to the words in the order in council: "Subject to certain conditions therein mentioned," he contended that taking paragraphs 17 and 25 of the petition of right together, they comprehended an allegation that all conditions were fulfilled, or that their fufilment was waived. Now, that the order in council in itself, irrespective of there having ever been any prior obligation or debt imposed upon, or incurred by either of the old provinces in existence, prior to confederation, is the sole foundation upon which the petition of right rests the suppliant's claim, and that this claim is for payment out of moneys alleged to have been due from New Brunswick to old Canada prior to confederation to the suppliant, as assignee of Tibbits, all sums of money not alleged as having been due to him, prior to the making of the order, but which, as the petition insists,

became by the order in council a debt, due from the Dominion Government to Tibbits, appears to me, to be the only case to be collected from the petition, as being sought to be made by it. If the allegations in the petition leave any doubt upon this point, such doubt seems to me, to be wholly removed by the prayer of the petition, which is that the government of Canada may be declared, under the said order in council to be indebted in the said sum of $25,400, with interest thereon at six per cent. per annum, and may be ordered to pay the same to your suppliant. What the petition alleges in substance, is that the government of old Canada, prior to confederation, in the years 1842 and 1844, issued licenses to one Tibbits, to cut timber upon certain lands lying on the confines of the provinces of old Canada and New Brunswick, which lands the petitioner calls, disputed territory, that is to say, claimed by old Canada and New Brunswick respectively—that the government of New Brunswick in the assertion of their claim, seized the timber when passing down through New Brunswick to the sea, and detained the same, until Tibbits paid certain charges demanded by New Brunswick – that the sums so imposed upon, and paid by Tibbits, made the cutting of timber so unprofitable, that Tibbits ceased cutting any more—that the boundary being still in dispute, the matter was referred to arbitrators, who made an award determining certain boundaries, which boundaries an Imperial Act 14th and 15th Vic., ch. 63, fixed as the boundary between old Canada and New Brunswick—and that the Act directed that the net proceeds of the funds in the hands of old Canada and New Brunswick respectively, arising from the territory in dispute between the provinces, should be applied: 1st, to defray the expenses of the arbitration; 2nd, to defray the necessary expenses of running the boundary line as settled, and in case

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such funds should prove insufficient the expenses to be borne equally by the respective governments, and 3rd, the balance of the funds to be applied towards the improvement of the land and water communication between the rivers St. John and St. Lawrence.

Now stopping here for a moment, it is to be observed that there is no allegation whatever that any legal demand had accrued to Tibbits, either against old Canada or New Brunswick, for the seizure by New Brunswick of the timber cut by him under the Canada licenses or for any other cause whatever. For all that appears the act of the New Brunswick authorities in seizing that timber may have been quite illegal. There is nothing from which it can be collected that the land upon which the timber was cut did not prove to be in old Canada; and as to the moneys received by New Brunswick, in respect of the timber seized, they were appropriated to specific purposes by the Imperial Act. It is not, however, upon the fund consisting of the proceeds of moneys arising from the territory which had been in dispute that the claim of the suppliant as the assignee Tibbits is made, but upon a sum of money alleged to have become due from New Brunswick to old Canada for the excessive outlay of the latter province in running the boundary fixed by the Act, the expense of which was directed by the Act to be borne equally by old Canada and New Brunswick respectively.

The petition then proceeds to allege that in the fall of 1855 a joint commission consisting of Messrs. Dawson and Cutler was appointed by the two provinces (old Canada and New Brunswick) to investigate and report upon the funds accrued from the disputed territory, and upon all questions of bonds to be prosecuted and enforced (referring to bonds given by certain licensees), or claims to be remitted in connection there-

with; and the running of the boundary line having been finished, that the commissioners were required to ascertain the amount spent on that survey by each government and strike a balance between the provinces on the transactions. The petition then alleges that no such report was ever made by the said commissioners jointly, but that the said Dawson, by a report made by him alone, dated the tenth day of August, eighteen hundred and sixty-three, found that the sum of twenty thousand two hundred and sixty-three dollars and thirty-one cents was due by New Brunswick to Canada as a balance of all the transactions, the amount expended by the province of Canada in respect of the said boundary survey, having been largely in excess of the sum expended by the province of New Brunswick in respect of the same object, and that the same figures were afterwards arrived at by Mr. Langton, Dominion auditor, in a memorandum of his upon the matter, made on the 31st day of May, 1871, as showing a correct balance as aforesaid.

Now, here it is to be observed that the petition does not allege, as a matter of fact, that the province of New Brunswick, prior to confederation, was indebted to the province of old Canada in the sum of $20,263.31 for monies expended by the province of old Canada in excess of the equal share of that Province in the cost of the boundary survey, but that Mr. Dawson had so found; and it is not alleged that Mr. Dawson alone, by a report of his not joined in by his co-commissioner, had, or could have, established such sum to have been due from New Brunswick to old Canada. It may be quite true that Mr. Dawson's report was a correct finding, that New Brunswick was indebted in such amount to Canada, but the fact of the existence of the debt is not alleged; all that is here alleged being that Mr. Dawson, in a report made by him, asserted the existence

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of the debt, and that Mr. Langton, Auditor-General of the Dominion after confederation, concurred in the figures as reported by Mr. Dawson. However, not to rest upon the nakedness of this allegation in the petition, we may assume it to be alleged that New Brunswick was at the time of confederation indebted to old Canada in the above amount, for the case made by the petition upon the basis of the existence of such debt, is in the 12th paragraph of the petition of right stated to be, that under the British North America Act the indebtedness of the said province of New Brunswick to the said province of Canada, became a liability of and was assumed by the Dominion of Canada, and thereafter the said Dominion became bound to recover the same amount so due from New Brunswick and to credit the same to the old province of Canada, now the provinces of Ontario and Quebec respectively. With what view this paragraph was inserted in the petition, and what bearing it can have upon the case sought to be made for the suppliant, I find it difficult to understand: for, if, as is alleged in the paragraph the said debt of New Brunswick to the Province of old Canada became upon confederation a liability of and was assumed by the Dominion of Canada, the dominion became the debtor in lieu of old New Brunswick, and in such case could not be the creditor of, and entitled to recover the amount from, the Province of New Brunswick as constituted by the Confederation Act as debtor of the Dominion, and if, as is also alleged in the paragraph, the Dominion became bound to credit the same amount to the provinces of Ontario and Quebec that could only be by force of some provision of the British North America Act, and the obligation if existing and enforceable by process of law can only be so at the suit of the provinces of Ontario and Quebec, or of one of them.

The petition then alleges that Tibbits frequently

requested of the Governments of Canada and of the provinces of Ontario and Quebec—that the balance due by New Brunswick might be obtained and paid over to himself and the several parties who had been licensees in the disputed territory, by way of compensation to them for the serious losses they sustained. Now, as there is no previous liability alleged as having accrued to Tibbits, either from old Canada or from the Dominion of Canada, or from the provinces of Ontario or Quebec to pay any sum by way of compensation to Tibbits for any losses he may have sustained by reason of New Brunswick having seized his timber, the requests which are in this paragraph alleged to have been made must be taken to have been made to the governments named in the paragraph for the gratuitous application of moneys alleged to have been due from the old province of New Brunswick to old Canada, by way of compensation for losses with the occuring of which it is not alleged that old Canada, or Ontario, or Quebec, had anything to do, and in respect of which it is not alleged either that the old Province of New Brunswick or the Dominion of Canada, as representing it, had incurred any liability. The petition then proceeds in its 14th, 15th, 16th, 17th, 24th and 25th paragraphs, to state the facts upon which, as is contended, the right of the suppliants to recover as assignee of Tibbits, which in paragraphs numbering from 18 to 23 inclusive, he is alleged to be, is founded.

In the 14th paragraph it is alleged that the Privy Council of Canada on the 30th day of August, 1877, passed an Order in Council whereby it was acknowledged and declared that the said sum of $20,263.31, with interest thereon at six per cent. per annum from the 12th November, 1856, was then due by the province of New Brunswick to the late province of Canada in

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respect of the matters aforesaid, which said sum, with interest, amounts to $45,491.13.

In the 15th paragraph it is alleged that the said Order in Council declared that the province of Quebec had consented that the amount coming from the Province of New Brunswick should be paid to the parties entitled to the same, and mentioned in a statement thereunto annexed and agreed with the said Tibbits and the other licensees that upon the consent of the Governments of Ontario and Quebec being given thereto the said amounts should be paid to the respective claimants *pro rata*, according to the amounts of their respective claims, subject to certain special conditions therein mentioned, and that, by a statement annexed to the said Order in Council it appeared that one James Tibbits was one of the said claimants for and in respect of a certain sum or balance of $27,897.94 as therein set forth and which was thereby awarded him. Reading this 15th paragraph grammatically, it simply alleges that the said Order in Council declared that the Province of Quebec had consented, &c. &c., and agreed with Tibbits and the other licensees that upon the consent of the Governments of Ontario and Quebec being given thereto the said amount should be paid to the respective claimants *pro rata*, according to the amount of their respective claims, subject to certain special conditions therein mentioned. This, it has been contended, is a narrow and incorrect reading of the paragraph, and it is contended on behalf of the suppliant that what the paragraph alleges is: that the Order in Council declared, &c., &c., and agreed with the said Tibbits, &c., &c., and so reading it the contention is that the paragraph in substance alleges that the Privy Council of Canada, by the said Order in Council, "agreed with the said Tibbits and the other licensees, that upon the consent of the Governments of Ontario and Quebec being

given thereto the said amount, should be paid to the respective claimants, *pro rata*, according to the amounts of their respective claims, subject to certain special conditions therein mentioned.

There is no allegation of the existence of any debt as having been due to Tibbits from the province of old Canada, which would justify the appropriation of any moneys belonging to old Canada by way of payment of any sum of money to Tibbits. No claim whatever of Tibbits against the Province of old Canada, either of the nature of a debt due to him or of damages recoverable by him as for the breach of any contract made with him is alleged. Assuming, therefore, the paragraph to be susceptible of the construction contended for by the suppliant, namely, as alleging that the Privy Council of Canada, by the Order in Council, agreed with Tibbits and the others, &c., &c., it amounts merely to an allegation that the Privy Council of Canada agreed with Tibbits and the others, that the amount due from New Brunswick to old Canada should be appropriated in payment to Tibbits and the others, *pro rata*, of the amounts of their respective claims as stated in a memorandum annexed to the Order in Council, not in discharge of any liability of old Canada to any of them, but gratuitously upon the Governments of Ontario and Quebec, assenting to such gratuitous appropriation of such fund and subject to certain special conditions in the Order in Council mentioned. If it were necessary for the decision of this case to pass upon the validity of such an Order in Council, I, for my part, am prepared to hold that an Order of the Privy Council of Canada assenting to such gratuitous appropriation of monies belonging to old Canada upon the consent of the Governments of Ontario and Quebec being given to such gratuitous appropriation, does not constitute a debt due from the Dominion of Canada to Tibbits or

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give to Tibbits any claim against the public funds of the Dominion of Canada or of old Canada, under the control of the Dominion or against the Dominion Government, as representing old Canada or otherwise howsoever, which is recognizable or enforceable on a petition of right against Her Majesty. The Privy Council of Canada has not, by the constitution, any such absolute power of affecting the Dominion of Canada, or its public funds, with any liability under such a state of facts, and unsupported by any legal consideration. But it is unnecessary in this case to pass upon that point, for the only agreement alleged, if there is any, is to appropriate monies alleged to be due from New Brunswick to old Canada in payment to Tibbits, and others *pro rata*, certain sums mentioned in a memorandum annexed to the Order in Council, not merely on the consent of the Governments of Ontario and Quebec to such payment, but upon certain special conditions alleged to be mentioned in the Order in Council, and there is no allegation whatever as to the nature of those conditions, nor of their fulfilment, nor as to what would be the *pro ratâ* amount payable to Tibbits out of the particular fund mentioned, nor that such sum, or any part of it, remains unpaid. The 16th paragraph alleges, that the said Order in Council was communicated by the said government to Tibbits, and that at his, and the other claimants' request, the Governments of Ontario and Quebec, to whom the said Order in Council had also been communicated by the Government of Canada by Orders in Council duly passed, and communicated to the said government, ordered the payment of the said sum of money and interest to the said James Tibbits.

This paragraph is only material inasmuch as upon it the right of Tibbits, and of the suppliant as his assignee, to recover upon this petition of right is put

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by the judgment of the Court of Exchequer upon the contention that Tibbits and the others having, as is alleged in the paragraph, procured the Governments of Ontario and Quebec to pass the Orders in Council, whereby they ordered the payment of the said sum of money to Tibbits, constitutes sufficient consideration, independently of the existence of any other, to support the promise by the Dominion Government to pay the said sum to Tibbits, which (as is also contended) is contained in the Order in Council. Whether the Order in Council can be construed as containing any such contract or promise, as made with, or to Tibbits, it is not necessary to decide, for, assuming it to be susceptible of that construction, I am of opinion that the consideration relied upon, however sufficient it might be to support a promise by a subject to a subject, to pay a sum of money, as to which I express no opinion, such a consideration cannot support a promise made by the Privy Council of Canada, so as to create a debt not founded upon any other consideration as due to Tibbits by the Dominion Government, recoverable by petition of right against Her Majesty as executive head of the Dominion Government. The public funds of the Dominion cannot be affected with a liability upon any such consideration. The 17th paragraph alleges that it was provided by the said Order in Council, that so much of the said amount as might be payable to the said Tibbits, as should be necessary to meet a certain alleged claim of the Province of Quebec against him, should be retained until the amount of his alleged indebtedness to the Government of Quebec should be ascertained either by agreement of the parties, or by some process of law, and the paragraph then proceeds thus:—

But as your suppliant alleges all matters of account between the said Government of Quebec and your suppliant have long since been

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settled, by the payment by your suppliant of all amounts due by him to the said Government of Quebec, so that the said government has no longer any claim to such monies or any part thereof.

Then, the 24th paragraph alleges that the Government of Canada have acted upon the Orders in Council passed as aforesaid by the Governments of Ontario and Quebec, and have paid on account of the monies of as aforesaid payable to Tibbits under the said Order in Council of the 3rd August, 1877, certain amounts set out and amounting in the whole to $10,239.32; and by the 25th paragraph the suppliant submits that on the said 30th day of August there was a settlement made and an account stated between the said Government of Canada and the said Tibbits, whereby the said amount of $27,897.94 was established on the amount then due to the said Tibbits, up to 12th day of August of that year, for the causes aforesaid, which sum with interest from the date last aforesaid was agreed to be paid by the said government, so soon as authority thereunto should have been received from the said Governments of Ontario and Quebec.

Now, assuming the 17th paragraph to allege that all matters of account between the Government of Quebec and Tibbits, instead of "between the said government and your suppliant" as the paragraph does allege, had been settled by the payment by Tibbits of all amounts due by him to the said Government of Quebec, &c., &c., &c., it is contended that this paragraph, so read, together with what is alleged in the 25th paragraph, amounts to an averment that all conditions mentioned in the Order in Council of the 30th of August, 1877, were fulfilled or waived, but there is no allegation that this condition referred to in this paragraph was the sole condition mentioned in the Order in Council, to which the words therein "subject to certain special conditions in the said order mentioned" apply; and as for the 25th

paragraph, what is contended for in it is that what took place on the 30th August, 1877, when the Order in Council of that date was passed, was an account stated between the Government of the Dominion of Canada and Tibbits, whereby the sum mentioned in the order was found to be due from Canada to Tibbits, but as there is no previous transaction in the nature of a debt or contract alleged to have existed between the Government of Canada and Tibbits, in respect of which a valid account stated, could be had, it is futile to contend that the suppliants claim can be sanctioned as upon an account stated; moreover, the Order in Council which is relied upon as the sole evidence to establish the liability of the Government of Canada to Tibbits, does not establish or profess to establish the sum of $27,897.94, or any sum as then due by the Government of Canada or by any person to Tibbits; all that it professes to do is to refer to that sum as an amount mentioned in a memorandum annexed to the order, as an amount claimed by Tibbits to be the amount of his losses in getting out the timber which the authorities of New Brunswick seized, and to order that if the Governments of Ontario and Quebec should consent to the appropriation of the sum alleged in the order to be due from New Brunswick to old Canada towards the payment of such losses, and like losses of other persons similarly situated with Tibbits the same should be paid to Tibbits and the other licensees *pro rata*, that is in proportion to the amounts of their respective claims for their losses. And as for the allegation in the 24th paragraph, the payments therein alleged to have been made may have been the whole amount by the order directed to be paid to Tibbits as his *pro rata* share of the fund so appropriated, and, moreover, such payments having been so far as appears by the petition of right made wholly *ex gratiâ* unfounded upon any legal con-

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sideration, such payments could never impose a legal obligation, giving to Tibbits or his assignee any claim enforceable by petition of right for the recovery from Her Majesty as executive head of the Dominion of Canada, or any further portion of his alleged losses. Upon the whole, I am of opinion that the petition of right fails to disclose any case sufficient to warrant a judgment against Her Majesty.

Appeal allowed with costs.

Solicitor for appellant: *Geo. F. Gregory.*

Solicitors for respondent: *Robertson, Ritchie & Fleet.*

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*May. 20.

*Nov. 16.

THE ST. LAWRENCE & OTTAWA RAILWAY COMP'Y (Defendants).. } APPELLANTS;

AND

WILLIAM PITMAN LETT (Plaintiff)... RESPONDENT.

APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Railway Company—Negligence—Death of wife by—Damages to husband as administrator—Benefit of children—Loss of household services—Care and training of children.

Although, on the death of a wife caused by negligence of a railway company, the husband cannot recover damages of a sentimental character, yet the loss of household services accustomed to be performed by the wife, which would have to be replaced by hired services, is a substantial loss for which damages may be recovered, as is also the loss to the children of the care and moral training of their mother. (Taschereau and Gwynne JJ. dissenting.)

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*PRESENT.—Sir W. J. Ritchie C.J. and Fournier, Henry, Taschereau and Gwynne JJ.

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APPEAL from the Court of Appeal for Ontario (1), sustaining a verdict for the respondent as administrator of his wife, on account of her death caused by negligence of the appellants.

The accident which caused the death of the respondent's wife occurred while she was driving along Dalhousie street in the city of Ottawa, at about ten o'clock in the morning of the third day of September, 1881. It appeared that as she approached a railway crossing on the said street, a train belonging to the appellants' company was proceeding along the track at right angles to the said street, moving reversely, and struck the carriage in which the respondent's wife was driving, and she was thrown out and received injuries from which she died. Her husband, having obtained letters of administration, brought an action against the company, on behalf of himself and the children of the deceased, and alleged in his statement of claim, that the train causing the accident which resulted in his wife's death, had violated the Railway Act in several particulars: by not ringing a bell or blowing a whistle; by not having a man on the rear of the car to warn persons of the approach of the train; and by proceeding at a greater rate of speed than six miles an hour.

On the trial it was shown that the deceased had been accustomed to perform various household services, such as milking a cow, &c., and managed all the household affairs.

The jury found the railway company guilty of negligence, and gave a verdict for the plaintiff with $5,800 damages of which $1,500 was apportioned to the husband and the balance divided among the children. This verdict the Court of Appeal refused to disturb, and the company appealed to the Supreme Court of Canada.

Christopher Robinson Q.C. for the appellants.

(1) 11 Ont. App. R. 1.

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In addition to the authorities and points relied on by counsel which are stated in the judgments of the court below (1), and in the judgments delivered in this court, *Seward* v. *Vera Cruz* (2); and *Savary et al* v. *G. T. Railway of Canada* (3) were cited.

Dalton McCarthy Q.C. and *M. O'Gara* Q.C. for the respondent, cited *Tilley* v. *Hudson River RR. Co.* (4); *McIntyre* v. *N. Y. Central R.R. Co.* (5); *Chamberlain* v. *Boyd* (6).

Sir W. J. RITCHIE C.J.—This action was brought by a husband, under Cons. Stats. of Canada, ch. 78, secs. 2 and 3, on behalf of himself and his children, to recover damages for the death of his wife caused by the negligence of the defendants and their servants. The sections of the statute referred to are as follows:—

2. Wherever the death of a person has been caused by such wrongful act, neglect or default, as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, in such case the person who would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death has been caused under such circumstances as amount in law to felony. C. S. C., c. 78, s. 1.

3. Every such action shall be for the benefit of the wife, husband, parent and child of the person whose death has been so caused, and shall be brought by and in the name of the executor or administrator of the person deceased, and in every such action the judge or jury may give such damages as they think proportioned to the injury, resulting from such death, to the parties respectively for whom and for whose benefit such action has been brought; and the amount so recovered, after deducting the costs not recovered from the defendant, shall be divided amongst the before-mentioned parties, in such shares as the judge or jury by their verdict find and direct. C. S. C., c. 78, s. 2.

The jury found that the death was caused by the

(1) 11 Ont. App. R. 1.
(2) 10 App. Cas. 70.
(3) 6 L. C. Jur. 49.
(4) Sedgwick L. C. 796.
(5) 37 N. Y. 287.
(6) 11 Q. B. D. 407.

negligence of the defendants, and awarded damages to the husband and to the children of the deceased being under age. The Queen's Bench Division (Chief Justice Haggarty and Mr. Justice Cameron) set aside this verdict and ordered a non-suit, Mr. Justice Armour dissenting; the Court of Appeal reversed the decision of the Queen's Bench Division, three of the learned judges holding plaintiff entitled to recover, Burton J. dissenting. All the judges in both courts admitted that defendants had been guilty of negligence, but differed as to the meaning to be attached to the word injury used in the statute. Chief Justice Haggarty and Mr. Justice Burton held that the loss of the wife or mother, no matter how industrious, careful or attentive she might have been in looking after her husband's domestic affairs, and in promoting the material and moral condition and prospects of her children, was still sentimental, and not of a sufficient pecuniary character to support the action. The other judges held that what is meant by pecuniary loss in all the decided cases in which the expression had been used is the loss of some benefit or advantage which is capable of being estimated in money as distinguished from mere sentimental loss.

The evidence as to damages was to the following effect:—The husband was married on 21st October, 1849; his wife was in her fifty-third year when she was killed; he was nine years her senior, and she was in the very best of health; they had had nine children, seven of whom were living aged respectively 30, 22, 21, 19, 16, 14 and 11. The five younger children, to whom the jury awarded damages, lived at home, and were not providing for themselves; the wife and mother managed the whole business of the house, made all purchases and repairs, and did everything about the house; the husband had nothing to do while she lived

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except to attend to the business of his office; she did a great deal of the house-work though they always kept one servant; she almost always milked the cow in preference to allowing the servant to milk her who did not understand her; and, to the question: Was she a careful mother? the answer was: Very much so; and to the question: As regards the education of her children? the answer was: Yes. The question now before us then is: What are the damages which the jury are authorized to give in proportion to the injury resulting from this death, to the parties respectively "for whom and for whose benefit such action has been brought," to be divided, after deducting certain costs amongst the parties in such shares as the judge or jury by their verdict shall direct.

I cannot think the injury contemplated by the legislature ought to be confined to a pecuniary interest in a sense so limited as only to embrace loss of money or property, but that, as in the case of a husband in reference to the loss of a wife, so, in the case of children, the loss of a mother may involve many things which may be regarded as of a pecuniary character. The term pecuniary is not used by the legislature, and this, of itself, I think, affords a good reason for saying that that term should not be introduced in a narrow confined sense as applicable only to an immediate loss of money or property. In several of the United States of America, where the word pecuniary is introduced into a statute, it is not construed in a strict sense, and is held not to exclude the loss of maintenance or of the intellectual, moral and physical training which a mother only can give to her children. Therefore, *a fortiori*, the word should not be judicially introduced into our statute with a view to a narrow and strict construction.

The principles, so far as they are enunciated, in the English cases, in my opinion, support the views I have

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just expressed. In *Pym* v. *The Great Northern Ry. Co.* (1), Erle C.J., in delivering judgment, says :—

The principle which governs these cases appears to us to be, to consider whether there was evidence of a reasonable probability of pecuniary benefit to the parties, if the death of the deceased had not occurred; and was it lost by reason of that death, caused by the wrongful act, neglect, or default of the defendants? If this were so, then there is a case which the judge must leave to the jury.

And Pollock C. B., in *Franklin* v. *South Eastern Ry. Co.* (2), says :—

In this case the plaintiff, as administrator of his son, sued (under the Statute 9 and 10 Vic., ch. 93) the defendants, by the negligence of whose servants his son's death was caused; and the question was if he was entitled to maintain the action, it being contended that it was necessary the plaintiff should show a damage, and that he had shown none.

The statute does not in terms say on what principle the action it gives is to be maintainable, nor on what principle the damages are to be assessed, and the only way to ascertain what it does, is to show what it does not mean. Now, it is clear that damage must be shown, for the jury are to "give such damages as they think proportioned to the injury." It has been held that these damages are not to be given as a *solatium;* but are to be given in reference to a pecuniary loss. That was so decided for the first time in *banc* in *Blake* v. *The Midland Railway Co.* (3). That case was tried before Parke B., who told the jury that the Lord Chief Baron had frequently ruled at *nisi prius,* and without objection, that the claim for damage must be founded on pecuniary loss, actual or expected, and that more injury to feelings could not be considered. It is also clear that the damages are not to be given merely in reference to the loss of a legal right, for they are to be distributed among relations only, and not to all individuals sustaining such a loss; and accordingly the practice has not been to ascertain what benefit could have been enforced by the claimants had the deceased lived and give damages limited thereby. If, then, the damages are not to be calculated on either of these principles, nothing remains except that they should be calculated in reference to a reasonable expectation of pecuniary benefit, as of right or otherwise, from the continuance of the life. Whether the plaintiff had any such reasonable expectation of benefit from the continuance of his son's life, and if so, to

(1) 4 B. & S. 406.
(2) 3 H. & N. 213.
(3) 18 Q. B. 93.

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what extent, were the questions left in this case to the jury. The proper question then was left, if there was any evidence in support of the affirmative of it. We think there was. The plaintiff was old and getting infirm; the son was young, earning good wages, and apparently well disposed to assist his father, and, in fact, he had so assisted him to the value of 3s. 6d. a week. We do not say that it was necessary that actual benefit should have been derived, a reasonable expectation is enough, and such reasonable expectation might well exist, though from the father not being in need, the son had never done anything for him. On the other hand a jury certainly ought not to make a guess in the matter, but ought to be satisfied that there has been a loss of sensible and appreciable pecuniary benefit, which might have been reasonably expected from the continuance of the life.

Dalton v. *The South Eastern Ry. Co.* (1) and *Franklin* v. *the same company* (2) are to the same effect, and are commented upon in the Supreme Court of Pennsylvania by Thomson J., in the case of *The Pennsylvania Railroad Co.* v. *Adams* (3) as follows:

The rule established in *Dalton* v. *The South Eastern Ry. Co.* and *Franklin* v. *the same company* is, that if there be a reasonable expectation of pecuniary advantage, the destruction of such expectation by negligence occasioning the death of the party from whom it arose will sustain the action. This is the settled rule in England for the right of recovery where the family relation exists in fact but not in law, so far as maintenance or support is concerned. It is high authority; it is a precedent we may safely follow. It seems to consort entirely with the highest dictates of reason and justice.

And there are many cases in the United States directly in point on the question, among which the following may be noted:

In *Tilley* v. *The Hudson River Railroad Company* (4) Denio J. says:

It will not be essential to pass upon the other exceptions, except so far as may be useful for the purposes of another trial. We think it was not improper to allow the plaintiff to show the habitual occupation and employment of the deceased, for the purposes for which it was offered and received on the trial, namely, to show her general

(1) 4 C. B. N. S. 296.
(2) 3 H. & N. 211.
(3) 5 P. F. Smith 503.
(4) 24 N. Y. 474.

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capacity and relation to her family. It is true that the testimony on that point was made to assume proportions beyond what seems to have been necessary for the purposes mentioned; but, it being competent, it was for the judge to determine the extent to which the examination might be carried.

The injury to the children of the deceased by the death of their mother was a legitimate ground of damages, and we do not agree with the defendant's counsel, that they ought to have been nominal The difficulty upon this point arises from the employment of the word pecuniary in the statute, but it was not used in a sense so limited as to confine it to the immediate loss of money or property; for if that were so, there is scarcely a case where any amount of damages could be recovered. It looks to prospective advantages of a pecuniary nature which have been cut off by the premature death of the person from whom they would have proceeded; and the word pecuniary was used in distinction to those injuries to the affections and sentiments which arise from the death of relatives, and which, though most painful and grievous to be borne, cannot be measured or recompensed by money. It excludes, also, those losses which result from the deprivation of the society and companionship of relatives, which are equally incapable of being defined by any recognized measure of value. But infant children sustain a loss from the death of their parents, and especially of their mother, of a different kind. She owes them the duty of nurture and of intellectual, moral and physical training, and of such instruction as can only proceed from a mother. This is, to say the least, as essential to their future well being in a worldly point of view, and to their success in life, as the instruction in letters and other branches of elementary education which they receive at the hands of other teachers who are employed for a pecuniary compensation.

Again in *Tilley* v. *The Hudson River Railroad Company*, Sedgwick's, leading Cases on Damages, p. 799, Hogeboom J. says :—

The charge of the judge was explicit that the damages must be limited to pecuniary injuries; and he said that in estimating them they had a right to consider the loss (that is, the pecuniary loss) which the children had sustained in reference to their mother's nurture and instruction, and moral, physical and intellectual training. I think this does not imply that the children are necessarily and inevitably subjected to such a loss, but leaves it to the jury to determine whether any such loss has been in fact sustained, and if so, the amount of such loss. This is the fair scope and

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meaning of the charge, and if it was not sufficiently explicit, should have been made so by a direct request for such purpose. This understood, I regard it as unexceptionable. It is certainly possible, and not only so, but highly probable, that a mother's nurture, instruction and training, if judiciously administered, will operate favorably upon the worldly prospects and pecuniary interests of the child. The object of such training and education is not simply to prepare them for another world, but to act well their part in this, and to promote their temporal welfare. If they acquire health, knowledge, a sound bodily constitution, and ample intellectual development under the judicious training and discipline of a competent and careful mother, it is very likely to tell favorably upon their pecuniary interests. These are better, even in a pecuniary or mercenary point of view, than a feeble constitution, impaired health, intellectual ignorance and degradation and moral turpitude. To sustain the charge, it is enough that these circumstances might affect their pecuniary prospects. It was left to the jury to say whether in the given case they did so or not, and if so to what extent. * * *

The charge is supposed to have been particularly objectionable because it set before the jury moral training and culture as one of the sources of pecuniary benefit, which the jury were at liberty to consider. * * * * *

But I think it defensible on the grounds already advanced, that moral culture, like bodily health and mental development, improve and perfect the man and fit him for not only a more useful but a more prosperous career, for worldly success as well as social consideration. It is not essential to show that they necessarily result in direct pecuniary advantage; it is sufficient that they may do so; that they often do so; that it is possible and not improbable that such may be the result, and that, therefore, these items may be set forth and presented for the consideration and deliberation of the jury, to be disposed of as they shall deem to be just. I think the exception is not well taken if they may possibly result in pecuniary benefit and do not tend in a contrary direction. I concede these are quite general and to some extent loose and indefinite elements to enter into a safe and judicious estimate of actual pecuniary damage, but I am unable to find in the statute a restriction which shall confine it within narrower limits.

In the *Pennsylvania Railway Co.* v. *Goodman* (1), the following doctrine is laid down:

Damages in a case like this, where the plaintiff is entitled to

(1) 62 Penn. 332.

recover, should be given as a pecuniary compensation, the jury measuring the plaintiff's loss by a just estimate of the services and companionship of the wife of which he was deprived by this accident, that is, of their value in a pecuniary sense—nothing is allowable for the suffering of the deceased nor for the wounded feelings of the plaintiff. Of course the jury will examine the testimony to aid them in ascertaining the damages, as well as every other point in the issue they are trying. But if damages are to be given at all, there is no reason why they should be nominal merely; they should be a just compensation for the value of the companionship and services lost to him by reason of this unfortunate collision.

When charging the jury, the judge said:

After commending this case to your most careful consideration, I have only to add, that if you should arrive at the conclusion that, according to the evidence in regard to the facts and the law as given to you by the court applicable to the facts which you find to be proved, the plaintiff is entitled to recover, you will enquire and assess the amount of damages to be awarded to him for the injury he has sustained. The law is, that the damages for such an injury are to be a pecuniary compensation, to be measured by the value of the loss of service and companionship sustained by the plaintiff. There is evidence before you in relation to the condition of the family of the plaintiff, his occupation and business, the age, health and character of his wife for industry and careful management. These are all considerations that may enable you to form a correct judgment as to the amount of damages you should award the plaintiff, if, according to the law and the evidence, he ought to recover.

When delivering the judgment of the court, the judge said:

Looking at the entire charge on the subject of damages, we think it clearly confined the damages to a pecuniary compensation for the loss of Mrs. Goodman's service. The court told the jury in express language that nothing is allowable for the suffering of the deceased, nor for the wounded feelings of the plaintiff. They said, also, that the plaintiff's loss was to be measured by a just estimate of the services and companionship of the wife. It is thought that this meant, by way of solace, for the loss of companionship. But all the judge said on this point made it evident he did not mean compensation by way of solace, and could not have been so understood by the jury. Companionship was evidently used to express the relation of the deceased in the character of the service she performed. He merely meant to say that the loss should be measured by the value

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of her services as a wife or companion. The form of expression, perhaps, was not the best selection of words, yet it certainly meant no more than that the pecuniary loss was to be measured by the nature of the service characterized as it was by the relation in which the parties stood to each other. Certainly the service of a wife is pecuniarily more valuable than that of a mere hireling. The frugality, industry, usefulness, attention, and tender solicitude of a wife and the mother of children, surely make her services greater than those of an ordinary servant, and therefore worth more. These elements are not to be excluded from the consideration of a jury in making a mere money estimate of value. Finding no error we can reach, the judgment must be affirmed.

And in *McIntyre* v. *New York Central R.R. Co.* (1) in the judgment of Fullerton J., we find the following :—

When we consider the defect which the statute was designed to remedy, it was taking too narrow a view of the matter to say that the word pecuniary was used in so limited a sense as to embrace only the loss of money.

Such a limitation would, in many cases, render the statute a mere mockery, because it would afford no substantial aid in the very case in which it is most needed. The loss of the society of a deceased relative, the injury to the affections of those surviving, cannot be regarded as being within the remedy of the statute, because in no sense can the loss be regarded as pecuniary. But to children the loss of a parent involves the loss of many other things which this court has heretofore regarded as of a pecuniary character, and as the subjects of consideration by a jury in assessing the damages under the statute.

I think the statute intended that where there was a substantial loss or injury there should be substantial relief. I cannot think that in giving compensation to a child for the loss of its parent the legislature intended so to limit the remedy as to deprive the child of compensation for the greatest injury it is possible to conceive a child can sustain, namely, in being deprived of the care, education and training of a mother, unless it could be shown that the loss was a pecuniary loss of so many dollars or so much property, a construction which, in ninety-nine cases out of a hundred, would

(1) 37 N. Y. 295.

simply amount to saying that though there was an almost irreparable injury, affecting the present and future interests of the child, no compensation was to be awarded; in other words it would be, in effect, to deny to a child compensation for the death of a mother by negligence in almost every conceivable case.

I think the term injury in the statute means substantial injury as opposed to mere sentimental, and I cannot bring my mind to the conclusion that a husband or infant children may not, in the loss of a wife or mother, and did not in this case by such a loss, sustain a substantial injury and one for which it was the intention of the legislature to indemnify the husband and children. I am free to admit that the injury must not be sentimental or the damages a mere solatium, but must be capable of a pecuniary estimate; but I cannot think it must necessarily be a loss of so many dollars and cents capable of calculation. The injury must be substantial; the loss, a loss of a substantial pecuniary benefit, and the damages are not to be given to soothe the feelings of the husband or child, but are to be given for the substantial injury. It may be impossible to reduce such an injury to an exact pecuniary amount. In estimating the pecuniary value of such an injury courts and juries, will, no doubt, be governed by a consideration of the relative positions of the parties, such as the relative positions of husband and wife, the ages of the children, and the duties discharged by the mother, and in the consideration of all the surrounding circumstances will give such damages as will afford a reasonable pecuniary compensation for the substantial injury sustained. No doubt this rule may be somewhat loose and indefinite, but the rule as to many injuries for which the law gives compensation is not less so.

I cannot, therefore, appreciate the force of the argu-

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ment as to the difficulty of fixing a pecuniary estimate upon the loss which the husband or child may sustain, as affording any reason against awarding him or them a just and reasonable compensation. There are abundant cases in our law where there is the same difficulty in reducing the injury to a pecuniary standard; in actions of slander for words actionable in themselves where special damage is not required to be proved; libel, breach of promise of marriage, and many others where substantial injury is complained of, but the amount of damage is left to the discretion and judgment of the jury; there are no judicial tables by which the amount of such damages can be ascertained, nor any judicial scales on which they can be weighed, yet pecuniary damages are, without difficulty awarded, assessed by the good sense and sound judgment of the jury, upon and by reference to, all the facts and circumstances of each particular case, and who are, as Lord Campbell expresses it, to take a reasonable view of the case and give a fair compensation.

There may, doubtless, be cases in which neither the husband nor children would be entitled to recover, because there may be cases where the wife and mother was incompetent, from physical infirmity, to render any services or benefit to her husband or children, but whom, on the other hand, might be a burthen to either or both; or there may be cases where the conduct and example of the mother may be baneful, and so far from being beneficial to the children may be positively injurious; it would seem obvious in such cases, that there being no substantial injury there could be no damage. But, on the other hand, let us suppose a case of a household of children too young to work, practically managed and maintained by the energy, activity, frugality, intelligence and industry of a wife and mother; is the loss of such a wife and mother no substantial pecuniary injury

to the husband and child? Or suppose the father of this family unable to work, or, if able to work, a poor man, dependent on his daily labor, with wages insufficient to enable him to employ a servant; who has a comfortable, happy home under the care and administration of such a wife; the wife is taken away; in what condition would that husband and those motherless children be left while their father was earning his scanty wage, the children neglected, the family meals uncooked, the household uncared for? Or take the case of a mother, a widow, with no means but her daily labor, who, by such daily labor, supports her children, clothes, educates, and brings them up in comparative comfort, who is killed by negligence and her children are thrown on the world, homeless, motherless and penniless, and yet, when all or any of them seek compensation for this grievous substantial injury inflicted on them by negligence, are they to be told that they have sustained no appreciable injury capable of pecuniary compensation, and that the injury they have sustained is purely sentimental? Truly, the daily suffering of the bereaved father and the motherless children would tell a very different tale.

I must confess myself at a loss to understand how it can be said that the care and management of a household by an industrious, careful, frugal and intelligent woman, or the care and bringing up by a worthy loving mother of a family of children, is not a substantial benefit to the husband and children; or how it can be said that the loss of such a wife and mother is not a substantial injury but merely sentimental, is, to my mind, incomprehensible. And if the injury is substantial, the only mode the law could provide for reimbursing the husband and children is by a pecuniary compensation, and so, in my opinion, in the eye of the law, the injury is a pecuniary injury.

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But it is said that this may lead to investigations of a very disagreeable and undesirable character. That, in my opinion, must be left to the discretion of those putting forward claims involving such a result; but on a fair claim, such as the present, it would seem somewhat strange that the party at whose hands the claimants have suffered should be permitted to say they should not be allowed to recover because in some doubtful cases the investigation may be made unpleasant or inexpedient. To allow an objection such as this to prevail or have any weight whatever as a bar to the right to recover would, in my humble opinion, simply be to put pure sentiment in the way of law and justice.

The evidence in this case shows that the husband was receiving benefits and advantages from the services of his wife capable of pecuniary computation, and had such reasonable expectation of pecuniary benefit from the continaunce of such services by the continuance of the wife's life as would entitle him to damages under the statute; and, as to the children, I agree with Mr. Justice Armour that there is an education in religion, morals and virtue which, owing to the peculiar confidence inspired by the relationship of mother and child, can be imparted to the children by the mother alone; I think that such education is a benefit and advantage to the child and is capable of being estimated in money, and that the deprivation of a mother's superintendence and care of the children, occasioned by the death of the mother, is a pecuniary loss to the children. Although those children, or some of them, being still under age, may have passed from mere childhood, they were still in a position where a mother's care and supervision and moral, physical and intellectual training was, if possible, more important, more necessary, more valuable to them, and more difficult to be supplied, than in the case of very young children.

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FOURNIER J.—I entirely concur with the views expressed by the learned Chief Justice and I think the appeal should be dismissed.

HENRY J.—This appeal should be dismissed. I entirely agree with the Chief Justice in this case.

The action was commenced under the statute passed by the Legislature of the Province of Ontario, which is a copy of Lord Campbell's Act, and it was in consequence of the death of the plaintiff's wife being caused by what was not contested to be, the defendant's negligence.

The question is whether the husband of the deceased wife is entitled to bring this action in the capacity he has done, and whether the children are entitled to relief. I have looked at the statute very attentively and it allows a jury to award damages for injury caused by negligence under the circumstances in evidence in this case. The lady would have been entitled, had she survived the injury she sustained, to have brought, with her husband an action for damages. But it is said that Lord Campbell's Act was never intended to give to the survivor any right to recover damages except for a specific pecuniary loss—that is, if she lived, the husband would recover damages for any loss he could show he had sustained, but if she died, he has no remedy except for technically a pecuniary loss.

Looking at the law applicable to that subject at the time that statute was passed, we are to find out what the latter intended, and how far parties were to be compensated for loss sustained. In the case before us this lady was proved to be a dutiful wife and mother, industrious and hard working, even to the milking of the cows, and we are told that the loss of her services would not be a pecuniary, but a sentimental loss. Here is an actual substantial loss independent of any sentimental feeling. It is clear, to my mind, that nothing but absolute value

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could compensate for it. It is truly said that in England no sentimental damages can be recovered, and that there must be actual pecuniary loss. The statute does not provide for the recovery of damages for mere grief or loss of society, &c., to be ascertained solely, as must be the case, by the testimony of the interested party, for nobody else can measure or appreciate it. To that extent I admit the decisions go in England. And in this case we have no right to go beyond the decisions in England in limiting the operation of this statute. Under all the circumstances I think we are bound in this case to sustain the verdict of the jury awarding damages for a *bonâ fide* absolute loss, for I consider it is a pecuniary loss which the respondent and those for whom he is acting have sustained, which it takes money or money's worth to make up, and which can be ascertained by evidence as easily and effectually as may be done in cases of slander and many others.

I am therefore of opinion that the judgment of the court below should be affirmed.

TASCHEREAU J.—I concur in the conclusion arrived at by Mr. Justice Gwynne, whose reasons for judgment I have had occasion to read.

GWYNNE J.—This is an action brought by William P. Lett as administrator of his deceased wife, who was killed by a collision on the defendants' railway, to recover damages from the defendants under the provisions of chapter 128 of the Revised Statutes of Ontario. The action is brought for the benefit of the husband himself, and of seven surviving children of the marriage, of the respective ages of 30, 22, 21, 19, 16, 14 and 11 years. At the trial it appeared that the deceased was possessed of a small income derived from real estate, of which her husband upon her death

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became tenant by the courtesy. The plaintiff testified that during the life of his wife she managed this property, and received the income without any interference upon his part, and that she always applied the income for the support of the family. The child aged 30 who was a married daughter, gave evidence that her mother was in the habit of assisting her with meat, butter, money and clothes to the value, as she believed, of about $100 per annum, but it is unnecessary to deal with this evidence as the jury allowed nothing to this daughter; the child aged 22, a son, who was in the receipt of a small income from an office held by him, gave evidence that he by contract with his mother, paid her ten dollars a month for his board, and that she was in the habit of making him little presents from time to time, which however were about balanced by money given by him to his mother in excess of the ten dollars per month agreed upon for his board; it is unnecessary also to deal with this evidence as the jury allowed nothing to this son either.

The husband made no claim, as by way of compensation for any loss alleged to have occurred in respect of the income which the wife possessed from her real estate, and the only evidence given in support of the husband's own claim for compensation for the injury alleged to be sustained by him, resulting from his wife's death was in the following language of the plaintiff:—

His wife he said was at the time of her death 53 years of age and he 62. She managed the whole business of the house, made all purchases and repairs, and did everything about the house. He had nothing to do while she lived, except attend to the business of his office from which he received an income of sixteen hundred dollars per annum. They always kept one servant, but the wife did a good deal of the household work, she mostly always milked the cow in preference to allowing girls to milk her, who did not understand her. The child, aged 21, is a daughter whose education was complete at the time of the death of the mother, and she, he said, had

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been trained in domestic affairs by her mother, since whose death she "runs the house."

When asked to explain the pecuniary damage occasioned to him by his wife's death, he replied that he would sustain the loss of her management. In support of the right of the children to compensation for injury resulting to them from the death of their mother, the only evidence given, apart from that of the son and daughter, to whom the jury allowed nothing, was that of the plaintiff, who, in reply to a question, whether the deceased was a careful mother, said that she was very much so. And upon the question being repeated in the form, whether she was a careful mother as regards the education of her children? he answered yes.

Upon this evidence the jury rendered a verdict for the plaintiff with $5,800 damages, distributed as follows:— To the plaintiff himself, $1,500; to the child aged 21, a daughter, $600; to the child aged 19, a son, $400; to the one aged 16, a son, $800; to the child aged 14, a daughter, $1,200; and to the child aged 11, a son, $1,300. Upon a rule being obtained in the Queen's Bench Division of the High Court of Justice for Ontario to set aside this verdict and for a new trial upon the grounds, among others, that the verdict was against law and evidence and the weight of evidence, and upon the ground that no cause of action was established, there being no pecuniary loss established, or that there was no right to recover on behalf of the children, as the death of Mrs. Lett was no pecuniary injury to the children, even if it was established to be to her husband, and on the ground that the damages were excessive, the majority of that court being of opinion that there was no evidence proper to be submitted to a jury of any injury resulting from the death of Mrs. Lett within the meaning of the 128th chapter of the Revised Statutes of Ontario, made the rule absolute for entering

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a non-suit. Upon appeal to the Court of Appeal of Ontario, this rule was set aside and the rule *nisi* for the new trial discharged with costs, thus leaving the verdict of the jury to stand. It is from this judgment of the Court of Appeal for Ontario that the present appeal is taken, and the question presented to us by it, is whether or not the evidence given of the sustaining by the persons, or any of the persons for whose benefit the verdict has been rendered, of injury resulting from the death of the deceased was of such a nature as that the verdict rendered for the plaintiff can be sustained in whole or in part, within the true meaning of chapter 128 of the Statutes of Ontario.

This statute in so far as the point in question is affected, is identical in its provisions with the Imperial Statute 9 and 10 Vic., ch. 93, commonly called Lord Campbell's Act. The rule to be collected from the decisions in the English courts, I think, is that damages are not recoverable by a husband upon the ground merely of his being deprived of his wife; or *per quod consortium amisit*, nor by children, upon the ground merely of their being deprived of their mother; but that the loss (by the death) of all those benefits which being procurable with money are capable of pecuniary estimate, and which the parties in whose behalf the action is given by the statute had actually enjoyed, and but for the death, might have reasonably expected to continue to enjoy; and the disappointment by the death of the reasonable expectation of pecuniary benefit in the event of the continuance of the life of the deceased, are injuries which may be compensated with damages recovered in an action under the statute.

The circumstances under which parties may recover depend, as it appears to me, much upon the condition in life of the parties claiming and the nature of the benefit or services, the loss of which, resulting from the

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death, constitutes the injury in respect of which compensation is claimed. Evidence which would be sufficient to warrant a recovery in the case of parties in a humble condition of life, might be quite insufficient and inappropriate in the case of parties in wealthy, or even in comfortable circumstances; for example, the loss of his wife by a poor man having a family depending for their support upon his manual labor and who is compelled of necessity to depend solely upon his wife for the management of his little household affairs and the care of his children, may, perhaps, be said to be a proper subject of compensation in money, to enable him to supply, albeit imperfectly by hired assistance, the necessary services which his wife during her life had rendered, while a claim by a wealthy man, or by a man in comfortable pecuniary circumstances, for the loss of his wife, although such wife had during her life taken such control and management of her household affairs and such care of her children as a good wife and mother, having regard to her husband's circumstances, might naturally be expected to take, could not reasonably be entertained. So likewise in the case of parents of good education but of narrow means, wholly insufficient to pay for a good, liberal education for their children, but who, being themselves competent to give such an education, had assumed the duty, the loss to the children of such parents, or of such a parent, may be said to be as susceptible of pecuniary estimate as would be the loss of a parent having in his life-time abundant means to procure the education of his children, which means terminated with his life. Of this latter nature was the case of *Pym* v. *The Great Northern Railway* (1), where the points decided and the rationale of the decision are thus stated:

As the benefit of education and the enjoyment of the greater com-

(1) 2 B. & S. 759 and 4 B. & S. 397.

forts and conveniences of life depend on the possession of pecuniary means, to procure them the loss of those advantages is one which is capable of being estimated in money; in other words, is a pecuniary loss, and therefore the loss of such advantages arising from the death of a father *whose income ceases with his life* is an injury in respect of which an action can be maintained on the statute. A *fortiori* the loss of a pecuniary provision which fails to be made, owing to the premature death of a person by whom such provision would have been made had he lived, is clearly a pecuniary loss for which compensation may be claimed.

The English cases beyond doubt establish that if there be a reasonable expectation of pecuniary advantage, the extinction of such expectation by negligence occasioning the death of the party from whom the expectation arose will sustain the action. Some of the American courts, it must be admitted, have gone far beyond the decisions in the English courts. In *Pennsylvania Road Co.* v. *Goodman* (1) the Supreme Court of the State of Pennsylvania held, that a husband was entitled to recover by way of compensation for the loss of his wife, damages measured by the value of her services as a wife or companion. If this be sound law, there cannot well be conceived any case of an action by a husband for the loss of his wife not resulting in a verdict for the plaintiff upon the bare evidence of the death having been caused by the act or default of the defendant, such a decision seems to amount to one that the action lies—*per quod consortium amisit*—I cannot concur in this view. The cases on the contrary in which a husband can obtain damages for the loss of the services rendered by a wife are, in my judgment, very exceptional, and each case must be governed by its own peculiar circumstances; the condition in life of the husband and the evidence of the nature of the particular service, the loss of which is made the subject of the claim. In *Tilley* v. *H. R. R. Co.* (2) a majority of the Court of Appeals in the State of New York held, that those losses which result from

(1) 62 Penn. Rep. 329. (2) 29 N. Y. 252.

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the deprivation of the society and companionship of relatives, as being incapable of being defined by any recognized measure of value are excluded, and are not therefore the subject of compensation in damages under their statute, which is similar in substance to ours, but that in an action brought to recover damages on behalf of children for injury occasioned to them by the death of a mother, the jury in estimating damages had a right to consider the nurture, instruction and the physical, moral and intellectual training which they might have received from their mother had she continued to live, and that they were not restricted by the arrival of the children at their majority. From a reference to the report this does not appear to me to be laid down as an abstract proposition of law applicable in every case, but as having reference to the particular evidence given in that case as to what the mother had been in the habit of doing in her life time. The learned judge who read the judgment of the majority of the court there says:

> If they (the jury) are satisfied from the history of the family or the intrinsic probabilities that damages were sustained by the loss of bodily care or intellectual culture or moral training which the mother had before supplied, they are at liberty to allow for it.

And again he says:

> That which had been already given and of which the children had already reaped the benefit, could not be increased by the continued life of the parent, nor curtailed by her sudden death—the result had been already realized, but her sudden and wrongful removal was the withdrawal, the permanent and perpetual withdrawal, of a moral and intellectual fund from which the children were constantly deriving pecuniary aliment and support, and it is the withdrawal which formed the basis of the whole allowance of any damage arising from this source.

Having regard to the evidence in that case in so far as it appears in the report, I am not prepared upon a similar case arising under our statute to adopt the judgment of the majority of the court as above announced.

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Pecuniary compensation proportionate to an injury done to a person by such person being deprived of anything should be the value expressed in money of the thing of which they have been deprived. What in the supposed case a child is deprived of by the loss of his or her mother, is the possibility of receiving from the mother that care in sickness in case the child should be afflicted with sickness, that a mother naturally would give, and only a mother can give, and of that motherly advice and moral instruction which it might naturally be expected that, and it is therefore probable that, a mother would take the opportunity of giving to her child. There is no standard, as it appears to me by which a pecuniary value could be set upon the probability of the necessity for such maternal care in sickness arising or upon such maternal care in case the opportunity for its display should arise, nor upon such material advice and moral instruction in case they should be given, nor does the loss of such maternal care and advice constitute, in my opinion, such a disappointment of a reasonable expectation of pecuniary advantage as is cognizable under the statute. These benefits which spring from parental love and affection are neither procured nor procurable with money, and are therefore insusceptible of having a pecuniary value attached to them, and their loss, therefore, cannot be estimated in money. To throw a case into a jury box, with a charge that the action lies on proof of death by negligence of the defendants, and that it rests with the jury to measure the value of the loss to a child of the possibility of benefit of which it is deprived by the death of its mother, without any standard existing by which the estimate can be made, could not fail to result in a verdict for the plaintiff in every case with damages against defendants, by way merely of punishing them for their having caused the death, a result which cannot have been within the con-

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templation of the statute, which only authorizes damages to be given proportionate to the injury resulting from the death to the parties on whose behalf the action is brought. In the case before us the only evidence in support of the verdict, in so far as it is in favor of the children, is that the deceased was a careful mother as regards the education of her children, but this carefulness is quite consistent with her not having herself taken any part in imparting their education to them. The plaintiff admitted that the education of the daughter who was 21 years of age was completed at the time of the death of the deceased, at which time also the younger children appear to have been going to school for their education; but it was contended that whether the education of any of them had or not been completed, or whether any of them had arrived at full age was of no importance, for that this right to recover damages rested wholly upon their having been deprived by their mother's death of the possibility of their receiving that maternal care in case of sickness, and that good advice and moral instruction which it was naturally and reasonably to be expected that a good and virtuous mother would, if she had lived, have given to her children. In my judgment there is no standard by which a pecuniary estimate can be made of the injury resulting to the children from their being deprived of the possibility of their receiving such maternal care and advice, and that therefore such an injury is not cognizable under our statute. If the loss of maternal advice be a ground for compensation that would open enquiries as to the nature, the quality and value, of the advice, of which having been given there should be some evidence. This, in my opinion, never could have been contemplated by the statute, and no defendant could venture to enquire into such particulars without exposing himself to heavy damages for his temerity.

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At the trial there was, I think, some evidence given having relation to an injury resulting to the married daughter which could not have been withheld from the jury, for upon her behalf it was said that she was in the habit of receiving annually pecuniary assistance from her mother, which may have come out of the income which her mother derived from her real estate, but as this estate has devolved upon the father for his life, and as the daughter is, perhaps, as likely to receive from him the same benefit she was accustomed to receive from her mother, she seems, and with reason I doubt not, to be content with the verdict of the jury, which allows her nothing. She has made no complaint against that verdict, and is no party to the question before us, which, in so far as the children are concerned, is whether the verdict in favor of those of them in whose favor it has been rendered can be sustained, and I am of opinion it cannot, and that there was no evidence given which warrants a verdict in their favor. In support of the verdict, in so far as the amount awarded to the husband of the deceased is concerned, the only evidence offered was that of the husband himself, who attributes the injury resulting to him to the loss of the management of his affairs by his wife, and the statement that she "mostly always milked the cow in preference to allowing girls to milk her who did not understand her." In what the pecuniary injury to the husband consists in respect of this milking of the cow does not appear. It is not suggested that the deceased milked the cow for the purpose of relieving, or that she did thereby in fact relieve, her husband from any expense whatever. It is not pretended that the plaintiff derived any pecuniary benefit from the circumstance of the cow having been milked by the deceased, which he has lost by her death, nor that since her death he has been put to any greater

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expense in the matter than he was put to during her life. He cannot, therefore, recover any sum by way of compensation in damages in respect of this particular item. There remains to be considered only the ground upon which the plaintiff in his evidence rested his claim for compensation for the injury resulting to himself personally, namely, the loss of her management of his household affairs. Whether in an action of this discription there be anything peculiar in the condition in life of the parties, or whether there be anything exceptional in the nature of the services rendered by a wife to her husband, in respect of the loss of which by her death damages are claimed on behalf of the husband, are, no doubt, questions for the jury; but if there be not anything in the evidence disclosing anything peculiar or exceptional in those particulars, there can be nothing to submit to the jury unless the mere proof that the defendants caused the death of the wife be sufficient to entitle the husband to compensation in damages for injury resulting to him from her death; for the control and management of her husband's household affairs by a wife is an incident to her character as wife, and is part of the duty which, as a wife, she assumes and is, in fact, the management of her own affairs as much as of his—their joint affairs,—and every husband when he loses his wife by death loses the benefit of having his household affairs managed by his wife; such management is an incident to the *consortium*, and if the loss of the *consortium* be not sufficient to entitle him to compensation, the loss of that which is an incident to the *consortium* cannot. There is nothing in the evidence in the present case which distinguishes it from the case of damages sought to be recovered merely upon the ground of the loss of *consortium*, and as that is not sufficient to entitle the plaintiff to damages, the verdict rendered in his favor cannot I

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think be sustained. It is not suggested that any evidence has been withheld which might have been given or that there is any further evidence which could be given upon another trial, nor, if there be any such evidence, has any explanation been offered for its not having been given, the only question appears to be whether or not the rule to enter a non-suit, which was granted by the Queen's Bench Division of the Supreme Court of Justice for Ontario, should be maintained, the rule *nisi* having only asked for a new trial. The Ontario courts have ever since the passing of 37 Vic., ch. 7, s. 33, now sec. 283 of ch. 50 of the Revised Statutes of Ontario, exercised the jurisdiction upon the argument of a rule *nisi* for a new trial, of granting a rule to enter a non-suit when the court was of opinion that the evidence given did not warrant any verdict in favor of the plaintiff; the section under consideration provides 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.

This seems to be the exercise of a wholesome jurisdiction when there is no evidence given sufficient to sustain a verdict for the plaintiff for any amount, and as for the reasons already given, I am of opinion that the verdict for the plaintiff cannot be sustained, the appeal should be allowed, and the rule to enter a non-suit reinstated.

Appeal dismissed with costs (1).

Solicitors for appellants: *Pinhey, Christie & Christie*

Solicitors for respondent: *O'Gara & Remon.*

(1) Application to the Judicial Committee of the Privy Council for special leave to appeal in this case was refused.

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*May 26, 27, 28.
1886
*Mar. 8.

ALEXANDER B. PETRIE (PLAINTIFF).... APPELLANT ;

AND

THE GUELPH LUMBER COMPANY, GEORGE MACLEAN, DONALD GUTHRIE, JOHN HOGG, AND GEORGE DOUGLAS FERGUSON (DEFENDANTS)..... } RESPONDENTS.

JOHN INGLIS AND DANIEL HUNTER, trading under the name, style and firm of INGLIS & HUNTER (PLAINTIFFS)..... } APPELLANTS ;

AND

THE GUELPH LUMBER COMPANY, GEORGE MACLEAN, DONALD GUTHRIE, JOHN HOGG, AND GEORGE DOUGLAS FERGUSON (DEFENDANTS)..... } RESPONDENTS.

ROBERT STEWART (PLAINTIFF) ..... APPELLANT ;

AND

THE GUELPH LUMBER COMPANY, GEORGE MACLEAN, DONALD GUTHRIE, JOHN HOGG, AND GEORGE DOUGLAS FERGUSON (DEFENDANTS)..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Corporation—Promoters of—Action against Company and promoters for fraudulent misrepresentation—Action ex delicto for deceit—Fraudulent concealment.

A suit was brought against a joint stock company, and against four of the shareholders who had been the promoters of the company. The bill alleged that the defendants, other than the company, had been carrying on the lumber business as partners and had

* PRESENT—Sir W. J. Ritchie C.J. and Fournier, Henry, Taschereau and Gwynne JJ.

become embarrassed; that they then concocted a scheme of forming a joint stock company; that the sole object of the proposed company was to relieve the members of the firm from personal liability for debts incurred in the said business and induce the public to advance money to carry on the business; that application was made to the Government of Ontario for a charter, and at the same time a prospectus was issued; which was set out in full in the bill; that such prospectus contained the following paragraphs among others, which the plaintiff alleged to be false:

1. The timber limits of the company, inclusive of the recent purchase, consist of 222½ square miles, or 142,400 acres, and are estimated to yield 200 million feet of lumber.
2. The interest of the proprietors of the old company in its assets, estimated at about $140,000 over liabilities, has been transferred to the new company at $105,000, all taken in paid up stock, and the whole of the proceeds of the preferential stock will be dues for the purposes of the new company.
3. Preference stock not to exceed $75,000 will be issued by the company to guarantee 8 per cent. yearly thereon to the year 1880, and over that amount the net profits will be divided amongst all the shareholders *pro rata*.
4. Should the holders of preference stock so desire, the company binds itself to take that stock back during the year 1880 at par, with 8 per cent. per annum, on receiving six months' notice in writing.
5. Even with present low prices the company, owing to their superior facilities, will be able to pay a handsome dividend on the ordinary as well as on the preference stock, and when the lumber market improves, as it must soon do, the profits will be correspondingly increased.

The bill further alleged that the plaintiffs subscribed for stock in the company on the faith of the statements in the prospectus; that the assets of the old company were not transferred to the new in the condition that they were in at the time of issuing the prospectus; that the embarrassed condition of the old company was not made known to the persons taking stock in the new company, nor was the fact of a mortgage on the assets of the old company having been given to the Ontario Bank, after the prospectus was issued but before the stock certificates were granted; that the assets of the old company were not worth $140,000, or any sum, over liabilities, but were worthless; and prayed for a rescission of the contract for taking stock, for re-

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payment of the amount of such stock, and for damages against the directors and promoters for misrepresentation.

There was evidence to show that the promoters had reason to believe the prospects of the new company to be good, and that they had honestly valued their assets.

On the argument three grounds of relief were put forward:

1. Rescission of the contract to subscribe for preference stock.
2. Specific performance of the contract to take back the preference stock during the year 1880 at par.
3. Damages against the directors and promoters for misrepresentation. The company having become insolvent the plaintiffs put their case principally on the third ground.

Held, affirming the judgment of the court below, that the plaintiffs could claim no relief against the company by way of rescission of the contract, because it appeared that they had acted as shareholders and affirmed their contract as owners of shares after becoming aware of the grounds of misrepresentation.

Held, also, as to the action against the defendants other than the company for deceit, that the evidence failed to establish such a case of fraudulent misrepresentation as to entitle plaintiffs to succeed as for deceit.

Held, also, as to the alleged concealment of the mortgage to the Ontario Bank, it having been given after the prospectus was issued it could not have been in the prospectus, and, moreover, that the shareholders were in no way damnified thereby, as the new company would have been equally liable for the debt if the mortgage had not been given; and as to the concealment of the embarrassed condition of the old company, the evidence showed that the old firm did not believe themselves to be insolvent; and in neither case were they liable in an action of this kind.

APPEAL from a decision of the Court of Appeal for Ontario (1) affirming the judgment of the Chancery Division of the High Court of Justice for Ontario (2) dismissing the plaintiffs' bill.

The facts of the case are sufficiently set out in the judgment in the Chancery Division and in the judgment of Gwynne J. hereinafter given.

Dalton McCarthy Q.C., for the appellants, referred to the following cases and authorities in addition to those relied on in the Chancery Division:—Kerr on Frauds

(1) 11 Ont. App. R. 336. (2) 2 O. R. 218.

(1); *Smith* v. *Chadwick* (2); *Smith* v. *Land and House Property Corporation* (3); *Mackay* v. *Commercial Bank of New Brunswick* (4); *Edgington* v. *Fitzmaurice* (5); *Ex parte Whittaker, in re Shackelton* (6); *Mathias* v. *Yelts* (7).

Christopher Robinson Q.C. and *Walter Cassels* Q.C., for the respondents, referred to *Dickson* v. *Reuter Telegram Co.* (8); *Jennings* v. *Broughton* (9); *Wood* v. *Schultz* (10).

The judgment of the court was delivered by

GWYNNE J.—The learned counsel for the appellant in his argument before us and in the printed argument contained in the appellant's factum, thus summarizes the relief claimed:

The plaintiffs claim:—

1. Rescission of the contract to subscribe for preference stock on the ground of misrepresentation, their being no laches on their part, they having repudiated within one month after they became aware of the fraud.

2. Specific performance of the contract contained in the prospectus should the holders of preference stock so desire, the company binds itself to take that stock back during the year 1880, with eight per cent. per annum on receiving six months notice in writing. The notice was given on the 26th September, 1879.

3. Damages as against the directors and promoters for misrepresentation, or, as it is called at common law, deceit.

And he adds,

The plaintiffs put their case upon the third or highest ground, and the argument is addressed to that and to that alone for two reasons:—First, that it includes the other two, and, also affords the only substantial redress in the premises, the company being insolvent. Secondly, that if it fails it will suffice to the consideration of the other two, as to the success of which the plaintiffs are in little doubt,

(1) 1 Ed. pp. 32, 36 and 37.
(2) 20 Ch. D. 44.
(3) 28 Ch. D. 15.
(4) L. R. 5 P. C. 394.
(5) 32 W.R. 848; 52 L.T.N.S. 351
(6) 23 W. R. 555; L. R. 10 Ch. App. 446.
(7) 46 L. T. N. S. 502.
(8) 3 C. P. D. 1.
(9) 5 DeG. M. & G. 126.
(10) 6 Can. S. C. R. 592.

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and will thereby afford them the somewhat thankless remedy in the premises of a set-off for costs. It is, therefore, intended to press all three of the above enumerated rights, but it is frankly admitted that this appeal substantially succeeds or fails, except on the question of costs, upon the success or failure to establish the third right.

Gwynne J.

In view of these admissions the relief sought under the two first of the above heads might have been left out of the statement of claim altogether. That sought under the second head is quite inconsistent with that claimed under the first; for specific performance, or rather the fulfilment of a particular term contained in a contract, cannot be enforced if the contract be rescinded. The plaintiff cannot avoid the contract upon the ground of its having been procured by fraud, and at the same time rest upon it as good and valid, so as to entitle him to have the benefit of the company's contract contained, not in the prospectus which is but an invitation to take stock in the company and is signed by no one, but in the scrip certificate which is under the seal of the company and contains their contract to pay 8 per cent. up to the year 1880, and to take back the stock at par during that year if the holders should so desire, upon receiving six month's notice. As the plaintiff's case is that the company is now insolvent, he does not desire to have a decree against it founded upon this term in the contract; nor could he obtain such a decree without abandoning his claim for rescission of the contract, as to which, however, it is sufficient to say that the plaintiff, having been a party to the report made in August, 1879, containing the information upon which the charges contained in his statement of claim are based, and having subsequently acted as a shareholder in virtue of the stock which he says he was induced to subscribe for by the fraud and false representations of the defendants other than the company, and having voted at an election of directors with full

knowledge of the several matters now relied upon as the acts of fraud and false representation, he cannot now claim to be relieved of his stock, even if such relief would be of any benefit to him. His sole remedy, therefore, if any he has under the circumstances appearing in evidence, consists in an action in form *ex delicto* against the defendants other than the company as for deceit, and upon the result of that action alone he must stand or fall, and in consideration of that claim we cannot lose sight of the fact that at the election of directors of the company, held after the report made in August, 1879, by the committee, of which the plaintiff (Petrie) was himself a member, as also was Inglis, he voted for all of the defendants except MacLean, while Inglis voted for all including MacLean, as directors of the company for the ensuing year. At the trial the plaintiff's case was rested chiefly upon his own evidence of statements which he alleged to have been made to him by MacLean alone, who brought the prospectus to him and asked him to take stock, but this case cannot be rested as against the other defendants upon any false and fraudulent representation, if any, made by MacLean to the plaintiff on that occasion, for three reasons—

1st. Because in an action of this kind, where the liability arises from wrongful acts of the defendants, although each is liable for all the consequences attending wrongful acts of which they are guilty, yet, the others of them cannot be made responsible for the consequences of a wrongful act of one of them to which the others are not parties. The case against each is distinct, depending upon the evidence against each (1). MacLean, as a provisional director of the incorporated company, and as one of the partners of the old firm, may have had the authority of the other defendants to take the prospectus around and upon the strength of its

(1) *Atty. General* v. *Wilson* 1 Cr. & Ph. 28.

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statements to canvas for subscriptions of stock, but he was not the agent of the other defendants to make, and had no authority from them to make, any representations outside of the prospectus by which, if false and fraudulent, they could be made responsible for such false and fraudulent representations; if any were made by MacLean, he alone is responsible;

2nd. As against MacLean himself, this evidence of the plaintiff cannot be relied upon as sufficient, because the evidence in respect of the matters complained of by the plaintiff is not only not corroborated by any other evidence, but is in most material particulars contradicted, not only by MacLean, but also by one Edgar, who was present, and who further gives a narrative of the circumstances under which Petrie signed the agreement to become a subscriber for stock at the foot of the prospectus in the books of the company, wholly different from that given by Petrie; and in an action of deceit it would be very unsafe to proceed upon the evidence of a plaintiff alone not only uncorroborated, but so contradicted by other evidence (1);

And 3rd. Because the only case made by the plaintiff's statement of claim is one of false and fraudulent misrepresentations contained in the prospectus itself. Whether there be in the prospectus itself such false and fraudulent misrepresentations as entitle the plaintiff to recover in this action *ex delicto* is then the sole question in the case. The preliminary facts may be stated to be, that these defendants, being engaged together as partners in the business of manufacturers of lumber, had acquired certain timber limits and rights to cut timber upon private property, and, in the year 1875, had erected, at considerable expense, a first class saw mill upon their property at Parry Sound, the machinery for which was furnished and put up in the

(1) *Lovesy* v. *Smith* 15 Ch. D. 664.

mill by Inglis & Hunter, the plaintiffs in the second of the above actions; and in the year 1876, they had constructed docks at their mill for the convenient shipping of the lumber cut at the mill. In the spring of 1877, having a considerable stock of lumber on hand, and the lumber trade being then in a very depressed condition, and in consequence thereof the value of timber limits being very much reduced, MacLean, who was the manager of the partnership business in charge of the mill and of the sale of its produce, strongly urged upon his co-partners the great benefit it would be to the business if they should take advantage of the low price of limits and acquire some which were in the market, and could be purchased at a low and very advantageous rate. This he persuaded them would be so much to the advantage of their business, that they came to the conclusion, as they had already invested largely in the business, to form a joint stock company of limited liability in order to raise the sum of $75,000 additional capital, which was thought necessary in order to acquire additional limits and to carry on the business on a large scale, so as to secure the benefit of an improved condition in the lumber trade which was looked forward to as likely, shortly, or at no distant day, to take place. Accordingly, upon the information furnished by their manager, in whose judgment they apper to have had implicit confidence, they made an estimate of their liabilities and of their assets, for the purpose of arriving at the amount at which their assets in excess of their liabilities might be estimated, with a view to their taking stock in the joint stock company to that amount, to be deferred to the $75,000.00 proposed to be raised as preference stock, and as a result of this estimate of their liabilities and assets they concluded to take steps for the formation of a joint stock company upon the basis of their taking

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stock to the amount of $105,000.00, as the estimated value of their interest in the partnership assets and to invite subscriptions for preference stock upon this basis. Accordingly, upon the 28th May, 1877, they entered into an agreement made and executed by all the partners in the firm consisting of the above defendants and one Symon, since deceased, whereby after reciting that the partnership firm, known as the Guelph Lumber Company, were possessed of a mill property, timber limits, timber and other property, and that for the purpose of purchasing additional limits and otherwise extending their business it was desirable to procure additional capital and to form a joint stock company to be incorporated under the name of The Guelph Lumber Company (limited), and that the members of the old company proposed to take paid up stock in the new company for their interest in the assets of the old, the same being estimated for the purpose at $105,000 00, and that the capital stock of the new company should be $300,000.00 divided into 300 shares of $1,000 each. It was mutually agreed as follows:—

1. That a new company be incorporated under the Joint Stock Companies Act for the purpose of taking over the business and assets of the old partnership firm known as The Guelph Lumber Company, such new company, when incorporated, to take the place of the old in respect of such business.

2. That MacLean, Guthrie, Hogg, Ferguson and Symon, being the only persons interested in the old partnership agree to accept paid up stock in the aggregate for $105,000.00 in the new company, in the proportions set opposite to their respective signatures in full satisfaction of their interest in the business and assets of the old company when incorporated, and the said new company shall thereupon succeed to and assume all the business and assets of the old company.

3. That the capital stock of the new company should be $300,000, divided as aforesaid, and the parties thereto agreed to take and subscribe for the number of shares thereof set opposite to their respective signatures.

4. That the first directors of the new company should be John

Hogg, George MacLean and Donald Guthrie, and that the said directors should take steps to procure the incorporation of the new company.

5. That the said directors are authorized to purchase in trust for the new company any timber and timber limits offered for sale prior to the procuring of a charter.

6. That the business of the old company should belong to the new company at the time of incorporation on the terms therein specified, notwithstanding any increase or change in the assets thereof, it being understood that the members of the old company should not, in the meantime, receive any dividend or profit therefrom. The instrument was then subscribed

By the defendant Ferguson	for 28 shares.....	$	28,000 00
By the defendant Hogg	for 28 do		28,000 00
By defendant MacLean	for 24 do		24,000 00
By defendant Guthrie	for 23 do		23,000 00
And by Charles Symon	for 2 do		2,000 00
			$105,000 00

In pursuance of this agreement the steps necessary to procure letters patent of incorporation to be issued incorporating the new company under the provisions of the Joint Stock Companies' Act were taken, which letters patent issued as stated in the plaintiff's statement of claim, namely, upon the 20th of August, 1877.

In the meantime a contract having been entered into by Mr. Guthrie on behalf of the old firm with one Dodge for the purchase of certain limits, to be held in trust for the new company in the event of its being incorporated, and the sum of $5,000 having to be paid as a cash instalment of purchase money upon such purchase, the defendant Guthrie himself advanced $3,000, part thereof, and procured Inglis and Hunter to advance the residue, namely, $2,000, and thereupon an agreement was entered into between the old partnership firm, known as the Guelph Lumber Company, and the defendant Guthrie and Messrs. Inglis and Hunter, and signed by them respectively in the terms following :

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The Guelph Lumber Company having requested Messrs. Inglis and Hunter to make an advance of two thousand dollars and D. Guthrie of three thousand dollars to pay the cash payment required to be paid to secure purchase of 6th June, 1877, from W. E. Dodge of the following timber berths, namely, the Township of Spence, Berth number one, Township of Ferguson, Berth number one, Township of Hagerman, and Berth number three Township of McKillop, it is agreed as follows:—The agreement or agreements for said purchase and said timber berths or the interest of MacLean, Ferguson, Hogg, and Guthrie therein (representing The Guelph Lumber Company) shall be assigned to Inglis and Hunter, in trust to secure them in the first place and said Guthrie in the next place, the repayment of the said respective advances and interest thereon at the rate of 9 per cent. per annum to be repaid in one year after the date, with power of sale of the said timber berths and interest therein in default of payment, interest to be paid yearly.

It is further agreed that a formal assignment of said agreement or agreements and said interest in said timber berths shall be made to said Inglis and Hunter, said Inglis and Hunter to hold Guthrie's interest therein, in trust for such person or corporation as may advance him the money, if any to pay such advance or any part thereof. It is further agreed that the said Inglis and Hunter shall have the option of acquiring an interest in the said company equal to two shares of one thousand dollars each therein, and also that said Guthrie shall have a similar option to acquire an additional interest equal to three shares of $1,000.00 each in said company, such shares to be in an incorporated company with limited liability, and to be preferred shares to those held at present by the old members, and such option to be exercised at any time within one year from the date hereof. It is further agreed that the arrangement witnessed hereby shall apply to the notes this day given to the manager of the said company to secure such advances, such notes, namely, one of two thousand dollars by Inglis and Hunter and one by Guthrie for three thousand dollars to be taken as cash, and before such notes mature the company shall execute the said formal assignment. The company agree that if Inglis and Hunter and Guthrie, or either of them, shall not take stock as aforesaid to repay to them respectively the amount of such advances and interest thereon half yearly from this date at the rate aforesaid.

The stock subsequently accepted and taken by Inglis and Hunter was taken by them in lieu of the $2,000 by them advanced to purchase limits, and secured by the above agreement.

Subsequently to the issue of the latters patent of incorporation of the defendants, and others who should become subscribers for stock as a company with limited liability, the provisional directors of the company, namely, Hogg, MacLean and Guthrie, issued the prospectus which contains the statements which are charged to be false and fraudulent, and in the preparation and issuing of that prospectus, the defendant Ferguson also took part, and it was in the month of September, 1877, that Petrie and the other plaintiffs agreed to become subscribers for the shares, which were subsequently, as is admitted, allotted to and accepted by them respectively. Petrie in his evidence seemed to convey that it was before the issue of the letters patent of incorporation, but I take the statement in his statement of claim upon this point, which alleges it to have been after the date of the letters patent, to be more correct, because it was not until the latter end of August or beginning of September, 1877, that Edgar says he went up to inspect the mill premises and its capacity, and it was after he came down that the subscriptions to the prospectus in a book opened by the company were obtained, and Inglis, whose name is on the list before that of Petrie, says that he subscribed his name there in the latter end of September or beginning of October.

As to the evidence necessary to support an action of this kind, in its nature *ex delicto*, there does not appear now to exist any conflict of judicial opinion.

In *Taylor* v. *Ashton* (1) the plaintiff brought an action *ex delicto*, against the directors of a bank for statements made by them in certain of their reports, upon the faith of which the plaintiff had purchased shares, and which he alleged to be false and fraudulent. The jury found a verdict for the defendants upon the ground that although the statements complained of

(1) 11 M. & W. 400,

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were in fact untrue, the defendants had no knowledge of their being so; but they accompanied their verdict with the expression of opinion that the defendants had been guilty of gross and unpardonable negligence in publishing the report. A motion was made for a new trial upon the contention that the gross negligence so found accompanied with damage to the plaintiff, was sufficient to sustain the plaintiffs action, but Parke B., delivering the judgment of the court, says:—

> From this proposition we wholly dissent, because we are of opinion that, independently of any contract between the parties, no one can be made responsible for a representation of this kind unless it be fraudulently made.

It was held, however, that in order to constitute actionable fraud, it was not necessary to show that the defendants knew a fact stated as being true to be untrue, if it was stated for a fraudulent purpose, they, at the same time, not believing it to be true.

Ormrod v. *Huth* (1) was an action of deceit brought to recover damages alleged to have been sustained by the plaintiff, by reason of his having purchased cotton from the defendant upon the faith of a representation made by him that the bulk corresponded with the sample, which in truth it did not, but was very inferior.

Upon the trial the learned judge directed the jury that, unless they could infer that the defendants or their brokers were acquainted with the fraud that had been practised in the packing, or had acted in the transaction against good faith or with some fraudulent purpose, the defendants were entitled to the verdict, and this was held by the Court of Exchequer and the Exchequer Chamber to be the proper direction; and the latter court held the rule upon the sale of goods to be that, in the absence of a warranty a purchaser cannot recover

(1) 14 M. & W. 651.

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on a representation as to quality, unless he can show it to have been fraudulent; that if the representation was honestly made and believed at the time to be true by the party making it, though not true in point of fact, the representation does not furnish a ground of action. This case establishes the principle that in the case of a contract inter parties induced by the representation of one of them, unless the representation be embodied in the contract, it affords no ground of an action, if it be not false to the knowledge of the one making it.

In *Childers* v. *Wooler* (1) it is laid down as established by *Collins* v. *Evans* (2) in Error, and numerous other authorities, that to support an action for false representation, the representation must not only have been false in fact, but must also have been made fraudulently.

The case of the *Western Bank of Scotland* v. *Addie* (3) establishes that representations made by directors of a company relative to the affairs of the company, which they do not believe to be true, or have no reasonable grounds to believe to be true, will, if untrue, give a good cause of action in deceit to a person suffering damage from such representation. If the directors *bonâ fide* believe the representation to be true, the action will not lie, but then the *bonâ fides* of the belief is a fact which is to be tested and determined upon a consideration of the grounds of belief; but before we can arrive at the conclusion that the representations were made fraudulently and not under the influence of a *bonâ fide* belief in their truth, the insufficiency of the grounds to warrant such belief should be apparent beyond all controversy, for some persons may entertain a *bonâ fide* belief in the existence of a fact upon grounds which, in other minds, might not give birth to the same belief,

(1) 2 El. & El. 307. (2) 5 Q. B. 820.
(3) L.H. 1 Sc. App. 162.

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and the question is not whether, in the opinion of the persons testing the *bona fides* of the belief of another in the existence of the fact, there were sufficient grounds to warrant the belief, but whether in point of fact the belief was *bonâ fide* entertained by the persons who assert that they entertained it. As said by Lord Cramworth in that case, persons who make statements which they *bonâ fide* believe to be true, cannot be said to be guilty of fraud because other persons think, or the court thinks, there was not sufficient grounds to warrant the opinion they had formed. In *Venezuela Railway Company* v. *Kisch* (1), which was a case in which a shareholder in a company sought relief from his contract as a shareholder upon the allegation that he was induced to subscribe for shares by false representations contained in a prospectus issued by the company, Lord Chancellor Chelmsford, adopting the decision of V. C. Kindersley in *New Brunswick and Canada Ry. Co.* v. *Muggeridge* (2), as enunciating the rule applicable in such cases, says:

> Those who issue a prospectus holding out to the public the great advantages which will accrue to persons who will take shares in a proposed undertaking, and inviting them to take shares on the faith of the representations therein contained, are bound to state everything with strict and scrupulous accuracy, and not only to abstain from stating as fact that which is not so, but to omit no one fact within their knowledge, the existence of which might in any degree affect the nature or extent, or quality of the privileges and advantages which the prospectus holds out as inducements to take shares.

In *Reese River Silver Mining Co.* v. *Smith* (3), which was also the case for relief by a shareholder from his contract for subscription of shares induced by like false and fraudulent statements, etc., in a prospectus, Lord Cairns says:

> I hardly think it was gravely argued at the bar that in this case a fraud had been committed against the respondent—when I say a

(1) L. R. 2 H. L. 99. (2) 1 Dr. & Sm. 363.
(3) L. R. 4 H. L. 79.

"fraud" I do not enter into any question with regard to the imputation of what may be called fraud in the more invidious sense against the directors. I think it may be quite possible, as has been alleged, that they were ignorant of the untruth of the statements made in their prospectus; but I apprehend it to be the rule of law that if persons take upon themselves to make assertions as to which they are ignorant, whether they are true or untrue, they must, in a civil point of view, be held as responsible as if they had asserted that which they knew to be untrue.

Peck v. *Gurney* (1) was, on the contrary, a bill against directors in form *ex delicto* to recover damages from them for the wilful suppression and concealment from their prospectus, for the formation of a company in which the plaintiff had become a shareholder upon the faith of the truth of the statements made in it, of a deed which, if mentioned in the prospectus, would have shown the statements which were made in it to be positively untrue. Lord Chelmsford there says:

This is a suit instituted to recover damages from the respondents for the injury the appellant has sustained, by having been deceived and misled by their misrepresentations and suppression of facts to become a shareholder in the proposed company of which they were promoters. It is precisely analogous to the common law action for deceit. There can be no doubt that equity exercises a concurrent jurisdiction in cases of this description, and the same principles applicable to them must prevail both at law and in equity. I am not aware (he adds) of any case in which an action at law has been maintained against a person for an alleged deceit, charging merely his concealment of a material fact which he was morally, but not legally, bound to disclose.

And after quoting cases in support of this view he adds:

Assuming that mere concealment will not be sufficient to give a right of action to a person who, if the real facts had been known to him, would never have entered into a contract, but that there must be something actively done to deceive him, and to draw him to deal with the person withholding the truth from him, it appears to me that this additional element appears in the present case. He then proceeds to show how the matter, which was designedly suppressed so

(1) L. R. 6 H. L. 378.

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falsified what was stated as to constitute a positive and active misrepresentation of the truth.

And Lord Cairns in that case shows that he also recognizes the distinction between the rule applicable in a case simply for rescission of a contract, and that applicable in an action for deceit.

> This suit (he says) is in the nature of an action for damages for misrepresentation, it is in the nature of an action or proceeding *ex delicto*.

And again:

> I entirely agree with what has been stated by my noble and learned friends before me, that mere silence could not, in my opinion, be a sufficient foundation for this proceeding. Their non-disclosure of material facts however, morally censurable, however the non-disclosure might be a ground in a proper proceeding, at a proper time for setting aside an allotment or a purchase of shares, would, in my opinion, form no ground for an action in the nature of an action for misrepresentation. There must, in my opinion, be some action, misstatement of fact, or at all events, such a partial and fragmentary statement of fact as, that the withholding of that which is not stated, makes that which is stated, absolutely false.

And he proceeds to show how the deed, the existence of which was designedly withheld, showed the statements which were made in the prospectus to be absolutely false.

In *Eaglesfield* v. *Marquis of Londonderry* (1) Lord Justice James says:

> That in order to maintain a case of misrepresentation in an action of deceit the representation must be wilful and fraudulent.
>
> Whether the fraud, (he says) is supposed to be a fraud in this court as distinguished from moral fraud or not, there must be a wilful and fraudulent statement of that which is false to maintain an action of deceit.

In *Arkwright* v. *Newbold* (2), which was an action in form *ex delicto* to recover damages from the defendants for injury sustained, as was alleged by the plaintiff, by reason of his having been induced to subscribe for

(1) 4 Ch. D. 711. (2) 17 Ch. D. 301.

shares in a company of which the defendants were promoters and directors and secretary, upon the faith of statements contained in a prospectus issued by the defendants, Lords Justices James and Cotton recognize in the clearest language the difference existing between the nature of the misrepresentation requisite to sustain an action for deceit and that which is sufficient for the rescission of a contract. Reversing the judgment of Fry J., (1) Lord Justice James says:

It appears to me, with all deference to him, that there has been on his part a confusion, if I may use the expression, between two different wrongs and two different remedies—between the question what *mala praxis* on the part of vendors and persons standing in a fiduciary position to a purchaser is sufficient to entitle the purchaser to rescind the contract, and the question what *mala praxis* is sufficient to enable him to maintain an action of deceit. There are a number of purely equitable considerations which arise when the courts are dealing with actions to set aside contracts or conveyances which have been obtained by means of misrepresentation of a fact, or by means of concealment or suppression of a fact which, in the opinion of the court, ought to have been stated. Those cases stand by themselves, and are entirely distinct from such a case as we have before us.

And again:

It has been conceded throughout that there has been misconduct, that is to say, improper dealing between the vendors and the persons whom they procured to become directors—a kind of transaction against which the courts always have, and I hope always will, very strongly set their faces. But we have to see whether there was, to use the language of Lord Cairns in *Peck* v. *Gurney*, (2) that which must be proved—some active misstatement of fact, or at all events such a partial and fragmentary statement of fact as that the withholding of that which is not stated makes that which is stated absolutely false. The statement made must be either in terms, or by such an omission as I have stated, an untrue statement, and no mere silence will ground the action of deceit.

And Lord Justice Cotton (3) says:

I think it is in this case essential to consider what the action is, and I say so because a great deal of the argument and a considerable

(1) P. 316.
(2) L. R. 6 H. L. 377.
(3) P. 320.

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portion of the learned judge's judgment does not, in my opinion, draw a sufficient distinction between an action of deceit and an action or proceeding to set aside a purchase, or to make the directors of a company answerable for money which they received by reason of their being in a fiduciary position. An action of deceit is a common law action, and must be decided on the same principles, whether it be brought in the Chancery Division or in any of the common law divisions; there being, in my opinion, no such thing as an equitable action for deceit. It is a common law action in which it is necessary to prove that a statement has been made, which, to the knowledge of the person making it, was false, or which was made by him with such recklessness as to make him liable, just as if he knew it to be false, and that the plaintiff acted on that statement to his prejudice or damage. Much has been said about omission—of course I adopt what was said by Lord Cairns—that the omission of something in a prospectus or any other document may make the statement contained in it false, as, for instance, if it contained the statement of a covenant and omitted to state the fact that the covenant had been released; but mere omission, even though such as would give reason for setting aside a contract, is not, in my opinion, if it does not make the substantive statements false, a sufficient ground for maintaining an action of deceit. It also must be borne in mind, that in an action for setting aside a contract which has been obtained by misrepresentation, the plaintiff may succeed although the misrepresentation was innocent; but in an action of deceit the representation to found the action must not be innocent, that is to say, it must be made either with knowledge of its being false ,or with a reckless disregard as to whether it is or is not true. That difference is material in regard to the question whether or not the plaintiff in this action is entitled to succeed.

Redgrave v. *Hurd* (1) was a case in which the plaintiff sought specific performance of a contract entered into by him with the defendant, who resisted the performance and claimed a return of his deposit of £100, upon the ground of misrepresentations made to him by the plaintiff in relation to the subject of the contract, and he, also, in his counter claim, claimed £300 for other damages sustained by him *ultra* the £100 recoverable upon the rescission of the contract, as having been incurred by the deceit of the plaintiff. The case of the

(1) 20 Ch. D. 1.

respondent was two-fold—first, for rescission of the contract, and as incident thereto, the return of his deposit, and second, for recovery of damages, by way of counter claim, in an action of deceit. Now, this case, although much pressed upon us by the learned counsel for the appellants in support of their right to recover in this action, in consequence of certain observations of Sir George Jessel M. R., set out below and upon which the learned counsel relied, seems to me to point out very clearly the distinction between an action of deceit and one for rescission of a contract, to which latter species of action the observations of the master of the rolls related.

As regards the defendant's counter claim (the learned master of the rolls says (2), we consider that it fails so far as damages are concerned, (that is to say, so far as it is in form *ex delecto* for deceit), because he has not pleaded knowledge on the part of the plaintiff that the allegations made by the plaintiff were untrue, nor has he pleaded the allegations themselves in sufficient detail to found an action for deceit.

But as to the plaintiff's claim for specific performance, and so much of the defendant's counter claim as asks for the rescission of the contract and, as involved therein, the return of his deposit, the learned master of the rolls said :

Before going into the details of the case I wish to say something about my views of the law applicable to it, because in the text books, and even in some observations of noble lords in the House of Lords, there are remarks which, I think, according to the course of modern decisions, are not well founded and do not accurately state the law. As regards the rescission of a contract there was no doubt a difference between the rules of the Courts of Equity and the rules of courts of common law—a difference which, of course, has now disappeared by the operation of the Judicature Act, which makes the rule of equity prevail. According to the decision of courts of equity it was not necessary, in order to set aside a contract obtained by material false representation, to prove that the party who obtained it knew at the time when the representation was made

(2) P. 12.

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that it was false. It was put in two ways, either of which was sufficient. One way of putting the case was: A man was not to be allowed to get a benefit from a statement which he now admits to be false. He is not to be allowed to say for the purpose of civil jurisdiction that when he made it he did not know it to be false—he ought to have found that out before he made it. The other way of putting it was this: Even assuming that moral fraud must be shown in order to set aside a contract, you have it, where a man having obtained a beneficial contract by a statement which he now knows to be false, insists upon keeping the contract. To do so is a moral delinquency, no man ought to seek to take advantage of his own false statements. The rule in equity was settled, and it does not matter on which of the two grounds it was rested. As regards the rule of common law, there is no doubt it was not quite so wide. There were indeed cases in which, even at common law, a contract could be rescinded for misrepresentation, although it could not be shown that the person making it knew the representation to be false. They are variously stated, but I think according to the later decisions the statements must have been made recklessly, and without care whether it was true or false, and not with the belief that it was true. But, as I have said, the doctrine in equity was settled beyond controversy, and it is enough to refer to the doctrine of Lord Cairns in the *Reese River Silver Mining Company* v. *Smith* (1), in which he lays it down in the way which I have stated.

Then in *Smith* v. *Chadwick*, in the same vol. (2), which was an action for deceit in form *ex delicto*, the same learned judge says (3):

This is an action, which used to be called an action of deceit, brought by a gentleman against a firm of financial agents for inducing him to take shares in an iron company by means of false and fraudulent representations—that is, by means of representations which were material to induce him to take the shares, which were false in fact, false to the knowledge of the defendants, or as to which, at all events, they made statements, although they knew nothing about the facts—that is, statements made so recklessly, that in a court of law they would be in the same position as if the statements were false to their knowledge. That is the case which the plaintiff has to make out, the real questions we have to try are, whether there were representations false in fact—whether if any of these

(1) L. R. 4 H. L. 64.

(2) 20 Ch. D. 27.

(3) P. 43.

representations were false in fact they were false to the knowledge of the defendants, or recklessly made by them?

And again he says:

Again, in an action of deceit, even though the statement may be untrue, yet if it was made in good faith, and the defendant had reasonable ground to believe it to be true, the defendant will succeed.

In this case in the House of Lords to which it was carried (1), Lord Blackburn expresses his entire concurrence with what was said by Cotton L.J., in *Arkwright* v. *Newbold*, that an action of deceit is a common law action, and must be decided upon the same principles, whether it be brought in the Chancery Division, or any of the common law divisions, there being no such thing as an equitable action for deceit, and Lord Bramwell (2) says:

I am not satisfied that these men did not believe the statement to be true; under these circumstances I am not dissatisfied that your lordship's should affirm the judgment that has been given in their favor. The question is not whether they should be in any way punished for most improvident and rash statements (more than one) in the prospectus, but whether we are satisfied that this particular statement was fraudulent as well as, what it was to my mind, an untrue statement. I am not satisfied of that—let me not be misunderstood: an untrue statement, as to the truth or falsity of which the man who makes it has no belief, is fraudulent, for in making it he affirms that he believes it, which is false.

The learned Law Lord's judgment was in favor of the defendants, because, although he believed the statement in question to have been untrue, in fact, still he was not satisfied that the defendants did not believe it to be true; and upon the question of *bona fides* of the defendants' belief, he rested upon their own evidence on the cause and the fact that one of them gave convincing proof of his sincerity by taking £500 of stock in the company. The learned counsel for the appellant also strongly contended that the language of Lord Justice

(1) 9 App. Cas. 197. (2) P. 203.

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Knight Bruce in *Rawlins* v. *Wickham* (1) was in support of the maintenance of the present action, but that was not an action in its nature *ex delicto* for deceit, but in its nature *ex contractu* to set aside a contract of partnership into which the plaintiff had been induced to enter with Bailey, one of the defendants, and Mr. Wickham, since deceased (whose executors were the other defendants) by a positively false statement as to the liabilities of a banking firm, of which Bailey and Wickham were the sole members, furnished to the plaintiff to induce him to enter the partership firm, he having required to be furnished with a statement of such liabilities before he would consent to becoming a partner; and the plaintiff, by his bill, sought for reimbursement of the money paid by him on entering the firm, with interest to be made to him out of the estate of Wickham; Bailey, against whom he had recovered in an action at law, having become insolvent. If this action had been one in its nature *ex delecto* for deceit, the plaintiff must have failed, for, as said by Lord Chelmsford in *Peck* v. *Gurney*—

> No case can be found in which upon a claim against a testator *ex delicto* executors have been held liable in equity to answer in damages.

It is to the nature of the action as one to set aside a contract, and to obtain indemnity out of the estate of the testator who benefited by the false statement to which he was a party, that the observations of the lord justice relate. The false representation vitiated the contract of partnership, and therefore the plaintiff was entitled to obtain and obtained redress by a decree that it should be set aside, and that the plaintiff should be reimbursed out of the estate of Wickham for the money paid by him on his joining the firm. The contention

(1) 3 D. & J. 348, also reported in 5 Jur. N. L. 280.

(2) L. R. 6 H. L. 375.

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of the learned counsel was that since the Judicature Act the same rule as governed courts of equity in cases like the above, for setting aside contracts and reimbursing to the plaintiff the amount paid by him on the contract being entered into, applies now to a claim in its nature *ex delicto* for deceit, but that is not so; if it were, then all the judgments in the cases above cited, laying down what is necessary to be established in a claim for damages for deceit, would be erroneous. With respect to such a claim the Judicature Act makes no difference whatever. The clause relied upon is that which makes provision that in all matters in which there is any conflict or variance between the rules of equity and the rules of common law with reference to the same matter the rules of equity shall prevail. This rule applies, doubtless, to the cases of actions brought upon a contract, the defence to which is that it was obtained by fraud, of which nature were *Corafoot* v. *Fouke* (1) and *Evans* v. *Edwards* (2), or to an action for money had and received to recover back money paid upon a contract procured to be entered into by defendant by the fraud of the plaintiff, of which nature was *Clarke* v. *Gibbs* (3). In such cases the rule of equity, as stated by Sir George Jessel in *Redgrave* v. *Hurd*, governs under the above provision in the Judicature Act; for in those matters, that is those relating to the rescission of contracts, there was a conflict between the rule of equity and the rule of common law with reference to the same matter. But an action to enforce a contract, the defence to which is that it was obtained by fraud, or an action for specific performance of a contract which is resisted on the ground of fraud, or an action for rescission of a contract, which are all in their nature *ex contractu*, are matters wholly different from

(1) 6 M. & W. 359.
(2) 13 C. B. 777.
(3) El. Bl. & El. 148

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an action to recover damages for deceit, which is in its nature *ex delicto*, as to which matter there never was any of rule of equity other than the rule of common law, consequently in such a matter there can be no conflict between a rule of equity and a rule of common law, and the provision of the Judicature Act is not that a rule of law, which is applicable to one particular matter and to an action of one nature, shall give place to a rule of equity, which is applicable to a wholly different matter and to an action of a different nature. As to the paragraph in the statement of claim, alleging that the defendants other than the company by the prospectus promised to whomsoever should become an applicant for a share or shares, in the proposed preference stock, that they would fulfil the undertaking and make good the representations in the prospectus contained, &c., &c., &c., &c., there is no foundation for this contention. The prospectus is signed by no one, and does not in fact contain any such promise or warranty. For the representations made in it, if false and fraudulent, the defendants are responsible in an action *ex delicto* like the present, but not at all *ex contractu*, for there is no contract contained in it, it is merely an invitation to the parties to whom it is presented and to the public to take shares, but it contains no contract upon the part of the defendants issuing it. The signature of the plaintiff to the undertaking at the foot of the prospectus in the books of the company to take shares to the amount set opposite to his name, if allotted to him by the company, is an offer made to the company which, when the allotment takes place, matures into a contract with the company. In this case the plaintiff's contract became complete when he accepted the shares, which could not have been until some time in or after the month of March, 1878, inasmuch, as although the company was incorporated on the 20th August, 1877, they

did not obtain power to issue the preference shares until an Act was passed by the Legislature of Ontario on the 7th March, 1878, 41 Vic., ch. 8, sec. 16 of which gave them the power, and the certificate of allotment subsequently issued to the plaintiff contains the terms of his contract, which is with the company and not with the defendants other than the company. Between these latter defendants and the plaintiff there is no contract. The learned judge before whom the case was tried was of opinion that the evidence wholly failed to establish the case made by the plaintiff's statement of claim, and he dismissed the claim; the learned counsel for the appellant, while admitting that the evidence failed to establish the wilful and deliberate conspiracy to defraud charged in the statement, still insisted that it displayed a reckless disregard, whether the statements contained in the prospectus were true or false, and a fraudulent concealment of material facts, if such facts were necessary to be established to entitle the plaintiff to recover; but all that was necessary to be established, as he contended, was such misrepresentation as upon the authority of *Redgrave* v. *Hurd* and *Rawlins* v. *Wickham*, and cases of that class, was sufficient to call for a rescission of his contract for shares, in a court of equity. I have already shown that such evidence, as is sufficient in cases for rescission of a contract, is not sufficient to support an action of the nature of the present which is for deceit, and arises *ex delicto* and not *ex contractu*. Now, having read with the greatest care every particle of the evidence, and having given the best consideration I could to the argument of the learned counsel for the appellant, as delivered orally before us, and as expanded at large in his printed factum, I feel compelled to say, that in my opinion, the defendants are not only free from any just imputation of the gross fraud with which they are charged in the

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statement of claim, but that they are equally free from any reckless disregard of the truth or falsity of the statements made in the prospectus, and that they prepared that document with an honest intention of fairly representing, according to their knowledge, the condition of the business for the taking up which the company was proposed to be incorporated, and that they *bonâ fide* believed to be true every statement made in the prospectus, both as to the condition of the business in which they were engaged and as to the prospects of the proposed company, of which I think they have given, in addition to their evidence upon oath in the cause, the strongest possible proof by having taken among themselves $40,000, or more than 50 per cent. of the preference stock issued by the company; and I cannot but add, that the fact that the plaintiffs in these three suits voted for the defendants as directors of the company after they had made the investigation, in which they acquired all the information upon which they based these actions and caused them to be brought, seems to my mind to show that the plaintiffs themselves did not believe the defendants to be guilty of the frauds now imputed to them, the charges as to many of which as appears by the examination of the plaintiff, seem to owe their origin to the zeal of the pleader who prepared the statement of claim rather than to the plaintiff or any information derived from him. The defendants interrogated the plaintiff very precisely, requiring him, as to each of the allegations of misrepresentation contained in his statement of claim, and as to each paragraph of the prospectus, to state in what he considered the falsity charged to consist, and be resolved all into an objection as to the value of the mill and timber limits, and as to the amount of the assets.

In the following paragraphs of the prospectus are involved all the grounds of the plaintiff's complaint:

1. The timber limits of the company inclusive of the recent purchase consist of 222½ square miles, or 142,400 acres and are estimated to yield 200 million feet of lumber.

2. The interest of the proprietors of the old company in its assets, estimated at about $140,000 over liabilities has been transferred to the old company at $105,000 all taken in paid up stock, and the whole of the proceeds of the preferential stock will be used for the purposes of the new company.

3. Preference stock not to exceed $75,000.00, will be issued by the company to guarantee 8 per cent. yearly thereon to the year 1880, and over that the net profits will be divided among all the shareholders *pro ratâ*.

4. Should the holders of preference stock so desire, the company binds itself to take that stock back during the year 1880 at par with 8 per cent. per annum on receiving six months' notice in writing.

5. Even with present low prices the company, owing to their superior facilities, will be able to pay a handsome dividend on the ordinary as well as on the preference stock, and when the lumber market improves, as it must soon do, the profits will be correspondingly increased.

Now, the sole objection to the first of the above paragraphs consists in the estimate of the yield of lumber from the limits which, as was contended, was grossly excessive. In the opinion of one witness called by the defendants, an experienced government wood ranger, an expert in such matters, the estimate of the defendants is under the mark. In the opinion of another, himself an owner of limits and a manufacturer of lumber, it was much below the mark; of two witnesses called by the plaintiff, who were also lumberers, one said that from the results of a careful investigation, taking the whole area of water, rock and timber in the region in which defendants limits are, he estimated one million feet per square mile, the fair average production, leaving one-third of that still remaining to be cut at a future period, but that in a well timbered limit it will often yield two or three million to the mile, and the

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other said, that one million feet per square mile is the fair average estimate in the original state, but he, with a view to making an offer for the defendants company's limits since the disaster which has befallen the company, deducted from the total product calculated upon that average, 30 million feet for losses by fire and taken away by settlers, which estimate of loss did not appear to be founded on any actual data, but was to all appearance quite conjectural. As to the evidence of the two other witnesses called by the plaintiff upon this point, it is only necessary to say that it was utterly unreliable in consequence of the partial inspection, which, by their own showing they made of the limits; their object apparently being, in the interest of their employers, who also contemplated purchasing since the failure of the defendant company, to depreciate the limits rather than to estimate them at their fair value. Upon this evidence the plaintiff has, in my opinion, wholly failed to establish that the estimate of the quantity of lumber on the limits stated in the prospectus was inaccurate, much less fraudulently so. As to the second of the above paragraphs, it has been treated in argument by the learned counsel for the appellant as if the defendants had in this paragraph made a positive assertion as matter of fact that the value of their assets exceeded their liabilities by $140,000, and that such statement was untrue in fact, as was the statement of liabilities made by Bailey and Wickham in *Rawlins* v. *Wickham*; but no such positive assertion is made in the paragraph. The defendant Guthrie explained that their object was, as I think the paragraph itself seems clearly enough to show, to ascertain at what rate in paid up stock of the incorporated company the interest of the partners in their assets might be fairly estimated, and that having, upon as careful a calculation as they could make

of the value of property of the nature of that under consideration, came to the conclusion that the value of their assets in excess of their liabilities was about, or in the neighborhood of, $140,000. They, in order to make sure of arriving at a fair estimate, deducted 25 per cent. from that amount, and so arrived at the $105,000. Now, upon the recent investigation which has taken place in this suit, it appears that some liabilities escaped observation; I say "escaped observation" because the evidence fails, I think, wholly to establish any intentional suppression of them; it is also sworn that some of the assets were under estimated in the calculation by which the sum of $105,000 was arrived at, and that the liabilities which escaped observation fell short of the 25 per cent. which was deducted from the $140,000. The evidence, therefore, in my opinion, fails to establish that the estimate of $105,000, as the amount for which the defendants should have paid up stock in the incorporated company, was arrived at by any reckless disregard of the truth or falsity, or of the accuracy or inaccuracy of such estimate. All that the plaintiff said when asked to explain his objection to this paragraph, and what he understood by it, and wherein its falsity consisted, was that he understood that the defendants, the old firm, would receive stock to this amount of $105,000 for the estimated $140,000, and that when the new company should be formed they would assume the business, and that there was a binding contract to that effect which would be carried into effect upon the company becoming incorporated. Well, that expectation does not seem to have been disappointed to the plaintiff's prejudice or at all. It was contended also that the proceeds of the preference stock was not applied to the uses of the new company, as the paragraph had said that they should be. If not so applied that was a matter occurring after the prospectus had been

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issued, and could not make false any statement contained therein or make the defendants liable as for deceit for issuing it, whatever claim the company might have against its directors for misappropriation of the funds of the company. But the plaintiff in his examination admitted that he knew there were liabilities of the old firm, as to the amount of which he made no enquiries, but he knew that part of the proceeds of the new stock was to be applied towards the payment of these liabilities. He also knew that the business was to be transferred from the old firm to the new company as a going concern, and that it was to be continued right along until it should be transferred to the new company, and such was the nature of the business that to carry it on, new liabilities would naturally have to be incurred in carrying it on in 1877 and 1878; and there is no pretence that the proceeds of the preference stock were applied to any other purpose than towards payment of instalments upon the recent purchases of new limits, and of the liabilities of the old firm assumed by the company, and of the expenses incurred in carrying on the business for the benefit of the incorporated company under the terms of the agreement of the 28th May, 1877. The persons who received the proceeds of the preference stock were the directors of the incorporated company, and if they have misappropriated any of the funds of the company they may be made answerable for such breach of trust in an appropriate proceeding, but not in an action of the nature of the present.

The plaintiff's claim, in respect of the 3rd and 4th of the above paragraphs, is in its nature *ex contractu* and against the company, founded upon the contract as evidenced by his scrip certificate of stock held by him, and not one *ex delicto* against the defendants for deceit. However, in the 5th paragraph, the plaintiff contends

that the defendants, in reckless disregard of the truth or falsity of the matter therein, stated fraudulently and represented the prospects of the company to be better than they could have believed them to be. As to this charge I have already said that I have come to the conclusion that the defendants *bonâ fide* entertained the expectations set forth in this paragraph. The question is not whether, in the opinion of the witnesses called in this cause or of the court, these expectations were well founded, but whether in point of fact the defendants *bonâ fide* entertained them, and that they did so entertain them they have, in my opinion, given the best possible proof by taking among themselves $40,000 of the stock which they invited others to take.

Some of the evidence, given on the plaintiff's behalf, is sufficient to establish that the great disaster which has befallen the company within the short period of $2\frac{1}{2}$ years after its incorporation, may fairly be attributed to bad management, coupled with a continued depression in the timber trade, which, instead of improving as was expected in 1877, became worse and continued so until 1880 or 1881. In the timber business success is said to depend wholly on the management, which, according as it is good or bad, may readily make a difference of $2.00 on every 1,000 feet of lumber cut. Now MacLean's management has been condemned by the witness, who thus speaks of good management as the essential element of success in the lumber business, and it may well be that the disaster which has befallen the shareholders in this company, and from which the defendants themselves are the chief sufferers, is attributable to MacLean's bad management, but bad management and fraud are matters very different in their nature; moreover the evidence shows that there are

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those who entertain the belief that if the creditors of the company could have waited for another year when prosperity returned to the lumber trade, the expectations of the promoters would have at length been realized.

The only remaining point is that of the alleged fraudulent concealment.

The only matters relied upon as having been concealed are the execution of the mortgage to the Ontario Bank in January, 1878, and the fact that at the time the prospectus was issued, the old partnership firm were, as the plaintiff alleges the fact to be, in a state of hopeless insolvency. As to the former, as it was a matter which occurred long after the issuing of the prospectus, it could not be stated in the prospectus; but, in truth, the giving of this mortgage did not place the plaintiff in any different position from that in which he would have been if the mortgage had not been given. The plaintiff knew that the business was to be carried on as before until the incorporated company should be completely organized, but for and in the interest of the proposed company, and for this purpose, in order to carry on the business in the winter of 1877-78, it was necessary to get an advance from the Bank of Ontario, which they gave to the directors of the company which was incorporated by letters patent in the month of August, 1877, on the condition that security should be given to the bank by mortgage for the sum so advanced and the debt of the old partnership firm; and as the title to the property mortgaged still remained in the members of the old firm, they executed the mortgage; but the incorporated company would have been equally liable for the whole amount secured by this mortgage, if the mortgage never had been executed; so that, in point of fact, the mortgage made no difference whatever in the position in which the plaintiff,

as a shareholder, would have been, if the mortgage had not been given.

As to the allegation that the prospectus was issued by the defendants when they knew that they were in a state of absolute insolvency, it is only necessary, in my opinion, to say that the defendants did not know or believe themselves to be, if they were in fact, in any such state. The term insolvency, as here applied, cannot be used in the strict sense in which that term was used in the Insolvent Act, when it was in force, namely, an inability to pay all their debts as they fell due. In the conduct of the lumber business a very large outlay is necessary before there is any return, and when the business is carried on, as it generally is by accommodation at a bank, a long and generous credit must be extended by the bank, and constant renewals granted, to ensure success to those engaged in the business. Now the defendants had, as they believed, completed the improvements at their mill necessary to enable them to carry on a large business. They had assets which, to a very considerable amount, constituted fixed capital in the business, that is, the property necessary to be retained for carrying on the business, and which, therefore, were not available for sale so long as the business should be carried on; they had, also, other assets to a considerable amount, which were the product of the business, and which were available for sale, but the market for which was in a very depressed condition, which depression however was expected to pass away shortly. Now, it is not pretended that the property with all its recent improvements, was not in a good position to carry on business upon a large scale, although if the creditors of the owners of this property attempted to enforce immediate payment of their claims they might not have been able to continue the business.

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For the above reasons I am of opinion that the appeals in all three cases must be dismissed with costs.

Appeals dismissed with costs.

Solicitors for appellants: *McCarthy, Osler, Hoskin & Creelman.*

Solicitors for respondents other than George MacLean: *Blake, Kerr, Lash & Cassels.*

Solicitors for respondent George MacLean: *Moss, Falconbridge & Barwick.*

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*Feb'y. 25.
*June 23.

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ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

St. John City Assessment Act, 1882 (45 *Vic., ch.* 59, *N. B.*)—*Chartered Bank—Assessment on capital stock of—Par value—Real and personal property of Bank—Payment of taxes under protest.*

By sec. 25 of the Saint John City Assessment Act of 1882 it is provided that "all rates and taxes levied and imposed upon the city of Saint John shall be raised by an equal rate upon the value of the real estate situate in the city, and part of the city to be taxed and upon the personal estate of the inhabitants and of persons deemed and declared to be inhabitants or residents of the said city. * * * * * And upon the capital stock, income, or other thing of joint stock companies, corporations, or persons associated in business." And after providing for the levying of a poll tax, such section goes on to say that "the whole residue to be raised shall be levied upon the whole ratable property, real and personal, and ratable income and real value, and amount of the same as nearly as can be ascertained, provided that joint stock shall not be rated above the par value thereof."

Sec. 28 of the same Act provides that "all joint stock companies and

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

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corporations shall be assessed, under this Act, in like manner as individuals; and for the purposes of such assessment the president, or any agent, or manager of such joint stock company or corporation shall be deemed and taken to be the owner of the real and personal estate, capital stock and assets of such company or corporation, and shall be dealt with and may be proceeded against accordingly."

J. D. L., the President of the Bank of New Brunswick, was assessed, under the provisions of the above Act, on real and personal property of the bank valued, in the aggregate, at $1,100,000. The capital stock of the bank at the time of such assessment, was only $1,000,000, and he offered to pay the taxes on that amount which was refused. It is not disputed that the bank was possessed of real and personal property of the assessed value. On appeal from the Supreme Court of New Brunswick, refusing a *certiorari* to quash the said assessment.

Held, (Fournier, J., dissenting,)—That the real and personal property of the bank are part of its capital stock, and that the assessment could not exceed the par value of such stock, namely, $1,000,000.

The Chamberlain of the city of Saint John is authorized, without any previous proceedings, to issue execution for taxes if not paid within a certain time after notice. In order to avoid such execution, the Bank of New Brunswick paid their taxes under protest.

Held,—That such payment did not preclude them from afterwards taking proceedings to have the assessment qualified.

APPEAL from the Supreme Court of New Brunswick refusing to make absolute a rule *nisi* for a *certiorari* to quash an assessment made by the city of Saint John upon the Bank of New Brunswick under the provisions of the "Saint John City Assessment Act of 1882," (1).

In 1883 an assessment was made upon the Bank of New Brunswick, under the "Saint John City Assessment Act of 1882," on a valuation, by the assessors of the city of St. John, of the real and personal property of the bank amounting to $1,100,000, being $42,200 real estate and $1,057,800 personal estate. The sections of the Act 45 Vic., ch. 59, N.B., under the authority of

(1) 23 N. B. R. 591.

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the assessment was made are referred to at length in the judgments hereinafter given. The amount of the assessment was $12,760, or 1·20 per cent. of the estimated value of the property.

At the time of such assessment, the par value of the stock of the bank was $1,000,000, and Mr. Lewin, the president, gave notice to the chamberlain of the city, that he objected to the assessment on the ground that the property of the bank constitutes the joint stock of the corporation, and offered to pay a rating upon $1,000,000, the par value of the stock. This offer the city would not accept, and the taxes were paid under protest, the bank being desirous of avoiding an execution to recover them.

A rule *nisi* for a *certiorari* to quash the rate was obtained by the bank, and argued in Michaelmas term, and a majority of the court ruled that the assessment was not an improper one and dismissed the rule. The bank then appealed to the Supreme Court of Canada.

C. W. Weldon, Q.C., for the appellants, cited on the question of the validity of the assessment: *Ex parte Bank of New Brunswick* (1). And on the question of payment: *Peyser* v. *Mayor* (2); *Tuttle* v. *Everitt* (3); *Mayor* v. *Riker* (4).

Tuck, Q.C., for the respondents, cited *Ex parte Lewin* (5); *Queen* v. *Wilson* (6).

RITCHIE C.J.—The appeal in this case is made by Mr. James D. Lewin, who was assessed as president of the Bank of New Brunswick, for the amount of certain taxes levied on the bank. Under the Assessment Act of the province the capital stock of the bank may be assessed up to its par value, but not beyond that. In this case the assessors have assessed the stock up to its

(1) 1 Pugs. 266.
(2) 70 N. Y. 497.
(3) 51 Miss. 27.
(4) 38 N.J. 225.
(5) 19 N. B. Rep. (3 P. & B.) 425.
(6) 21 N. B. Rep. 178.

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par value, and have also assessed the real and personal estate of the bank. I think that the sliding scale intended by the Act was a sliding scale downwards and not upwards, and that the real and personal property of the bank are part of the capital stock of the bank. I am of opinion that the assessment is wrong, and that the appeal should be allowed. I agree with Mr. Justice Fraser in his construction of the statute, and I have nothing to add to what he has said. I do not consider that the bank has waived its right to object by paying the taxes. In New Brunswick they have a very summary way of collecting taxes. They issue a notice to the party, and if he does not pay within ten days they issue execution without any further notice to the party and without a judgment This bank was threatened in this way, and those who controlled its affairs paid the taxes. I do not think that circumstance should prevent them going to the Court of Appeal, for it may be they would not have paid it but for the fact that they were liable to have their property seized.

STRONG J.— These are two appeals which, as they raised precisely the same questions, were argued together. The appellant is the president of the Bank of New Brunswick, and he complains that the bank, in his name as its president, was over-assessed by the assessors of rates for the city of St. John for the years 1882 and 1883 to the amount of $100,000 in each year. Upon the application of the appellant the Supreme Court of New Brunswick granted rules *nisi* calling upon the assessors to show cause why a writ of *certiorari* should not issue to remove into the Supreme Court the assessment lists for the years mentioned with a view to the assessments complained of being quashed. These rules, after argument, were discharged, Mr. Justice Weldon and Mr. Justice Fraser dissenting from the judgment.

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As has been stated, the amount of the alleged over-assessment complained of was the same in each of the two years, 1882 and 1883, the only difference being that this sum in 1882 was made up of $42,800 for real estate and of $57,200 for personal estate, and in 1883 of $37,000 for real estate and $63,000 for personal estate; the $100,000 thus arrived at being in each year added to the sum of one million dollars, the par value of the amount at which the capital of the bank is fixed by a statute of the Dominion.

The assessments were made under the authority of the "St. John City Assessment Act of 1882," (45 Vic., ch. 59).

The provisions of that Act material to the question which the court is called upon to decide are the 25th and the 28th.

The 25th section enacts that:—

All rates and taxes levied and imposed upon the city of St. John shall be raised by an equal rate upon the value of the real estate situate in the city and parts of the city to be taxed, and upon the personal estate of the inhabitants, and of persons deemed and declared to be inhabitants or residents of the said city, wherever such personal estate may be, and upon the income of inhabitants and of persons deemed and declared to be inhabitants or residents, as aforesaid, for the purpose of taxation, being the income derived and coming in any manner, except from real or personal estate actually assessed under this law, and upon the capital stock, income or other thing of joint stock companies, corporations or persons associated in business and otherwise as hereinafter provided, and shall be made and levied as follows, that is to say, there shall be levied a poll tax of one dollar upon all male inhabitants of the city of the full age of 21 years, not being paupers, for the purposes set forth in the first section of this Act, on each side of the harbour, and, after levying any other poll tax authorized by law to be included in the general assessment, the whole residue to be raised shall be levied upon the whole ratable property, real and personal, and ratable income, and joint stock, according to the true and real value and amount of the same, as nearly as the same can be ascertained, provided that joint stock shall not be rated above the par value thereof.

The 28th section is as follows:—

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All joint stock companies and corporations shall be assessed under this Act in like manner as individuals, and for the purposes of such assessment the president or any agent or manager of such joint stock company or corporation, shall be deemed and taken to be the owner of the real and personal estate, capital stock, and assets of such company or corporation, and shall be dealt with and may be proceeded against accordingly.

The appellant objects that to the extent of $100,000, there have been double assessments, the sum of his argument being that the real estate and personal estate making up that amount form part of the capital of the bank, and that the maximum valuation which can be placed upon the capital is by force of the concluding words of the 25th section "provided that joint stock shall not be rated above the par value thereof," the amount at which the capital of the bank is fixed by statute, in other words its "par value" and not its actual market value.

Nothing can be better established by authority than that acts of this kind are, as against the subject, to be strictly construed, and there is to be no liability to taxation unless the tax is imposed by unambiguous language. And again we are to make every presumption against an intention to impose a double burden. It appears to be very clear that by the express words of the 25th section the assessment in the case of joint stock companies and corporations is to be on the capital stock.

Then the capital stock is not to be limited to the active capital, that in actual use for banking purposes, but includes also investments in real estate and in personal property as the rest or reserve fund in the present instance. That these investments and rests may have been additions to the original amount of the capital not positively authorized by statute can, it is conceived, make no difference; *de facto*, it is capital, and that is sufficient for the present purpose. It may, however,

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be incidentally remarked that there would appear to be nothing illegal in these investments and accumulations, although not directly authorized by statute; at all events the only persons who could possibly complain would be shareholders, who might perhaps insist that all net earnings should be divided as profits. But however this may be, there can be no question that reserve funds and investments in real estate form part of the capital and must increase the credit of the bank, and so tend to increase the value of the shares.

The real question in dispute is not, however, whether the funds and property, the value and the amount of which is represented by this $100,000, is actual capital, but whether the capital, including these additions, is, for the purposes of taxation, to be taken at its actual or estimated value, or at the aggregate amount of the shares into which the whole statutory capital of one million dollars is divided. The answer to this must depend on the construction to be placed upon the concluding words of the 25th section: "Provided that joint stock shall not be rated above the par value thereof."

In the first place I am of opinion that this provision is not to be confined to the assessment of shares in the hands of individual holders, but applies also to the assessment of the corporate body itself in respect of its capital. As I have said before, the rule is that there is to be a strict construction against the burden of the tax, and it is also the rule that where there is an exemption or restriction, that it is to be liberally construed in favor of persons for whose benefit it is enacted. Now here the words "joint stock" are used generally, and not in any way restrained to "shares" in a joint stock or capital, but in their primary signification apply to an assessment of the capital of a joint stock company

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as a whole, at least as obviously as to an assessment of the fractions or shares of such a whole.

Again, in the preceding part of the same section we find these words:

> And upon the capital stock, income or other thing, of joint stock companies, corporations or persons associated in business and otherwise as hereinafter provided.

Therefore subsequent provisions which are in their nature applicable, are by this reference expressly made to apply to the assessment of the capital of corporations and companies, and this by itself is sufficient to entitle corporations to the benefit of the restriction contained in the proviso at the end of the same clause. This provision being thus applicable, the question is narrowed to this: What meaning is to be attributed to the expression "par value?" Apart from the well known meaning which these words have acquired in the language of commerce and finance, their abstract meaning is of course "equal value." Then, equal to what? The answer must of course be, equal to the nominal value of the shares. But having regard to the very general use of the expression with reference to capital of corporations held in shares, it, of course, means that the shares are to be taken to be of the same value as that for which they were originally and nominally issued. Therefore, as one of the 10,000 shares or fractions into which the capital is divided, is not to be assessed at any higher value than its nominal face value of $100, so the aggregate capital represented by these 10,000 shares must, if there is any force in language, be subject to the same restriction. Thus, giving the section in question a strict verbal construction, the result at which I arrive is in favor of the appellants contention, and in statutes of this kind, this mode of construction is not merely permissible, but is made imperative, by authorities which cannot be questioned, and which are too

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well known to make it desirable to refer to them specifically.

When we come, however, to consider what the consequences of applying the mode of assessment adopted in the present case to joint stock companies, such as manufacturing companies whose whole capital may be invested in lands, buildings and plant, as put in the very clear and able judgment of Mr. Justice Fraser, we see at once that the construction contended for by the respondents cannot possibly be correct in view of the great injustice to which such an interpretation would lead.

This consideration alone, even if the words of the statute were much less favorable to the appellant than I think they are, would have led me to the same conclusion. I forbear from entering at length into this part of the case, because I entirely adopt the reasoning of Mr. Justice Fraser, which seems to me to have received no answer.

Lastly, it is said that the appellant is not entitled to the writ, as regards the taxes for 1882, for the reason that he voluntarily paid the taxes for that year, and consequently has no *locus standi* for the present purpose.

I do not think that this objection applies to an application of this kind made with a view to quash the assessment, even though it might be a defence to an action for money had and received.

If money is paid under pressure of an execution irregularly issued, or under threat of an execution on a judgment illegally or irregularly entered up, which execution it is in the power of the judgment creditor immediately to put in force, the money cannot, it is true, as long as the judgment or execution stands, be recovered back. But if the judgment be set aside, an action for money had and received will then lie, for there will be

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nothing to justify its receipt. And it will be no answer to the application to set aside the judgment that the money has been paid, unless it appears that the payment was not induced by the pressure of the writ or of the threat of the writ, but was made voluntarily, that is in such a way as to indicate an intention to waive and abandon the right, afterwards to call the validity of the judgment in question. This motion for a writ of *certiorari* in order that the assessment may be quashed, I consider analogous, not to an action to recover the money, but to an application to set aside the judgment. That the payment of the taxes involved any waiver of the right to call the legality of the assessment in question in this way, is negatived by the protest which accompanied it.

Whether, as regards an action for money had and received, a payment of taxes assessed in this way is subject to the same legal considerations as the payment of money recovered by a judgment, is a point which does not at present arise, and which need not therefore be further considered.

I am of opinion that both appeals must be allowed and the rules for the writs of *certiorari* made absolute in the court below.

FOURNIER J.—Was of opinion that the appeal should be dismissed for the reasons given by the court appealed from.

HENRY J.—I think the taxation to the extent of a million is all the city authorities are justified in imposing. The general assessment law provides for the taxation of real and personal property; but special provision is made for banks, namely, that they may be taxed up to the par value of their capital stock. It appears to me that this is intended to cover everything

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so far as banks are concerned, and to exclude the idea of taxing their real and personal property.

The law of the province lays down a particular mode in which banks shall be assessed, and when it mentions that particular mode, it prevents the general provisions with regard to taxation from operating in the case of banks. These remarks apply of course only to resitend banks, foreign banks being taxed upon their income. I think that the taxation of the stock to the amount of one million dollars must be held to include all the taxes which can legally be levied on the bank, and that therefore the appeal should be allowed.

TASCHEREAU J.—I am of the same opinion, that the appeal should be allowed with costs.

Appeal allowed with costs

Solicitor for appellant: *G. Sidney Smith.*

Solicitor for respondent: *W. H. Tuck.*

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*May. 17.

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*Jan'y 12.

OGLE ROBERT GOWAN PECK AND JOHN COLEMAN (PLAINTIFFS)..... } APPELLANTS;

AND

CHARLES POWELL (DEFENDANT)..... ..RESPONDENT.

OGLE ROBERT GOWAN PECK, JOHN COLEMAN AND GEORGE BRETT (DEFENDANTS)..... } APPELLANTS;

AND

CHARLES POWELL (PLAINTIFF).....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Patent, sale of—Specific performance—32 & 33 Vic., ch. 11, sec. 17—(Patent Act)—Renewal.

On 1st June, 1877, C. P. the owner of a patent for an improved pump which had only about a month to run, but was renewable for

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

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two further terms of five years each, agreed to sell to P. *et al.*, his pump patent for five counties, and by deed of same date he granted, sold, and set over to P. *et al.* "all the right, title, interest, which I have in the said invention, as secured by me by said letters patent for, to and in the said limits of the counties of," &c. The *habendum* in the deed was "to the full end of the term for which the letters patent are granted." The consideration was $4,500, of which $1,500 was paid down, and mortgages given on the land on which the business was carried on, and on the chattels for the residue. The patent expired on the 19th July, 1877, and C. P. renewed it in his own name for the further term of five years, and P. *et al.* having made default in June, 1878, C. P. filed his bill asking for payment of the balance of purchase money, or in default for a sale of the land. Almost at the same time P. *et al.* brought a suit against C. P. to enforce specific performance of the agreement for sale of the patent right for the full period to which C. P. was entitled to renew the same under the patent laws.

Held,—In the suit *Peck et al.* v. *Powell*, reversing the judgment of the Court of Appeal, that under the agreement and assignment plaintiffs were entitled to the extension as well as the current term.

And in the suit *Powell* v. *Peck et al.*, affirming the judgment of the Court of Appeal, that C. P. was entitled to a decree for the redemption or foreclosure of the mortgaged premises with costs.

Per Strong, J.,—According to the principles upon which a court of equity acts in carrying into execution by its decree such contracts and agreements as are properly the subject of its jurisdiction, the court will always execute the whole or such parts of the agreement as remain executory, but if the parties have thought fit before the institution of the suit, to carry out any of the terms of the contract, such executed portions will not be disturbed.

Per Henry and Gwynne, JJ.,—That the decrees in the Court of Chancery should be consolidated and the decree for sale in default of payment in the suit of *Powell* v. *Peck et al.*, delayed until P. had assigned the renewal term.

APPEALS from a judgment of the Court of Appeal for Ontario (1), reversing the decree of the Court of Chancery (2).

(1) 8 Ont. App. R. 498. (2) 26 Gr. 322.

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The respondent, (Charles Powell,) sued the appellants, (Peck, Coleman and Brett,) to enforce payment of a mortgage for $3,000 due to respondent in respect of a sale by him to them of his interest under a patent for an improved pump. Almost at the same time the appellants, Peck *et al*, began the suit of *Peck* v. *Powell*, to enforce specific performance of an agreement dated 1st June, 1877, for sale of such patent right for the full period to which respondent was entitled to renew the same under the patent laws.

The defence set up in the suit of *Powell* v. *Peck*, was the same as the case which Peck *et al* sought to make in *Peck* v. *Powell*, namely, that when the agreement of the 1st June, 1877, was made, Powell falsely represented that letters mentioned or referred to in the said agreement for certain new and useful improvements, known as the "cone pump and its connections," had ten years to run, whereas the fact was, that unless in the meantime renewed, said letters would have expired in a few weeks, and Peck *et al* claimed in consequence of such misrepresentation that they were not bound to pay the mortgage money sued in *Powell* v. *Peck*, and that Powell's proceedings should be restrained until Powell had made good his representations and carry out his contract with respect to said patent.

Powell answered that he never intended to sell, and Peck *et al* never intended to purchase any more that the limited interest conveyed in the assignment of the 1st June, 1877.

The agreement and assignment are set out in the judgment of Ritchie, C.J.

The causes were heard together in the Court of Chancery, and in the Court of Appeal, and there was but one argument in both appeals before the Supreme Court of Canada.

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Hector Cameron, Q.C., and *Fitzgerald* with him, for appellants.

Dalton McCarthy, Q.C., and *Moss*, Q.C., for respondent.

Sir W. J. RITCHIE C. J.—There are two appeals of *Peck et al.* v. *Powell* standing for judgment.

The first turns upon the question whether the patent rights which had been sold by Powell for five counties included all rights of renewal, and the second turns upon the right of vendor to foreclose a mortgage given by purchaser to secure balance of purchase-money.

The patent is dated 19th July, 1872, and expired on the 19th July, 1877.

The assignment by Powell to Peck and others, though dated 1st June, 1877, was not executed till the 23rd June, 1877, less than one month before date of expiring.

The assignment of Powell to Peck is as follows:

Whereas, I, Charles Powell, of the city of Toronto, in the county of York, did obtain letters patent of Canada for certain new and useful improvements in pumps known as "the cone pump and its connections," which letters patent bear date the 19th of July, 1872.

And whereas, O. G. Peck, John Coleman and George Brett are desirous of acquiring an interest therein:

Now this Indenture Witnesseth, that for and in consideration of the sum of six thousand five hundred dollars to me in hand paid, the receipts of which is hereby acknowledged, I have granted, sold and set over, and do hereby grant, sell and set over unto the said Peck, Coleman and Brett, all the right, title and interest which I have in the said invention, as secured to me by said letters patent, for, to and in the limits of the counties of York, Halton, Peel, Simcoe and Ontario, and in no other place or places, the same to be held and enjoyed by the said Peck, Coleman and Brett for their own use and behoof of their legal representatives, to the full end of the term for which the said letters patent are granted, as fully and entirely as the same would have been held by me, had this grant and sale not been made, save and except such portions of the above territory as may have been sold by the patentee before the 1st day April, 1877.

In testimony hereof I hereunto set my hand and affix my seal this 1st day of June, 1877.

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The memorandum of bargain and sale of same date is as follows:

Said Powell agrees to sell, and the said Peck agrees to buy, the said Powell's right, title, and interest in the said Powell's pump manufacturing business, together with the land on which the buildings stand, at or for the sum of four thousand five hundred dollars, payable as follows:—Fifteen hundred dollars, the 16th day of June instant, with interest at 10 per cent.; also, the sum of three thousand dollars, to be secured by first mortgage on the property, (with insurance clauses,) and machinery and plant, stock on hand and chattels. One thousand dollars to be paid on the first day of June, 1878; one thousand dollars on the first day of June, 1879, and one thousand dollars on the first day of June, 1880, together with the interest at the rate of eight per cent. per annum, payable half-yearly, on all unpaid sums, on the first days of June and December in each and every year until fully paid and satisfied; the first payment of interest on the three thousand dollar mortgage on the 1st day of December next ensuing; the payment of the above-named $1,500 is to be made secure by assignment of mortgage from Mrs. Ogle R. Gowan to C. Powell, guaranteed by her and Mr. Peck; Powell to assign his interest in his pump patents to Mr. Peck for the counties of York, Halton, Peel, Simcoe, and Ontario; Powell to pay all debts incurred before this date on account of said business, so far as he shall have been party to or cognizant of some; Powell not to be responsible for any debt incurred, unless the goods have been actually delivered and accepted; all assets owing to the firm to be paid to Powell, and are his property absolutely, namely, all outstanding accounts and notes or other assets and balances; Mr. Peck is to assume all Powell's guarantee liabilities in reference to pumps; John Coleman and George Brett, with both their wives, are to join in the mortgages to C. Powell.

(Signed), CHARLES POWELL,
OGLE R. PECK,
JOHN COLEMAN,
GEORGE BRETT.

Signed, sealed and delivered in the presence of }

The right of extension being, under our law, secured by statute to the holder of the patent, whether he be the patentee or his assignee, I agree with Mr. Justice Patterson, that when Powell, by his agreement of 1st July, 1877, undertook "to assign his interest in his

pump patents to Mr. Peck for the counties of York, Peel, Simcoe, Halton and Ontario;" and, when by his deed of the same date, he granted, sold, and set over to Peck, Coleman and Brett, "all the right, title and interest which I have in the said invention, as secured to me by said letters patent for, to, and in the said limits of the counties of York, etc.," he parted with all his interest, so far as the five counties were concerned; and that part of his interest, and, in fact, the only substantial part which existed when he executed these documents, was the statutory right of extension The deed has an *habendum* "to the full end of the term for which the said letters patent are granted, as fully and entirely as the same would have been held and enjoyed by me, had this grant and sale not been made, save and except such portions of the above territory as may have been sold by the patentee before the first day of April, 1877." And I also agree with him that this had not the effect of restricting the previous grant to the term existing at the time so as to exclude the grantee from the right of renewal or extension; on the contrary, that it makes it more clear that, within the limits of the territory described, the grantor divests himself of all title up to the last moment of the current term, and thus to affirm the status of the grantee as being at, as well as before, the expiration of term of five years, the holder of the patent and the person entitled under section 17 to the extension, so far as the right had relation to that territory.

And Powell having taken the extension in his own name for the whole Dominion, he should be decreed to execute such instruments or do whatever acts may be necessary to vest in Peck and Coleman their right and title in such extension. I think, therefore, that Peck, as to the case of *Peck* v. *Powell*, should have a decree affirming his right to the patent in these five counties

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(of York, Peel, Simcoe, Halton and Ontario,) and as to the case of *Powell* v. *Peck*, Powell should have a decree of foreclosure.

Ritchie C.J.

STRONG J.—In the case of *Peck* v. *Powell* I agree in all respects with Mr. Justice Patterson, who has shown in his very clear judgment that the principles of the English and American cases as to the right of an assignee of a patent to the benefit of the statutory extension, do not apply to patents issued under the Dominion Statute applicable to this patent. In the United States the renewal was granted under the former Act of Congress (now repealed), not as a matter of right, but in the discretion, judicial, or quasi-judicial, of commissioners after a hearing of the parties interested. In England, in like manner, the extension is granted by the Judicial Committee of the Privy Council, who are also bound to hear the parties.

Under the Dominion Statute applicable to this patent the extension is not a matter of judicial discretion, but can be claimed as an absolute right by the holder of the patent, just as a renewal of a term can be claimed by a lessee whose lease contains a covenant to that effect. And I am of opinion, therefore, that the analogy between an assignment of a patent granted under this statute, and the assignment of a lease with a right of renewal, is perfect. The appellants could not insist upon a partial renewal confined to the five counties in respect of which the respondent agreed to assign to them, but so soon as a renewal was obtained by the latter he became, under the words of the agreement to sell and assign all his right, title, and interest in the patent, a trustee of the renewed patent for the appellants in respect of those counties. This, then, being the proper construction and effect of the written agreement entered into between the parties, the decree pro-

perly directed a specific performance of that agreement according to the construction mentioned, by ordering an assignment of the renewed patent for the renewed term of five years, unless the evidence shows that there was some mistake in the agreement, which, on the ordinary principles applicable to relief by way of specific performance, made it improper so to carry out the contract. After attentively considering the evidence, I see no sufficient ground for withholding from the appellants the relief sought to which they are *primâ facie* entitled on the construction of the agreement in the way I have mentioned, and as it has been construed by Mr. Justice Patterson. I think, therefore, the decree was entirely right and ought to be affirmed, and that the order of the Court of Appeal to the contrary should be reversed. I may add that although I do not proceed entirely upon the same grounds as those the Chancellor placed his judgment upon, I am far from saying that if the case depended upon the considerations with which he dealt, the decree would have been wrong; on the contrary I incline to think that in this view also the appellants would have been entitled to succeed. I have no doubt whatever that the case in the aspect in which I view it, is open on the pleadings, the agreement is set forth in the bill and the material facts stated; it is not incumbent on a plaintiff in equity to set forth in his bill the arguments by which he intends to sustain his case, he can claim any relief which his allegations of fact entitle him to consistently with the relief prayed.

I cannot, however, agree that the decree pronounced in *Powell* v. *Peck* was correct, nor can I assent to the modification of that decree proposed by Mr. Justice Patterson; on the contrary, for the reasons which I will proceed to state, it appears to me very clear that the order of the Court of Appeal reversing it ought to be affirmed, though I am led to this conclusion by reasons

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altogether different from those upon which the majority of the court of below acted. Although the agreement of the 1st June, 1870, was executory, being in terms an agreement to assign and not a final or completed assignment, the consideration paid and given for it was executed, part of that consideration being the mortgage, the foreclosure of which is now sought in this suit. A compliance with the equitable obligations to carry that agreement into specific execution was not a condition precedent to the right to enforce the security for the purchase-money, more especially after the purchasers had already to some extent had the benefit of the patent. Nothing can, as it appears to me, be better established both at law and in equity than that the obligations of the vendor, in respect of the assignment and conveyance of the patent, and those of the purchaser in respect of the payment of the purchase-money under this security given for it, had (having regard to the way in which the parties had acted under it) become distinct and independent. At law they would be clearly so regarded. Had the respondent (the mortgagee) sued at law upon the covenant in the mortgage deed to recover the money secured by it, there would have been no legal defence to the action founded on the omission or refusal of the plaintiff in the action to assign the renewed term. Then what equity could have been asserted to restrain such an action? None that I can see, for if the obligations of the vendor in respect of the assurance of the thing sold, and those of the purchaser in respect of the price, are independent at law, I am not aware of any principle upon which they could be differently construed in equity after the contract has been executed on the part of the purchaser to the extent of paying or securing the price, more especially after there has been a partial performance by the vendor and a partial enjoyment of the consideration for

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the mortgage by the purchaser. For to say that the vendor shall not in such a case be entitled to realise his security for the purchase money, is tantamount to saying that he shall have nothing for the valuable consideration the purchaser has already had the benefit of. The only way in which justice can be done in such a case is by treating the liabilities of the parties in equity, as at law, as independent of each other, and leaving the purchaser to his remedies upon the contract at law and in equity. This is very analagous to a case in which a purchaser of land under an executed contract of purchase sues his vendor in equity, for a specific performance of the covenant for further assurance. In such supposed case I have never understood that if the purchase money happens to be unpaid and secured by mortgage, the court will enjoin the mortgagee (that is the vendor) from enforcing his security until he has executed the further assurance. The only case so far as I know, or have been able to discover upon looking into authorities in which a court of equity has ever interfered with a security for the purchase-money upon a ground of a breach of the vendor's covenants in the conveyance, is where there has been a breach of the covenant against incumbrances; in that case, which, however was always regarded as exceptional, some authorities decided in the Ontario Court of Chancery do, it is true, countenance the principle that the court will give the purchaser a lien, for the encumbrance which constitutes a breach of the covenant, upon the unpaid purchase-money secured by mortgage; in other words, it will set-off what the purchaser may be liable to pay to the holder of the paramount incumbrance against the unpaid purchase-money secured by mortgage; and this, it was formerly held, would be done even against an assignee of the mort-

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gage (1). This doctrine has, however, been much narrowed, if not entirely displaced, by a later decision of the Court of Appeal in the case of *Eagleson* v. *Howe* (2), which latter case restored the authority of a former decision of the late Vice-Chancellor Esten (a very high authority on such a question) in the case of *Tully* v. *Bradbury* (3). If, however, the case of *Henderson* v. *Brown* stood unimpeached, it would not help the mortgagor, since in the case to which it applied, the relief afforded amounted to nothing more than a set-off or recoupment of liquidated and ascertained sums, which is not the case here. If the purchase-money here had not been secured by an executed and completed security, but the provisions of the agreement respecting it had remained wholly executory, the case would have admitted of very different considerations, for, in that case, the court, in decreeing a specific performance, would have provided for the execution of the reciprocal covenants or stipulations on both sides.

According to the principles upon which a court of equity acts in carrying into execution by its decree such contracts and agreements as are properly the subjects of its jurisdiction, the court will always execute the whole, or such portions of the agreement as remain executory, but if the parties have thought fit before the institution of the suit to carry out any of the terms of the contract, such executed portions will not be disturbed. But I cannot distinguish between the case of a mortgage given to secure the purchase-money and that of the actual payment of the money; and, in the latter case, I take it to be altogether out of the question to say that a court of equity would, if there appeared to be some further interest which a purchaser was entitled to call upon the vendor to assure to him, under a

(1) *Henderson* v. *Brown*, 18 Gr. 79. (2) 3 Ont. App. Rep. 566.
(3) 8 Gr. 561.

covenant for further assurance, the purchasers right to which was disputed by the vendor, and, in the judgment of the court, wrongfully disputed, merely upon that ground, decree a repayment of purchase-money already paid, more especially in a case like the present where part of the benefit of the purchase had been actually enjoyed by the purchaser. A fair test of the correctness of such a principle as that just adverted to is to put the converse case of a purchaser, suing in equity for a further assurance under the vendor's covenant to that effect, being met by the objection, that he was not entitled to maintain his suit for the reason that he was in default as regards the payment of his purchase-money. In that case I apprehend there could be no doubt that the non-payment of the purchase-money would be no defence to the relief by way of further assurance, and if this is a correct assumption, reciprocally, the refusal to execute a further assurance could be no defence to an action for the purchase-money, either at law or in equity. In such a case the liabilities would be regarded as distinct and independent. The case of *Gibson* v. *Goldsmid* (1), appears to be a clear authority for this. In that case a partnership had been dissolved, and certain foreign shares in a joint stock company, which had belonged to the partnership, were transferred to the plaintiff, it being recited in the deed of dissolution that they were transferable by delivery. The deed contained a covenant for further assurance. It afterwards appeared that the shares in question were not transferable by delivery, but that a formal written transfer was necessary, which being refused by the other partner, a suit was brought against him for specific performance of the covenant for further assurance, to which it was set up as a defence that the plaintiff was himself in default to the defendant in respect of a

(1) 5 DeG. McN. & G. 757.

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covenant, to indemnify him against partnership debts, contained in the same deed. To this defence, which was assumed by the court to be founded on fact, the Master of the Rolls in the first instance gave effect by making the payment of any balance found due in an account to be taken under the indemnity covenant, a condition precedent to the relief the plaintiff sought; but upon appeal the Lords Justices (Knight Bruce and Turner) reversed this decree and directed a performance of the covenant. In the valuable judgment of Lord Justice Turner the grounds of the decision are fully and clearly stated. He says it was argued on behalf of the defendant "that he who seeks equity must do equity;" but, as the Lord Justice shows very clearly, that maxim is not adopted by the court in the wide and popular sense often attributed to it, but as meaning that a Court of Equity will impose upon the plaintiff, as a condition of relief, submission to equities which the defendant, if a plaintiff, could actively assert against him in respect of the same subject matter, but not a submission to such equitable rights as the defendant could actively, as plaintiff, enforce against the defendant in respect of distinct and independent matters; and he quotes, with approval, a passage from the judgment of Sir James Wigram in *Hannam* v. *Keating* (1) to this effect. The Lord Justice then proceeds to point out that in the case before the court the covenant for indemnity was a distinct and independent matter.

That case seems to me here an authority on two points: first, it establishes that even where covenants are still executory, they will, if independent and distinct, according to the proper legal construction of the instrument, be regarded as separate subjects of relief in equity; and secondly, that a defendant cannot merely, owing

(1) 4 Hare 1.

to his position on the record, and upon a construction and application of the maxim "that he who seeks equity must do equity," insist on a right to interpose obstacles to the equities asserted by the plaintiff, which he could not assert as a plaintiff seeking relief. The present case is much stronger than that cited, for here the plaintiff is not seeking to enforce an executory covenant but something entirely foreign to the original agreement, namely, to realize the security given in satisfaction and discharge of the original liability for the payment of the price, and therefore to enforce an executed—not an executory—part of the original agreement. That the respondent's position on the record as plaintiff can make no difference, as compelling him to submit to a different measure of equity from that which the defendant could enforce against him if their relative positions were reversed, is also, as has been shown, a point conclusively settled by *Gibson* v. *Goldsmid*, and the cases there referred to.

I repeat that if the agreement of the 1st June, 1870, had not been in any respect carried into execution by the appellants (the mortgagors), but if the clauses of that instrument to be performed on their part had been left, as the expression is, *in fieri*, then, no doubt, in decreeing specific performance, the court would have taken care to provide that they should not be compelled to pay their money or execute the security for it, until their rights under the contract were properly assured to them. But where the appellants executed the mortgage deed without insisting on a precedent or contemporaneous performance by the vendor of the obligations on his part, they voluntarily put it out of the power of the court so to protect them and waived any claim which they might have had, to retain the purchase money in their own hands until the vendor's obligations to them were duly performed, and by so doing they

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must be considered as indicating an intention thenceforward to rely solely upon such remedies as they might have against the vendor upon the stipulations contained in the contract.

The result is, that my judgment must be that the decree in *Peck* v. *Powell* should be restored and affirmed, and the order of the Court of Appeal reversing it should be discharged; and that the decree in *Powell* v. *Peck*, (the foreclosure suit) as entered under the order of the Court of Appeal, should be affirmed.

There should be no costs to either party of this appeal, and in the Court of Appeal there should be no costs. In the Court of Chancery Peck should have all the costs of *Peck* v. *Powell* as provided for by the decree in that case, and in *Powell* v. *Peck* the plaintiff should have only the costs of an ordinary foreclosure suit, to be added to the debt in the usual way.

FOURNIER J. concurred.

HENRY J.—I have had no difficulty in arriving at the conclusion that Powell always had an interest in the five counties. I think, therefore, the plaintiffs in that suit were entitled to recover. In fact, at the time that the agreement was made the patent right had expired within a few days, and, if he did not convey the right to the two renewals, and the right as far as these five counties were concerned in these renewals, he gave no value at all to the parties for the mortgage they gave as security for the payment of the amount agreed upon. I think, therefore, independently of the legal construction of the document, that the parties intended that should be the case. The difficulty I see in the matter is this: The second renewal has been obtained, the third may be obtained by Powell hereafter.

In the case of *Powell* v. *Peck et al.*, I do not think Powell should obtain the benefit of the foreclosure of

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the mortgage and the payment of the mortgage money, until he conveys the right to the five counties to the defendants, and gives security that he will obtain an extension of the right for another five years, and give them the benefit of it. It appears to me that is necessary to secure them. Otherwise, he may not renew that patent; he may not pay the money on it and in that case these parties will lose; and they cannot themselves do so under the Act. Powell must renew it, and, if he does, he will become the trustee for the benefit of those parties as far as the five counties are concerned. I think, under the circumstances, as he has contested and kept back all these matters since almost the time of the first agreement, he ought not to get costs for the foreclosure of the mortgage or to get the foreclosure until he gives value. I think the two matters ought to be held, and referred back to the court for a decree to be passed in accordance with the suggestion of the judgment of my learned brother Gwynne on the subject, and left there for the court to take measures to secure the rights of the parties.

GWYNNE J.—The late learned Chancellor of Ontario, Chancellor Spragge, before whom the above cases were tried together had such infinitely superior opportunity of eliminating the truth from the contradictory evidence of the respective parties who gave their evidence before him, than a judge of a Court of Appeal can possibly have, that I can have no hesitation in adopting the conclusion of fact arrived at by him, namely, that there was a representation made by Powell, the defendant in one of the above suits and the plaintiff in the other, that the patent in the cone pump and its connections, which, in the month of June, 1877, he was selling to Peck, Coleman and Brett, for the counties of York, Halton, Peel, Simcoe and Ontario was good for ten years, and

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that it was upon the faith of this representation that Peck, Coleman and Brett signed the agreement of the 1st of June, 1877, which was in evidence. In the learned Chancellor's criticism of the evidence bearing upon this question, I entirely concur. But I am of opinion, further, that the said agreement of the 1st June, 1877, and the assignment in pursuance thereof, dated on the same 1st of June, although executed later on in that month, were in their terms sufficient in equity, if not in law, to pass to Powell's said assignees all right and title to renewal of the letters patent for the said article, which, he (Powell) then had, as regards the said five counties, and to make him a trustee for his said assignees of any renewal of the said letters patent, which should be obtained by him as regards those counties. By the agreement Powell undertook to assign his interest in his pump patents to Mr. Peck for the above named counties, and by the assignment, after reciting that on the 19th day of July, 1872, he had obtained letters patent of that date for certain new and useful improvements in pumps known as "The Cone Pump and its Connections," and that O. G. Peck, John Coleman, and George Brett were desirous of acquiring an interest therein, it is witnessed, that for the consideration therein mentioned, he, the said Powell, did thereby grant, sell and set over unto the saidP eck, Coleman and Brett:—

> All the right, title and interest which I have in the said invention as secured to me by said letters patent, for, to, and in the limits of the counties of York, Halton, Peel, Simcoe and Ontario, and in no other place or places, the same to be held and enjoyed to the said Peck, Coleman and Brett for their own use and behoof of their legal representatives to the full end and term for which the said letters patent are granted, as fully and entirely as the same would have been held by me had this grant and sale not been made.

Now, by force of the Act respecting patents of invention then in force, 32 and 33 Vic., ch. 11, as a right, title

and interest, which Powell then had in his invention as secured to him by the said letters patent of the 19th July, 1872, was the right, at, or before the expiration of the five years mentioned in the said letters patent of obtaining an extension of the said letters patent for another period of five years, and of obtaining again after the expiration of such second five years a further extension for other five years. It was thus, in point of fact, substantially true that the letters patent of the 19th July, 1872, were in the month of June, 1877, good for the period of ten years, which, as matter of fact, the learned chancellor has found that Powell represented them to be, and upon the faith of which representation Peck and his co-purchasers completed the purchase; and as this right of obtaining such extensions of the said letters patent of the 19th July, 1872, was a right incident to the said letters patent and vested in Powell, as the then holder thereof, it was a right which the terms of assignment executed by Powell as affecting the said five counties were sufficient to pass in equity, if not in law, to Powell's assignees; and when Powell by an instrument duly executed under the statute procured to issue to himself an extension of the said letters patent for a second period of five years from the 19th of July, 1877, over the whole of the Dominion of Canada, or a much larger portion thereof than was composed within the five counties to which the assignment of the date of the 1st June was limited, he became a trustee of such extension of the said letters patent and of all benefit thereof, as to the said five counties for the use and behoof of his said assignees, and having wholly repudiated such position, and having insisted upon retaining for his own use and benefit such extension of the said letters patent as well over the said five counties as over all other parts of the Dominion, and upon his having the right of disposing of the said extension, as to the

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said five counties as he might think fit, the decree of the learned chancellor of the 2nd day of April, 1879, in the suit of *Peck et al* v. *Powell*, that the defendant Powell should, by a good and sufficient deed, free from incumbrances, assign and transfer to the plaintiffs therein the patent right secured by such extension for such second period of five years as regards the said five counties, and that he should do all things necessary to convey and assign to the plaintiffs by a good and sufficient conveyance in the law, the further right to obtain a further extension of the said letters patent, as affecting the said five counties, for the further period of five years from the expiration of the said second period, such deed to be approved by the Master in case the parties should differ about the same, and that the said defendant should pay to the said plaintiffs all costs as were by the said decree directed to be paid to them, was a decree quite warranted by the fact as found by the learned chancellor, and by the true construction of the agreement and assignment in the plaintiff's bill, relied upon and proved in evidence. This relief, as well as relief by way of an injunction as prayed for by the bill, was relief properly granted to the said plaintiffs under the case made by the bill, and established in evidence, and under the prayer for general relief, as well as under the special relief prayed for by the bill. It may be that by force of the statute 46 Vic. ch. 19, the latter part of this decree would be now unnecessary if the defendant Powell should execute a good and sufficient deed in the law, transferring to the said plaintiffs all right, title, and interest vested in him, in and to the said extension of the said letters patent obtained in the month of July, 1877, in so far as the said five counties are concerned, so that the plaintiffs may register the same according to law, but in view of the persistent contestation and denial to the present time by the defendant Powell of

the plaintiffs' right to the benefit of such extension, and the assertion by him of his own sole right and title therein and thereto, the plaintiffs are, in my opinion, entitled to the full benefit of the decree of the learned chancellor for the execution by the defendant of a good and sufficient deed in the law, transferring to the plaintiffs, free from incumbrances, such extension of the said letters patent and all the said respondent's right, title and interest therein and thereto as regards the said five counties.

The case of *Powell* v. *Peck et al.* was a bill praying for payment of money secured by mortgage on certain lands therein mentioned, and in default thereof for a sale of the mortgaged lands. To this bill the defendants set up by way of defence the agreement for the sale by Powell of his interest in the cone pump patent over the afore-named five counties, and the deed of transfer thereof, as set out in the bill of complaint at the suit of *Peck et al.* v. *Powell*, and averring by way of defence the several matters alleged in their bill and the payment into court of the sum of $735, in pursuance of an order made in the said suit wherein they were plaintiffs, they prayed, by way of cross relief, relief similar to that prayed for in their bill of complaint, and they, by their said answer, offered to pay to the plaintiff Powell the sum for which the mortgage in question was given, in accordance with the terms of the said mortgage as soon as the plaintiff should make good his representations and assurances, but they submitted that until the said plaintiff should do so they were not under any default, and that the plaintiff had no claim against them in respect of the said mortgage. The plaintiff, having joined issue to the said answer, relied upon the contention which he set up by way of defence to the bill at the suit of *Peck et al.* Both cases were tried together, and at the same time as the learned chancellor made the

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decree above set out in the case of *Peck et al.* v. *Powell*, he made a decree in the mortgage suit to the effect that the bill of complaint of the plaintiff Powell should be dismissed with costs, but without prejudice to the right of the plaintiff to take proceedings on the mortgage in his bill mentioned, so soon as he should make good to the defendants, Peck *et al.* the consideration for which the said mortgage was given. Assuming the decree of the learned chancellor in the case at the suit of *Peck et al.* v. *Powell* to be, as I think it was, correct, I can see no substantial ground of objection to his decree in the case of *Powell* v. *Peck et al*, the plaintiff therein having persisted throughout, as indeed he still did, upon these appeals, that all that he transferred or agreed to transfer to Peck *et al* was an interest in the cone pump and its connections until the 19th July, 1877.

In my opinion, therefore, these appeals should be allowed with costs to be paid by the respondent to the appellants, and as the appellants by their answer to the respondent's bill have offered to pay to the respondent the sum for which the mortgage was given, so soon as the plaintiff in that suit should make good to them the benefit of their purchase of the patent right in the said cone pump over the said five counties for the full period of such patent right, we may, I think, vary the decrees as made in the Court of Chancery by consolidating the two suits into one and directing one decree to be made therein to the effect following: Direct the suits to be consolidated and declare that the agreement of the 1st June, 1877, in the second paragraph of the bill of complaint of *Peck et al.* v. *Powell* is valid and binding upon the parties thereto, and that the plaintiffs are entitled to have the representations of the defendant Powell in said paragraph set out made good and decree the same accordingly. Declare that the said instrument under the hand and

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seal of the said Powell of the date of the same 1st of June, whereby the said Powell purported to grant, sell and set over unto the said Peck, Coleman and Brett in the agreement mentioned all right, title and interest, which he, the said Powell, had in the said invention of the cone pump and its connections therein mentioned secured to him by letters patent thereof as respects the counties of York, Halton, Peel, Simcoe and Ontario, was sufficient to transfer, and did transfer to the grantees therein named all his, the said Powell's, right, title and interest in and to the said letters patent and to the said patented article, as regards the said five counties, including in such rights and interest all right to the benefit of any extension that might be granted of the said letters patent under the provisions of the statute in that behalf (32 and 33 Vic., ch. 11), in so far as such five counties are concerned, and declare that the patentee, Powell, having by an instrument duly executed under the provisions of the said statute procured to himself an extension of the said letters patent of the 19th July, 1872, for five years from the 18th of July, 1877, over the whole of the Dominion of Canada, he thereby became and now is a trustee for his said assignees named in the said deed of transfer of the 1st of June, 1877, of the benefit of such extension, in so far as the same relates to and affects the said five counties. Order and decree that the said Powell do forthwith assign and transfer to the plaintiffs, Peck and Coleman, by a good and sufficient conveyance in the law free from all incumbrance, all benefit of, and all the right, title and interest of the said Powell in and to the said extension of the said letters patent from the 19th July, 1877, in virtue of the instrument securing or purporting to secure the sums to him in so far as such extension relates to the said five counties. Such conveyance to be approved by the master, in case the parties differ,

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about the same, in which all proper parties are to join as the master shall direct, order and decree, that the defendant Powell do pay to the plaintiffs Peck and Coleman, all costs of the said consolidated suits, less such costs as shall be taxed as consequent upon adjournment of the hearing of the cause of *Peck at al* v. *Powell*, obtained upon the part of the plaintiff therein, which costs are to be taxed and allowed to Powell by way of set-off against the costs hereby made payable by him; and upon the execution by Powell of such good and sufficient deed as aforesaid, decree that an account be taken of what remains due to Powell upon the security of the mortgage in the pleadings mentioned in case the parties differ about the same with the usual decree for sale of the mortgaged premises in default of payment of costs up to the hearing, to be paid by Powell, and subsequent costs and further directions reserved.

In *Peck et al.* (*plaintiffs*) v. *Powell* (*defendant*)—*Appeal allowed without costs.*

In *Peck et al.* (*defendants*) v. *Powell* (*plaintiff*)—*Judgment of Court of Appeal varied as to costs of that court. Subject to such variation appeal dimissed, without costs.*

Solicitors for appellants: *Fitzgerald & Beck.*

Solicitors for respondents: *Delamere, Black, Reesor & Keefer.*

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*Mar. 28.
*Nov. 16.

WILLIAM KELLY (PLAINTIFF) .....APPELLANT;

AND

THE IMPERIAL LOAN AND INVESTMENT COMPANY OF CANADA (LIMITED) AND WILLIAM DAMER (DEFENDANTS).....RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Mortgagor and mortgagee—Assignment of equity of redemption in trust—Re-conveyance by trustee—Foreclosure against trustee—Sub-

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

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sequent sale—Power of sale in mortgage - Exercise of by deed after foreclosure—Recitals in deed.

K. gave a mortgage of leasehold premises to the Imperial Loan and Investment Co., with a covenant authorizing the company to sell the premises on default, with or without notice to mortgagor, and either at public or private sale. The mortgage conveyed the unexpired portion of the current term, and "every renewed term." K., shortly after giving the mortgage, conveyed the equity of redemption in the mortgaged premises to one O'S. for a nominal consideration, and in trust to carry out certain negotiations for K., who then left the country and was absent for several years. During his absence, the lease of the ground mortgaged to the company expired, and was renewed in the name of O'S.

Default having been made in the payment of interest under the mortgage, a suit was brought against O'S. for foreclosure, the mortgagees having knowledge of his want of interest in the premises. Prior to such suit, O'S., fearing that such proceedings would be taken against him, had executed a deed of re-conveyance of the equity of redemption to K., but such deed was never delivered.

O'S. then filed an answer and a disclaimer of interest in such suit, but he was afterwards persuaded by the mortgagees to withdraw the same, and consent to a decree, and a final order of foreclosure was made against him. Pursuant to this order the company subsequently sold the mortgaged premises to the defendant D. for a sum less than the amount due under the mortgage; the deed to D. recited the proceedings in foreclosure, and purported to be made pursuant to the final order of foreclosure.

K. brought a suit against the company and D. to have the decree re-opened and cancelled, and the deed to D. set aside, and prayed to be allowed to come in and redeem the premises.

Held,—affirming the judgment of the Court of Appeal, Strong and Henry JJ. dissenting,—that even if the decree of foreclosure was improperly obtained, and consequently void, yet the sale and conveyance to D. were a sufficient execution of the power of sale in the mortgage, and passed the renewed term conveyed by the mortgage.

APPEAL from a decision of the Court of Appeal for Ontario (1), reversing the judgment of Proudfoot V.C.

In August, 1875, the appellant mortgaged certain

(1) 11 Ont. App. R. 526.

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leasehold premises in Toronto to the respondents, which mortgage contained a proviso, that in default of the payment of the moneys thereby secured the mortgagees should have power to sell the mortgaged premises by private contract or at public auction, and without previous notice to the mortgagor.

In December, 1876, the appellant conveyed the equity of redemption in the said mortgaged premises to one O'Sullivan for a nominal consideration, which conveyance, the appellant alleged, was only intended to convey such equity of redemption in trust for certain purpose agreed upon between him and O'Sullivan.

The respondents took possession of the mortgaged premises in January, 1877, and the same were leased to one Patrick Scully for five years from the first day of January in that year, the appellant being a party to the indenture of lease.

The original lease to appellant expired in July, 1878, and O'Sullivan procured a renewal in his own name, appellant being then absent from the Province and his whereabouts not known.

In November, 1878, O'Sullivan, being threatened with suit for foreclosure of the mortgage, &c., conveyed the equity of redemption to appellant by deed purporting to be executed 15th November in that year, having previously notified respondents that he had no interest in the mortgaged premises, but that the same belonged to the appellant.

On 21st November, 1875, respondents filed a bill against O'Sullivan for foreclosure of said mortgage, and the latter at first took steps to defend such suit and filed a disclaimer, but he afterwards withdrew such defence and consented to a decree against him in the suit foreclosing his equity of redemption in the said mortgaged premises, which decree was made in May, 1880.

In September, 1881, the respondents sold the premises to the defendant Damer, reciting in their deed the proceedings against O'Sullivan and their title to the premises under the final order of foreclosure in such suit.

The appellant only ascertained the fact of the suit against O'Sullivan and the making of the decree on his return to the Province of Ontario subsequent to their occurrence, and he notified the defendant Damer that he was interested in the premises before the said sale, and also notified the respondents not to sell. After the sale he filed a bill to have the final order of foreclosure re-opened and cancelled, the sale to Damer set aside and an account taken of what was due on the mortgage.

Proudfoot V.C. before whom the cause was heard, made a decree in favor of the appellant, holding that the decree of foreclosure was improperly obtained on account of the knowledge in respondents of want of title in O'Sullivan, and ordered the account prayed for by the respondents. The Court of Appeal reversed this judgment, holding that notwithstanding the recital of the proceedings of foreclosure in the deed to Damer, the same could operate as an execution of the power of sale in the mortgage, and that such power authorized a sale of the renewal term as well as of the original.

This appeal was brought from the last-mentioned judgment.

Dalton McCarthy Q.C. and *Plumb* for appellant:

The learned judges of the Court of Appeal have found that, although the company had assumed to sell by virtue of their title acquired by foreclosure, yet the sale, though invalid upon the strength of their title, could be upheld as an exercise of their power of sale in the mortgage, because—1. The power of sale, though only expressed to be exercisable upon the original term of years mortgaged was nevertheless exercisable upon

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the renewal term; and 2. That although it was the expressed intention of the company to convey to Damer by virtue of their foreclosure title recited upon the face of the conveyance, yet the title could, to the extent of its invalidity, be fed out of the unexercised power of sale.

Upon the first point, Mr. Justice Osler delivers the judgment of the court, Mr. Justice Burton merely saying that after considerable doubt he concurs; and the ground on which the learned judge bases his conclusion is, that a renewal term is considered as a graft upon the old lease, and "subject in equity to the same mortgage as affected it" (1).

Now it must be borne in mind that the mortgage from Kelly to the Imperial of the 7th August, 1875, was by way of demise or sublease under the then current term. Habendum is as follows: "Unto the said mortgagees, their successors and assigns for the residue now unexpired of the term of years thereby created, and every renewed term, save and except one day thereof."

The covenant for further assurance extends to the "term of years" only, but not to renewal terms, and the power of sale by express language only extends to and is exercisable upon the "term of years or such part or parts thereof as they may deem expedient."

In order to warrant the conclusion of Mr. Justice Osler, the authorities which he cites should show that not only is the renewal term subject to the same equities which affected the original term, but also to every legal incident created by express contract between the parties, and advisedly limited to the duration only of the original term.

The cases cited by the learned judge at page 538 of the report, show that there will adhere an equitable lien,

(1) 11 Ont. App. R. 534.

upon the renewal term corresponding in equity to the legal charge created upon the original term—but not one of them goes the length of even raising the suggestion that a power of sale or other arbitrary remedy for enforcing the lien by the unaided hand of the person claiming it, of his own mere motion and strict right, without the assistance of a court of equity, will be implied as an incident to or attribute of that equitable lien.

The very fact in the cases referred to, that the persons asserting the right had to resort to courts of equity for a declaration of it, negatives the presumption of the continuance of a remedy whose exercise would have lain in their own hands.

The doctrine of the attachment by way of equitable lien upon the renewal term of a mortgage or other charge previously existing upon the expired term is a creation of the courts of equity, and can be called into action only by the intervention of the remedial power of the court; and it is submitted that the learned judges of the Court of Appeal lost sight of the origin of the principle and unwarrantably extended it in declaring that there was inherent in that equitable lien an incident which enabled its exercise at the mere motion of the claimant lien-holder without the intervention or aid of the court.

Powers of sale must be free from doubt, and will not be implied in a subsequent mortgage. *Curling* v. *Shuttleworth* (1); Coote on Mortgages (2). Nor will a power of sale be implied in a conveyance absolute in form by way of mortgage. *Pearson* v. *Benson* (3); Fisher on Mortgages (4).

A power of sale exercisable without notice has been held to be oppressive. *Miller* v. *Cook* (5).

(1) 6 Bing. 121.
(2) 4th Ed. 249, 253.
(3) 28 Beav. 598.
(4) 3rd Ed. 287; 4th Ed. 276.
(5) L. R. 10 Eq. 641.

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As to the second point decided by the learned judges in the Court of Appeal, that although it was the expressed intention of the company to convey to Damer by virtue of their foreclosure title, recited upon the face of the conveyance, yet the title could, to the extent of its invalidity, be fed by the unexercised power of sale. It is admitted in all the cases cited and by the learned judges in the Court of Appeal themselves, that where one has a power and an interest, the question of the execution or not of the power is wholly decided by the apparent intention to execute or not to execute it.

The apparent intention of the grantors, the company, in this instance, was to convey by virtue of their supposed interest acquired by foreclosure and not by virtue of their power of sale, and the deed upon its face bears evidence of the fact, and in this view of the case the authorities cited in the judgment of Mr. Justice Osler are authorities in favor of the appellant, notably *Maundrell* v. *Maundrell* (1). See also Rawle on Covenants (2); *Bowman* v. *Taylor* (3); *Lainson* v. *Tremere* (4); *Carver* v. *Jackson* (5); *Van Rensselaer* v. *Kearney* (6).

Upon either or both of these points the appellant submits that the judgment of the Court of Appeal should be reversed.

James Maclennan, Q.C., for respondents:

The sale to Damer, whether treated as a sale after foreclosure, or as an exercise of the power of sale contained in the mortgage to them, was effectual, and the same should not be disturbed. See *Grugeon* v. *Gerrard* (7).

Galt, counsel for Damer, contended that he was a *bonâ fide* purchaser for value of the said lands and pre-

(1) 7 Ves. 567, 10 Ves. 246.
(2) 4th Ed. 388.
(3) 2 A. & E. 278.
(4) 1 A. & E. 92.
(5) 4 Peters 86.
(6) 11 How. (U.S.) 325.
(7) 4 Y. & C. 119.

mises without notice of any equities in favor of the appellant, and that he was entitled to protect his purchase by claiming the benefit of all the rights which his co-respondents had at the time of the assignment by them to him.

The learned counsel also relied on the judgments delivered in the court below and cases therein cited (1).

Sir W. J. RITCHIE C.J., after reciting portions of the mortgage and of the deed to Damer, proceeded as follows:—

The recitals would seem to be inconsistent with the execution of the power, but the nature and effect of the instrument is entirely consistent therewith, and demonstrates, I think, a practical intent to execute the power, though, no doubt, the recital would show that the deed was executed on the assumption that the foreclosure was valid and that the property had thereby absolutely passed to the mortgagees.

The power authorized the defendants to convey the interest mortgaged absolutely; the deed executed purports to do, in express terms, that which the mortgagees had the right to do, if not under the decree of foreclosure then under the power.

Then why should the deed, notwithstanding the recital, not receive its legal effect, and be treated as a good execution of the power, the legal effect of the deed being precisely the same, whether under a valid decree, or, there being no valid decree, under the power, the intent being to do what the decree, if valid, would authorize, or what, if invalid, the power would authorize.

As, therefore, the mortgagees had power to give the deed effect, either by virtue of the foreclosure or of the power, the legal effect of the deed being strictly in

(1) 11 Ont. App. Rep. 530 et seq.

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accordance with the power, that is to say, the deed intending to do the very thing which could be done under the power, why should it not have that effect? The mortgagees clearly intended to convey the property absolutely; the power gave them authority so to convey, and in conveying it absolutely they necessarily executed the power; and it not being alleged that the recital in any way affected the sale or the plaintiff's interest under it, or that he was in any way damnified by the execution of the power in the manner it was done. Where the nature of the interest is in accordance with the power, and the intention is clear to effect that which the power authorized to be done, I think we should be departing from recognized principles if we held that it does not demonstrate an intention to execute the power, or that the power is not thereby executed.

There can, I think, be no doubt that an instrument may be an exercise of a power, though on its face it does not so purport. In *Blake* v. *Marnell* (1) the Lord Chancellor says:

> It is perfectly clear and well established that the recital of a power is not essential to the due execution of it; it is sufficient if the estate over which the power extends is dealt with in a manner which can be effectual only by reference to the power.

It was argued that the power did not extend to the renewed lease. I think it did; that it was the intention of the parties that the mortgagees should have the security of the power of sale for realizing the money secured by the mortgage so long as the mortgage remained unpaid, and it should, therefore, be held to cover the renewed term, as well as the term originally assigned.

I think the judgment of the Court of Appeal should be affirmed, and this appeal dismissed with costs.

(1) 2 Ball & B. 35.

STRONG J.—I entirely agree with both the courts below, that the foreclosure proceedings were imperfect to the extent that the decree was a nullity. Even if the purchaser Damer had had no notice that the decree was valueless for the reason that the equity of redemption was not vested in the defendant I should have thought it no bar to the plaintiff's right to redeem, but as it is it is plain that he had notice.

That the power of sale extended to the renewed term is, I think, clear. The words of the habendum include any renewed term which, indeed, without such words would be a graft on the mortgagees' interest, though but for the words of the power of sale, or, rather, one word in the power of sale, the latter might not have extended to the renewed interest. As the power is framed, however, it is very clear that it does comprehend a renewed term, for it is not merely a power to sell "the said term of years," in which case it would have been confined to the current term, but to sell "the *said* land," meaning, of course, all interest in the lands to which the mortgage applied.

Upon the remaining question, however, I differ very widely from the Court of Appeal. I quite agree in the law, or rather the rule, of construction as stated by both the learned judges in the Court of Appeal whose judgment we have, Mr. Justice Burton and Mr. Justice Osler, but I differ from them in their application of it to the case before us.

The rule of construction is laid down by Lord Eldon in *Maundrell* v. *Maundrell* (1), by Lord Romilly in *Carver* v. *Richards* (2), and by Lord Justice Christian in *Minchin* v. *Minchin* (3), and that rule, I apprehend, may be expressed as follows: If a man has a power but no interest, or not such an interest as will enable him to

(1) 10 Ves. 258. (2) 27 Beav. 488.
(3) 5 Ir. Rep. Eq. Series 258.

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pass the estate which he purports to convey, he will by his conveyance, although he uses words applicable only to the conveyance of an interest and not to an appointment or the execution of a power, be held to have intended to execute the power, more especially in favor of a purchaser for value. This is as high as the rule can be put, perhaps more strongly than it is found actually expressed anywhere. And it should be added that even if it is shown that the party had no knowledge of the existence of the power, that makes no difference, it will still be presumed, in the absence of any indication of an intention to the contrary, that he purposed to execute it. The reason of the rule is said to be this, that when a person proposes to convey an estate it will be assumed that he intended his assurance should operate in any possible way in which it could operate, provided no contrary intention is indicated. In some cases it is said that where there is a general intention to convey it will be presumed, in the absence of any indication of a contrary intention, that the party meant to do so by the exercise of all powers vested in him which may be requisite to make his conveyance effectual. And it makes no difference that the grantor was not even aware of the existence of the power. But in every judicial expression of the rule it will be found that there is an exception of the case where a contrary intention appears on the face of the deed. And it is not enough that it may be inferred from the circumstances that the grantee would have executed the power if he had been aware that he possessed it, if the terms of the deed are inconsistent with the actual execution of it. (1)

From some authorities it might be supposed that if the deed can take effect at all by way of conveyance of an interest, whatever that interest may be, it will not be presumed that there was an intention to execute the

(1) *Langslow* v. *Langslow*, 21 Beav. 552; *Minchin* v. *Minchin*, Sup.

power, but that is not the latest and best statement of the principle. If it were it might be said here that as the legal estate vested in the mortgagee passed, the deed would operate as a mere transfer of the mortgage, but I admit with the Court of Appeal, that this is not enough to exclude the operation of the rule of construction mentioned, for I think it sufficiently appears here on the face of this deed that there was an intention to pass an absolute interest to the grantee, and that the deed was not intended to take effect as the mere assignment of a mortgage. That the foregoing is a correct statement of the law sufficiently appears from the case of *Carver* v. *Richards* (1), referred to in the judgments of the learned judges in the court below, and also from *Minchin* v. *Minchin*, *ubi sup*, where Lord Justice Christian states the law in terms which Mr. Farwell, in his treatise on Powers (2) has summarized as follows:—

> All that is requisite is an intention on the part of the donee that the fund shall pass to some one who is an object of the power. When that intent appears, and the only means which the person so intending possesses of giving effect to it is by an exercise of a power of which he is donee, then, though his mind is a mere blank as to the execution of power, though he has forgotten its existence, or never knew he had it, the law will presume that he must have meant to make use of the only means within his reach of achieving his express purpose. This is subject to one exception, which is theoretical rather than practical. When what we find is not merely the absence of a positive intention to exercise the power, but the demonstrated presence of a positive intention not to exercise it, then it will be held not to have been exercised, even though the intention to pass the subject is expressed.

The question, and I freely admit the only question here is, whether there does appear on the face of the deed any expression of an intention contrary to or inconsistent with the design of executing the power of sale. In most of the cases we find that the question has gen-

(1) 27 Beav. 488. (2) P. 156.

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erally arisen with reference to a general power of appointment, and by a general power I mean a power which the donee can exercise in favor of any objects and in any way he thinks fit and in respect of which he is in no sense a trustee for another. I concede, however, that though a power of sale in a mortgage is neither a power over the legal estate (for that estate is actually vested in the mortgagee) but is a mere equitable power to be executed for the benefit of the mortgagor as well as for that of the mortgagee, there is no reason why the same principle should not be applied as in the case of general powers of appointment of the legal estate.

It must, however, be remembered that the power of sale is a power to sell and convey the equity of redemption only, and that the conveyance of the mortgagee for the purpose of carrying out a sale under it operates on the legal estate as a conveyance strictly and not as the execution of a power, from whence it follows that if the equity of redemption is gone by foreclosure or otherwise the power is also extinguished.

The application of these principles in the present case depends altogether on whether it appears by the deed of the first of October, 1881, whereby the loan company conveyed to the defendant Damer, that the mortgagees did not intend to execute their power of sale. This deed contains a recital, as follows:—

> And whereas default being made in payment of the moneys due under the said mortgage from said William Kelly to the Imperial Loan and Investment Company, the said Imperial Loan and Investment Company exhibited their bill of complaint in the Court of Chancery for Ontario, and thereafter by an order of the said court made in the said cause, and dated the fifteenth day of May, one thousand eight hundred and eighty, it was ordered that the said Dennis Ambrose O'Sullivan stand absolutely debarred and foreclosed of and from all right, title and equity of redemption of, in and to the said leasehold premises,

I regard this recital as amounting in effect to a recital that the power of sale was extinguished and gone. It recites the fact of the foreclosure and the legal effect and consequence of the foreclosure was of course to destroy the power which was incidental to the equity of redemption, the estate which was cut off and barred by such a decree. It is, therefore, for the present purpose, tantamount to a recital that the mortgagees had become the absolute owners of the estate, and that the power of sale no longer existed. Had there been such a recital in terms, there could have been no question that the deed would have disclosed an intention not to execute the power, and I am unable to distinguish between the extreme case which I put and that before the court. I am therefore of opinion that the recital demonstrates a very clear intention not to execute the power of sale by an exercise of which alone can the plaintiff's right of redemption in the present case be barred.

I have heard no answer to this proposition or argument, the factum does not contain any, and all the authorities I have looked at suggest none. I am compelled, therefore, to say that I arrive at this conclusion without the slightest doubt or hesitation. Although, as I have said, the principle upon which a general power of appointment is held to be executed by a deed not referring to it and containing only operative words technically applicable to a conveyance may be applied in a case like the present, yet I must add that there are reasons why the expression of a contrary intention which, in the case of a power of appointment may be considered to some extent technical only, is in the case of a sale by a mortgagee as in the present instance, substantial as well as technical. The mortgagee is, in respect of the power, a trustee to some extent for the mortgagor, and is bound to use reasonable care and

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diligence in selling; it is not, as in the case of a power to appoint in favor of any persons the donee may please to select as the objects of his bounty altogether a matter of indifference to him whether he carries out his purpose by a conveyance of an absolute estate or by an exercise of the power of sale; a mortgagee, who supposes himself to have the absolute estate, may for reasons of his own, choose to sell for a price less than he would think himself bound to demand if he knew he was actually executing a fiduciary power in respect of which he was liable to be called to account by the mortgagor. I mention this not as a reason why any other or different mode of construing this deed than that before stated should be adopted, but as a reason why the rule in question should here be strictly applied, as we should otherwise be making a precedent which might in other cases involve practical consequences to the prejudice of the mortgagors.

The principle of construction before mentioned as applicable to powers is not confined to such cases but is general, and is also the test applied when a grantee who has *primâ facie* a right to elect that the conveyance under which he takes shall operate either at common law or under the statute of uses, is sought to be restrained to one mode of operation. Hayes on Conveyancing (1).

It also applies when a person, having both a beneficial and fiduciary interest in property conveys by general words of conveyance by which *primâ facie* he will (notwithstanding the case of *Faussett* v. *Carpenter* (2) which, according to Lord St. Leonards, is now generally regarded as an erroneous decision) he intended to convey all his interest as well that which he has as a trustee as that of which he is the beneficial

(1) Vol. 1, p. 163.

(2) 5 Bligh (N.R.) 75.

owner, unless from the recitals of the deed a contrary intention can be gathered. *Strong* v. *Hawkes* (1).

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I refer to these other instances for the purpose of showing that from the wide extent of the rule, any innovation upon it may have an application to cases not confined to the circumstances presented by the case now before us.

I am of opinion that the plaintiff was entitled to a decree for redemption and that the appeal should be allowed with costs.

FOURNIER J.—I concur in the judgment of His Lordship the Chief Justice.

HENRY J.—The appellant was mortgagor of the premises in question and the respondent company were the mortgagees. Subsequently to the mortgage the appellant assigned the equity of redemption to one O'Sullivan, but in trust to raise money and pay off the mortgage. The appellant removed to California and his address was not known to O'Sullivan when subsequently the respondent company threatened to foreclose O'Sullivan's interest. He, therefore, having no interest in the property and wishing to be clear of further responsibility about it, on the 15th November, 1878, re-conveyed the property to the appellant. On the 21st November, 1878, the company knowing that O'Sullivan had no beneficial interest in the property, filed a bill against him to foreclose the mortgage, setting it forth and alleging that he was entitled to the equity of redemption.

O'Sullivan, after having filed an answer and disclaimer of the interest in the property, was induced subsequently by the solicitor of the company to withdraw his answer and disclaimer and consent to a decree for foreclosure, which was passed and bears date the

(1) 4 DeG. M. & G. 185.

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14th January, 1879. A final order of foreclosure was made on the 15th of May, 1880.

In September, 1881, the company agreed to sell the property to the defendant Damer for $20,000, which was less than the amount of their claim. Before the contract was completed by a conveyance, the appellant, as admitted by Damer in his evidence, notified him not to purchase the property as he had an interest in it.

On the 1st October, 1881, the company executed a conveyance to Damer by which after reciting the original lease, the assignment thereof to Kelly, that Kelly had, on the 7th August, 1875, assigned the same and all his interest therein by way of mortgage to the company, that he had subsequently assigned all his interest to O'Sullivan, whose equity of redemption therein had been foreclosed by the final order of foreclosure of the 15th May, 1880, that in pursuance of the covenant for renewal, Northcote, the original lessor had, on the 1st July, 1878, executed a lease of, and demised the land to O'Sullivan for 21 years, and the said lease, term and premises had become vested in and were then lawfully held by the company, and that the assignee had agreed with the assignors to purchase the lease and premises; the company granted, &c., to Damer, "the said parcel of land and all other the premises comprised in and demised by the said in part recited indenture of lease together with the said indenture of lease and the right of renewal thereof," &c. Habendum to the assignee for and during the residue of the said term granted by the said indenture of lease and the estate term and right of renewal, if any, and other interest of the assignors therein.

The instrument contains the usual covenant for title right to convey and further assurance.

The learned judge held that the decree and final order of foreclosure were void as against the plantiff, that

O'Sullivan could not be treated as a trustee within G. O. Chy. 58, 61, O.J. Act, Rule 95, for the purpose of representhim, and that even if he could be so treated, yet that the re-conveyance had been executed before the filing of the bill; therefore the plaintiff was at that time the owner of the equity of redemption and the proper party to the action, of which the company had notice.

(2) That the sale to the defendant Damer could not be supported as an exercise of the power of sale in the mortgage, as it did not profess to be made under the power, but under the title gained by means of the foreclosure suit.

(3) The plaintiff was entitled to redeem, subject to Damer's right to compensation for improvements.

The questions to be determined are:

(1) Whether the decree and final order of foreclosure in the action against O'Sullivan affected the rights and interests of the appellant.

(2) If not, whether the defendant Damer is affected by any irregularity or invalidity in the proceedings.

(3) If he cannot rely upon a title acquired by his co-defendant under the foreclosure, whether their conveyance to him can be upheld as an effectual execution of the power of sale in their mortgage.

The first question is answered by all the learned judges in the court below, and I think properly, that the decree and order did not affect the rights or interests of the appellant.

As to the second question I have only to say that after notice of the appellant's interests he can stand in no better position than that of the company; and now as to the third and only remaining, can the conveyance to Damer be upheld as an effectual execution of the power of sale in the mortgage?

It is no doubt well settled law, that where a party makes a conveyance under a power, it is unnecessary to

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refer to the power, and that where a party has an interest and a power and makes a conveyance beyond his interest, but within the power, the conveyance is to be understood as an execution of the power for the same reason, namely, that it is unnecessary to set forth the power, and as if the company in this case had made the conveyance without having had recourse to measures for foreclosure and decree and order.

In the case of *Maundrell* v. *Maundrell* (1) cited by Mr. Justice Osler herein, where a man had interests in two different estates and powers over them, he executed an instrument reciting the power over one of them and his interest in it, and as to it expressly executed his power and conveyed his interest by lease and release. As to the other, he recited, not that he had power to appoint, but that he was seized in fee and conveyed his interest in it by lease and release. It was held that the latter estate passed out of his interest only, and not by force of the power, from the apparent intention not to execute the power.

In this case the respondent company in their conveyance show most clearly their intention not to execute the power. There is no reference to the power but it recites the lease to the appellant and the mortgage, his subsequent assignment to O'Sullivan and the foreclosure of O'Sullivan's equity of redemption; a further lease from the lessor of the appellant to O'Sullivan in pursuance of a covenant for renewal, and alleges that the last mentioned lease, term and premises had become vested in and were lawfully held by the company.

If the decision in *Maundrell* v. *Maundrell* above referred to is correct then we must hold that the conveyance to Damer was made under the foreclosure and not in the execution of the power. A sheriff or other officer making a levy or distress under a defective warrant may

(1) 7 Ves. 246, 10 Ves. 258.

justify under another and a good one. The issue in such a case relates to the act of levy or distress. If the officer was justified by either warrant the taking was lawful and that is the only question; or if the officer was justified in the act of taking, no wrong was done —but that is a case very different from the one under consideration. In fact, the law as to powers and their execution is settled upon principles peculiar to it and them, and in the application of them little can be gained by analogy from decisions on other subjects, and each case must, pretty much, depend on its own circumstances.

The Lord Chancellor says, *Roake* v. *Denn* (1):

Now the law applicable to this question, as has been stated by the Lord Chief Baron, has been settled by a long series of decisions, from the case which has been referred to in the time of Sir Edward Coke, Sir Edward Clere's case, down to the present time, that if the will, which is insisted upon as the execution of the power, does not refer to the power, and if the disposition of the will can be satisfi, ed without their being considered to be an execution of the power unless there are some other circumstances to show that it was the intention of the devisor to execute the power of appointment by the will, under such circumstances the courts have uniformly decided that the will is not to be considered to be an execution of the power. Now in this case there is no reference in the will to the power; there was other property in the county of Surrey, sufficient to satisfy the terms of the will; and there is no circumstance whatever to satisfy my mind, as I conceive it ought to be satisfied, that there was a manifest intention in the testatrix to execute an appointment under the power given by this will.

If the company had nothing but the power, the conveyance in question, we would, I think, be bound to conclude to have been made in execution of it; if the company had not, as in this case, set out their title by the foreclosure. Independently of that foreclosure the company had an interest as mortgagees, and that interest was covered by the conveyance to Damer. They had therefore an interest to be assigned but they had no other unless by the foreclosure or by an execution of

(1) 4 Bligh N. R. 20.

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the power by a conveyance which, though silent as to the power, did not show they were not acting in the execution of it.

They had given one or more notices to the appellant that they would sell or lease under the power, but it is shown they never did.

Mr. Boulton, their solicitor, in his evidence, on being shown one of the notices identified it and said: "Yes, and we attempted to sell and failed in so doing, and after several efforts to realize upon the property in some way, by lease or otherwise, I got instructions to take proceedings for foreclosure;" and Mr. Boulton admits that the sale was not made under the power but under the foreclosure.

Such being the case how can we, in opposition to facts so fully and plainly proved, arrive at the conclusion that there was any execution of the power. I can find no case or decision to sustain the proposition that where a party in the conveyance distinctly shows he is not executing a power that conveyance can be held to be an execution of it. See Sugden on Powers (1). He says: "It is intention that in these cases governs, therefore, where it can be inferred that the power was not meant to be exercised, the court cannot consider it as executed." Again at p. 353: "A power will not be deemed to be executed contrary to the intention of the party where he supposes a different power to be vested in him."

The case of *Maundrell* v. *Maundrell* is on principle very similar to this one. In that case the instrument recited the power as one of the properties, and in the other was recited not that he had the power but that he was seized in fee and so conveyed it. Here the company in their conveyance did not recite the power but a title in

(1) 8th Ed. p. 350.

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fee through the foreclosure. I think to decide in favor of the respondents in this case would be to reverse the judgment in the other case with which I have compared it, which, as far as I can discover, has never been overruled. I am of opinion, for the reasons given, that the appeal herein should be allowed and the usual decree for redemption in the court below to be made with costs.

TASCHEREAU J.—I think the appeal should be dismissed. The mortgage clearly gives the power to sell, and the sale, as it was made, must be held to be an execution of that power. To hold the contrary would be to defeat the intention of the mortgage.

Appeal dismissed with costs.

Solicitors for appellant: *McCarthy, Osler, Hoskin & Creelman.*

Solicitors for respondents Imperial Loan Co.: *Boulton, Rolph & Brown.*

Solicitors for respondent Damer: *Caston & Galt.*

LA COMPAGNIE DE VILLAS DU CAP GIBRALTAR ..... APPELLANTS;

AND

GEORGE A. HUGHES *esqualité* ..... RESPONDENT.

1883

*Nov. 15.

1884

*June 23.

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

Con. Stat. L. C., ch. 69—Building Society by-law—Purchase of Land—Intra vires.

L. Cie. de V., a building society incorporated under ch. 69, Con. Stat. L. C., by its by-laws, on the 21st August, declared that the principal object of the society was to purchase building lots, and to

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

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build on such lots cottages costing about $1,000 each for every one of its members. In order to obtain its object, the company through its directors, obeying the instructions of the shareholders, on the 7th October, 1874, purchased the particular lots described in the by-laws and contracted for the building of twenty-four cottages at $1,250 each, the amount that each of the shareholders had agreed to pay. A year elapsed, during which the cottages are built and drawn by lot for distribution among the members. On the 11th October, 1875, the vendors of the lots and contractors for the building of the cottages, borrowed money from the ominion Building Society, and transfered to the same as collateral security the moneys due them by the appellants in virtue of the deeds of purchase and building contract. The appellant company accepted the transfer and paid some monies on account, and finally a deed of settlement *acte de reglement de compte* was executed between the two companies, upon which was based the suit by H., the respondent, as assignee of the Dominion Mortgage Loan Company (which name was substituted for that of "The Dominion Building Society," by 40 Vic., ch. 80, D.), against the appellants.

The question argued on the appeal was whether the purchase of the lots and contract for building entered into by the directors was *intra vires* of the appellant company.

Held, affirming the judgment of the court below,—that as the transaction in question was for the purpose of carrying out the objects of the society in strict accordance with its views, it was not *ultra vires*, Strong and Gwynne JJ. dissenting.

APPEAL from a judgment of the Court of Queen's Bench for Lower Canada (Appeal side) (1).

The facts and pleadings are fully set out in the head note, and judgments hereinafter given.

Chrysler for appellants:—

The principal question is whether the appellants, a non-permanent building society, organized under ch. 69 Con. Stats. of Lower Canada, has power, immediately after organization and before any money had been paid upon the stock subscribed, to make the purchase of 100 building lots and to enter into a contract for the building of houses thereon.

(1) 3 Dorion's Rep. 175.

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The appellants submit that they have not such power. See ch. 69, sec. 2; sec. 4, ss. 1 and 2. Secs. 10, 11 and 13 are all in favor of this view, and in effect they provide that the society cannot invest in real estate, except by way of loan or advance upon property of the borrower. *Victoria Permanent Benefit Society* (1); *In re National Permanent Benefit Building Society* (2).

The second question is whether the Dominion Mortgage Loan Company, represented here by their assignee, the respondent, had the right to take the assignment of the mortgage from the appellants' company to Desmarteau and others. The first objection is to the power of the Dominion Parliament to incorporate what is a building society empowered to transact business in only the Province of Quebec.

Sec. 2 provides that the company shall have, hold and continue to exercise the powers, &c., enjoyed by the Dominion Building Society (a provincial society), and no other powers are conferred, nor is the Act declared to be one for the general advantage of Canada. Further, the Dominion Building Society had no power to lend money upon security in the nature of personal security.

A. Ouimet, Q.C., for the respondent:—

As to the last question: Permanent building societies are, in effect banking institutions, and not local corporations dependent upon provincial legislation. Further, the appellants cannot contest, by incidental procedure, the legal status of a corporation, but such status must be regularly attacked under 12 Vic., ch. 41, art. 997, C. C. (L. C.) See *Union Building Society* v. *Russell & Moran* (3).

As to the first question: A transaction by a corporation which is but a mode of attaining more easily the object of its creation, is not *ultra vires* when authorized

(1) L. R. 9 Eq. 605. (2) L. R. 5 Ch. 309.
(3) 8 L. C. R. 276.

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by the rules and regulations. *Mulloch* v. *Jenkins* (1); *Grimes* v. *Harrison* (2); *Bateman* v. *Ashton under Lyne* (3); *Hughes* v. *Layton* (4); *Brice* (5); *Richardson* v. *Williamson* (6); Art. 358 C. C. (L.C.)

J. Doutre, Q.C., followed for respondent.

A. Geoffrion, Q.C., for appellants, in reply.

Sir W. J. RITCHIE C.J.—Although no direct evidence to that effect has been adduced, it may well be presumed that the real organisation of the appellant company took place on the 21st of August, 1874. On that day, the by-laws were adopted and signed. On the 7th of October next following, the company through its directors, obeying the instructions of the shareholders, purchased by notarial deed, the particular lots described in the by-laws and contracted for the building of twenty-four cottages. The prices were precisely those determined by the rules and regulations of the society, $1,000 for each cottage, and $250 for the lots, being for each shareholder $1,250, the amount that each of them had agreed to pay. Moreover the amount was payable by instalments corresponding with the quarterly payments of the shareholders.

A year elapse during which the cottages are built and drawn by lot for distribution among the members. On the 11th October, 1875, the vendors of the lots and contractors for the building of the cottages, Desmarteau and others, happening to be shareholders in the Dominion Building Society, borrow money from the latter and transfer to the same as collateral security the moneys due them by La Compagnie de Villas du Cap Gibraltar, in virtue of the above deeds. The latter company accepted the transfer, paid some monies on

(1) 14 Bear. 628.
(2) 26 Bear. 435.
(3) 3 H. & N., 323.
(4) 10 Jur. N. S. 513.
(5) 2 Ed. 256.
(6) L. R. 6 Q. B. 276.

account now and then until 1877, when an action in recovery of the arrears then due was taken out against them in the Superior Court. On the 12th of January, 1877, judgment was entered condemning the present appellants to pay to the Dominion Building Society $4,703.09 with interest.

A few months after that judgment, which was accepted as final by both parties, the deed of settlement (acte de règlement de compte) upon which is based the present action was executed.

Building Societies are of course subject to articles 358 and 366 of the Civil Code. They possess only the powers specially conferred upon them by their charter or Act of Incorporation, and those that are necessary to attain the object of their creation; and they are subject to the disabilities arising from the law and comprised in the general laws of the country respecting mort-mains and bodies corporate, prohibiting them from acquiring immovable property except for certain purposes only.

The appellants were incorporated under cap. 69 of the Consolidated Statutes of Lower Canada, intituled: "An Act respecting Building Societies." This act deals with two kinds of building societies, non-permanent and permanent.

Their object is the same: to raise by periodical subscription from members a capital to be afterwards lent by the society upon hypotheque to facilitate the purchase of real estate or the building of houses. Both have the power of taking and holding real estate in certain cases: non-permanent building societies, for the purpose only of securing advances made to their members, or debts due to the society; and permanent building societies for these objects and also up to a certain fixed sum, for establishing thereupon a place of business.

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The following clauses of the said act are common to the two kinds of building societies:

Sect. 1, §2.—Such Society shall be constituted for the purpose of raising, by monthly or other periodical subscriptions of the several members of the said society, in shares not exceeding the value of four hundred dollars for each share (and by subscriptions not exceeding four dollars per month, for each share), a stock or fund for enabling each member to receive out of the funds of the society the amount or value of his share or shares therein, for the purpose of erecting or purchasing one or more dwelling houses, or other freehold or leasehold estate, such advance to be secured by mortgage or otherwise to the said society, until the amount or value of his share or sharesis fully paid to the said society, with the interest thereon, and with all fines or liabilities incurred in respect thereof.

§3 —The several members of such society may.....make and constitue rules and regulations for the government and guidance of the same.....so as such rules be not repugnant to the express provisions of this Act or to the laws in force in *Lower Canada*.....

Sect. 4, §1.—Every such society shall, by one or more of their said rules, declare all and every the interests and purposes for which such society is established; and shall also in and by such rules direct all and every the uses and purposes to which the money from time to time subscribed, paid or given to or for the use or benefit of the said society.

§2.—But the application of such money shall not in any wise be repugnant to the uses, interests or purposes of such society, or any of them to be declared as aforesaid.

This latter section has been taken from the Act. 12. Victoria, Ch. 57, Sect 4, which is in the following terms:

And be it enacted, that every such society so established as aforesaid shall in or by one or more of their said rules, declare all and every, the interests and purposes for which such society is intended to be established; and shall also in and by such rules direct all and every the uses and purposes to which the money which shall from time to time be subscribed, paid or given to or for the use or benefit of the said society, or which shall arise therefrom, or in any wise shall belong to the said society, shall be appropriated and applied; and in what shares or proportions and under what circumstances any member of such society or other person, shall or may become entitled to the same, or any part thereof; provided that the application thereof shall not in any wise be repugnant to the uses, interests or purposes of such society, or any of them to be declared as aforesaid.

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Sect. 10.—Any such society may take and hold any real estate or securities thereon *bonâ fide* mortgaged, assigned or hypothecated to the said society, either to secure the payment of the shares subscribed for by its members, or to secure the payment of any loans or advances made by, or debts due to such society, and may also proceed on such mortgages, assignments or other securities, for the recovery of the moneys thereby secured, either at law or in equity or otherwise; and such society may invest in the names of the president and treasurer for the time being, any of its surplus funds in the stocks of any of the chartered banks, or other public securities of the province.

Sect. 11.—Any such society may, from time to time, lend and advance to any member or other person, money from and out of its surplus funds, upon the security and mortgage, (*hypothèque*) of real estate.

Sect. 12.—Whenever any such society has received from any shareholder a mortgage or hypothec, or an assignment or transfer of any real estate belonging to him or her, to secure the payment of any advance, and containing an authority to the society to sell such real estate in case of nonpayment of any stipulated number of instalments, or sums of money (as every such society is hereby authorized to do).....such society may cause the same to be enforced by an action or proceeding in the usual course.

Sect. 13.—Every such society may advance, in the usual manner moneys or any real estate whatsoever of any member of the said society, as well for the actual purchase of the same and for the erection of buildings thereon, as generally upon the security of any real estate belonging to any such member, at the time of his borrowing such moneys, and may take a mortgage, hypothec or assignment of all such real estate whatsoever in security for such advances.

All the clauses of the Act, from section 21 onwards, relate only to permanent building societies, and among them are the following:

Sect. 24.—No such society, by its rules, regulations and by-laws authorized to borrow money, shall borrow, receive, take or retain, otherwise than in stock and shares in such society from any person or persons, any greater sum than three-fourths the amount of capital actually paid in on unadvanced shares and invested in real securities by such society; and the paid in and subscribed capital of the society shall be liable for the amount so borrowed, received or taken by any society.

Sect. 26.—Any such society may advance to members on the

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security of investing on unadvanced shares in the said society, and may receive and take from any person or body corporate, any real or personal security of any kind whatever, as collateral security for any advance made to members of the society.

Sect. 27.—Any such society may hold absolutely real estate for the purposes of its place of business, not exceeding the annual value of six thousand dollars.

The Act under which the Building Society (appellants) was incorporated, the object for which it was formed, and the manner in which its capital was to be employed, are mentioned in articles 1, 2, 3, 4, 5, 6 and 7 of its by-laws, viz:—

By-Laws of the Villa Association of Cape Gibraltar, (Lake Memphremagog,) adopted at the general meeting of the 21st August, 1874:

Art. I.—The society shall be called "the Villa Association of Cape Gibraltar, Lake Memphremagog:" La Campagnie de Villas du Cap Gibraltar, Lac Memphremagog.

It is incorporated in virtue of Ch. 69 of the Consolidated Statutes of Lower Canada, entitled: "An Act concerning Building Societies."

Its office shall be at Montreal.

Art. II.—The object of the society is to offer to its members a sure and advantageous means of investing their savings, to aid them in acquiring cottages on certain lots of land of one hundred feet frontage and three hundred feet depth, situate at Cape Gibraltar, Lake Memphremagog, county of Brome, Province of Quebeb, being a portion of the property known as the Furniss property.

Art. III.—The present capital of the society is $100,000, being the first issue. The directors may increase the capital when they may deem it necessary and fix such conditions of payment and other conditions that they may consider expedient. Each increase of capital shall be designated according to its issue.

Art. IV.—The present capital of the company forms the first issue and is divided into shares of one hundred dollars each, called the fixed stock; this issue is also composed of an indeterminate amount of accumulating stock.

The shares are divided into a certain number of accounts or numbers, each account or number consisting of ten shares.

Shareholders shall pay during ten years at the office of the society, for each account or number which they owe, the sum of one hundred dollars per annum in three instalments of $33.33\frac{1}{3}$; such instalments

shall represent the fixed stock. They shall moreover pay $25.00 per annum in three instalments of $8.33⅓; such instalments shall represent the accumulating stock, and they shall be continued until the expiration of the society.

Art. V.—The capital or funds of the society shall be employed—1st for the cost of administration; 2nd to purchase building lots on the property known as the "Furniss property" situate on the shores of Lake Memphremagog; 3rd to build on such lots cottages costing about $1,000.00 each for every one of its members or shareholders.

Art. VI.—These cottages shall be erected under the care and direction of the directors according to plans and contracts approved by them.

Art. VII.—As soon as one or more of such cottages shall be built as the directors may decide, there shall be a drawing by lot to designate the number or shareholder to whom such house and the lot upon which it is built shall belong.

These by-laws were approved of and signed as appears by plaintiff's exhibit A, viz:

"Nous, les soussignés, après avoir lu et examiné les règlements de la Compagnie de Villas du Cap Gibraltar, Lac Memphrémagog, les approuvons, les signons, et nous nous engageons de nous y conformer ainsi qu'aux changements et amendements qui pourront y être faits et nous y souscrivons le nombre de parts inscrites vis-à-vis nos noms respectifs.

No des Livres	Signatures des membres.	Occupation.	Domicile.	Nombre de Parts.	Montant
1	Chs. Pariseau.....	Marchand..	Montréal.	2	$2500.00
2	"	" ..	" ..		
3	C.G. Gaucher.....	" ..	" ..	2	2500.00
4	U. Emard, D.L.C.Q.&B	" ..	" ..		
		&.,	&c.,	&c."	

After much consideration I have come to the conclusion that the judgment of the Superior Court, confirmed by the Queen's Bench on appeal, is right and should be affirmed. It cannot be denied that when an incorporated company has certain limited powers it can only be bound when acting within the limits of those powers. Any acts or agreements outside of these powers are

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ultra vires, and for which the corporation will not be liable, or as Mr. Bryce puts it, "a corporation incurs no liability by engaging in transactions *aliunde* those for the prosecution of which it has been created"—and as corporations can be bound only within certain limits, outside those limits they are not bound, and therefore, as he says, "neither at law nor in equity will the other contracting parties obtain any redress in any form of suit upon the engagement itself from the corporation, whatever be the fraud or however unjust the refusal of such redress."

And as Jervis C. J., in the *East Anglian Railways Co.* v. *The Eastern Counties Railway Co.* (1) says:—

> If the contract is illegal, as being contrary to the Act of Parliament, it is unnecessary to consider the effect of dissentient shareholders; for, if the company is a corporation only for a limited purpose, and a contract like that under discussion is not within their authority, the assent of all the shareholders to such a contract, though it may make them all personally liable to perform such contract, would not bind them in their corporate capacity or render liable their corporate funds.

In *Riche* v. *Ashbury Railway Carriage Co.* (2) Mr. Justice Blackburn expresses himself thus:—

> I do not entertain any doubt that if on the true construction of a statute creating a corporation, it appears to be the intention of the legislature, express or implied, that the corporation shall not enter into a particular contract, every court, whether of law or equity, is bound to treat a contract entered into contrary to the enactment as illegal, and therefore wholly void, and to hold that a contract wholly void cannot be ratified.

And Lord Cairns in the *Ashbury Railway Carriage & Iron Co.* v. *Riche* (3), citing that passage says: "that sums up and exhausts the whole case." And by Lord Cranworth in the *Eastern Counties Railway Co.* v. *Hawkes* (4), and by Lord *Selborne* in the *Ashbury Railway Carriage & Iron Co.* v. *Riche* (5), it has been stated as settled law

(1) 11 C. B. 813.
(2) L. R. 9 Ex. 262.
(3) L. R. 7 H. L. 693.
(4) 5 H. L. Cas. 331.
(5) L. R. 7 H. L. 693.

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that a statutory corporation created by Act of Parliament for a particular purpose, is limited as to all its powers by the purposes of its incorporation as defined by that act.

The simple question then is as to the competency and power of the company to make this contract; if it was beyond the objects for which it was incorporated it was beyond the powers of the company to make it and was therefore void from the beginning and as if no contract at all had been made, and therefore could not be ratified though every member had originally sanctioned the action of the directors and authorized the placing of the seal of the company to the contract, or had subsequently ratified and confirmed the transaction. If, therefore, the contract in this case is of a nature not included in the memorandum of association, it would be *ultra vires* not only of the directors, but of the whole company, so that the subsequent assent of the whole body of shareholders would have no power to ratify it, because it is in its inception void or beyond the provisions of the statute. Has the corporation in this case then gone beyond the objects and purposes expressed or implied in the act? It must be borne in mind that there is a clear distinction as to what may be *ultra vires* the directors of the company and of the company itself, because there may be acts *extra vires* the directors and yet *intra vires* the corporation.

In the *Eastern Counties Railway Co.* v. *Hawkes* (1) Lord St. Leonards said:—

> The mere circumstance of a covenant by directors in the name of the company being *ultra vires*, as between them and the shareholders, does not necessarily dis-entitle the covenantee to sue upon it.

In *Bateman* v. *Mayor, &c.*, of *Ashton-Under-Lyne* (2), Martin B. says:—

> I do not at all mean to differ from any of the cases cited on the

(1) 5 H. L. Cas. 331 at p. 372. (2) 3 H. & N. 337.

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argument. I am content to take the law as laid down in *The East Anglian Railway Company* v. *The Eastern Counties Railway Company* (1), and in *McGregor* v. *The Official Manager of the Dover and Deal Railway Company* (2), in conjunction with what I have already referred to as being stated by Lord *Wensleydale* in *The South Yorkshire Ry. Co.* v. *The Great Western Ry. Co.* (3), and Mr. Justice *Erle* in *The Mayor of Norwich* v. *The Norfolk Ry. Co.* (4). The cases in equity which were cited were as between the companies and their shareholders, where the question is very different from that between a third person and the company, being a corporation, upon a *bonâ fide* contract.

The real question then will be: What were the objects for which the corporation was established? For those objects and those alone is the company in existence. The object is thus expressed in article II., "The object of the society is to offer to its members a sure and advantageous means of investing their savings, to aid them in acquiring cottages on certain lots of land of 100 feet frontage, situate at cape Gibraltar, lake Memphremagog, county Brome, province of Quebec, being a portion of the property known as the Furnis property."

Now, practically, is not the object to be attained by this arrangement and purchase identical with the object the act of incorporation and rules agreed on were intended to attain only in a different manner from that generally adopted by benefit building societies? Is there then anything in the express provisions of the statute creating the corporation, or by necessary and reasonable inference from its enactments, expressly or impliedly forbidding the making of the contract sought to be enforced, and thus showing that such an arrangement or contract was *ultra vires*, that is, that the legislature meant that such a contract should not be made, or, as Lord Wensleydale expresses it (5):—

Whether it can be reasonably made out from the Statute that this covenant is *ultra vires*, or, in other words, forbidden to be entered into.

(1) 11 C. B. 775.
(2) 18 Q. B. 618.
(3) 9 Ex. 84.
(4) 4 E. & B. 413.
(5) 9 Ex. 85.

And again at p. 88

It not being made out that the Act prohibits such a bargain the contract must be enforced.

Adopted by Erle J., and also by Martin and Channell BB., in *Bateman* v. *Mayor, &c., of Ashton-under-Lyne* (1)?

This contract was unquestionably made *bonâ fide* on both sides—there is no pretence for saying there was any breach of trust as against the shareholders, or that the agreement was in fraud of the proprietors of shares. On the contrary, all that was done in reference to this transaction was with the unanimous consent and concurrence of the shareholders, so that the simple question is: Was what has been done illegal as being forbidden by law, that is, not authorized by the act of incorporation and therefore prohibited by the act? So far from there being anything in this transaction unconnected with the object of the incorporation, or calculated to defeat the purposes of this incorporation, the object seems to me to be directly in furtherance of what the parties had in view, therefore I fail to see how it can be said that the transaction is prohibited by implication. If the purposes to be accomplished were substantially the same, then the means and modes by and through which such purposes are to be effected would not make the transaction *ultra vires*.

See the *Mayor of Norwich* v. *The Norfolk R'ly Co.* (2), as to the "distinction between a difference of purposes and a difference of means and modes by and through which the same purpose is to be effected." And in *Bateman* v. *The Mayor, &c.* (3), Bramwell B., who differed from the Court in the final conclusion, says at page 340:—

I in no way doubt the correctness of what Lord Wensleydale said in the *North Yorkshire R. Co.* v. *The Great Northern Railway Co.* (3)

Coleridge J., in *Mayor of Norwich* v. *Norfolk Railway*

(1) 3 H. & N. 335-6.

(2) 4 E. & B. 397 at p. 432.

(3) 9 Ex. 84.

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Co. (1), in speaking of the well considered judgment of Lord Langdale in *Colman* v. *Eastern Counties R'y Co.* (2) says:

This language points to an undenied distinction between a difference of purposes and a difference of means and modes by and through which the same purpose is to be effected, and where in any particular instance the lawfulness of a change is in question it will be discussed accordingly on different principles.

And after speaking of a corporation attempting to carry on or substitute a purpose different from that for which it has been created, he says:

If once you establish the substantial difference of purpose there is therefore no longer any question of degree or convenience. But where the corporation merely adopts different means or modes by or through which the original purpose is to be effected, the question will turn, not on the want of power, but on the interests and consent or otherwise of those affected by the change, and all considerations of degree and convenience will be material.

And again he says:

When one considers the immense extension and increase of corporate bodies in modern times, the vast variety of purposes for which they are created, the complication of circumstances under which they are to act, the liability to error in the formation of prospective plans as to detail, and the ever arising improvements in the means and appliances of mechanics and science, it would seem that public convenience and policy, as well as good sense and justice, require that, within the limits of a substantial adherence to purpose, the empowering clauses of incorporating instruments should be construed largely and liberally, so as not to defeat the purpose by a too narrow restriction of the means.

And Lord Campbell C. J. says:

In *South Yorkshire Railway and River Dun Co.* v. *Gt. Northern Railway Co.* (3), (I believe the most recent case upon the subject), my brother Parke, after observing that individuals and corporations which are the creations of law are bound by their contracts as much as all the members of a partnership would be by a contract in which all concurred, goes on to say: But where a corporation is created by Act of Parliament for particular purposes, with special

(1) 4 E. & B. 432. (2) 10 Beav. 1-16.
(3) 9 Ex. 55, 84.

powers, then indeed another question arises, their deed, though under their corporate seal, and that regularly affixed, does not bind them, if it appear by the express provisions of the statute creating the corporation, or by necessary or reasonable inference from its enactments, that the deed was *ultra vires*, that is, that the legislature meant that such a deed should not be made.

The question then appears to me to be simply this, whether it can be reasonably made out from the statute that this covenant is *ultra vires*; or, in other words, forbidden to be entered into by either the plaintiffs or defendants.

There is no doubt a distinction between a benefit building society and a freehold land society.

Kindersley V. C. thus speaks of benefit building societies (1):

Their object is that any individual member may borrow money from the society to enable him to buy or build a house, mortgaging it to the society as security for the money borrowed, and ultimately making it absolutely his own by paying off the mortgage out of his subscription.

In *Grimes* v. *Harrison* (2), Sir John Romilly said:

There is in my opinion a great distinction between a freehold land society and a benefit building society. A freehold land society buys land with the funds contributed by the members of the society and then divides it amongst them; but a benefit building society advances to its borrowing members money derived from the subscriptions and which the borrowing members themselves lay out in the purchase of land or buildings, and then mortgage them to the society. But this is quite clear, that in both cases the members must be bound by the rules constituting the society to which they have become parties and upon which they have acted.

The case of *Queen* v. *D'Eyncourt* (3), seems to me to be on all fours with this case, and to establish that there was no change of purpose, but simply a carrying out of the purpose contemplated by different modes and means.

The object of the society in that case, registered in 1852, under the 6 and 7 William IV. cap. 32 for the registration of Benefit Building Societies, as a benefit

(1) In *re* Kent Building Society, 1 Dr. & Sm. at p. 422.

(2) 26 Beav. 435.

(3) 4 B. & S. 820.

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building society, was to enable its members by weekly subscriptions to purchase freehold property in shares; that every member upon receiving the money advanced to him should execute a mortgage of the property offered as a security for all payments due or to become due according to the rules, upon his share or shares. In 1853 the directors purchased a freehold estate partly by the subscriptions of the members and partly with money borrowed for that purpose, and it was divided into allotments among such of the members as desired to have land.

In 1855 *L.*, who was a subscribing member, agreed to take two allotments and to continue his weekly subscriptions. In 1858 the company decided not to receive any further subscriptions from investing members, but to consider them as withdrawing members. After March, 1855, L. discontinued the payment of his weekly subscriptions, and after notice of arbitration, pursuant to one of the rules and 10 Geo. 4 ch. 56 s. 27, an award was made against him for payment of £69 8*s.* 4*d.* Upon his refusal to pay that sum an application was made to a Police Magistrate to enforce the award, which he declined to do. Upon a rule calling upon the magistrate to enforce the award, it was held: "That the society had not ceased to exist by reason of the purchase of the land; that if that was a mis-application of the funds the remedy for members who had not assented to it was in a Court of Equity."

In that case, as in this before us, the society purchased land, instead of its members doing so, with money advanced to them. It was contended, as in this case, that the society ceased to be a Benefit Building Society and lost the statutory powers given by Statute 6 & 7 Wm. 4 ch. 32. But it was established that converting the society from a benefit building society into a free hold land society was not illegal, and was not a contract

contrary to the policy of the act, and though the society could not compel a member to take an allotment instead of money, the members might agree among themselves that instead of the members receiving money the funds and credits of the society should be applied in the purchase of a tract of land to be afterwards allotted to them.

Cockburn C.J. thus speaks in *The Queen* v. *D'Eyncourt* (1) :—

This was a society registered as a Benefit Building Society under Statute 6 & 7 W. 4 ch. 32, and according to the rules, which have been duly certified, subscriptions and fines became payable by Layton, who was a member, and he has not paid them.

The main answer to the claim of the society is that it has been dissolved. It is said that by an arrangement among themselves the members have changed the purposes of their society and converted themselves into a Freehold Land Society, by applying the funds in the purchase of land, and therefore the society is put an end to. But that does not follow. If there has been a mis-appropriation of the funds contributed by the members, that is a case for the intervention of a Court of Equity on the application of any member who thinks himself aggrieved. But the society does not cease to exist because it does something which its rules do not warrant. A Court of Equity would restrain the directors from mis-applying the money recovered under the award, but so long as the society exists the members are bound by the rules, and the question of an alleged misapplication of its funds is foreign to the jurisdiction of the magistrate under the statute.

Crompton J. (2) :—

The converting the society from a Benefit Building Society into a Freehold Land Society is not in the nature of an illegal conspiracy. The society took certain powers under the Act of Parliament, by which its members received an amount of money to enable them to purchase land, and afterwards arranged among themselves that land should be purchased and allotted among them. There is nothing illegal, immoral, or vicious in that, so as to be void: it does not even amount to a contract contrary to the policy of the Act. The society could not compel a member to take an allotment instead of money; he would have a right to say: "I do not claim through this arrangement for allotting the land, but under the rules of the society,"—he traces his title from the arrangement made when he entered the society.

(1) At p. 831. (2) At p. 833.

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Blackburn J. (1):—

How has Layton, who had become a shareholder, taken himself out of the provisions of the Benefit Building Society Act? The rules of this society are framed with the view of enabling the members to purchase land. In fact the members have agreed among themselves that, instead of the members receiving money, the funds and credit of the society shall be applied in the purchase of a tract of land to be afterwards allotted among them. That was so far illegal, that under the rules they had no right to do it; it was a breach of trust. But Layton was a party to that proposal, and agreed to take part of the land so purchased on the terms of his paying his weekly subscriptions as usual. If that agreement had been carried out he would have got an allotment; and it would have been the same as if he had paid for it and the society had returned the money to him by way of loan.

I therefore think this transaction, thus carrying out the objects of this society in strict accordance with its rules, is not *ultra vires*—that is, in the language of *Parke*, B., (2) "it is not forbidden expressly or by implication by the Acts of Parliament relating to these companies, and I am happy to find that the law of this case coincides with the honesty of it, and does not sanction the breach by the defendants company of the solemn contract into which they have fairly entered and from which they are trying to escape."

STRONG J.—I am compelled to dissent from the majority of this court as well as from the court below. The opinion of Mr. Justice Cross, who differed from the other members of the Court of Queen's Bench, seems to be in all respects well founded. It appears that the purchase of lands by the appellants and the contract with Desmarteau and others for building the 24 cottages, entered into upon the 7th of October, 1874, as well as the deed of arrangement of the 10th of September, 1877, founded on the previous deed, were all *ultra vires* of the appellants and void.

(1) At p. 834.

(2) *South Y. Ry. Co.* v. *Gt. N. Ry. Co.* 9 Ex. 89.

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Taking this view of the case, it will be unnecessary to consider the question raised as to the status of the respondents.

The appellants are a non-permanent building society incorporated under the Con. Stats. L. C. ch. 69, from which their powers are to be ascertained. The principal matter for our determination is, therefore, whether that Act conferred upon them power to enter into contracts for the purchase of lands for the purposes for which the lands in question were avowedly acquired, and whether they have power to enter into building contracts such as that for the construction of the twenty-four cottages which Desmarteau agreed to build for them by the second agreement of the 7th October, 1874. The general law as to the power of corporations in the Province of Quebec is contained in art. 358 of the Civil Code which is as follows:—

The rights which a corporation may exercise besides those specially conferred by its title, or by the general laws applicable to its particular kind, are all those which are necessary to attain the object of its creation; thus it may acquire, alienate and possess property, sue and be sued, contract, incur obligations, and bind others in its favor.

The law of England upon the subject of the powers of corporations is stated by the Lord Chancellor (Cairns) in a late case (1), in the House of Lords, approving the definition of the rule laid down by Mr. Justice Blackburn in the same case in the Exchequer Chamber; Lord Cairns there says:

I do not entertain any doubt that if, on the true construction of a statute creating a corporation it appears to be the intention of the legislature, express or implied, that the corporation shall not enter into a particular contract, every court, whether of law or equity, is bound to treat a contract entered into contrary to the enactment as illegal, and therefore wholly void, and to hold that a contract wholly void cannot be ratified.

(1) *Ashbury Railway Carriage and Iron Co.* v. *Riche*, L. R. 7 H. L. 673.

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It thus appears that the law of England is less strict than that of the Province of Quebec, as explicitly declared by the code; for, whilst by the latter a corporation is deemed to possess no powers except such as are expressly or impliedly conferred upon it by the instrument of its creation, by the English law a corporation is held to have all legal powers which are possessed by a natural person, except such as are either by express words or by implication prohibited by the statute, (either general or special) charter, or articles of association which has called it into legal existence.

A late American work on the law of corporations (1), points out that the decisions of the American courts have laid down a rule on this subject identical with that which had been adopted by the Quebec code, and therefore a rule which in its mere terms of statement differs from the definition adopted by the House of Lords in *Riche* v. *Ashbury Railway Carriage and Iron Co.*, but adds that the law is substantially the same in both countries in its effects and result, inasmuch as a power which, according to the doctrine of the Supreme Court of the United States would be considered as so foreign to the proposed objects of a corporation as not to be impliedly conferred upon it, would equally, according to the English rule, be *extra vires* as impliedly prohibited. I mention this apparent distinction merely to show that there is no reason why English authorities should not apply, not of course directly as binding decisions, but so far as they appear to have been well decided as guides in a case like the present.

There has been some confusion in the cases arising from the use of the term *ultra vires* being indiscriminately applied to the Acts of corporations or the governing bodies of corporations objectionable on very different grounds; it is sometimes applied to acts in which the

(1) Morawetz on Private Corporations, P. 149 *et seq.*

governing body of the corporation, such as a board of directors, have transcended the powers delegated to them, though the Act objected to was not beyond the powers of the corporation itself; in other cases, it has been applied to acts of the corporation itself, which, though not beyond the capacity conferred upon it by the Act of incorporation, exceeded the powers to which the by-laws or constitution had limited the exercise of their powers; but in its more general and proper signification it is applied to acts in excess of the powers conferred on the corporation by its Act of incorporation or charter. I refer to these distinctions for the reasons that most of the cases cited in the appellant's factum belong to the first and second, and not to the last of these classes.

The enquiry which we must make in the present case is thus confined to this, does the Con. Stats. L. C. ch. 69 give authority to non-permanent building societies, formed pursuant to the provisions of that Act, to enter into such contracts as those of the 7th Oct., 1874, for the purchase of these lands and the building of cottages.

It is to be observed, in the first place, that no authority to hold real estate is given to the society otherwise than by the 10th section, which empowers the society to take and hold real estate mortgaged, assigned or hypothecated to it, to secure payment by the members of the shares, or to secure loans or advances made by the society. This is the only express power on the subject.

The purpose for which such societies are constituted are declared in the second sub-section of the 1st section of the Act, as follows:

> Such society shall be constituted for the purpose of raising by monthly or other periodical subscriptions of the several members of the said society, in shares not exceeding the value of $400 for each share, (and by subscriptions not exceeding $4 per month for each share), a stock or fund for enabling each member to receive out of the funds of the society the amount or value of his share or shares therein for the purpose of erecting or purchasing one or more

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dwelling houses, or other freehold or leasehold estate, such advance to be secured by mortgage or otherwise to the said society until the amount or value of his share or shares is fully paid to the said society with the interest thereon, and with all fines or liabilities incurred in respect thereof.

This section contains all that is to be found in the Act as to the object and design of the society; and it is manifest that it does not confer power to purchase or acquire land, or to build houses. The objects are very plainly stated; they are to carry on the society until, by means of the monthly subscriptions of the members, the interest in loans, fines, and other legitimate sources, the capital stock or fund is realized, when the society will terminate, and members who have not by borrowing received their shares in advance will be entitled to be paid the full amount of the shares for which they subscribed; and a further object is, to advance on sufficient security upon freehold or leasehold lands, the amount of their shares to borrowing members, the security being not of course to re-pay the loan, but to continue the monthly payments or subscriptions on the borrower's shares, interest and fines, until the termination of the society in the manner before mentioned. It is true, it is said, that the intention is to enable members to lay out the amount of their shares advanced to them, in purchasing or building houses, but there is nothing in the Act making it obligatory upon them so to apply the money which they may raise by borrowing upon, or taking their shares in advance, for they may, as, in practice, is constantly done, use the money in any way they may think fit, and there is nothing authorizing the society to lay out the money for them in the purchase of land or in building houses. So far from the Act conferring any power upon the society to acquire land or enter into building contracts, we find the 10th section giving express power to take land in the only way, and for the only purpose, contemplated by the legislature, namely,

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as security for money advanced. And even as regards surplus moneys, by which I mean moneys in the hands of the society arising from subscriptions and other legitimate sources authorized by the Act, and not taken up by borrowing members, and which, therefore, the interests of the society require should be invested in some manner in order that a profit may be derived, we find that the only investments of such moneys authorized are those indicated in the 10th section, namely, mortgages of real estate, the stock of chartered banks, and other public securities of the province. From this 10th section I think it is evident that it was not the intention of the legislature to empower building societies to invest in the purchase of land or in the building of houses. If they can so invest, it can only be because some implied power to do so is to be inferred, but I have read the Act many times and have failed to find any ground for such an implication, and the respondents have failed to point out any particular clause from which it may be inferred. If we were so to hold, we should be obliged also to hold that it was open to the society to invest in any securities they might think fit, and to construe the 10th section as in no way restrictive, but as merely expressing what was already implied. Such a mode of construction is not, in my opinion, admissible. I think the only use to which the moneys of the society can be put before its termination, is loans on mortgages to borrowing members, and investments in mortgages, bank shares and public securities.

That I am right in this view of the construction of the Act is, I think, confirmed by the consideration that the scheme which these societies were intended to carry out was borrowed from the early Building Societies Acts in England, and it is clear that without special powers they were not authorized to purchase land.

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That the object of the English societies was the same as this, appears from the case of The Kent Benefit Building Society (1), when Kindersley V.C. describes the object of such societies to be:—

> That any individual member may borrow money from the society to enable him to buy or build a house, mortgaging it to the society as security for the money borrowed, and ultimately making it absolutely his own by paying off the mortgage out of his subscription.

The same case also shows that it was not within the scope of the powers conferred by the Act of parliament authorizing the creation of such societies that they should themselves acquire land by purchase.

In short, the conclusion I come to is, that whilst the expressed object of the society is to enable members to buy or build houses, yet that object is to be attained, and attained only, in the mode of operation pointed out by the act, namely, by borrowing money from the society, and with the money purchasing or building houses, and that this mode of carrying out the scheme of the act is essential, and one to which its purposes are to be restricted; and I cannot agree that this prescribed mode of proceeding can be set aside, and the same result secured by the society itself purchasing houses and lands or building houses and reselling them to members.

Therefore, these contracts of the 7th October, 1874, were, *ipso jure*, void and inexisting, and being so void were not susceptible of confirmation, and consequently the deed of arrangement of the 10th September, 1877, was likewise void, and this action must therefore fail.

It is said, however, that the former judgment of the Superior Court rendered on the 12th May, 1877, in an action brought to recover the amount of instalments alleged to have become due on the contracts of the 7th October, 1874, is sufficient to establish the defence of

(1) 1 Dr. & Sm. 417.

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chose jugée pleaded to the present action, I am unable to assent to this. The defence now pleaded that the contracts were *ultra vires* was not raised in that action. But it appears from the judgment itself that there never was any actual adjudication in favor of the plaintiff in the former action of any disputed questions, on the contrary the "*considérants*" of the judgment show that the action would have been dismissed, upon the ground that all payments received from shareholders up to the time of the institution of the action had been paid over according to the contracts, if the defendants (the present appellants) had not consented to a judgment for the sum of $4,703.09. A judgment thus rendered by consent cannot have the effect of *chose jugée*, as to the legal validity of the obligation sued upon, in a subsequent action upon the same obligation, for it amounts to nothing more than this, that there being certain matters in dispute between the parties, an arrangement or "transaction" takes place between them, which is by consent confirmed and made exigible by the judgment of the court. Such a judgment cannot have the effect of a judgment recovered adversely, and no more concludes the appellants from now setting up the defence of *ultra vires* to another demand founded on the same deed than the voluntary payment of the amount for which the judgment was allowed to pass, would have done. Further, a judgment in respect of one instalment, portion of the debt, does not constitute *res judicata* as regards subsequent instalments, being other portions of the same debt. Merlin Rep. tit. *chose jugée p.* 320. See Laurent, vol. 20, p. 16.

I am of opinion that the appeal should be allowed.

FOURNIER J.—Le présent appel est interjeté d'un jugement de la cour du Banc de la Reine, siégeant en appel pour le district de Montréal, confirmant celui

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que la Cour Supérieure pour le même district avait rendu le 29 avril 1881, condamnant l'appelante à payer à l'intimé la somme de $3,920.28, pour un versement avec intérêt, dû par l'appelante, en vertu d'un règlement de compte fait par acte authentique du 10 septembre 1877, à la Compagnie de Construction de la Puissance. Cette compagnie d'abord organisée en vertu du ch. 69 des Statuts Refondus, B. C., reçut une extension de pouvoirs, en vertu d'un acte de la Puissance, 40 Vict., ch. 80, amendant sa charte et changeant son nom en celui de Compagnie de prêts hypothécaires de la Puissance. Devenue insolvable, elle est actuellement représentée par l'intimé comme syndic à sa faillite.

La Compagnie des Villas a été aussi organisée en vertu du chapitre 69, Statuts Refondus, B. C. Elle ne possède que les pouvoirs conférés par cet acte et par les règlements faits en conformité d'icelui.

Peu de temps après son incorporation, la dite compagnie, par le ministère de son président et vice-président, acheta par acte de vente en date du 7 octobre 1874, de Desmarteau et autres, promoteurs de la dite compagnie, cent lots à bâtir, situés sur les bords du Lac Memphrémagog, contenant chacun cent pieds de front sur trois cents de profondeur, pour la somme de $25,000, payables en dix ans, par paiements trimestriels de $625, chacun.

Par marché et devis, passés le même jour, entre la dite compagnie et Desmarteau et autres, ces derniers s'obligeaient à construire, pour la somme de $24,000, 24 cottages (villas) sur les lots achetés par l'acte précité.

Par acte d'obligation et transport en date du 14 octobre 1875, Desmarteau et autres se reconnurent endetté envers la susdite société de construction de la Puissance en diverses sommes mentionnées au dit acte, et, pour en assurer le remboursement, transportèrent à la dite société, les deux sommes, ci-dessus mentionnées,

de $25,000 et de $24,000, dues aux dits Desmarteau et autres par la compagnie appelante, en vertu des deux actes ci-dessus du 7 octobre 1874.

Après ces diverses transactions les deux compagnies, parties en cette cause, firent le 10 septembre 1877 un acte d'arrangement par lequel la compagnie appelante se reconnut endettée envers la Compagnie des prêts hypothécaires de la Puissance en la somme de $40,599.32, balance restant due en vertu de l'acte de vente et de l'acte de devis et marché dont les montants respectifs dus par l'appelante à Desmarteau et autres avaient été par eux transportés, comme ci-dessus dit, à la dite Compagnie de prêts hypothécaires avant que son nom eût été changé comme susdit. A l'action de l'intimé l'appelante a plaidé: 1o. l'inconstitutionalité de l'acte de la Puissance 40 Vict., ch. 80, incorporant l'intimé; et 2o. la nullité des actes de vente et de marché et devis, en date du 7 octobre 1877, en alléguant que par l'acte en vertu duquel elle est incorporée (ch. 69, Statuts Refondus, B. C.), elle n'avait aucun pouvoir d'acquérir des immeubles ni de faire construire des maisons, parce qu'elle n'avait pas alors en caisse, les deniers suffisants pour payer les dites acquisitions et constructions.

Le montant de la créance réclamée n'est pas contesté. Les seules questions à résoudre sont celles que je viens d'indiquer sommairement.

Quant à la première, celle de la constitutionalité de l'acte 40 Vict., ch. 80, il est inutile de s'en occuper, car la question a été, depuis que cette cause a été plaidée, tranchée par une décision du Conseil Privé.

Il ne reste que celle de la validité ou nullité des procédés adoptés par la compagnie appelante pour parvenir au but qu'elle s'était proposé, savoir: de procurer à chacun de ses membres le moyen de recevoir à même les fonds de la dite société, le montant de ses actions pour construire ou acheter un ou plusieurs immeubles,

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Les actionnaires de la compagnie appelante, tous également pressés d'entrer en possession de leurs villas, n'attendirent pas pour la réalisation de leurs désirs, que la caisse de la dite compagnie fût remplie au moyen du procédé trop lent de la rentrée des souscriptions périodiques. Ils crurent devoir adopter un mode beaucoup plus expéditif que celui indiqué par le ch. 69, en vertu duquel ils s'étaient incorporés. Ils eurent recours à l'emprunt d'une manière indirecte, comme on l'a vu par les actes ci-haut cités, pour se procurer de suite les fonds nécessaires pour la construction de 24 villas. Les deniers nécessaires à cette fin leur furent avancés par l'intimé, en vertu des actes ci-dessus cités, consentis par les officiers de l'appelante, dûment autorisés à cet effet par les règlements de la dite compagnie, signés par tous et chacun des actionnaires. L'illégalité invoquée par l'appelante consisterait donc dans le fait d'avoir outrepassé ses pouvoirs en empruntant pour acheter des terrains, pour faire construire des villas, suivant les règlements de la dite société,—au lieu d'avoir suivi le mode indiqué par le chapitre 69, de ne procéder à l'acquisition d'immeubles et de ne faire des avances aux actionnaires qu'avec le capital fourni par la rentrée des souscriptions périodiques, but des sociétés de bâtisse, et le mode de procéder. La section 2 du chapitre 69, énonce ainsi qu'il suit le mode de procéder:

Sect. 1. § 2.—Such Society shall be constituted for the purpose of raising, by monthly or other periodical subscriptions of the several members of the said Society, in shares not exceeding the value of four hundred dollars for each share (and by subscriptions not exceeding four dollars per month, for each share), a stock or fund for enabling each member to receive out of the funds of the Society the amount or value of his share or shares therein, for the purpose of erecting or purchasing one or more dwelling houses, or other freehold or leasehold estate, such advance to be secured by mortgage or otherwise to the said Society, until the amount of value of his share or shares is fully paid to the said Society, with the interest thereon, and with all fines or liabilities incurred in respect thereof,

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Le but de la société appelante est énoncé comme suit en l'article 2 de ses règlements :—

Art. II.—The object of the society is to offer to its members a sure and advantageous means of investing their savings, to aid them in acquiring cottages on certain lots of land of one hundred feet frontage, situate at Cape Gibraltar, Lake Memphremagog, county of Brome, Province of Quebec, being a portion of the property known as the Furniss property.

Comme on le voit, le but de la société appelante est conforme à celui du ch. 69 :—faciliter aux actionnaires l'acquisition d'immeubles. Le mode adopté pour y parvenir, est différent, il est vrai de celui indiqué par l'acte ; mais il a été délibérément accepté par tous les actionnaires qui ont donné à cet effet aux officiers et au bureau de direction de la dite compagnie, tous les pouvoirs nécessaires pour adopter le mode de l'emprunt qui a été suivi comme on l'a vu plus haut. L'article suivant des dits règlements autorisait les dites transactions :—

Art. XXXIII.—The president, and, in his absence, the vice-president, and secretary-treasurer, on deliberation of the board of directors, thereto authorizing them, may in the name of the society negotiate all sales or purchases of bank stock or public funds, lend and contract all loans deemed necessary and useful by the directors, on such conditions, and under such restrictions, as may be approved by them; they may, in the same manner, and on similar deliberation, accept, acquire, hold, sell, alienate, transfer, bind and mortgage for and in the name of the society, all real estate, heritages, moneys, merchandise, moveables and effects whatsoever, and all titles, deeds, and other instruments bearing obligations for moneys, transfers, cessions and subrogations, acts or titles, and all other effects, and all rights and claims, which the society may lawfully accept, acquire, hold, sell, alienate, transfer, bind and mortgage, in virtue of the law, make abatements, in part and compound with all persons whatsoever, for claims of which they may consider the recovery doubtful, or more or less uncertain or distant, make abatement, in certain cases, of fines incurred and all acts required to give effect to the above, shall be signed by the president, or in absence, or if he be personally interested, by the vice-president, and also counter-signed by the secretary-treasurer, and if the latter be absent,

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or personally interested, by the assistant-secretary-treasurer, or by any other person specially authorized by resolution of directors.

Il est à remarquer que la nullité des procédés n'est invoquée que par l'appelante. Aucun des actionnaires ne semble avoir voulu s'en prévaloir, car, dans les nombreux procès que l'appelante a eu pour soutenir cette prétention, aucun actionnaire n'a jugé à propos d'intervenir pour en prendre avantage. On comprend qu'un actionnaire qui n'aurait pris aucune part à la confection des règlements et qui ne les aurait jamais ratifiés puisse être reçu à invoquer ces moyens de nullité, mais la compagnie elle-même, autorisée à faire ces transactions, qui les a complétées en recevant les deniers empruntés de l'intimé et à laquelle il ne reste plus qu'à en faire le remboursement, ne le peut certainement pas. La loi ne peut tolérer un aussi étrange et aussi injuste procédé. Aussi fait-elle la distinction entre les nullités qui sont contraires au but de la loi et celles qui n'affectent que les moyens employés pour parvenir au but de loi.

Dans le cas actuel, la transaction attaquée ayant été complétée, il n'est pas au pouvoir de la compagnie appelante, d'invoquer son incapacité, comme l'établit l'autorité suivante :—

But when a transaction of the kind now under consideration is completed on the part of the other contracting party, every principle of common sense and equity requires that the corporation should not be permitted to repudiate payment therefor, or the other party due completion thereof by itself on the ground that the transaction, though admitted to be within its possible capacities, it outside its actual powers then called into existence. The very defence discloses fraud. Brice (1).

When a contract to which a corporation is a party has been fully executed on the other part, and nothing remains to be done but the payment by the corporation, it will not be allowed to set up that the contract was *ultra vires*. *Oil Creek, etc, R. R. Co.* v. *Passenger Transp. Co.* (2).

A corporation is estopped from setting up the defence in an action

(1) 2nd Ed. p. 833. (2) 83 Pen. St., 160.

to recover money loaned to it that the money was borrowed and expended in a business beyond the corporate powers, that the lender knew the use intended was *ultra vires* makes no difference, so long as the purpose was not in itself one of an immoral or illegal character.

L'appelante a cité plusieurs décisions des tribunaux d'Angleterre qui maintiennent ses prétentions jusqu'à un certain point. Elles sont fondées sur le statut 6 et 7, William 4, ch. 32, qui déclare que les *Benefit Building Societies* sont formées dans le but de créer, au moyen de souscriptions périodiques, un fonds pour permettre aux actionnaires :

To erect or purchase one or more dwelling houses, or other real or leasehold estate to be secured *by way of mortgages* to such society until the amount of his or her share shall have been fully repaid.

Le chapitre 69 de nos statuts, qui a été modelé sur le statut impérial 6 et 7 William 4, ch. 32, a donné aux société de bâtisses, organisées en vertu de ses dispositions, la faculté d'assurer leurs avances, non-seulement par hypothèque (*by way of mortgage*), mais aussi par tout autre moyen,

Such advance to be secured by mortgage or otherwise to the said society,

tandis que le statut impérial n'admet que le moyen de l'hypothèque (*mortgage*). En conséquence de cette extension de pouvoir les précédents cités par l'appelante n'ont guère d'application dans la présente cause. Cependant malgré les termes restrictifs de l'acte 6 et 7, William 4, on trouve la cause de La *Reine* v. *d'Eyncourt et al.* (1), parfaitement analogue au cas actuel, dans laquelle il fut décidé que l'acquisition d'immeubles contrairement au mode indiqué par l'acte 6 et 7 William 4, ch. 32, n'avait pas eu l'effet de mettre fin à l'existence de la société.

La société dont il s'agit dans la cause de La *Reine* vs. *D'Eyncourt*, après avoir été organisée, comme la compagnie appelante, pour l'acquisition de propriétés au

(1) 4 B. & S. 820.

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moyen de souscriptions périodiques, en vertu de l'acte 6 and 7 William 4, ch. 32, dont les dispositions sont en grande partie reproduites dans le ch. 69, Stat. Ref., B.C., acheta, partie avec l'argent reçu des souscripteurs, et partie avec de l'argent emprunté à cet effet, des terrains qui furent ensuite divisés en lots et partagés entre ceux qui voulurent s'en porter acquéreurs. Ceux qui n'avaient point reçu de lots continuèrent comme membres déposants (*investing members*) à la différence de ceux qui avaient reçu des lots. Laxton, l'un de ceux qui avait pris des lots et continué sa souscription, fut averti comme les autres que la société ne recevait plus de souscription des membres déposants, mais qu'elle les considérerait comme des membres retirés. Après cet avis il cessa de payer sa souscription et une sentence arbitrale (*award*) fut prononcée contre lui pour la somme de £60-8-4, montant de ses arrérages. Sur son refus de payer, une demande fut faite au magistrat pour faire exécuter la sentence ; mais celui-ci refusa de l'accorder. Sur une règle de cour pour ordonner au magistrat d'exécuter la sentence, la cour du Banc de la Reine décida que la société n'avait pas cessé d'exister en conséquence de l'achat de terrains, que s'il y avait eu emploi illégal des fonds de la société, le moyen d'y remédier pour les membres qui n'y avaient pas donné leur consentement était de s'adresser à la cour de Chancellerie, et que la sentence arbitrale avait été duement prononcée. Voici comment s'exprime à ce sujet Cockburn, C.J., (1).

This was a society registered as a benefit building society under statute 6 and 7 *William* 4, c. 32, and according to the rules which have been duly certified subscriptions and fines became payable by Laxton who was a member, and he has not paid them.

The main answer to the claim of this society is that it has been dissolved. It is that by an arrangement among themselves the members have changed the purposes of this society and converted

(1) 4 B. & S. p. 831.

themselves into a freehold land society, by applying the funds in the purchase of land, and, therefore, the society is put an end to. But that does not follow. If there has been a misappropriation of the funds contributed by the members, that is a case for the intervention of a court of equity on the application of any member who thinks himself aggrieved. But the society does not cease to exist because it does something which its rules do not warrant. A court of equity would restrain the directors from mis-applying the money recovered under the award, but so long as the society exists the members are bound by the rules, and the question of an alleged misapplication of its funds is foreign to the magistrate under the statute. It is also said that the resolution of the directors not to call on the investing members for further subscriptions left no shareholders but those participating in the freehold lands scheme. I think that if such a resolutien was within the scope of the power of the directors it did not disolve the society, but only made the number of members less than originally contemplated. I think, further, that such a resolution was inoperative and that investing members might insist upon paying up their subscription and getting the benefit of the society, unless they had precluded themselves by concurring in the resolution to treat themselves as withdrawing members. But all these matters are for the consideration of a court of Equity. The magistrate had only to consider, first, whether the society on whose behalf the application was made was in existence; secondly, whether the person against whom the application was made was a member; and thirdly, whether he had become liable, under the rules of the society, to pay the sum for which the award was made.

Crompton, J. :—

The converting the society from a benefit building society into a freehold land society is not in the nature of an illegal conspiracy. The society lost certain powers under the act of parliament by which its members received an amount of money to enable them to purchase land, and afterwards arranged amongst themselves that land should be purchased and allotted among them. There is nothing illegal, immoral, or vicious in that, so as to be void; it does not even amount to a contract contrary to the policy of the act. The society could not compel a member to take an allotment instead of money; he would have a right to say: "I do not claim through this arrangement for allotting the land, but under the rules of the society," he traces his title from the arrangement made when he entered the society.

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I think it was purposely made (the award). How has *Layton* who had become a shareholder, taken himself out of the provisions re. the Benefit Building Society Act? The rules of this society are framed with the view of enabling the members to purchase land. In fact the members have agreed among themselves that, instead of the members receiving money, the funds and credit of the society shall be applied in the purchase of a tract of land to be afterwards allotted among them. That was so far illegal that under the rules they had no right to do it; it was a breach of trust. But *Layton* was a party to that proposal, and agreed to take part of the land so purchased on the terms of his paying his monthly subscriptions as usual. If that agreement had been carried out he would have got an allotment; and would have been the same as if he had paid for it and the society had returned this money to him by way of loan.

Les raisonnements de ces honorables juges au sujet de la validité des achats de terrain faits contrairement aux dispositions de l'acte 6 et 7 William 4, ch. 32, sont parfaitement applicables à cette cause et démontrent d'une manière évidente que ce qu'il y avait d'irrégulier dans les procédés de l'appelante a été couvert par le consentement des actionnaires L'appelante doit être renvoyée avec dépens.

HENRY J.—I have not written a judgment in this case; but I entirely agree with the Chief Justice and Judge Fournier that this appeal ought to be disallowed for the reasons given by them.

GWYNNE J.—According to my understanding of the statute by force of which the appellants were author ised to act, the contract made by the company for the purchase of the land in question was wholly *ultra vires* and no action against the company upon that contract can be maintained. The appeal, in my opinion, therefore, should be allowed.

Appeal allowed with costs.

Solicitors for appellants: *Beique & McGoun.*

Solicitors for respondent: *J. Ald. Ouimet.*

MICHAEL SINNOTT AND ALBERT MONKMAN ..... } APPELLANTS;

AND

THOMAS C. SCOBLE, W. G. DENISON AND S. TRUDEAU ..... } RESPONDENTS.

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*Jan. 19.

*June 23.

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

Permits to cut timber (Man.)—Rights of holders of—Dominion Lands Act, 1879, 47 *Vic., ch.* 71, *sec.* 52—*Interim Injunction—Damages.*

On the 21st November, 1881, Sinnott *et al.* obtained a permit from the Crown Timber Agent, Manitoba, "to cut, take and have for their own use from that part of range 10 E, that extends five miles north and five miles south of the Canadian Pacific Railway track," the following quantities of timber: 2,000 cords of wood and 25,000 ties, permit to expire on 1st May, 1882. They obtained another permit on the 10th February, 1882, to cut 25,000 ties. In February, 1882, under leave granted by an Order in Council of 27th October, 1881, Scoble *et al.* cut timber for the purpose of the construction of the Canadian Pacific Railway from the lands covered by the permit of the 21st November, 1881. Sinnott *et al.* by their bill of complaint claimed to be entitled by their permit to the sole right of cutting timber on said lands until the 1st May, 1882, and prayed that the defendants Scoble *et al.* might be restrained by injunction from cutting timber on said lands, and might be ordered to account for the value of the timber cut. An interim injunction was granted agianst Scoble *et al.* who justified their acts under the Order in Council of the 27th October, 1881, and denied the exclusive possession or title to the lands or standing timber. The injunction was made perpetual by the judge who heard the cause, but, on re-hearing, the judgment was reversed, and it was ordered that an enquiry should be made as to damages suffered by defendants by reason of the issue of the interim injunction at the instance of the plaintiffs.

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

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Held, that the decree made on re-hearing by the Court of Queen's Bench of Manitoba should be affirmed, and that the permit in question did not come within the provisions of the Dominion Lands Act of 1879, and did not vest in Sinnott *et al.* (the plaintiffs) any estate, right or title in the tract of land upon which they were permitted to cut, nor did it deprive the Government from giving like licenses or others of equal authority to other persons, as long as there was sufficient timber to satisfy the requirements of the plaintiff's licenses.

APPEAL from the judgment given and the decree made by the full Court of Queen's Bench for Manitoba, reversing the decree made in favor of the appellants by Miller J.

The pleadings and evidence are referred to at length in the judgment of Ritchie C.J.

Dalton McCarthy Q.C. for appellants:

The question is whether the permits granted by the Department of the Interior to cut timber on Dominion Lands enables licensees to protect their property. The license here is equivalent to a sale of the standing timber, and my first proposition is that having actual possession of this limit with the assent of the Crown, appellants are entitled to exclude trespassers, such as the respondents. *Harper* v. *Charlesworth* (1); *Asher* v. *Whitlock* (2); *Chambers* v. *Donaldson* (3); *Gilmour* v. *Buch* (4).

The recent consolidation of the Dominion Lands Act also shows that the intention was, and is, that these short leases or permits should carry with them the right to exclusive possession. See Dominion Lands Act, 1883, 47 Vic., ch. 71, sec. 52.

The permit gives the appellants leave to cut a certain quantity of timber, and it must be assumed that the Government intended to grant it under statutory powers, because they had no other. If it is held that

(1) 4 B. & C. 574.
(2) L. R. 1 Q.B. 1.
(3) 11 East 65.
(4) 24 U. C. C. P. 157.

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it must, of necessity, be for a year, the permit should not be held invalid, but that declaration at the end of it which says: "this permit expires 1st May, 1882," should be held invalid, as an unauthorized limitation.

The appellants were responsible to the Government for damage done to timber on their limit by fire, by provisions of their permit; and the Government could not have intended to allow others on the limit while exacting fulfilment of this provision.

In any case they had a right to cut 25,000 ties and 2,000 cords of wood, and further quantity of 25,000 ties under the two permits, and I contend that both permits are perfectly good, but even if the last was not appellants had not cut what they were permitted to cut by the first permit, and were entitled to retain exclusive possession and a choice of locality and timber until all was cut and removed.

As to the decree made at the hearing it only directed the continuation of the injunction until the expiry of the plaintiffs permits; but, by mistake, it was drawn so as to continue it indefinitely, and on the settlement of it the defendants' solicitor raised no objection. The plaintiffs have always been willing, and offered to allow it to be amended in that respect, but the defendants' counsel did not desire this and said, if you are entitled to an injunction at all that makes no difference.

Hector Cameron Q. C. and *T. S. Kennedy* for respondents.

The plaintiffs bill alleges they were in actual rightful possession of this tract of land, if this fact has not been proved, the bill should be dismissed.

The respondents contend then, first, that the appellants have shown no title to the land or timber which would entitle them to interfere with the respondents cutting and removing timber also from the same lands,

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and therefore the bill for an injunction will not lie and the appeal must be dismissed.

And second, that they were lawfully cutting and removing timber from off said lands by reason of the agreement with the railway and under rights conferred by the Order in Council.

The following cases were cited: *Carr* v. *Benson* (1); *Harper* v. *Charlesworth* (2).

Dalton McCarthy Q.C. in reply, cited *Newby* v. *Harrison* (3); Kerr on Injunctions (4).

Sir W. J. RITCHIE C.J.—Plaintiffs, by their bill on 1st paragraph, allege that they were in certain and rightful possession of range 10, east of the principal meridian, Province of Manitoba, that extends five miles north and five miles south of the Canadian Pacific Railway track, under and by virtue of a permit to cut timber on Crown Lands issued to plaintiff by Anderson, crown timber agent, by authority of the Minister of the Interior, in accordance with the provisions of the Dominion Lands Act, and are entitled by such permit to the sole right of cutting timber on the said lands until the first of May next.

In the second paragraph, that defendants have, from 3rd February, instant, continually, trespassed upon said lands by cutting down and removing timber and trees growing on lands.

Third paragraph, that defendants continue to threaten and intend to continue to trespass, although requested to desist; have men and teams, cutting and hauling away timber. Plaintiffs pray that defendants may be restrained by injunction and ordered to account and ordered to pay costs and other relief.

Defendants for answer, say to first paragraph, plaintiffs had a permit to cut on said lands, dated 21st No-

(1) 3 Chy. App. 524.
(2) 4 B. & C. 574.
(3) 1 John. & H. 393.
(4) P. 114.

vember, 1881, which had been agreed to be given them previous to 1st November, but only to the extent of 2,000 cords of wood and 25,000 ties, and had not sole right to cut timber and other trees on said land.

As to the second paragraph of the said bill, we say that by an Order in Council, which is in the words and figures following:—

Copy of a Report of a Committee of the Honorable the Privy Council, approved by His Excellency the Governor-General in Council, on 1st November, 1881.

On a Report dated 27th October, 1881, from the Minister of the Interior, submitting an application by the Canadian Pacific Railway Company, for permission to cut ties and timber requisite for the construction of the railway of the territory, lying between Broken Head River and the western boundary of the territory, acquired by the late Government of Canada, from the Indians, under the treaty commonly known as the "Robinson Treaty," and for a distance throughout of twenty miles in depth on each side of the Canadian Pacific Railway line.

The Minister observes that the company represents it experiences difficulty in obtaining the requisite wood for the great extent of railway, which it intends to complete next season.

The Minister therefore recommends that the company be given permission to cut timber, for the purposes of construction of the line on any lands belonging to the Dominion, included within the space above described, subject to the payment of dues by the company on each class and kind of timber taken at the rates set forth in the following schedule:

Fence posts, 8 ft. 6 in. long, each, 1 cent. Telegraph poles, 22 ft. long, each, 5 cents; each lineal foot over, 1 cent.

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Railroad ties, 8 ft. long, each, 3 cents. Rails, 12 ft. long, $2 per M.

Stakes, 8 ft. long, each $2 per M. Shingles, 60 cents per M.

Square timber and saw logs of oak, elm, ask or maple, $3 B. M.

Pine, spruce, tamarac, cedar and all other woods (except poplar), $2.50 per M.

Poplar, $2 per M. All other products of the forest, not enumerated, 10 per cent. *ad valorem.*

The committee concur in the above report and submit the same for your Excellency's approval.

3. That plaintiffs' have cut and delivered to railway the said 30,000 ties, and there is standing on the land over and above the amount required to cut the 30,000 ties, trees sufficient to make 75,000 more at least.

That the Canadian Pacific Railway acquired permission to cut timber on said lands, and defendants contracted with railway company to cut and deliver to them on line of railway between station Ingolf, on the east, and the half-breed line, near the Broken Head river, on the west, 75,000 ties and 4,000 telegraph poles, and railway agreed with defendants that they should have all the rights granted them by Order in Council, reserving to plaintiffs the right to cut ties and other wood to the extent of the contracts, the said railway had entered into with the plaintiffs—the said plaintiffs' contract, viz., 30,000 ties.

4. Defendants sub-let to Strevel a portion of contract for ties, who sub-let to Trudeau, and he, under instructions from defendants and Strevel entered on land, and cut and hauled away ties, which are the trespasses.

5. Injunction injurious to defendants, Strevel and Trudeau, and if continued, will prevent defendant from fulfilling contract with railway.

6. The plaintiff has no right to cut over and above

said 30,000 ties, and defendants pray injunction to restrain them from doing so.

The following is the permit to cut timber on Crown lands:

I, James Anderson, Crown Timber Agent, by virtue of power granted to me by the Right Honorable the Minister of the Interior, do hereby permit M. Sinnott and Company, Winnipeg, Man., to cut and take, and have for his own use from that part of range 10, east, that extends five miles north and (5) fives miles south of the Canadian Pacific Railway track, the following quanties of timber:

2,000 cord of wood, at 25 cents per cord	$ 500 00
Fence rails, at per 100	0 00
Fence posts, at do	0 00
House timber, at per lineal foot	0 00
25,000 ties, at 3 cents per tie	750 00
	$1,250 00
Permit fee	0 50
	$1,250 50
20 per cent. paid	250 50
	$1,000 00

And I hereby acknowledge the receipt of $250.50 on account. The balance to be paid, and affidavit of the quantity cut, to be made at Crown Timber Office, Winnipeg, on or before the first day of May, 1882. Such permit to be liable to forfeiture for non-fulfilment of any of the conditions set forth in the Order in Council of 17th January 1876, or of this permit, and the holder of this should he not fulfil such conditions, will be subject to the penalties of the Dominion Lands Act, 1879, for cutting without authority.

Granted under my hand and the seal of the Crown Timber Office, Winnipeg, this twenty-first day of November, 1881.

(Signed.) E. F. STEPHENTON,
For Crown Timber Agent.

This permit expires 1st May, 1882.

This permit extends only to lands owned and in possession of the Crown.

PERMIT TO CUT TIMBER ON DOMINION LANDS.

I, E. F. Stephenson, for Crown Timber Agent, by virtue of power granted to me by the Minister of the Interior and in consideration of the dues hereinafter set forth, do hereby permit Sinnott & Co., of the city of Winnipeg, Manitoba, to cut and take and have for their

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own use or for the purposes of barter or sale from the following described Dominion Lands: That part of Range Ten, East (R. 10, E.), that lying five miles north and five miles south of the Canadian Pacific Railway track, the following quantities of timber: 25,000 ties.

The dues on which amount to seven hundred and fifty dollars, and I hereby acknowledge the receipt of one hundred and fifty dollars, on account.

The affidavit printed on the back of this permit, showing the quantity cut to be sworn and the balance due thereon to be paid at Winnipeg on or before the first day of May, 1882.

This permit is liable to be forfeited for non-fulfilment of any of the conditions set forth in the Order in Council of 10th October, 1881, or of this permit and the holder of the permit should they not fulfil such conditions, will be subject to the penalties of the Dominion Lands Act, 1879, for cutting without authority.

Granted under my hand, this tenth day of February, 1882.

(Signed,) E. F. STEPHENSON,
For Crown Timber Agent.

Office fee, 50 cents.

This permit expires on 1st May, 1882.

I accept this permit and agree to all the terms and conditions thereof.

(Signed,) M. SINNOTT & Co.

Witness: (Signed,) E. F. STEPHENSON.

Plaintiffs then put in an agreement between themselves and the Canadian Pacific Railway, dated 3rd January, 1882, whereby plaintiffs agreed to cut and deliver in winter of 1882, on or before 1st May next, 30,000 railway ties and 2,000 cords of wood, to be cut on a certain limit extending west of White Mouth and lying on both sides of the line of the Canadian Pacific Railway.

The following evidence was given at the trial:—

Monkman proves Stephenson was acting Crown timber agent and in sole charge of office.

Plaintiffs went in to fulfil contracts. Proves defendants cutting on limits. That he got an extension of limit on Monday and filed bill on Tuesday.

Sinnott proves 25,000 ties got out.

James Jackson proves 1,200 ties got out and not marked.

Skead, agent of Canadian Pacific Railway for ties, says: 20,000 have been inspected and plaintiffs claim 10,000 more.

Defendants are getting out 75,000 ties, 4,000 telegraph poles, and 3,000 piles on section 14 of Canadian Pacific Railway; they put in an Order in Council, and 1st November, 1881, and close. (The Sinnott limit is a limit of Canadian Pacific Railway).

Defendant Dennison proves contract with Van Horne representing the Canadian Pacific Railway, to get out 75,000 ties, 4,000 telegraph poles, and 1,000 piles, before 20th June, on Canadian Pacific Railway limits. Plaintiffs' limits are on this. We had all rights of Canadian Pacific Railway, except what had been given to Stewart and Short. Plaintiffs were not exempted; they applied for it but did not get it till some time after.

Trudeau says:—

I am one of the defendants. I know part of this limit. I have known it for two years, there is timber enough there that I have seen on a part of plaintiff's claim, to make 75,000 to 80,000 ties, and I have not seen all the limit and some I have not seen at all, and a small piece west of a certain line, from the railroad at its southern end, about three miles running north, I have not seen. On the west part of limit, south of railroad, I have not seen at all.

And again he says:

There are 15,000 ties that can be got out on corner where I was working.

W. Kennedy, for defendant, offers further evidence as to number of ties, &c.

The judge.—"I say not."

Wm. C. Van Horne says:—

25th February, 1882.

I am General Manager of Canadian Pacific Railway, and have been so since early in December. The defendants have a contract with Canadian Pacific Railway to furnish ties, wood and poles. The Canadian Pacific Railway have a permit to cut on sections 15 and 14,

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as per Order in Council. They undertook to supply 75,000 ties, if they were allowed to have the rights of Canadian Pacific Railway on section 15, and as far east on section 14 as Ingolf.

Cross-examination—Nothing was said about Sinnott & Co., or other private rights.

In rebuttal—Andrew Mackie knew Sinnott & Co.'s foreman; says he knows the Sinnott limit pretty well; I don't think there are more than 12,000 ties left.

James Jackson:—

I examined what is left over, and above what Mackie has spoken of; I think there are 6,000 left.

This is practically all the evidence in the case. The interim injunction having been continued till the 25th February, on that day the cause came on for judgment, when the following decree was pronounced:

This court doth order and decree: That the defendants and their servants, agents and workmen, be restrained from felling, cutting, removing, or otherwise interfering with any timber now being upon the lands in the plaintiffs bill of complaint mentioned, being that part of range 10, east of the principal meridian in the Province of Manitoba, extending five miles north and five miles south from the track of the Canadian Pacific Railway, where it crosses the said range, and that an injunction do issue accordingly.

This court doth further order and decree: That it be referred to the Master of this court to take an account of the damage caused to the plaintiffs in consequence of the timber cut by the defendants, or by their authority and direction, and of the value thereof to the plaintiffs; and that the defendants do pay such damages to the plaintiffs, when ascertained, forthwith.

This court doth further order and decree: That the defendants do pay to the plaintiffs their costs of this suit, and of the interim injunction, and motion to continue the same, forthwith, after taxation thereof by the Master of this court.

We are left entirely in the dark as to the reasons which led to the making of this decree, or, indeed, as to whether any reasons were given.

A re-hearing having been granted before the full court, this decree was reversed by the Chief Justice and Mr. Justice Dubuc, Miller, J., adhering to his original opinion.

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I cannot discover under what statute, order in council, or legal authority, the permit under which plaintiff claims was issued as this was.

If under a legal authority, it did not give the licensee possession of the land covered by the permit, or any interest in all the trees standing on such land; nor did it prevent the Crown from giving a permit to cut on the same land subject to such permit.

And even in my opinion, if this license or permit had been issued under legal authority, it amounted to no more than a mere permission or right to enter on the land and cut the quantity of timber specified in the permit, and gave the licensee no interest in or possession of the land, or exclusive right to cut or property in the standing trees. This permit is entirely different from a license such as that contemplated by the 52nd section of the Dominion Lands Act, which covers all the timber on the land, and gives the licensee the exclusive possession of thel and.

I do not think the plaintiff could complain unless he could show that the holder of the second permit wrongfully interfered with him, and that there was not sufficient to fill the permit and allow any others to cut, and then could he have more than an action on the case. See *Beckwith* v. *McPhelim* (1).

Long ago it was held, by the Supreme Court of New Brunswick, that a license to cut timber and remove it from lands does not enure as a grant of the trees until cut under the license. *Kerr* v. *Connell* (2); and again, that license conveys no interest in the land to the grantee, nor any property in the standing trees. *The N. B. & N. S. Land Co.* v. *Kirk* (3); *Breckenridge* v. *Woolner* (4).

(1) 2 Allen 501.
(2) Bert. R. 133.
(3) 1 Allen 443.
(4) 3 Allen 303.

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But it was held that a licensee of Crown land with authority to cut and take away timber may maintain an action on the case against a person wrongfully cutting, in consequence of which the licensee sustains damage. *Beckwith* v. *McPhelim* (1).

The appeal should be dismissed with costs.

STRONG J.—I adhere to the judgment of the late Chief Justice of Manitoba in all respects. I think the appellant has shown no title whatever, and that the appeal should be dismissed with costs.

FOURNIER J.—Le permis invoqué par l'appellant n'est pas accordé en conformité des dispositions du "Dominion Lands Act of 1879," et ne confère à l'appellant aucun droit de possession à l'étendue de terrains sur laquelle il lui était seulement permis de couper du bois de corde, des liens (*ties*). Ce permis ne privait pas le gouvernement du droit d'accorder le même privilège à d'autres personnes. L'appellant n'avait aucun intérêt à contester ce droit tant qu'il existait dans l'étendue du terrain en question une quantité plus que suffisante de bois pour lui permettre de couper les quantités mentionnées dans son permis. La preuve a fait voir qu'il y en avait beaucoup plus qu'il n'avait droit d'en couper.

Les causes citées n'ont rapport qu'à des permis accordés en vertu des "Statuts Refondus du Canada" et non pas à des permis d'un caractère tout spécial, comme dans le cas actuel.

Quant à la partie du jugement de la Cour du Banc de la Reine réformant le jugement de l'hon. juge Miller ordonnant une référence, pour l'estimation des dommages causés aux intimés par la suspension de leurs travaux, ordonnée par *l'injonction intérimaire*, je crois qu'elle doit être maintenue. Je concours dans les motifs donnés à ce sujet par l'hon. juge Gwynne.

Appel renvoyé avec dépens.

(1) 2 Allen 501.

HENRY J. concurred.

GWYNNE J.—The plaintiffs claiming to be in actual and rightful possession of a tract of land twenty miles in length and ten miles in depth, situate in the Province of Manitoba, filed their bill in the Court of Queen's Bench in Manitoba, alleging that the defendants had trespassed on the said tract of land, and were cutting down and removing therefrom and applying to their own use, and threatened to continue cutting down, removing and applying to their own use, divers valuable timber trees growing on the said land, and the bill prayed that the defendants might be restrained by injunction from committing the acts aforesaid and other acts of a like nature, and that they may be ordered to account for the value of the timber and other trees cut down, removed and applied to their own use, and for further relief an interim injunction was granted *ex parte*. The defendants by their answer denied the right and title asserted by the plaintiffs and claimed to have a right to cut the timber they were cutting under authority derived from orders in council of the Privy Council of the Dominion of Canada of equal authority with the right under which the plaintiffs claimed, and they claimed damages for the injury sustained by reason of their work having been stopped by the interim injunction. At the hearing of the case Mr. Justice Miller made a decree that the defendants and their servants, agents and workmen be restrained from felling, cutting, removing, or otherwise interfering with any timber upon the lands in the bill mentioned, being part of range 10 east of the principal meridian, in the Province of Manitoba, extending five miles north and five miles south from the track of the Canadian Pacific Railway, where it crosses the said range, and that an injunction do issue accordingly; and that it be referred to the

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master to take an account of the damages caused to the plaintiffs in consequence of the timber cut by the defendants, or by their authority and direction, and the value thereof to the plaintiffs, and that the defendants do pay such damages to the plaintiffs when ascertained. Upon the cause being re-heard by the full court this decree was reversed, and a decree was made in effect dismissing the plaintiffs' bill with costs, and directing an account to be taken of the loss and damage sustained by the defendants by reason of the interim writ of injunction, and that the plaintiffs should pay to the defendants the amount so to be found due.

The plaintiffs appeal from this decree.

The title upon which the plaintiffs rested their claim, so far as it is necessary to set it out, is as follows:—(1)

I am of opinion that this appeal should be dismissed and that the decree pronounced upon the re-hearing should be sustained, and for the reasons stated by the learned judges who constituted the majority of the court and by whom that decree was pronounced, namely: that the permit, under which alone the plaintiffs claim title, neither is or professes to be such an instrument as comes within the provisions of the Dominion Lands Act of 1879, and that it does not vest in the plaintiffs any estate, right, or title in the tract of land upon which they were permitted to cut the quantities of cordwood and ties mentioned, but is and professes to be only a license to the plaintiffs to enter upon the tract in question, and to enable them to cut thereon the specified quantities of timber mentioned without subjecting them to be treated as trespassers. It gave to the plaintiffs no estate whatever in the land, nor did it deprive the government from giving like licenses or others of equal authority to other persons, whose acting under which, whatever might be

(1) See p. 577.

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their form, the plaintiffs had no right whatever to dispute, so long at least as there was timber growing on the tract more than was sufficient to satisfy the requirements of their own prior license; and there is no pretence that this was not the case here, nor, indeed, did the plaintiffs rest their claim upon any such pretence, but solely upon the ground that, as they contended, the license they had to cut 2,000 cords of wood and 25,000 ties upon a tract of 20 miles long and 10 miles wide, even though it should be covered with timber, vested in the plaintiffs an exclusive right and title, to the possession of the whole of the tract, and to the whole of the timber growing thereon, and to so much, if any, as should be cut by any other person thereon, so long as their license should continue in force which was stated to be only until the 1st May, 1882.

The cases relied upon, as decided under the provisions of the Consolidated Statutes of Canada, relating to Crown Timber Licenses issued under that Act, have no bearing whatever upon licenses of the special character of that under which the plaintiffs claim.

As to the clause in the decree upon re-hearing, which directs an enquiry before the master, as to the damage sustained by the defendants by reason of the issuing of the interim injunction under the undertaking of the plaintiffs interested therein, I concur in the opinion expressed by Lord Justice Cotton in *Smith* v. *Day* (1), and in the authority of *Novello* v. *James* (2) cited by him, decided by Lords Justices Turner and Knight Bruce, the latter of whom, as Vice-Chancellor, was the author of the undertaking as to damages which is inserted in orders for interim injunctions. I am therefore of opinion that the clause should be retained.

This case is one which, in my judgment, emin-

(1) 21 Ch. D. p. 429. (2) 5 DeG. M. & G. 876.

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ently calls for satisfaction in damages being rendered to the defendants. The plaintiffs have by the claim which they set up, very wantonly, as it seems to me, done great damage to the defendants, and these interim injunctions are, I think, in the courts of this country at least, granted more freely and with less consideration than they would be if it were not considered that they are granted at the whole risk of the plaintiff, in whose interest they are granted as to damages in case upon more mature reflection of the case at the hearing, it should appear that the plaintiff's right to have had the injunction, cannot be sustained. If a reference as to damages should never be directed, and if it be established that a plaintiff, by giving the undertaking, incurs no responsibility, when the judge grants the injunction by a mistake in law, in a case in which the court, upon mature consideration at the hearing, shall be of opinion that it should not have been granted, these injunctions, which are found so useful in practice, must needs to a great extent fall into disuse, and as observed by Lord Justice Cotton, the courts of first instance will have to deal with those cases in a way in which they ought not to be dealt with. The appeal, in my opinion, should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for appellants: *F. B. Robertson.*

Solicitor for respondents: *T. S. Kennedy.*

SOLOMON WHITE AND JAMES O'NEIL (DEFENDANTS)..... } APPELLANTS;

AND

HENRY E. NELLES (PLAINTIFF).....RESPONDENT.

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*Feb'y. 25.

*June 22.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Possession fraudulently obtained by defendant—Plaintiff not put on proof of title—Tax sale—Rev. Stats. Ont. ch. 40 sec. 37; 33 Vic., ch. 33.

N., respondent, as assignee in insolvency of H., who bought a lot of land from the purchaser at a sheriff's sale for taxes, filed a bill in Chancery under the Ontario Administration of Justice Act against W. & O'N. (appellants), who were in possession, praying *inter alia* that defendants be ordered to deliver up possession of the lands and to account for the value of trees, &c., cut down and removed. W. by his answer adopted O'N.'s possession and claimed under conveyance from the Crown and impeached the validity of the sale for taxes. O'N. by his answer alleged he was in possession under W. At the trial it was proved that H. gave a lease of the lot to one T. for four years, and that O'N. went to T. while he was still in possession, and by fraudulent representations induced T. to leave the place and thereby obtained possession for the benefit of W. The Court of Chancery for Ontario held that appellants were obliged to yield up possession to the respondent before asserting any title in themselves. The Court of Appeal for Ontario varied the decree by declaring that the decree was to be without prejudice to any proceeding the appellant W. might be advised to take to establish his title to the lands in question within two months from the date thereof.

Held, Per Ritchie C.J., and Strong, Fournier and Henry JJ., affirming the judgment of the Courts below,—that the appellants, having gone into possession under T., were estopped in this suit from disputing their landlord's title, and that the respondent was entitled to an injunction to restrain appellants from committing waste and to an account for waste already committed.

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

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Per Strong J.—The decree made by the Chancellor would have constituted no bar to a subsequent action at law or suit in equity by W. to impeach the tax sale, and should not have been varied by the Court of Appeal.

Per Gwynne J.—The case should have been disposed of upon the issue as to the valibility of title upon which the plaintiff had by his bill rested his case; and as the appellants had failed to prove that the taxes had been paid before the sheriff's sale, the Ontario statute, 33 Vic., ch. 23, had removed all errors and defects, if any there were, which would have enabled the true owner, at the time of the sale, to have avoided it, and pursuant to the provisions of ch. 40, sec. 87, R.S.O., the respondent was entitled to recover possession of the land in question and to have execution therefor, but not to an order for an injunction or any direction for an account, the statute authorizing title to real property to be tried in a Court of Chancery not justifying a judgment of a more extensive character than would have been pronounced in a court of common law if the action had been brought there.

APPEAL from the judgment of the Court of Appeal for Ontario varying a decree of Chancellor Spragge (1) in favor of the respondent.

This suit was commenced on the 23rd day of December, 1880, in the Court of Chancery for Ontario, by the respondent Nelles against the appellants White and O'Neil, to recover possession of the north 100 acres and the south 30 acres of lot No. 1, in the 10th concession of the township of Colchester.

The respondent by his bill set up that he claimed title from one John Hargreaves, an insolvent; that Hargreaves held possession of the lands from the time of his acquiring the same, in the year 1876, down to the month of October, 1880, when, as alleged in the 4th paragraph of the bill of complaint, the respondent contended that the said land becoming unoccupied, the appellant Solomon White, wrongfully and without any color of right, put the appellant James O'Neil into posssession of the lot.

The respondent by the said bill also alleged that the

(1) 29 Gr. 338.

appellant O'Neil resided upon the land and held possession of it as tenant to or agent of the appellant White, and that he refused to deliver up possession to the respondent.

In the fifth paragraph of the said bill the respondent alleged that the appellant White claimed to have some interest in a part of the land, but denied the appellant White's title, and alleged that if he ever had any title it had been barred by the statute of limitations.

The bill also alleged that the title of Hargreaves was founded upon a sale of the land for taxes, and that the appellants contended that the sale was invalid for the reasons alleged in the answer.

The respondent by the said bill set up that all the proper proceedings had been taken under the statutes respecting the sale of lands for taxes, and that the tax sale was valid. The respondent also alleged that the purchaser at the said sale, and his assignees and Hargreaves, had paid taxes and made large, valuable and lasting improvements upon the lands.

The prayer of the bill was that the appellants might be restrained from committing acts of waste; ordered to account for the value of timber and other trees cut down and removed; to deliver up possession of the lands, and that, in that event, the respondent's title being defective, the respondent might be declared entitled to a lien upon the lands and premises for the improvements, taxes and interest.

The appellants answered the said bill disclaiming the title to that part of the land described as the south 30 acres of lot No. 1; but the appellant White claimed to be entitled as owner in fee simple in possession of the north 100 acres of the said lot. And the appellant O'Neil claimed title as his tenant. The appellants also set up as a defence that the said alleged tax sale under

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which the said respondent claimed title was invalid and void, for the reasons in the said answer referred to.

The case was heard before Spragge, Chancellor of Ontario, at Sandwich, on the 26th day of April, 1881.

His Lordship held, as will appear from his reported judgment (1), where the facts will be found more fully stated, that the tax sale was invalid, but that the respondent was entitled to succeed upon another point, namely, that Hargreaves, claiming to be entitled under the tax sale, had, in 1872, put one Thompson into possession of the land; that afterwards, in 1878, he gave him a lease for four years, from the 1st April, 1878; and the defendant O'Neil went to Thompson, while he was still in possession, and by fraudulent representations had induced Thompson to leave the place, and that O'Neil had entered under White, and that upon the authority of *Doe Johnson* v. *Baytup* (2), the appellants were obliged to yield up possession to the respondent before asserting any title in themselves.

A decree was then drawn up ordering a perpetual injunction as against the appellants, and ordering the appellants forthwith to deliver up possession of the land to the respondent, and to account for the timber and other trees cut upon the same.

The appellants then appealed to the Court of Appeal for Ontario, which dismissed the said appeal with costs, but varied the decree complained of by declaring that the said decree was to be without prejudice to any proceedings which the appellant White might be advised to take to establish his title to the lands and premises in question within two months from the date thereof, and also declaring that in the event of the appellant, White, paying such costs, and taking any proceedings to establish his title to the land, he should have liberty

(1) 29 Grant 338. (2) 3 A. & E. 188.

to bring any action for that purpose within the time thereinbefore limited as of the 27th day of April, 1882.

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J. Bethune Q. C. for appellant:

The respondent having based his right to recover upon the tax sale, and not having raised any question whatever as to any fraud on the part of the appellant O'Neil in taking possession of the land in question, it was not open to the respondent at the trial to raise the point upon which the decree proceeded; and the court having found that the title of the respondent was bad, ought not to have acted upon the principle referred to by *Doe Johnson* v. *Baytup*, (1) even if the evidence established the facts to be within the law as laid down in that case, because the point was not made by the pleadings, and in any event was not one which could be relied upon in a suit in chancery, which was brought for purposes of determining finally and conclusively the question of title, and not merely the question of possession. If the decree as originally made had stood, the appellants' title would have been extinguished, and the appellants would have had to account to the respondent for trespass committed upon the lands in question, even although the respondent did not possess a scintilla of title to the land. It is quite clear, however, that no ground existed for applying the authority of the case *Doe Johnson* v. *Baytup*.

The appellants, however, contend that even trying this suit as an action of ejectment, the respondent ought not to have been allowed to recover possession, because the unexpired term which had been granted to Thompson by Hargreaves from the 1st of April, 1878, for four years, had not expired; and so it appearing that there was a present right of possession in Thompson, even if Hargreaves' title was valid, the respondent ought not to

(1) 3 A. & E. 188.

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have been allowed to recover even possession of the land; and contend also for the reasons referred to by the learned Chancellor in his judgment (1), that the tax sale was invalid.

Further, the appellants, I claim, have proved a paper title to the lands in question, which if not strictly proved was sufficient to have warranted the Court of Appeal in allowing the appellants to give further evidence by production of title deeds to show clear proof of their title under the Crown, and that if it were necessary to establish a title to the lands, the Court of Appeal ought not to have refused the cross relief sought by the appellants in this action, and directed the bringing of another action; because it will be observed that by the 15th clause of the answer, the appellants sought, by way of cross relief, that their title might be declared valid and that the title of the respondent might be declared invalid, and there was therefore no reason why that question ought not, even if the cause had been sent back for trial, to have been determined in the cause, instead of being required, as the Court of Appeal did not require it, to be determined by independent suit.

S. H. Blake Q.C., and *Lash* Q.C., for respondent:

At a time when the respondent was in the lawful occupation of the premises in question the appellants procured possession thereof under such circumstances as warranted the court of first instance in holding that the appellants were bound to restore such possession to the respondent, and that finding has been affirmed by the Court of Appeal.

The learned counsel cited the following authorities:—As to the effect of the wrongful possession, see Cole on Ejectment (2); Adams' Ejectment (3); *Doe dem. Hughes*

(1) Pp. 341 to 346 of 29 Grant. (2) P. 213.
(3) Pp. 28 & 276.

v. *Dyball* (1); *Johnson* v. *Baytup* (2); *Loveland* v. *Knight* (3); *Walker* v. *Friel* (4).

As to validity of sale some taxes in arrear for the time mentioned in statute, *Edinburgh Life Association* v. *Ferguson* (5); *McKay* v. *Chrysler* (6); *Fenton* v. *McWain* (7).

As to irregularities not vitiating sale, *McKay* v. *Chrysler* (8); *Bank of Toronto* v. *Fanning* (9); *Silverthorne* v. *Campbell* (10).

As to confirmation of the title of respondent by payment of taxes, making improvements, &c., *Fraser* v. *West* (11).

As to confirmation of title by possession and delay in attacking tax deed, Statutes of Limitations (12); Tax Statutes (13); *Hamilton* v. *Eggleton* (14).

Sir W. J. RITCHIE C.J.—After stating the facts as hereinbefore set forth, proceeded as follows:—

The appellants submit that the decree, originally made by the Court of Chancery and varied by the Court of Appeal, was erroneous and should be reversed, and the bill dismissed with costs.

The plaintiff's evidence is to the following effect:—

Hargreaves purchased from Meyer and gave him a farm worth over $1,000 for it.

Some few years after, in 1872, he placed Thompson as tenant. He was there continuously till he made lease in 1879. The lease is dated 11th April, 1879, to be computed from 26th April, 1879, for four years, with provision that he should not assign, sub-let, or transfer without permission; that he never gave permis-

(1) 3 C. & P. 610.
(2) 3 A. & E. 188.
(3) 3 C. & P. 110.
(4) 16 Gr. 105.
(5) 32 U. C. Q. B. 253.
(6) 3 Can. S. C. R. 476.
(7) 41 U. C. Q. B. 239.
(8) 3 Can. S. C. R. 476.
(9) 18 Gr. 391.
(10) 24 Gr. 17.
(11) 21 U. C. C. P. 161.
(12) R. S. O. ch. 108.
(13) R. S. O. ch. 180.
(14) 22 U. C. C. P. 536.

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sion. That he paid the taxes from 1865 till 1877 and failed to pay in 1878, in all thirteen years. He had a shanty and a stable put up and eight acres cleared. The shanty was put up the year Thompson was put in possession and no deed was ever tendered him, and he never heard of White's claim previous to 1870. White came to his house about 1873 or 1874 and did not then offer to pay the taxes. No possession till 1872 —wild land in 1873.

Thomas Adair, who was asked by Nelles to get possession of land from O'Neil, in his evidence says:—

He did not get possession, and found O'Neil in possession in December, 1880, and he refused to go off, and says he found timber had been cut and that O'Neil admitted he had cut it. After O'Neil was made a prisoner White said that the wrong man was taken up, that he was the party.

James Thompson in his evidence says he rented the place from Hargreaves and went on in 1872, and stayed on between seven and eight years steady, and then was off and on the balance of the time, and cleared off a piece and fenced it, and put up a log stable and shanty.

Thomas Thompson gave the following evidence:—

Q.—You rented this place from Mr. Hargreaves? A.—Yes.

Q.—When did you first go on? A.—It would be in 1872.

Q.—How long did you stay on? A.—Well, it was between seven and eight years steady and then I was off and on the balance of time afterwards.

Q.—And were there any improvements done or made during the time you were there? A—Yes; I cleared off a piece and fenced it and put up a log stable and shanty.

Q.—O'Neil is in possession there now for Mr. White; how did he get in? A.—Mr. O'Neil came down to me, it would be last June some time, and he told me about Hargraves and the assignee, some party of his coming down, and they were going to seize the things that I had there, that is on the place, and that I had better let him have possession and he would remove the things; so I gave up a day or so afterwards, and O'Neil was in possession.

Q.—He told you that who was going to seize? A.—It was the assignee's party, he didn't know his name, but he had sent him down there and was going to seize my things.

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Q.—That Hargraves had become insolvent? A.—Yes.

Q.—How did he get in, had you any one living in the house or had you the house locked? A.—The house was locked.

Q.—Did he get into the house? A.—Yes.

Q.—How? A.—I cannot tell you exactly; I told him to go and get the key; there was a family going in previous to that and this party had locked up the house and I told O'Neil to go to him and they would give him the key and they had not done so, for the party brought the key to me afterwards.

Q.—What did he say about his taking possession? A.—He said it was likely there would be some dispute about it and he would hold it for a term.

His Lordship.—Did he say in what capacity he proposed to act?

Mr. Boyd.—How was he going, what claim did he make? A.—Well, he did not say to me, not then exactly, I think he did afterwards.

Q.—What did he say? A.—He told me that Mr. White had given him power to come and take possession.

His Lordship.—Is he a defendant?

Mr. Boyd.—Yes, my Lord.

Mr. Gibbon.—He disclaims any right in himself.

Mr. Boyd.—You had a lease at that time from Hargreaves? A.—Yes.

Q.—And by the terms of that you were not to assign or transfer without his leave? A.—Yes.

Q.—Did you get his leave? A.—No; but I wrote to Mr. Hargreaves and did not get any answer back.

Q.—And you thought that this was the best thing to do to keep out of trouble? A.—Well, when I get no answer.

Q.—He said there was a man coming down to seize? A.—Yes.

Q.—Did you believe that at the time? A.—Yes, and I told O'Neil to remove part of my things and he did take them up to his place.

Q.—Why did you want them removed? A.—I did not want them seized, for I did not want any trouble at all.

Mr. Boyd.—Did you find out it was true what O'Neil told you, that there was going to be a seizure? A.—Well I did not get any satisfaction, but I did not see any parties.

Q.—There was no seizure? A.—No.

His Lordship.—When was it that O'Neil came? A.—It would be in June last, June sometime.

Mr. Boyd.—You were living in possession up to that time? A.—Yes.

Q.—And had your things in the house? A.—Yes; I had some things there.

Q.—A sleigh? A.—Yes; it was not in the house, but there were other things; a stove, etc.

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On behalf of the defendants Solomon White in his evidence says, that he sent to Messrs. Harris & McGee the deed and money for taxes to be tendered to Mr. Hargreaves; and Labadie, another witness, says he sold the lot to Charles Baby in 1855 and paid all the taxes.

I quite agree that the defendant White, having obtained possession through O'Neil by the means detailed, cannot be permitted to dispute the plaintiff's title until plaintiff is first placed in the situation he was before the possession was taken by O'Neil. White, through O'Neil, came into possession under Thompson or in collusion with him both White and O'Neil obviously well knowing that Thompson was in possession under Hargreaves, and could no more dispute plaintiff's title than Thompson could. He could neither by purchasing Thompson's right, nor by colluding with him, put himself in a position to dispute the landlord's title. This case, it is clear, comes quite within the principle of the case of *Doe Johnson* v. *Baytup* (1), referred to by the learned Chancellor and on which he acted, as also *Doe Hughes* v. *Dyball* (2); *Doe Bullen* v. *Mills* (3), and of the case of *Doe Bliss* v. *Estey* (4), which last case seems to me on all fours with this case, the marginal note of which is:

The defendant obtained possession of land from the plaintiff's tenant by representing that he had the title to it and threatening to eject the tenant. Held, in an action of ejectment by the landlord, that the defendant was estopped from disputing his title and setting up an adverse title in himself.

I was a party to this judgment and I have not since its delivery heard anything to make me doubt its correctness.

The case of *Doe Knight* v. *Lady Smythe* (5) is also in point. Dampier J. says:

It has been ruled often that neither the tenant, nor any one claiming by him, can controvert the landlord's title. He cannot put

(1) 3 A. & E. 188.
(2) 3 C. & P. 610.
(3) 2 A. & E. 17.
(4) 3 Allen N. B. 489.
(5) 4 M. & S. 347.

another person in possession, but must deliver up the premises to his own landlord. This (he says) I believe has been the rule for the last twenty-five years, and I remember was so laid down by Buller J. upon the western circuit, and I have no doubt has been the rule ever since.

I am of opinion that the appeal should be dismissed.

STRONG J.—This was a suit in chancery instituted under the Ontario "Administration of Justice Act," by Nelles as assignee in insolvency of Hargreaves against White & O'Neil. The Bill was filed on the 31st December, 1880. The suit was a mixed one being an amalgamation of an action of ejectment to recover possession of land, and a bill for an injunction to restrain trespass in the nature of waste, and for an account of the waste committed.

The facts are as follows: The plaintiff's title is under a sale for taxes of the 100 acres sought to be recovered, being the north 100 acres of lot No. 1, in the 10th concession of the township of Colchester. It is designated as lot 1 and 4, because it is lot 1 of the original survey by Barwell, and lot 4 of a subsequent survey of the 1st concession by Smith. The sale for taxes took place in 1860, and the sheriff's deed was given in pursuance of it. The real purchaser at the tax sale was Jeffreys, who purchased in the name of Godbold, Godbold having assigned his nominal purchase to Jeffreys, the sheriff's deed was made to Jeffreys, who afterwards conveyed to Brunton. Brunton subsequently conveyed to Heathfield and Heathfield to Meyer, from whom Hargreaves purchased and obtained a conveyance. This is the plaintiff's title so far as the paper title is concerned. It is impeached by the defendants who were in possession, upon the ground that the tax sale was invalid. 1st. because some of the taxes for which the land was sold had been, as is sworn by Labadie, a former owner, paid by him. These taxes so alleged to have been paid

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were the taxes from 1852 to 1856, the sale having been for an arrear of taxes from 1853 to 1858. 2nd. The tax sale is impeached on account of an alleged misdescription of the land.

The plaintiff, however, sets up an alternative title by estoppel against the defendants, which, if well founded, precludes them from questioning the validity of the sale for taxes, at least in the present suit. This title by estoppel is said to arise under the following circumstances: Hargreaves leased the land to one Thompson, who remained in possession until 1880 (some seven or eight years he says in his evidence) when he gave up possession to the defendant, O'Neil, who was a tenant to or in some way claimed under the defendant White, White himself asserting a title derived from the original owners of the land, and which, if sufficiently proved and if no estoppel were in the way, would entitle him to impeach the tax sale. After Thompson had been in possession for some time, a formal lease from Hargreaves to Thompson for four years, from 20th April, 1879, was executed, and the term created by it was therefore an existing term, when the defendants obtained possession from Thompson. It is contended by the plaintiff that the defendants, having thus gone into possession under Thompson, were estopped from disputing their landlord's title.

If this contention is well founded, it is obvious that it will be immaterial to consider the sufficiency of the proof of White's paper title, some deeds in which are proved only by secondary evidence, consisting of memorials executed by the grantees, and respecting which an important question in the law of evidence might have to be determined. And we shall also be relieved from considering the validity of the sale for taxes, which indeed would only, in any case, have had to be determined in the event of the defendant White's

title being held to be established by legal proof.

Reverting, then, to the question of estoppel, upon which, as it appears to me, this appeal can well be disposed of, let us consider it in its bearing upon the suit in both the aspects of an action of ejectment, and a suit in chancery for an injunction and account, which the bill presents.

First, as regards the plaintiff's right to recover in ejectment.

Upon the evidence the facts cannot be disputed, that O'Neil obtained possession from Thompson; that when he so obtained possession he was in privity with White; that the possession he obtained was for the benefit of White, and that at the time of the filing of the bill he was in possession under White, and claiming as his tenant, as he admits in his answer. Upon this state of facts the law is clear. As a tenant is estopped from setting up a title paramount, so all persons acquiring possession from the tenant, are in like manner estopped. This is so very elementary a principle of the law of landlord and tenant, that it scarcely requires to be vouched by a reference to authority. The case cited in the respondent's factum (1) is, however, at once a sufficient authority on the law and an example of its application directly to the point. The only difficulty in the plaintiff's way would arise from the fact that the four years for which the lease was granted not having expired when the bill was filed in December, 1880, the defendants would be entitled, at all events, to retain the possession during the residue of the term. This objection is, however, susceptible of two conclusive answers. White in his answer confines his defence to an assertion of his title paramount, as the purchaser at the sheriff's sale of the interest of one Pratt, in whom, as he alleges, the title of the patentee

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of the Crown had by mesne conveyances become vested; and to an impeachment of the validity of the sale for taxes. He nowhere claims title as the assignee of Thompson. The other defendant, O'Neil, by his answer merely alleges that he is in possession under White. This mode of pleading his defence would alone amount to a disclaimer by White of any right of enjoyment for the residue of the term to which he might otherwise have been entitled. But there is a still more conclusive answer than this arising from the terms of the lease by Hargreaves to Thompson. This lease was produced and proved at the trial; it is referred to in the depositions of both Hargreaves and Thompson. The reference to it in the evidence of the former is as follows:—

Q.—Then after you bought what did you do with the property, Mr. Hargreaves? A.—With this 100 acres?

Q.—What did you do with it? A.—Some time afterwards—some few years afterwards I placed on Mr. Thompson as a tenant.

Q.—Were there two lots? A.—There were.

Q.—When did you first place him on there? A.—In 1872.

Q.—And was he on from that till you made this lease in 1879? A.—He was.

Q.—Continuously on there? A.—Yes.

Q.—Is this (now produced) the lease you made to him, your signature? A.—Yes. (See lease dated 11th April, 1879, to be computed from the 20th April, 1879, for four years.)

Q.—And there is a provision in this that he should not assign or sublet or transfer without your permission? A.—Yes.

Q.—Did you ever give your permission to any transfer under this, or assignment of it to O'Neil? A.—No.

And Thompson, in his deposition, speaks of it thus:

Mr. Boyd.—You had a lease at that time from Hargreaves? A.—Yes.

Q.—And by the terms of that you were not to assign or transfer without his leave? A.—Yes

This lease although thus produced has not, however, been printed in the case as it undoubtedly ought to have been, and we are left to ascertain its terms as we best can by inference or presumption. It will be observed that it

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is said both by Hargreaves and Thompson, that the lease contained a provision against transfer or assignment, but whether such provision was a mere personal covenant not to assign, or extended to the term itself either made it unassignable or provided for its cesser on assignment, we have nothing to tell us. This is, of course, very material on the present question. It was incumbent on the appellant in printing the case, to comprise in it all material evidence, and as he has thought fit to suppress this exhibit, the lease, which was of course attainable by him, even if it was not in the possession of the officer of the Court, we are, I think, authorized in making against him the presumption that the proviso in question was in such a form as to operate as cesser or avoidance of the term upon an assignment being made, more especially are we entitled to do so, as having regard to the well known practice of conveyancing, of which we can take notice, such a proviso would be in the ordinary course, and the presumption thus made would be consistent with the probable fact. It follows that the appellant could have no benefit from the lease, and that upon the ground before indicated a recovery in ejectment would have been inevitable.

Then as regards the equitable side of this composite suit, it is clear that the right which a landlord has to an injunction restraining his tenant from committing waste and to account for waste already committed, extends to all persons claiming under the tenant, and who like him are incapacitated by the doctrine of estoppel from setting up a superior title, and for the reasons already given, the defendants here are in the position of such persons.

I am of opinion, therefore, that the decree of the Court of Chancery was entirely right and should be affirmed.

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With regard to the variation or addition made to that decree by the Court of Appeal, I must add that I think no such addition was called for since the decree made by the Chancellor would have constituted no bar to a subsequent term at law or writ in equity by White to impeach the tax sale. It could, however, if limited to a mere saving of the appellant's right to bring such action or suit, do no harm as it would be merely expressing what the law implied, but in limiting a term within which the action or suit was to be brought to two months, I think the order of the Court of Appeal was wrong. Any question of the statute of limitations as a bar to a future suit was a proper question to be determined in that proceeding. I am of opinion the order of the Court of Appeal should be varied by striking out this limitation of the appellant's right to sue to two months, and that in other respects the appeal should be dismissed with costs.

FOURNIER and HENRY JJ. concurred.

GWYNNE J.—This was an action in the nature of an action of ejectment instituted in the Court of Chancery for the Province of Ontario, under the provisions of ch. 40 of the Revised Statutes of that Province, entitled "An Act respecting the Court of Chancery." The 86th section of that Act enacts that:

The Court of Chancery shall have jurisdiction in all matters which would be cognizable in a court of law.

And the 87th section that:

Where a suit is instituted or where a petition is filed in the court for the purpose of establishing the title of the plaintiff or petitioner to any real property, no objection to such suit or proceeding shall be allowed upon the ground that the plaintiff or petitioner should first have sued at law or would have an adequate and complete remedy at law by action of ejectment or otherwise; and if it appears upon the hearing or other determination of such suit or proceeding, that the plaintiff or petitioner is entitled to the possession of such real

property, he may obtain an order against the defendant or respondent for the delivery of such possession, and writs of execution shall issue accordingly.

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The plaintiff in his bill claims title as assignee in insolvency of one John Hargreaves, against whom a writ of attachment under the Insolvency Act of 1875, issued upon the 24th day of January, 1880, and that the said John Hargreaves acquired an estate in fee simple in the land in question by purchase in the year 1867, and from the time of his so acquiring the said land, held possession of the same up to the month of October, 1880, "when the said land, becoming unoccupied, the defendant Solomon White wrongfully and without any color of right, put the defendant James O'Neil into possession of the said lot, and the said James O'Neil now resides thereon, and holds possession as tenant or agent of the defendant Solomon White; and the defendants, notwithstanding the plaintiff has requested them to deliver up possession to him, refuse to do so, and continue in possession of the said land as trespassers." The bill further alleged that the defendants contend that Hargreaves' title was founded upon a sale of the land for taxes, and that the said sale was invalid, but the plaintiff alleged that all proper proceedings were had and steps taken and things done as required by the statutes in that behalf, and that the said sale was and is valid.

And the bill further alleged that since the said sale for taxes the purchaser at the said sale and his assignees, and the said Hargreaves, were, and had been, in continuous occupation of the said land, and had paid the taxes continuously to the present time, and the plaintiff relied upon the various statutes relating to sales of land for taxes, and covering defects in such sales. The bill further alleged that Hargreaves, and those through whom he claimed under title derived from the

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tax sale, had paid taxes and had made large and valuable lasting improvements, and the plaintiff claimed that in the event of plaintiff's title proving defective, he is entitled to a lien on the said land for the taxes so paid, and interest at ten per cent. and for said improvements. The bill also alleged that since the defendants had been in possession of the land, they had cut down and removed, and applied to their own use divers valuable timber and other trees, which were growing on the land, and that they threaten to continue so to do. And the bill prayed:

1. That the defendants might be restrained by injunction from committing such acts, and that they should account for the value of the timber and other trees cut down, &c.

2. That they should be ordered to deliver up possession of the said land to the plaintiff forthwith.

3. That in the event of the plaintiff's title being defective, he might be declared to be entitled to a lien on the said land for the value of the improvements made thereon, and the taxes paid and interest.

4. That all proper directions might be given, and accounts taken, and for further relief.

The defendants by their answer insisted that the defendant Solomon White had title in himself to the land in question under title derived by divers mesne conveyances from the patentee of the Crown, and that the plaintiff's title depended on the validity of a tax sale, which was had on the 13th March, 1860, which sale, as they alleged, was invalid for divers errors and defects in the assessment and proceedings, to have the land sold for arrears of taxes, and, further, for the reason that as the defendants were informed and believed the taxes for the years 1853, 1854, 1855, 1856 and 1857, and for which the land was sold, had been duly paid, and satisfied prior to the said sale—and the defendant

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Solomon White prayed by way of cross relief that the said tax sale and the registered proceedings regarding the same might be declared invalid and void.

At the trial a warrant from the treasurer of the county of Essex, bearing date the 1st December, 1859, addressed to the sheriff of that county, in which county the land in question is situate, directing the sheriff to sell the land in question with other lands for arrears of taxes, was produced. The treasurer of the county proved that by the books in his office (he himself was not treasurer prior to, or at the time of, the sale) the taxes in arrear at the time of the sale which took place in March, 1860, were taxes which accrued due in the years 1853 to 1858, both inclusive. The sheriff's deed, dated the 18th March, 1861, to one Jeffery, as assignee of the person to whom as highest bidder at the sale the land had been knocked down, was produced and deeds passing the title from Jeffery to Hargreaves were also produced. The deed to Hargreaves was dated the 4th November, 1867, and was executed by one Meyer, who had purchased from one Heathfield, on the 14th May, 1862. It was also proved that Meyer paid up all the taxes which had accrued from 1859 to 1865, inclusive, and Hargreaves all the taxes which accrued due from 1865 to 1877 inclusive.

The defendant, White, gave evidence of the title in virtue of which he claimed to be seised of an estate in fee simple in the land in question.

The learned Chancellor, before whom the trial took place, instead of adjudicating upon the tax title, in virtue of which the plaintiff claimed and which the defendants disputed, and as to the validity of which they had joined in an issue which they had gone down to try, and in support of which the plaintiff had given all the evidence that he could give, rendered a verdict for the plaintiff upon a ground not taken or suggested

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by the plaintiff on the record or at the trial, namely, that it appeared in the evidence that the defendant O'Neil, upon Hargreaves becoming insolvent, went to the land and represented to one Thompson, then in possession as tenant of Hargreaves, that the latter having become insolvent Thompson's chattels on the place would, or might, be seized, and that Thompson becoming alarmed removed his chattels and left the place, and that O'Neil moved into it claiming that the defendant White had an interest in the place and that he, O'Neil, was there for him.

The learned Chancellor was of opinion that under these circumstances the principle of *Doe Johnson* v. *Baytup* (1) applied, and that the obtaining possession in this manner was such a fraud as estopped the defendants from putting the plaintiff to proof of title. The appeal is against this judgment of the learned Chancellor and the decree made in pursuance thereof.

The case, in my opinion, should have been disposed of upon the issue as to the validity of the title upon which the plaintiff had by his bill rested his case, the evidence upon which was fully entered into by both parties; by the plaintiff in support of the validity, and by the defendants in support of the grounds urged by them to establish the invalidity of the tax title. The evidence offered by the defendant, in support of the contention that the taxes for the years, for the alleged arrears in respect of which the land was sold, were paid before the sale was, in my judgment, wholly insufficient to establish that any such payment had been made for all or for any of such years, or to cast a doubt on the validity of the sale upon the ground that it took place when there were no taxes in arrear to justify a sale. There would be no security whatever in any title acquired upon a sale for arrears of taxes if a title

(1) 3 A. & E. 188.

held under a deed executed in 1861 followed by the payment of taxes ever since by the purchaser at the tax sale and those claiming under him, could be now avoided upon such evidence as that upon which the defendants relied. Whether there were any such errors or defects in the assessment roll or in the proceedings taken to effect the sale as would not now at this distance of time be relieved against under the provisions of the 156th section of chapter 180 of the Revised Statutes of Ontario, it is unnecessary to determine, for it is clear to my mind that as the defendants have failed to prove that the taxes had been paid before the sale, the Ontario Statute, 33 Vic., ch. 23, has removed all errors and defects, if any there were, which would have enabled the true owner at the time of the sale to have avoided it.

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By the 1st and 2nd sections of that Act it is enacted that in all cases where lands which were liable to be assessed according to the true intent and meaning of the statutes in that behalf, have, or any part thereof has, been sold and conveyed under color of such statutes for taxes in arrear and the tax purchaser at any such sale had, prior to the first day of November, 1869, paid at least eight years taxes charged on the said lands, although he shall not have occupied the said land or any part thereof, provided that the owner has not occupied the said land or some part thereof for one year between the sale by the sheriff and the said first day of November, such sale shall be deemed valid, notwithstanding the taxes and the sheriff's fees and charges for which the lands were sold were not imposed and charged in due form as required or authorised by the said statutes or any of them or exceeded the amount lawfully chargeable, and notwithstanding any defect in the warrant to sell, or that such warrant was issued too soon, and notwithstanding any irregularity in the notices of sale or the advertising and publishing thereof

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or in, or as to, the time and place of any such sale, or as to any adjournment of sale, and notwithstanding that there was on any such lands any property that might have been distrained, and notwithstanding that the lands have been assessed against some person as resident or occupant when they should have been assessed as non-resident lands, or were assessed as non-resident lands when they should have been assessed against the owner or occupant, or both, and notwithstanding any informality or defect in the keeping of the accounts of the taxes charged against such lands, or with which they were chargeable, and notwithstanding any other omissions, insufficiency, defects or irregularities whatsoever, as regards the assessment or sale, or the preliminary or subsequent steps required to make such sale effectual in law; and the 14th section of the Act enacts—that the words "tax purchaser," shall apply to any person who purchased, theretofore, at any sale under color of any statute authorizing sales of land for taxes in arrears, and include and extend to all persons claiming through or under him. The case of the plaintiff, as representing Hargreaves, comes precisely within the provisions of this statute, and the plaintiff was entitled to recover in virtue of the title asserted by him in his bill.

It becomes unnecessary, under these circumstances, to express any opinion upon the question raised, and so strongly pressed by the learned counsel for the appellant, namely, whether or not the facts in evidence as to the mode in which O'Neil entered into possession of the land, bring the case within the principle upon which the learned Chancellor proceeded, or whether the principle itself is applicable in this case in view of the special title asserted by the plaintiff in his bill, as to the validity of which the parties had joined in issue, which they had gone down to try, and in view also of

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the fact that the plaintiff did not assert any claim based upon the principle upon which the learned Chancellor proceeded, but had, on the contrary, averred in his bill that the defendant White, finding the land unoccupied, put the defendant O'Neil in possession. The plaintiff, therefore, under the provisions of the 87th section of ch. 40 of the Revised Statutes, was entitled to a judgment in his favor for the delivery up of the possession of the land by the defendants to him, and the decree to that effect must be sustained; but I cannot see upon what principle that judgment, which is simply in the nature of a judgment in an action of ejectment, should be supplemented with an order for a perpetual injunction restraining the defendants from the committal of further trespasses upon land, of which, by force of the judgment, they will no longer be in possession. The only purpose that I can see which can be sought to be obtained by such an order would be to give to the plaintiff, in addition to the ordinary remedies which the law affords to all owners of real property for the redress of wrongs committed upon their property by trespassers, such further remedy and protection in the enjoyment of their possession as the fear of incurring the fines and penalties attending the committal of contempt of court may afford, and this is a species of remedy the application of which is not, in my judgment, to be extended so as to become an incident attached to a recovery in an action of ejectment. The statute which authorized actions of ejectment to be tried in the Court of Chancery does not, in my opinion, sanction the introduction of this novelty, the decree, therefore, should, in my opinion, be varied by removal from it of the clause as to the injunction.

It may be very desirable and reasonable that a plaintiff, having established his title to real property, should

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in the same action wherein such title is established, to avoid a multiplicity of suits recover damages in the nature of mesne profits during the time he was wrongfully kept out of possession until judgment, and as part of such damages the value of such timber as may have been cut upon the premises and disposed of by the defendant during the time that he was so in possession until judgment. But the statute which authorizes actions of ejectment to be tried in the Court of Chancery makes no provision for the recovery of damages by way of mesne profits, or otherwise, in a different manner when the action is brought in the Court of Chancery from that in which they are recoverable when the action of ejectment was brought in a court of common law; in which case either party is entitled to insist that those damages should be assessed by a jury. There is no statute which, in my opinion, warrants the substitution by the Court of Chancery of the dilatory and expensive process of enquiries and the taking of accounts before a master in chancery, as to damages recoverable by way of mesne profits consequential upon a recovery in an action of ejectment for the simple, direct and much less expensive assessment of such damages by a jury when the case is tried before a jury, or by a judge when it is tried by a judge without a jury. The direction, therefore, for the taking of the account which is ordered by the judgment and decree of the learned Chancellor, and which necessitates the re-opening of a question which was thoroughly, and at considerable expense, entered into at the trial, and which, if mesne profits were recoverable in the action brought for trying the title, ought to have been determined by the learned judge himself upon the evidence taken by him, who when trying the case without a jury was substituted for a jury, seems to me not to be warranted by any statute. The learned counsel for the appellant did not,

however, as I understood him, object to the account ordered upon this ground: his objection was that as the learned Chancellor had not adjudicated either in favor of the plaintiff or of the defendants, upon the title to the fee in the land as asserted upon the record, but expressly abstained from doing so for the reason given by him, and as the timber belonged to him in whom the right to the fee in the land was, it was premature to order the defendant, whose title to the fee as asserted by him might be good, to account for the timber cut by him to a person, who upon the the title being tried might be found to have no title to the land. This objection appears to me to be well founded, and, in fact, to be unanswerable if the judgment of the learned Chancellor is to be maintained upon the ground upon which alone he proceeded, he having, for the reason given by him, expressly and purposely declined to determine the question of title to the fee simple in the land, which was the sole question upon which the parties had joined issue, which they had gone down to try, and upon which the right to an account in respect of timber cut depended.

In my opinion the decree and judgment of the Court of Chancery should be varied so as to change it into a simple judgment within the provisions of the 87th section of ch. 40 of the Revised Statutes of Ontario, namely, that the plaintiff is entitled to the possession of the land for the recovery of the possession of which the action was brought, and that he do have execution therefor accordingly, without more, thus giving to the plaintiff the same judgment as he could have had if the action had been brought in a court of common law instead of in the Court of Chancery. The Ontario statute which has authorized title to real property to be tried and determined in a Court of Chancery equally as in a court of common law, never authorized, or, in

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my opinion, contemplated the application of different principles in trying the title, varying according to the court in which the action should be brought, or the pronouncing a judgment in the Court of Chancery of a more extensive character than could have been pronounced by a court of common law, if the action had been brought there, the judgment in both courts should be the same, namely, that the plaintiff should recover the possession of the land for which the action was brought and that he should have execution therefor.

Appeal dismissed with costs; counsel for respondent assenting, the order of the Court of Appeal was varied by extending the time given the appellant White for bringing an action to establish his title for three months from the pronouncing of the judgment of the Supreme Court.

Solicitor for appellant White: *H. T. W. Ellis.*

Solicitor for appellant O'Neil: *T. White.*

Solicitors for respondent: *Cronyn & Betts.*

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*Mar. 21, 23, 24.
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*Mar. 9.

THE GRAND TRUNK RAILWAY CO. OF CANADA (DEFENDANTS)..... } APPELLANTS;

AND

SOLOMON VOGEL (PLAINTIFF).....RESPONDENT.

THE GRAND TRUNK RAILWAY CO. OF CANADA (DEFENDANTS)..... } APPELLANTS;

AND

GEORGE MORTON (PLAINTIFF).....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Railway Company—Carriage by railway—Special contract—Negligence—Liability for—Power of Company to protect itself from—Live stock at owner's risk—Railway Act, 1868 (31 *Vic. ch.* 68,) *sec.* 20 *sub-s.* 4—34 *Vic. c.* 43, *sec.* 5—*Cons. Railway Act*, 1879 (42 *Vic. c.* 9).

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

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A dealer in horses hired a car from the Grand Trunk Railway Company for the purpose of transporting his stock over their road, and signed a shipping note by which he agreed to be bound by the following, among other, conditions:—

"1. The owner of animals undertakes all risks of loss, injury, damage, and other contingencies, in loading, &c.

"3. When free passes are given to persons in charge of animals, it is only on the express condition that the railway company are not responsible for any negligence, default, or misconduct of any kind, on the part of the company or their servants, or of any other person or persons whomsoever, causing or tending to cause the death, injury or detention of any person or persons travelling upon any such free passes—the person using any such pass takes all risks of every kind, no matter how caused."

The horses were carried over the Grand Trunk Railway in charge of a person employed by the owner, such person having a free pass for the trip; through the negligence of the company's servants a collision occurred by which the said horses were injured.

Held,—Per Ritchie C.J. and Fournier and Henry JJ., that under the General Railway Act, 1868 (31 Vic. ch. 68) sec. 20 sub-sec. 4, as amended by 34 Vic. ch. 43 sec. 5, re-enacted by Consol Ry. Act, 1879 (42 Vic. ch. 9) sec. 25 sub-secs. 2, 3, 4, which prohibited railway companies from protecting themselves against liability for negligence by notice, condition or declaration, and which applies to the Grand Trunk Railway Company, the company could not avail themselves of the above stipulation that they should not be responsible for the negligence of themselves or their servants.

Per Strong and Taschereau JJ., that the words "notice, condition or declaration," in the said statute, contemplate a public or general notice, and do not prevent a company from entering into a special contract to protect itself from liability.

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

There is no difference in these two cases as to the points in dispute between the parties, and the following statement of facts will suffice for both.

In Morton's case there were other goods shipped besides the horses.

(1) 10 Ont. App. R. 162. (2) 2 O. R. 197.

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The plaintiff shipped a car load of horses by defendant's railway from Belleville to Prescott; the shipping note contained the following clauses:—

"1 The owner of animals undertakes all risk of loss, injury, damage, and other contingencies, in loading, unloading, transportation, conveyance, or otherwise howsoever, no matter how caused.

"2. The railway company do not undertake to forward the animals by any particular train, or at any specified hour; neither shall they be responsible for the delivery of the animals within any certain time, or for any particular market.

"3. When free passes are given to persons in charge of animals, it is only on the express condition that the railway company are not responsible for any negligence, default or misconduct of any kind, on the part of the company or their servants, or of any other person or persons whomsoever, causing, or tending to cause, the death, injury or detention, of any person or persons travelling upon any such free passes, and whether such free passes are used in travelling on any regular passenger train, or on any other train whatsoever, the person using any such pass takes all risks of every kind, no matter how caused."

The train to which the car containing plaintiff's horses was attached collided with another train a few miles from the place of delivery, and the horses were injured; the plaintiff suffered loss from not being able to sell a number of his horses, and from delay and extra expense in getting them to Prescott.

It was not disputed that the servants of the railway company were guilty of negligence, and the measure of damages for which plaintiff, if defendants were liable at all, should have judgment, was agreed to at the trial.

The two causes were tried separately and resulted differently, in Vogel's case a verdict being entered for

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the defendant, which was reversed by the Divisional Court, and in Morton's case the verdict being entered for the plaintiff for the loss of the goods other than the horses and sustained by the Divisional Court; the judgment of the Divisional Court was, in both cases, sustained by the Court of Appeal, from whose decision the defendants appealed to the Supreme Court of Canada.

Osler Q.C. and *McCarthy* Q.C. for appellants:

After the passing of the Consolidated Railway Act of 1879 (42 Vic., ch. 9, D.) the appellant's company were not subject to the provisions of the General Railway Act of the Dominion, and their statutory liabilities after this Act came into force were left as existing prior to the passing of the Act of 1875 (38 Vic., ch. 24).

Section 100 of the Act of 1879, which has reference only to sub-section 4 of section 25 of that Act, and not to the whole section, even if intended to apply to the appellant's company is inoperative and ineffectual, as "the premises" or subject-matter of its application are not in any way provided for or indicated so far as they relate to the appellants.

Sub-section 4, section 25, whenever applicable, imposes a burden upon the railway company and restricts the right to contract as theretofore enjoyed, and is therefore subject to the rule of strict construction and ought not to be held binding upon the appellants unless by clear and unambiguous enactment. Maxwell on Statutes (1).

Unless "the premises" in section 100 of the Act of 1879 are held to mean the provisions of sub-sections 2 and 3 of section 21 of the General Railway Act of 1851, or the corresponding section in subsequent Acts (for which position it is submitted that there is no foundation whatever) then there is no statutory provision

(1) 2nd Ed. p. 348 and cases there cited.

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limiting the appellant's right to contract against their own negligence.

Even if the statute applies to this company, we contend that there is no liability cast upon them under the circumstances of this case.

The neglect or refusal for which a statutory remedy by action is given, has reference only to the statutory duty cast on the railways to start trains, to furnish sufficient accommodation to take, transport and discharge passengers and goods on due payment of tolls or fares legally authorized therefor.

This provision has no application, nor does it attempt to interfere with the ordinary liabilities and rights of the railway company as common carriers, but is a provision to enforce proper train service to prevent extortion by charge of illegal rates,—that is, rates in excess of those authorized by any special or general act, ex. gr. by section 14 of the General Act of 1851, and to provide against undue preference being given to particular shippers.

The plaintiff in this action does not seek to recover by virtue of any such neglect or refusal. His right of action, if any, existed outside of the statute, and it is submitted that the provisions of sub-section 4 only apply to the strict statutory action referred to in "the premises."

In any event we contend that there is the clear right to make the special contract in question, and that upon its terms no liability is cast upon the appellants (1).

Lastly, the plaintiff is bound by the contract upon the answer of the jury to the third question (found at page 175 of the report). Upon this point counsel referred to *Burke* v. *South E. R. Co.* (2); *Watkins* v. *Rymill* (3).

(1) See *Vogel* v. *G. T. R. Co.*, 10 Ont. App. R. p. 162 and cases there cited.

(2) 5 C. P. D. 1.

(3) 10 Q. B. D. 178.

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Dickson Q.C. for respondent Vogel, and *Ermatinger* for respondent Morton :

The defendants contention that the said shipping note constituted a special contract for the transportation of the said horses, and that the 17th condition thereof exempts them from responsibility, is not valid, because, *a*—it is contrary to the declared duty of the defendant to take, transport and discharge upon payment of the freight or fare legally authorized, the condition being absolute, offering no alternative or option. "A carrier cannot force a special contract on a customer."—Ivatt on Carriers (1); *Allday* v. *Great Western Ry.* (2); *Booth* v. *North Eastern Ry.* (3); *Manchester Ry. Co.* v *Brown* (4); *Ruddy* v. *Midland Ry. Co.* (5) *b*.—The consignor did not know he was signing a special contract—*Simons* v. *Great Western Ry. Co.* (6); *Parker* v. *The South Eastern Ry. Co.* (7); Lawson on Carriers (8).

In England the Carriers Act, 2 Geo 4 & 1 Will. 4th, c. 86 (1830) was passed for the more effectual protection of common carriers, and the Railway and Canal Traffic Act, 1854, 17 and 18 Vic. c. 31, was passed to make better provisions for regulating the traffic. These acts are not in force in Ontario, *Hamilton* v *G. T. Ry.* (9), but they had been interpreted by the courts in England before our Parliament passed the various provisions for working of railways, in language very similar, in many respects, to that used in the Imperial statute.

Carr v. *The Lancashire and Yorkshire Railway Company* (10), and *Walker* v. *The York and Midland Ry. Co.* (11), immediately preceded the passage of the Railway and Canal Traffic Act of 1854.

(1) P. 174.
(2) 5 B. & S. 903.
(3) L. R. 2 Ex. 173.
(4) 8 App. Cas. 703.
(5) 8 Irish L. R. 224.
(6) 2 C. B. N. S. 620.
(7) 2 C. P. D. 416.
(8) Sec. 246.
(9) 23 U. C. R. 600.
(10) 7 Ex. 707.
(11) 2 E. & B. 750.

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The Dominion Act 34 Vic. cap. 43 sec. 5, was passed with the obvious intention of restricting the power of railway companies contracting themselves free from liability for loss however caused, which act the Ontario courts in *Scott* v. *Great Western Ry.* (1) and *Allan* v. *Great Western Ry.* (2) decided did not apply to railways incorporated before 1868; and the Supreme Court of Nova Scotia in 1871, in *Dodson* v. *The Grand Trunk Ry.* (3), said that it might be advisable for Parliament to pass a law for the whole Dominion, founded on the Imperial Act of 1854. Similar sentiments have been expressed by the Court of Queen's Bench and Common Pleas in Ontario.—*Hamilton* v. *Grand Trunk Ry.* (4); *Spettigue* v. *Great Western Ry.* (5); and *Bates* v. *Great Western Ry.* (6); whereupon Parliament, in 1875, passed 38 Vic. cap. 24, with the apparent design of restricting all railway companies as aforesaid.

In 1863 the House of Lords decided in *Peek* v. *The North Staffordshire Railway Co.* (7):—*a.*—That general notices and conditions were effectual only when they became in the particular case a contract or agreement and—*b.*—That a condition in a special contract exempting the company from all liability for loss caused by their own negligence was unjust and unreasonable.

The Dominion Parliament in the Act of 1868 (31 Vic. cap. 68 sec. 20), and the Act of 1871 (34 Vic. cap. 43 sec. 5), had enacted that goods should be taken, transported and discharged, and that any party aggrieved should have an action for damages against the company, from which action no notice, condition, or declaration, should relieve the company, if such damages arose from any negligence or omission of the company or its servants. Practically a re-enactment

(1) 23 U. C. C. P. 182.
(2) 33 U. C. R. 483.
(3) 7 U. C. L. J. N. S. 263.
(4) 23 U C. R. 600.
(5) 15 U. C. C. P. 315.
(6) 24 U. C. R. 544.
(7) 10 H. L. Cas. 473, S. C. 32 L. J. N. S. Q. B. 241.

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of the 1st clause of sec. 7 of the Imperial Railway and Canal Traffic Act, 17 and 18 Vic. cap. 31. "Notice or condition" had been judicially interpreted to mean contract and that unless it were assented to "so as to form a contract it was inoperative.—Brown on Carriers (1); *Peek* v. *North Staffordshire* (2); *LaPointe* v. *Grand Trunk Ry.* (3).

The Carrier's Act—11 Geo. 4th, and 1 Will. 4th, cap. 68—in sec. 2 speaks of "some notice to be affixed in some public and conspicuous part of the office." In sec. 2 instead of "public notice or declaration," our Dominion Act says, "any notice, condition or declaration."

The defendants are liable in any view for delay in delivering, and for non-delivery of all the horses, (3 valued at $332.50 never were delivered)—Brown on Carriers (4) *Robinson* v. *G. W. R. Co.* (5).

The contract being compulsory by the defendants on the plaintiff, and in violation of their declared duty is a *nudum pactum*.—See per Richards J. in *Sutherland* v. *Great Western Ry.* (6).

If the special contract has any effect it only relieves the defendants from their common law liability as insurers and not from loss occasioned by their negligence. —*Czech* v. *The General Steam Navigation Co.* (7); *Martin* v. *The Great Indian Peninsular R. Co.* (8); *Ohrloff* v. *Briscall* (9); *Phillips* v. *Clark* (10); *D'Arc* v. *London and North-Western Ry. Co.* (11); *Allan* v. *Great Western Ry Co.* (12).

There can be no difference in principle or effect in a like contract for the carriage of 1 horse and one for 60,

(1) 1st Ed. p. 126.
(2) 10 H. L. Cas. 473, per Blackburn J. and Williams J.
(3) 26 U. C. R. 479, at p. 486.
(4) P. 194.
(5) 25 L. J. C. P. N. S. 123.
(6) 7 U. C. C. P. 409, at p.'s 417-418.
(7) L. R. 3 C. P. 14.
(8) L. R. 3 Ex. 9.
(9) L. R. 1 P. C. 231.
(10) 2 C. B. N. S. 156.
(11) L. R. 9 C. P. 325.
(12) 33 U. C. R. 483.

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or for one or more car loads, and the form or request note shows that there is no difference in practice, it reading "all live stock shall be carried by special contract only," and "when sent in quantities of less than one car load, stock will be charged at per head."

Any condition assuming to discharge the carrier from all responsibility for negligence clearly proved, should be confined within the narrowest limit consistent with fair interpretation.—*Hately* v. *The Merchant's Dispatch Co.* (1).

The whole of clause 17 in the request note must be read to ascertain its meaning and effect, and the plaintiff submits its true construction is:—That animals are to be in charge of the owner or some one on his behalf, to whom a free pass will be given to feed and take care of them; the person accepting such free pass, taking, for his own person, all risks, and the company being exempted from all liability in respect to the feeding, and damages from the animals themselves such as kicking, etc., *i. e.*—To take all the risks of the journey, except what the defendants natually undertake to provide the means of carriage, and use reasonable care in the transit.—*Rooth* v. *North-Eastern Ry. Co.* (2). If it be shown that there are two sets of terms in the course of dealing with a carrier, the law accepts the one least favorable to the carrier. Ivatt (3); *Phillips* v. *Edwards* (4); *Ruddy* v. *Midland* (5). and the onus is on the carrier. (6) *Kendall* v. *London and South-Western* (7).

Reference was also made to—*Railway Co.* v. *Stevens* (8); *Willis* v. *Commissioners E. & N. A. Ry.* (9).

(1) 4 O. R. 723.
(2) L. R. 2 Ex. 173.
(3) P. 193.
(4) 3 H. & N. 813.
(5) 8 Irish L. R. 224.
(6) Ivatt p. 193; Lawson on Carriers 369.
(7) L. R. 7 Ex. 373.
(8) 5 Otto. 655.
(9) 2 Hanney N. B. 159.

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Ritchie C.J

Sir W. J. RITCHIE C.J.—The question to be decided in these cases, is whether or not the defendants were at liberty to protect themselves from liability by the terms of the special contract.

The Consolidated Railway Act, 1879, sec. 25 sub-sec. 4 provides:—

> The party aggrieved by a neglect or refusal in the premises, shall have an action therefor against the company, from which action the company shall not be relieved by any notice, condition or declaration if the damage arises from any negligence or omission of the company or of its servants.

Sec. 2 sub-sec. 2 makes the above provision applicable to every railway constructed, or to be constructed, under the authority of any Act passed by the Parliament of Canada.

This Act repeals the Railway Act of 1875 (38 Vic. ch. 24) which has been held to apply to the Grand Trunk Railway, but enacts in the repealing clause that:—

> All things lawfully done, and all rights acquired under the Acts hereby repealed or any of them, shall remain valid and may be enforced—under the corresponding provisions of this Act, which shall not be construed as a new law, but as a consolidation and continuation of the said repealed Acts.

At the trial, Wilson C.J. gave judgment for the defendants (in Vogel's case) after assessing the damages to enable the plaintiff to obtain a verdict without a new trial; the learned judge held that the Consolidated Railway Act, 1879, did not apply to this company.

The Divisional Court reversed this judgment, and ordered a verdict to be entered for the plaintiff for the damages assessed.

The Court of Appeal were divided in their opinion and the verdict sustained; Burton and Patterson JJ., who dissented from the judgment of the Divisional Court, held, that even if the Consolidated Railway Act applied to the company, they were still not debarred from making a special contract to relieve them from liability.

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Ritchie C.J.

After a careful examination of all the statutes bearing upon this case, I agree with Mr. Justice Osler:—

That these defendants are subject to the statutory law which takes away the defence in an action of this kind where the loss has been occasioned by the negligence of the company or its servants.

The statutory obligation imposed upon a railway company is:—

To start trains at regular hours, and to furnish sufficient accommodation for the transport of all passengers and goods, &c., and any party aggrieved by any neglect or refusal in the premises shall have an action therefor against the company, from which action the company shall not be relieved by any notice, condition, or declaration, if the damage arises from the negligence or omission of the company or its servants.

Any neglect or refusal in the premises. What are the premises? To take, transport and discharge, *inter alia*, such passengers and goods, upon payment of the freight or fare legally authorized therefor; if the goods then are not transported and discharged, by reason of any neglect or refusal, clearly an action lies; and is there any difference whether the neglect is in not providing sufficient accommodation, or in not sending the goods forward in the first instance, or having sent them forward in not transporting them to, and discharging them at, the place of destination, but so negligently dealing with them that such transport and discharge was prevented?

I think the object of the legislation was to prevent railway companies from escaping liability by entering into contracts whereby they could free themselves from liability for the neglect of themselves or their servants, whether by way of notice or condition or declaration, be the same by way of contract or otherwise; in other words, to prevent them from contracting themselves out of liability for negligence. To limit the clause as contended for would, in my opinion, entirely frustrate the intention of the legislature, or enable the companies to do so with impunity.

I think, therefore, the appeal in this case should be

dismissed.

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Strong J.

STRONG, J.—The first difficulty we have to deal with in deciding this appeal, is to ascertain the legislation actually in force; there have been so many alterations in the statutes, and these alterations have been effected in such a slovenly manner, that it requires frequent perusals and much comparison of the different enactments, before it is possible to say what has been repealed and what remains standing, all of which, with a little pains and care in the arrangement of the statutes, might have been ascertained at a glance.

By the General Railway Act of the Dominion, 31 Vic. ch. 68, passed in 1868, it was enacted by the 20th sec. as follows:—

Sub-sec. 2. The trains shall be started and run at regular hours to be fixed by public notice, and shall furnish sufficient accommodation for the transportation of all such passengers and goods as are within a reasonable time previous thereto offered for transportation at the place of starting and at the junctions of the railways, and at usual stopping places established for receiving and discharging way passengers and goods from the trains.

Sub-sec. 3.—Such passengers and goods shall be taken, transported and discharged, at, from and to, such places, on the due payment of the toll legally authorized therefor.

Sub-sec. 4—The party aggrieved by any neglect or refusal in the premises, shall have an action therefor against the company.

By the fifth section of 34 Vic. ch. 43 (passed in 1871), the 4th sub-sec. of sec. 20 of the Act of 1868 was amended by adding the following provision:—

From which action the company shall not be relieved by any notice, condition or declaration, if the damage arises from any negligence or omission of the company or its servants.

So far, the enactments just set forth were not applicable to the Grand Trunk Railway Company, but by the 38 Vic. ch. 24, (passed in 1875) the General Railway Act was further amended, and by sec. 4 it was declared that:—

This Act and the 50th sec. of the Railway Act, 1868, as hereby

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amended, and sec. 20 of the Railway Act of 1868 as amended by sec. 5 of the Act 34 Vic., cap. 43, shall apply to every railway company heretofore incorporated, or which may hereafter be incorporated, and which is subject to the jurisdiction of the Parliament of Canada.

The Grand Trunk Railway Company was and is, beyond question, a railway subject to the jurisdiction of the Parliament of Canada, inasmuch as it is a railway excluded from the jurisdiction of Provincial Legislatures by sub-sec. 10, of sec. 92 of the British North America Act, as being a railway extending beyond the limits of any single Province.

In 1879 the Railway Act of 1868, as amended by the subsequent enactments before mentioned, was, by the statute of 42 Vic. ch. 9 sec. 102, repealed, but by the 2nd, 3rd and 4th sub-secs. of sec. 25, the foregoing provisions of the Act of 1868, as amended by the Act of 1871, were re-enacted; the whole Act was not made applicable to all railways subject to the jurisdiction of the Parliament of Canada, but only to such railways as had been, or should be, constructed under the authority of any Act passed by the Parliament of Canada, by which expression I understand the Parliament of the Dominion. By the 100th sec., however, it was declared that sub-sec. 4 of sec. 25 should:—

> Apply to every railway company theretofore incorporated, or which might thereafter be incorporated, and subject to the jurisdiction of the Parliament of Canada

a provision which manifestly included the Grand Trunk Railway Company. Therefore we have, as applicable to the present appellants, this sub-sec. 4 of sec. 25, standing alone, not preceded by the 2nd and 3rd subsecs. which it had followed in the Act of 1868, as amended by the Act of 1871.

Although this was undoubtedly a very clumsy and confused mode of expressing the intention of the legislature, it still appears to me that sub-sec. 4 can easily

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be construed in the same way the courts below have construed it, by reading into it, in substitution for the words "the premises," the provisions of the foregoing sub-sections of section 25 of the Act of 1879; and so read, its effect will be precisely the same as if sub-sec. 4 and all the sub-clauses of sec. 25 which precede it, were set forth *in extenso*. To say that a party shall have an action for any refusal or neglect to take, transport and discharge goods, is equivalent to saying that it shall be the duty of the railway company to take, transport and discharge goods, and that the party aggrieved by any neglect or refusal so to do shall have an action therefor. Sub-sec. 4 therefore, read alone but construed in the way suggested, imposes upon the railway company the duty of taking, transporting and discharging goods offered for carriage: the effect of this legislation must therefore be to make a railway company to which it applies common carriers of goods; or, at least, to impose upon them the same duties in regard to receiving, carrying and delivering as those to which, by the common law, common carriers are subject in respect of the carriage of goods.

If I did not think this appeal would be decided on other grounds, I should have had to consider whether the word "goods" used in this statute included horses and cattle and other live stock, a point on which my first impression is altogether against the plaintiff; as it appears to me, however, that the case may be disposed of on other grounds, I need not enter upon this consideration.

It cannot be doubted that clause 17 of the special contract under which the horses were carried in both cases was, in its terms, quite sufficient to exempt the railway company from liability for "loss, injury, or damage" happening to the animals in the course of transit, though such injury should be caused by the

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negligence of the appellants' servants, unless the statutory provision in question invalidates the stipulation for such exemption; the cases referred to in the judgment of Chief Justice Moss, in the case of *Fitzgerald* v. *The Grank Trunk Ry. Co.* (1), are cited by Mr. Justice Patterson as sufficient authorities for this proposition, in which I agree with him. It is equally clear from the decisions in the same case of *Fitzgerald* v. *The Grand Trunk Ry Co.* (2), that the document signed by the plaintiff in Morton's case having the caption of "Release and Guarantee," is insufficient for this purpose, and that the company are not thereby exonerated from the consequences of accidents happening through the negligence of their servants. That the injuries in both these cases did arise from the palpable neglect of the company's servants, is a fact which is not and could not have been disputed.

What we have to determine then, in order to decide this appeal, may be included in two questions stated as follows:—

First. Does this statutory prohibition of exemption from liability apply at all to a case like the present where the goods were not received by the railway company in the ordinary way as common carriers, to be loaded by the company's servants, actually placed in their possession, and carried under their care and supervision, but under a special contract for the hire of a car, into which the plaintiff was to be at liberty to put as many or as few horses as he chose, which, during transit, were to remain in the possession, and to be under the exclusive care, of the plaintiff or his servants, thus differing from the ordinary contract impliedly entered into by a common carrier, who receives into his own possession goods tendered to him for carriage?

(1) 4 Ont. App. R. 601.

(2) *Ubi supra* and 5 Can. S. C. R. 209.

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Secondly, assuming that the statute does apply, and that we must consider these horses as having been tendered to, and received by, the appellants to be carried as common carriers, and subject to all the obligations and responsibilities which attach to such carriers, is there anything in the 4th sub-sec. of sec. 25 which invalidates a special contract expressly entered into, and signed by the consignor, restricting the ordinary common law or statutory liability of the carrier?

For the purpose of determining these questions, I of course assume that the horses are "goods" within the meaning of the statute, though I repeat I do not intend so to decide.

Although the order in which these questions are above propounded is the more natural and logical, yet it will be convenient first to consider that last stated. The solution of this, it is evident, must depend on the interpretation to be placed upon the latter part of the 4th sub-sec., or rather, upon the meaning of the words "notice, condition or declaration" there contained. The Queen's Bench Division and the Court of Appeal (the judges in the latter court being equally divided) have held that these words do comprise special contracts expressly entered into and signed by the consignors, as in the present instance. After giving the well considered judgments delivered by the learned Chief Justice in the Queen's Bench Division, and by Mr. Justice Osler in the Court of Appeal, the most attentive and respectful consideration in my power, I am compelled to differ from the conclusion at which they arrived.

As before stated, the effect of sub-sections 3 and 4 of sec. 25, so far as regards the receipt, carrying and delivery of goods, imposes no other or greater obligations on the railway companies subject to it than it would be liable to at common law if it had been itself

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a common carrier of the particular goods in question. In the view which I take, it is not necessary to decide whether it sufficiently appears from the evidence that the Grand Trunk Ry. Co. had so generally dealt with the public, and held itself out, as to make it, at common law and independent of statutory enactments, a common carrier of horses and other live stock; I will, however, assume, for the present purpose that not only are horses "goods" within the meaning of that word in the statute, but that the Grand Trunk Ry. Co. are proved to be common carriers of horses at common law. If it were necessary to decide this last point, I should, however, at least share the doubt expressed by Chief Justice Cameron.

Then conceding that these horses were delivered into the possession of the railway company, and were actually received by them to be carried as common carriers upon the terms stipulated by the company contained in the 17th clause of the special contract, and that the 4th sub-section was applicable, I must still hold that the plaintiffs in these cases are not entitled to recover so far as respects the injuries to the horses. I have no doubt that the word "neglect" has reference to negligence in carrying as well as negligence in omitting to carry; this, indeed, is implied in what has been already said—that the intention of the legislature was merely to impose on the railway company the liability of a common carrier. The grounds upon which I rest my judgment in this aspect of the case are that the words, "notice, condition or declaration," do not bear the construction that the court below has put upon them; that, on the contrary, they must be restricted in the way Mr. Justice Burton has pointed out; that they do not mean terms expressed in a special contract actually signed by the consignor, but in the language

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of Mr. Justice Burton, "terms, published by the company, of their own act and will, on which they are "willing to carry goods."

Allusion has been made in the judgments of some of the learned judges in the court below, to the history of the law in England as regards the restriction by carriers of their general common law liability by special contracts. At common law it was always within the powers of common carriers to relieve themselves by contract from the onerous responsibilities which the law, for reasons once practical, but long since become historical cast upon them. This freedom of contract was, however, found to be liable to abuse, inasmuch as carriers published general notices and conditions on which they announced they would alone accept goods to be carried, which notices and conditions, it was held, were, if so published that knowledge of them might reasonably be imputed to consignors, considered as imported into, and made part of, the contract for carriage; this was thought an unreasonable state of the law, not because it was considered unreasonable that carriers should be at liberty to relieve themselves from liability by contract, but because it was considered unfair that they should do so in this indirect way. To remedy this, the first Carriers Act, 11 Geo. 4th and 1 Will. 4th, ch. 28 was passed, which qualified this power of limiting liability by notice. In the 4th section of this Act we find the words "public notice and declaration" used in a proviso that such notices and declarations shall not, save in certain cases, have the effect of relieving from responsibility. I merely point this out as showing from whence the expression "notice, condition and declaration," used in this sub.-section 4, now under consideration, is originally derived, and that it is, in this first Carriers' Act, used in connection with the word "public."

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In the next legislative regulation of carriers' contracts which was applied in England, "The Railway and Canal Traffic Act, 1854," which was passed after the whole system of the inland carrying trade in England had been changed by the construction and use of railways, we find in the 7th section these same words now under consideration, "notice, condition or declaration." The first part of that section is as follows :—

> Every such company as aforesaid shall be liable for the loss of, or for injury done to, any horses, cattle or other animals, or to any articles, goods or things, in the receiving, forwarding, or delivery thereof, occasioned by the neglect or default of such company or its servants, notwithstanding any notice, condition or declaration made or given by such company contrary thereto or in any wise limiting such liability, every such notice, condition or declaration being hereby declared to be null and void.

The construction placed on these words by the English courts has been, that the words "notice, condition or declaration" refer to general notices, and do not exclude the right to make special contracts. Thus Jarvis C.J., in *Simons* v *The Great North-Western Railway Co.* (1), referring to the effect of this part of the section, says :—

> General notices to limit liability shall be null and void, but the company may make special contracts with their customers provided they are just and reasonable.

This last observation, of course, refers to the latter part of the section 7 and has no application here. The purpose for which I refer to this section, and the construction which has been placed upon it in England, is to show in the first place, that these words which we find in our own statute, and which we are now called upon to construe, were borrowed from the English Act, and therefore we are entitled to presume that it was intended they should have the same meaning here, as was placed upon them there by the English courts, namely, that it was intended by the expression to

(1) 18 C. B. 805.

exclude a limitation of liability by general notices, and that it was designed for this purpose only.

It is not necessary, however, to have recourse to the decisions of the English courts as establishing the proper construction of these words; taking these words "notice, condition, or declaration" by themselves, without assistance from any authorities, it seems apparent that they are not sufficient to disentitle the railway companies to the benefit of special contracts limiting their liability, especially when it is considered that it had been the universal practice of carriers to endeavor to exonerate themselves by general public notices; the words "notice and declaration" so read must, as I think every one will admit, clearly have reference to the general notices previously in use; the word "condition" may be more ambiguous, but we are surely bound to interpret it on the principle *noscitur a sociis*, and when we find it associated with words which clearly have reference to general notices, the unilateral acts of the company, we must limit, or rather fix, its import accordingly. Upon the whole, my conclusion is that the legislature, desiring to do away with general notices, adopted the phraseology which had been deemed apt for that purpose in the 7th section of the English Act of 1854, but not intending to limit parties in making special contracts to such as the courts should deem just and reasonable, but intending to leave the railway company full freedom of contract in that respect, did not, as was done by the English Act, proceed to provide for such special contracts. I think that this construction is inevitable when we consider that it is a universal principle of statutory construction that every presumption must be made against an intention to interfere with the freedom of contract, and when we advert to the serious consequences which would follow if railway companies were not allowed to protect

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themselves, to some extent, against liability for loss even from the negligence of their own servants, by fair and reasonable conditions applicable to the conveyance of property of extraordinary value, I cannot think that any such intention existed.

But I place my judgment not so much upon this consideration, as upon the utter inadequacy of the words of the Act of Parliament to warrant such an interpretation.

I am therefore of opinion, that making all the assumptions in the plaintiff's favor which have been stated, and treating the appellants in these cases as common carriers, there was nothing in the statute law to preclude them from qualifying their liability in the way they have done by the stipulations contained in these contracts.

Next we have to consider whether the appellants can be considered as coming within the provision contained in the 4th sub-section of section 25 of the statute of 1879. I venture to say that they cannot be so considered; in the first place, it is plain, upon the evidence taken in connection with the terms of the special contracts, signed by the parties, that the railway company never were in possession of the horses in question which always, whilst in the car provided by the company for their carriage, were in the possession of their respective owners. I take it to be essential to the liability of a common carrier that he should be entrusted with the possession of the property carried, and that when the possession is retained by the owner, the liability is so modified that it is no longer open to the owner to insist on any greater responsibility than that which in all cases attaches to acts of negligence, and which liability may therefore be excluded by contract without reference to any restriction on the liberty of contracting applicable to common carriers.

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Again, viewing this, as Mr. Justice Burton puts it, as an action on the statute, the liability to the action given by the 4th sub-section and the disability which is imposed as to escaping from such liability by "notice, condition or declaration" (even if we interpret these words as including "contract") only applies to goods "taken" by the railway company for transportation, the word "taken" as here used, manifestly meaning taken into the possession of the railway company. The cases which have been decided as to passengers' luggage seem therefore not without application here. It has been held that railway companies are to be deemed common carriers of a passenger's luggage entrusted to the care of their servants, but that if the passenger chooses to retain control of the luggage himself, the company is not to be considered as common carriers of it, but is liable only for loss by actual negligence. This argument is not, I conceive, met in the present case by the terms of the contract which acknowledges the receipt of the horses, a receipt being always susceptible of explanation, and here the evidence shows, beyond all question, that the horses from the time they were shipped were under the care and control of the owner who was carried upon a free pass, expressly in order that he might have such care and control.

The true legal definition of the contracts entered into in these cases by the plaintiffs with the appellants, was, I conceive, that propounded by Mr. Justice Patterson, namely, that the company let to hire to the plaintiffs a railway car for the carriage of horses, leaving it to the plaintiffs to load such cars with as many horses as they might think fit, and further agreed to draw such cars in their trains. Such being the effect of the agreement between the parties, the railway company could no more be said to be in the possession of the horses than could the owners of a steam tug employed to tow a ship be said

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to be in possession of the cargo. A class of cases decided on charter parties may also be referred to, not, perhaps, as affording analogy from which it would be safe to reason, but as illustrating the nature of the relationship between the railway company and the owners of the property in the present case. It has been held that when, by a charter party, the owner retains control of a ship, the master and crew being in his employ, he is to be deemed to be in possession of the cargo which, through his servants, is in such cases under his care and control, the contract only giving the charterer the right to the use of the ship for the carriage of his goods; but when the charter party amounts to a demise of the vessel, as it is held to be when the master and crew are employed by the charterer, the ship-owner is not considered as in possession of the cargo or liable in any way for it. It is no answer to this to say that no care of the owner could have prevented the injury in the present case; the argument based on the possession being retained by the owner, is only used to show that the property here was not carried by the defendants either as common carriers or under the statute, not as showing that the appellants would not have been liable for the negligence of their servants, if there had not been a contract exonerating them from such responsibility; in other words, the appellants liability depends on whether they carried as common carriers, either at common law or under the statute, and this they cannot be said to have done if they had not possession of the horses; so that possession becomes the test of the legal validity of the stipulation which they exacted, that they should not be so liable.

It is, in my opinion, sufficient to show that the case has not been brought within the terms of the statute literally construed, that is, construed as in any case we are bound to construe a statute, but more especially so

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bound when it is sought, as here, to impose legislative restrictions on the right of contracting freely; and therefore the consequences of such a construction would be of insufficient weight to authorize us to depart from the plain meaning of the words of the enactment. But no difficulty arises from the consideration that unreasonable or unjust consequences are likely to arise in the present case; if an owner wishes his horses carried by the railway company as common carriers, all he has to do is to tender them for transportation, and upon the payment of the proper charges the company will be bound to carry them if they are to be deemed generally common carriers, or if the statute applies to such property. On the other hand, by holding that under a contract like the present the railway company are unable to qualify their liability, we should go far towards invalidating the arrangements under which a most important branch of the inland carrying trade is now carried on; I allude to the arrangements between express companies and railway companies. If we held the appellants incapacitated from discharging themselves from liability by contracts like the present, upon what principle can it be said that railway companies, within the statute of 1879, can exempt themselves by contract, as they always assume to do, from liability to express companies in respect of the goods and property carried by the latter; in the case of express companies the goods are under the care and control of their servants to no greater degree than the horses in the present case were under the care of their owners; in each case the car is the property of the railway company, and in both alike, the agreement between the parties is resolvable into a contract to let to hire a car and to haul it. This consideration, in my judgment, greatly strengthens the construction which the mere words of the Act seem to call for.

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Again, it is more for the convenience of the public that valuable property, such as horses and live stock, should be conveyed in this way, under the care and control of persons used to their management, than that it should be left to the servants of the railway company to attend to their wants in respect of food and water and their transhipment when called for.

It may be that an improvement in the law would be wrought by an amendment making it incumbent on the courts to determine whether special contracts are reasonable or not, as was done in England by the Act of 1854, but against the good policy of such enactments we have the high authority of some of the Lords who heard the late case of *The Manchester Railway Company* v. *Brown* (1), particularly that of Lord Bramwell. Upon the whole I do not see that any great public inconvenience will result from holding that the 4th sub-section of the statute of 1879 does not apply to special contracts, provided consignors will take the trouble to read the special contracts which are presented for their signatures. As the Chief Justice remarked at the trial, if people will not read these conditions, it is their own fault if they operate as a surprise upon them when a loss takes place.

What is before said has, of course, reference only to the horses; as regards the other goods in Morton's case the appellants are liable for the loss in that respect upon the general ground of negligence, though they carried not as common carriers, nor under the statute, but under the special contract, inasmuch as the document headed "Release and Guarantee" did not, as before pointed out, exonerate them from such liability. In Morton's case the verdict should therefore be entered for the plaintiff for $89. The learned judge who heard Morton's case, discharged the jury and found that the

(1) 8 App. Cas. p. 703.

horses were carried under the special contract; in Vogel's case however, the jury expressly found that the horses were not carried under the special contract, "unless so far as that answer was qualified by their answer to the third question." The answer to the third question is that the plaintiff supposed the terms of the request note and shipping bill were of the like nature as those of other papers he had signed for the carriage of horses by the Grand Trunk.

I suppose that, strictly speaking, the question should have been left to the jury, whether Fanning signed the request note as the agent for the plaintiff, but this fact was not disputed; nor was it disputed that the horses were carried under the contract, nor pretended that they were carried under any other contract than that contained in the request note and shipping bill. Under the Judicature Act we may, I think, supply this finding; rule 321 seems to authorize this, and the corresponding English rule has been so applied. It would appear, therefore, that notwithstanding the finding of the jury, effect may be given to the law as before stated applied to the facts in evidence, without going through the useless formality of another trial.

My conclusion is, therefore, that the appeal should be allowed with costs in both courts, and judgment entered for the plaintiff for $89 in Morton's case and for the defendants in Vogel's case.

FOURNIER J. concurred in the judgment delivered by the Chief Justice.

HENRY J.—I am of the opinion that the appeal should be dismissed in the both cases. I think in one of the cases there was a reduction made for the carriage of the horses.

My opinion is that in both cases the party is entitled to recover the whole of the loss. I think the

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special agreement did not alter the liability, and that the party is entitled to recover not only for the other goods, but also for the horses.

Taschereau J.

TASCHEREAU J.—I would have allowed these appeals for the reasons given by Burton and Paterson JJ. in their dissenting opinions in the court below. I can see nothing in the statute to prevent this company from making special contracts for the carrying of goods. Why should parties desirous of making such contracts be deprived of their common law right to do so? If, for instance, a party wants a special train—hires a special train—to carry his goods, can he not make a special contract with the company about it? Has the legislature deprived him of that right? It would require express words to bring me to the conclusion that they have done so. I cannot find them in the statutes. Here it was a special car that the plaintiff hired. He made a special contract for it with the company. One of the conditions of that contract was that the company should not be liable for damage occasioned by accident. I can see nothing illegal in such a condition, as the statutes stand.

Appeals dismissed with costs.

Solicitors for appellants: *Messrs. Hoyles & Aylesworth.*

Solicitor for respondent Vogel: *Geo. D. Dickson.*

Solicitors for respondent Morton: *Ermatinger & Robinson.*

ELIJAH WASHINGTON FAULDS, WILLIAM MARTIN FAULDS, JAMES LINDA FAULDS, WESLEY BELL FAULDS AND MATILDA ELIZABETH FAULDS (PLAINTIFFS) } APPELLANTS.

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*March 17.
1886
*March 6.

AND

MARGARET HARPER *et al.* (DEFENDANTS)..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Mortgagor and mortgagee—Foreclosure and sale—Purchase by mortgagee—Right to redeem after—Statute of limitations—Trustee for sale.

In a foreclosure suit against the heirs of a deceased mortgagor who were all infants, a decree was made ordering a sale; the lands were sold pursuant to the decree and purchased by J. H., acting for and in collusion with the mortgagee; J. H. immediately after receiving his deed, conveyed to the mortgagee, who thereupon took possession of the lands and thenceforth dealt with them as the absolute owner thereof; by subsequent devises and conveyances the lands became vested in the defendant M. H. who sold them to L, one of the defendants to the suit, a *bonâ fide* purchaser without notice, taking a mortgage for the purchase money. In a suit to redeem the said lands brought by the heirs of the mortgagor some eighteen years after the sale and more than five years after some of the heirs had become of age.

Held,—Reversing the judgment of the Court of Appeal, that the suit being one impeaching a purchase by a trustee for sale the statute of limitations had no application, and that, as the defendants and those under whom they claimed had never been in possession in the character of mortgagees, the plaintiffs were not barred by the provisions of R. S. O. ch. 108 sec. 19, and that the plaintiffs were consequently entitled to a lien upon the mortgage for purchase money given by L.

Held, also, that as it appeared that the plaintiffs were not aware of the fraudulent character of the sale until just before commencing their suit, they could not be said to acquiesce in the possession of the defendants.

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

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APPEAL from a decision of the Court of Appeal for Ontario (1) reversing the judgment of the Chancellor (2).

The facts of the case are fully stated in the previous reports and the following judgments of this court.

McCarthy Q.C. and *Walter Cassels* Q.C. for appellants.

Street Q.C., for respondent.

The points of argument and cases relied on by counsel are fully given in the reports of the case in the court below.

STRONG J.—In 1857 William Faulds purchased from his father, Andrew Faulds, one hundred acres of land in the Township of Malahide, for the price of £875 ($3,500), of which a sum of £400 ($1,600) was paid in cash, and the residue of the purchase money, amounting to £475 (or $1,900), was allowed to remain upon the security of a mortgage of the property. This mortgage, which was effected by a deed dated the 20th of April, 1857, was unpaid at the death of the mortgagor, which occurred on the first of July, 1858. Sometime in 1861, Andrew Faulds, the mortgagee, filed his bill for the foreclosure of the mortgaged property against the co-heirs of his son, the deceased mortgagor, who had died intestate; these co-heirs were the plaintiffs in the present cause, and Eliza Jane Faulds, who died intestate, unmarried, and under the age of twenty-one years, in April, 1868. The plaintiffs, at the date of their father's death, were all infants; the eldest, Elijah Washington Faulds, being then of the age of 14 years, having been born in the year 1844.

By a decree bearing date the 28th of June, 1861, made in the foreclosure suit before mentioned, the mortgaged lands were, in default of the payment at the appointed time of the amount which should be found due to the

(1) 9 Ont. App. R. 537. (2) 2 O. R. 405.

plaintiff, ordered to be sold. Pursuant to this decree, the lands were, upon the 12th of April, 1862, put up for sale by auction in two lots, when Joseph Harper, one of the defendants in this cause, pretended to become the purchaser of the same for the aggregate price of $1,600.

The plaintiffs, in their bill, alleged that Andrew Faulds, the plaintiff in the foreclosure suit, and who, as such, had no right to purchase himself, employed Joseph Harper the ostensible purchaser, to purchase for his behoof, and that Joseph Harper was, in fact, the agent of Andrew Faulds in making the purchase and in carrying out the same; further, they allege that the lands were sold to Joseph Harper at a price greatly below their real value, on account of this combination between Joseph Harper and Andrew Faulds, which had the effect of "damping competition" and was intended to have that effect. The allegations of the bill on this head are contained in the 13th and 14th paragraphs, which are as follows:—

13. Your complainants allege, and the fact is, that the plaintiff in the said foreclosure suit being mortgagee and having no right to purchase for himself at the said sale, employed the said Joseph Harper (the purchaser of the said lands as aforesaid) as his agent in and for and he was in fact the said Andrew Faulds' agent during the carrying out of the said sale.

14. The said lands were sold to the said Joseph Harper at a price greatly below their real value on account of the combination between the said Joseph Harper and Andrew Faulds which had the effect of damping competition and was intended by them to have that effect.

It is not shown that Andrew Faulds, who, as the plaintiff in the cause, must, in the absence of any order to the contrary, be considered the vendor, and as such charged with the conduct of the sale, had leave to bid; nor do the defendants, in their answer, pretend that such leave was obtained.

This purchase by Joseph Harper was carried out by a deed of the 16th of June, 1862, whereby Andrew

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Faulds, as the mortgagee in whom the legal estate was vested, conveyed to Joseph Harper, and by a second deed dated the same day, Joseph Harper re-conveyed the same lands to Andrew Faulds in fee. On the 14th of June, two days before the execution of these conveyances, Andrew Faulds had exercised an act of ownership over the lands by executing a lease, whereby he demised them to one Bennett as his tenant for a year from April, 1862. From the date of the deeds before mentioned, Andrew Faulds assumed to be the absolute owner of the lands, and dealt with them as such up to the time of his death; by his will, he devised his property to his wife (who died before this bill was filed) for life, and directed that upon her death his executors should sell all his real and personal property, and out of the proceeds should pay his son, Thomas Faulds, $500, and divide the residue equally between the testator's son, Andrew Faulds the younger, and his daughters, the defendant Margaret Harper (the wife of Joseph Harper already mentioned) and Elizabeth Linda. The legacy to Thomas Faulds had been paid, and the interests of Andrew Faulds the younger and Elizabeth Linda had become vested by conveyance from the former, and by devise from, and by the death of, the latter, in the defendant Margaret Harper previously to the sale of the lands in question, to the defendant James C. Lane hereafter mentioned.

The testator, Andrew Faulds, appointed Peter Clayton and Walter E. Murray his executors, of whom the former died before the institution of this suit.

The defendant, Margaret Harper, having thus the sole beneficial interest in these lands vested in her, remained in the enjoyment of the property and in possession thereof by her tenants until the 29th of December, 1879, when, as she herself states in her factum filed for the purposes of this appeal, "being the beneficial

owner of the rights of the said lands, she sold and caused the lands to be conveyed to the defendant, James C. Lane, a purchaser for value without notice, who conveyed the same by way of mortgage to her to secure the payment of $4,780.29, being the purchase money and interest, and the said James C. Lane immediately entered into possession as owner, and has ever since remained in such possession undisturbed, save by the proceedings in this action." The defendant, Margaret Harper, being therefore the beneficial and absolute equitable owner of the lands at the time of the sale to Lane, and being, as regards the interest and shares of herself and Elizabeth Linda, a mere volunteer, and it not being alleged or pretended that either she or Elizabeth Linda were purchasers for value without notice in respect of the shares acquired from Andrew Faulds, the testator's son, it follows that the plaintiffs, not having been able to disprove Lane's plea of purchase for value without notice, upon establishing their case were entitled to have a personal decree against Margaret Harper, and also a lien giving effect to the same equities against the purchase money remaining unpaid by Lane, as they would have been entitled to enforce against the land which it represented if it had remained in the hands of Margaret Harper. The defendants, Margaret Harper and her husband, by their answers denied the alleged purchase by Joseph Harper on behalf of Andrew Faulds, and also pleaded the statute of limitations, and that the plaintiffs were bound by laches and acquiescence.

The only fact seriously disputed and upon which any conflicting evidence was given was that as to the real character of the purchase, in other words whether Andrew Faulds, the mortgagee, was in fact the real purchaser at the sale under the decree, through the agency of Joseph Harper. The evid-

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ence on this point was very strong, no less than seven witnesses having deposed to distinct admissions by either Andrew Faulds, or by Joseph Harper at a date anterior to his re-conveyance to Andrew Faulds, that such was the fact. Against this evidence the defendant Harper and his wife opposed no testimony but their own, which was regarded by the learned judge before whom the cause was heard as unsatisfactory, a conclusion which is not found fault with by any of the learned judges in the Court of Appeal, and which indeed a perusal of the depositions of the defendants will satisfy any one was the only result which could have been arrived at.

The cause having been heard before Vice Chancellor Blake on the 13th October, 1880, that learned judge on the same day made a decree declaring the sale to James C. Lane binding, and that the plaintiffs, Wesley Bell Faulds, were entitled each to one-fifth of the proceeds of the sale to James C. Lane by Margaret Harper, after deducting therefrom any balance remaining due upon the mortgage from William Faulds to Andrew Faulds, and further declaring the remaining plaintiffs, who had attained the age of 21 years more than five years before the filing of the bill of complaint herein, barred of their rights by the statute of limitations, and reserving costs and further directions until after the taking of the accounts.

This decree was re-heard at the instance of Margaret Harper, and on 22nd June, 1882, the Divisional Court (Proudfoot and Ferguson JJ.) pronounced a decree varying the decree by declaring each of the five plaintiffs entitled to one-fifth part of the proceeds of the sale to James C. Lane by Margaret Harper, after deducting therefrom any balance remaining due upon the mortgage from William Faulds to Andrew Faulds, and ordering the defendant, Margaret Harper, to pay the

costs of the re-hearing.

The defendant, Margaret Harper, appealed to the Court of Appeal for Ontario against the judgment of the Divisional Court, and judgment was given by that court (Spragge C. J. dissenting), allowing the appeal and dismissing the action with costs. The plaintiffs now appeal to this court against the judgment of the Court of Appeal.

The learned Vice Chancellor apparently founded his judgment on the applicability of the statute of limitations to the plaintiffs' case, treated simply as a bill to redeem, since he held the lapse of ten years a bar to the right of redemption of such of the plaintiffs whose disabilities of non-age ceased more than five years before the filing of the bill, and that those who had attained their age only within five years next before the filing of the bill were alone entitled to redeem, and that their right of redemption was confined to a redemption of their proportionate shares of the equity of redemption. The Divisional Court on the re-hearing proceeded on a different ground, holding that whilst the statute would have been applicable if the only persons entitled to redeem had been the plaintiffs who had attained full age more than five years before the filing of the bill, yet inasmuch as there were others (the plaintiffs, Wesley Bell Faulds and Matilda Elizabeth Faulds,) who had not attained the age of 21 years five years next before the filing of the bill, they were entitled to redeem the whole estate, which could not be redeemed piecemeal. The judgment of the Divisional Court in this last respect was founded on the authority of the case of *Rakestraw* v. *Brewer* (1). The plaintiff's right to the benefit of the exception contained in the statute in favor of persons under disability was rested on the authority of the decision of

(1) Sel. Cas. Ch. 56.

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the Upper Canada Court of Appeal in the case of *Caldwell* v. *Hall* (1), which the learned judges preferred to follow rather than to adopt the construction of the statute laid down in the English cases of *Fos'er* v. *Patterson* (2) and *Kinsman* v. *Rouse* (3). The majority of the Court of Appeal proceeded upon the same *ratio decidendi*, but treated *Caldwell* v. *Hall* as having been overruled by the late English decisions, and on this ground held that the exception of disabilities did not apply in favor of a mortgagor or his representatives seeking to redeem, and therefore reversed the decree below and dismissed the bill. The late Chief Justice of Ontario, who dissented, founded his judgment upon a ground which, although it does not seem to have received consideration from the other learned judges in any of the courts below, appears to me to be entirely right and to be sustained both by principle and authority. The learned Chief Justice considered that the bill was substantially one impeaching a purchase by a trustee for sale, a case to which the statute of limitations had no application, and that there had been no possession attributable to the mortgage title; that this sale was one which, even at the distance of time at which it was impeached, could not upon the evidence be sustained, unless there was acquiescence, of which there was no proof; and that as the defendants and those under whom they claimed had never been in possession in the character of mortgagees, the plaintiffs were not barred by the enactment originally embodied in the 28th section of 3 and 4 W. 4, cap. 27, and now contained in the Ontario R. S., cap. 108, sec. 19.

The language of the learned Chief Justice on this last point is so very clear and satisfactory that I quote it here. He says:

(1) 8 U. C. L. J. 42.
(2) 17 Ch. D. 132.
(3) 17 Ch. D. 104.

"Andrew Faulds never was in possession in any other character than that of purchaser. Consistently with that character he could not receive any payment on account of the mortgage debt, for, according to his position, the debt was extinguished, the sum bid by Harper being the amount of it; and for the same reason he could not give such acknowledgment in writing as to the right of the mortgagor as is contemplated by the statute. It cannot therefore lie in his mouth to say that he was in possession as mortgagee, and he cannot invoke the statute of limitations as extinguishing the title of the plaintiffs by reason of his possession in that character."

The Chief Justice refers to no authority, but as I shall show hereafter his proposition is amply supported in that way. As regards the fact of the purchase by Harper having been as an agent or trustee for Andrew Faulds that was not, as indeed it could not have been in view of the evidence and of the finding of the Vice Chancellor, disputed by any of the judges below, and indeed the Chief Justice says that upon the hearing of the appeal even the counsel for the present respondent did not dispute the fact to be as the Vice Chacellor had found it. We may therefore assume that point to be conclusively settled. As regards the effect of such a purchase in a court of equity, more especially when brought about in the secret and covert way in which it was arranged between Andrew Faulds and Harper in the present case, there could be as little difference of opinion, and indeed it does not seem to have been denied that the plaintiffs were entitled to be relieved against the sale, provided they brought themselves within the saving clauses of the statutes of limitations

That a purchase without leave of the court by a mortgagee at a sale under a decree in a suit instituted by him to realize his security, which sale it was his duty to conduct, is void in equity and will be so declared upon the same principle that a purchase by a trustee for sale will be set aside, is too clear and well established a proposition to call for any lengthened examination of authorities. The offending parties themselves

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were conscious of it in the present instance and endeavored to disguise the real fact and their apprehensions were well founded. Authorities of the greatest weight show conclusively that the court will, always, at the option of the party standing in the position of *cestui que* trust, as the heirs of the mortgagee in this case did, set aside such a purchase as conflicting with the duty of the vendor to obtain the very best price attainable for the property to be sold, and as having a tendency, if done openly, to damp the sale.

In the case of *Popham* v. *Exham* (1) the Master of the Rolls in Ireland thus states the rule and the reasons for it. He says:—

It is a well settled principle of courts of equity, that neither the plaintiff nor his solicitor can bid without the leave of the court. The rule more strongly applies in a case like the present, where the same party was the plaintiff, and in effect his own solicitor. It is said that the rule was first established in the case of *Drought* v. *Jones* (2), a few months after the sale in *Popham* v. *Exham*. The rule, however, is not a rule of practice or procedure; it is a rule of equity, founded on this well understood principle that the same person is not to be permitted to fill the double character of vendor and purchaser. A party who has the carriage of proceedings in a cause stands in a fiduciary position to all the parties and encumbrancers in the cause. The jurisdiction exercised by the court, of taking the carriage of the proceedings from a party who does not conduct the suit with due diligence, establishes that. The plaintiff's solicitor prepares conditions of sale. He is bound to see that these conditions are not of such a character as to deter parties from bidding. It is the duty of the plaintiff, acting through his solicitor, to see that the intended sale shall be duly advertised, and hand bills posted and circulated, so as to give publicity to the sale. The time when the sale should take place is often important. The plaintiff and his solicitor, in their character of vendors, have a duty imposed on them to sell for the best price that can be obtained. If the plaintiff or his solicitor purchase, their interest is in direct conflict with their duty, because in their character of purchasers they would or might be anxious to purchase at an under value. The court, therefore, when giving a plaintiff or his

(1) 10 Ir. Ch. Rep. 440. (2) Fl. & K. 317.

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solicitor liberty to bid, makes it part of the order that the carriage of the proceedings should be given to some other party or encumbrancer. If no other person will take the carriage of the proceedings, the notice of motion has informed all persons interested of the fact that the plaintiff or his solicitor have obtained liberty to bid, and the proceedings connected with the sale can be narrowly watched. If a plaintiff or his solicitor was to bid openly in his own name, without the leave of the court, the sale would, in my opinion, be impeachable; at all events if it appears to be at an undervalue, and if the proceedings to impeach the sale are taken within a reasonable time. But the objection becomes much more serious if, as in the present case, the purchase is made through a trustee, and where the fact of the plaintiff or his solicitor being the real purchaser is kept concealed from the court, and the Master, and the parties in the cause. In such case, the authorities would appear to establish that the sale is not simply impeachable for undervalue but is actually void.

The bill in the case of *Popham* v. *Exham*, as in the present case, impeached a purchase by the plaintiff in a mortgage suit, made without leave of the court, through the intervention and name of a trustee whose agency was, as here concealed; and although the Master of the Rolls expressly disclaimed all imputation of moral fraud, and there was no evidence of undervalue, the sale was set aside after a lapse of some seventeen years. In the case of *Browne* v. *McClintock* (1), which was also a suit instituted under similar circumstances and for the same purpose as the present, we find Lord Chelmsford saying:

Mr. Browne stood in such a relation to the cause in which the sale was decreed, that he could only have bid for the property by leave of the court. He was plaintiff in the suit and solicitor; and if the biddings, though nominally in trust for Unsworth, were really on behalf of Browne, there was a fraud committed upon the court.

In addition to the foregoing authorities I refer to the cases of *Aikins* v. *Delmage* (2); *Drought* v. *Jones* (3); *O'Connor* v. *Richards* (4); *Price* v. *Moxon* (5).

(1) L. R. 6 H. L. 466.
(2) 12 Ir. Eq. Rep. I.
(3) Fl. & K. 316.
(4) Sau. & Sc. 246.
(5) Cited in 2 Ves. Jr. 54.

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That in the present case the arrangement come to actually had a prejudicial effect on the sale, and that the price was less than the fair value of the property, is fairly to be presumed from the fact that this farm, which had been purchased for $3,500 some five years before, and on account of which an instalment of $1,600 had actually been paid, only realised a price of $1,600 on this sale. The direct evidence as to value given at the hearing is also altogether in favor of the plaintiffs and shows that the property was sold for not more than about one-half its actual value. It was therefore almost of course that this sale should have been set aside, unless the lapse of time afforded sufficient protection to the defendants either as a defence under the statute of limitations or as coupled with acquiescence.

That the statute of limitations has no application to the case of a trustee or other fiduciary agent purchasing in fraud of the rights of his *cestui que* trust or principal is well established by authority. A suit in equity for this purpose has been held not to be, as it is apparent it is not, a suit for the recovery of land, but is considered one to be relieved against a breach of trust or a constructive equitable fraud and to have the purchaser, who, by these means, has obtained the legal estate, declared a trustee of it for the plaintiff. It does not, therefore, come within the 24th section of the 3 and 4 W. 4 cap. 27, re-enacted by the Ontario Revised Statutes, cap. 108 sec. 29, but is left as before the Statute to be dealt with by courts of equity upon the principle of acquiescence or laches (1).

The 24th section of the statute, which provides that suits in equity to recover land must be brought within the same time as an action at law could have been brought if the title of the party had been legal, has been

(1) *Marquis of Clanricarde* v. *Henning* 30 Beav. 175; *Obee* v. *Bishop* 1 DeG. F. & J. 137; Browne's Limitations as to real property, 405.

held to apply only to cases where some equitable title is asserted which, if it had been a legal title, would have been within the statute, and it only bars equitable rights, so far as they would have been barred if they had been legal rights (1), and cases of breach of trust, and of constructive fraud are not within its terms.

Any case of acquiescence or laches accompanied with that knowledge which is an indispensable ingredient in this defence when set up by a defendant against whom fraud or breach of trust is proved, is here out of the question. No point was made as to this in the court below. The Chief Justice in the Court of Appeal upon this head makes the following observations, which I think indicate a correct appreciation of the evidence:—

In the case before us I do not find, upon looking over the evidence, that the plaintiffs knew, or that any of them knew, that the mortgagee was the real purchaser of the land. The fact was concealed, and the appellant and others claiming under the mortgagee appear always to have maintained that the fact was otherwise, and that Harper was the real as well as the nominal purchaser.

For all that appears the real facts as to the purchase were unknown to the plaintiffs until just before the filing of the Bill.

I have read the evidence several times with a view to ascertain exactly what is proved as regards the plaintiff's knowledge of the fact which is the vital point in this case, that Joseph Harper purchased under a preconcerted arrangement with Andrew Faulds, the vendor, as a trustee for the latter, and I find it impossible, consistent with the proofs, to impute such knowledge to the plaintiffs or any of them at an earlier time than that mentioned by the Chief Justice in the extract I have just read from his judgment. It is true that they all along thought they had some claim upon their aunts in respect of their father's estate, but whether this was regarded by them as a legal or moral claim it is not easy to make out. Now, in order to constitute

(1) *Archbold* v. *Scully* 9 H. L. Cas. 360.

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equitable acquiescence it is incumbent on the party who relies on it to prove, not merely that there was some vague suspicion of wrong, but that actual knowledge of the facts were brought home to the party to be affected by it.

It is said by a text writer (1):—

> Acquiescence also imputes knowledge, or the means of knowledge, of the material facts alleged to have been acquiesced in, for a person cannot be said to have acquiesced in what he did not know, and as to claims which he did not know he could dispute.

And this I adopt as a fair statement of the principles settled by the numerous cases which are referred to as authorities—particularly the *Marquis of Clanricarde* v. *Henning* (2), and *Charter* v. *Trevelyan* (3). In the last well known case the whole principle upon which courts of equity give effect to lapse of time as a defence is succinctly stated by Lord Cottenham, and his judgment has always been considered as remarkable, as well for a correct exposition of the law as for the felicity of the language in which it is expressed. In *Randall* v. *Errington* (4), Sir William Grant states the principle very distinctly as follows:

> To fix acquiescence upon a party it should unequivocally appear that he knew the fact upon which the supposed acquiescence is founded and to which it refers.

Applying these principles here it is quite out of the question to say that any such defence is made out. The plaintiffs' case impeaching this sale rests not upon the mere fact that Andrew Faulds purchased in breach of his duty as a trustee for sale, for if he had so bought in the property openly and in his own name, the fact being patent to all the world, notice of it might well have been ascribed to the plaintiffs or at least to

(1) Browne on Limitations p. 516.
(2) 30 Beav. 175.
(3) 4 L. J. N. S. Ch. 209; 11 C. & F. 740.
(4) 10 Ves. 428.

some of them, at a time sufficiently distant to make their subsequent laches a bar; but this is not the case of such an open breach of trust. Here the fiduciary vendor not only betrays the confidence which the court and the guardians of the infant heirs reposed in him, but he accompanies this wrong by another, by concerting a scheme by which his improper conduct should be concealed, thus practising a fraud upon the court as well as upon the beneficiaries, and also rendering it almost impossible that the real nature of the transaction should ever be discovered, unless in the course of time some accident should reveal it to the parties who were wronged, and it is evident that if Harper and Andrew Faulds had not themselves talked of the matter the real truth never would have been discovered. Then the ages of the plaintiffs at the date of the sale are also to be considered as affording another strong argument against this defence. The oldest at that time was not 14 years of age; their mother was not a person who could be expected to discover this fraud; how then could it be expected that such persons were to arrive at a knowledge of this hidden transaction which a person of acuteness and experience could only have discovered. On the whole, then, in my opinion, the defence on this point of acquiescence wholly fails. And had the statute of limitations been directly applicable the same result must have been reached; for by the express terms of section 26 of the original English Act (3 and 4 W. 4 cap. 27), R. S. O. cap. 108 sec. 31, it is enacted:

> That in the case of a concealed fraud the right to bring an action to recover land shall be deemed to have first accrued when such fraud actually was, or with reasonable diligence might have been, first discovered.

I hold, therefore, that there was no impediment in the way of giving the plaintiffs the preliminary relief of

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setting aside the sale and reducing the defendant, Margaret Harper, to the position of a mere mortgagee, as her father, the testator, originally was before he made the purchase, which I hold to have been, in equity, utterly void. Before leaving this part of the case I will quote a very apposite passage from the judgment of the Lord Chancellor of Ireland in the case of (1) *Aikins* v. *Delmage*, already referred to. He says:

> As to the plaintiff, she appears to have been in poverty and indigence throughout, and she was not as fully informed of the particulars of the case as she certainly should have been; but independent of her rights, even supposing she could be considered as acquiescing, the court itself has been deceived in the transaction. This was a sale by the court, conducted by the defendant as an officer of the court, and as such responsible to it for the manner in which that sale was conducted; and yet it is now proved that the facts under which that sale took place were not disclosed to the court. I cannot hold that the doctrine of acquiescence can be extended to a case such as this, where one of the most wholesome rules of the court has been infringed without its knowledge; and if high ground is needed for holding that this sale, even at this distance of time, cannot be supported, I am not afraid of taking that ground, and saying that the court has never been informed of the sale till the hearing of this cause, and has never acquiesced in it.

If this is a correct statement of the law, and I have found nothing in the books to indicate that it is not, there cannot be the slightest pretence for saying that the plaintiffs rights in the present case so far as the sale is concerned, are affected by lapse of time or acquiescence.

Next we have to deal with the question of redemption. The right to this is clear and cannot be disputed unless the statute of limitations applies. That it does not apply was the opinion of the Chief Justice in the Court of Appeal which I have already said appears to me to be correct, and that on grounds so obvious that I hardly expected to be able to find distinct authority for it. I have, however, found such authority. In the work of

(1) 12 Ir. Eq. Rep. 14.

one of the earliest and best commentators on the statutes of limitations, that of the late Mr. Hayes (1), a book which may be safely quoted and acted upon as authority if any text writer may be so trusted, in considering the 28th section of the statute that learned writer says:

> The possession of the mortgagee must have been gained by him in that character; if, therefore, he purchase the equity of redemption, and enter into possession, he cannot set up that possession as the possession of a mortgagee, in answer to the claims of persons seeking to impeach his title as purchaser.

And after citing cases he adds further on:

> In order to constitute a case, within either the new enactment or the old equitable doctrine, there must be the diligence of a mortgagee on the one hand and the laches of a mortgagor on the other (2).

If this is a correct statement of the law, and I accept it as such, it is decisive in favor of the plaintiffs who, not having lost their right to set aside the sale either by laches or acquiescence cannot be barred from redeeming by the operation of the statute on a possession which was never taken or held by the defendants, or their authors in the character of mortgagees. It follows, therefore, that the decree pronounced by the Divisional Court on the re-hearing, although for reasons differing from that court was substantially right. I think it well, however, to add that if I had to choose between the decisions in *Caldwell* v. *Hall* and those in *Kinsman* v. *Rouse* and *Foster* v. *Patterson*, I should certainly have agreed with the learned judges of the Divisional Court; for the reason that since the two cases in 17 Chancery Division, were decided the House of Lords has held in *Pugh* v. *Heath* (3) that a foreclosure suit is an action for the recovery of land. This being so it follows *a fortiori* that a redemption suit is also an action or suit for the recovery of land. And it is impossible, without doing violence to

(1) Treatise on Conveyancing vol. 1 p. 277.

(2) In *re Rafferty* v. *King*, 1 Keen, 601; *Lattee* v. *Dashwood*, 6 Sim. 462.

(3) 7 App. Cas. 235.

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the words of the statute, to hold that the saving of disabilities does not apply to any action or suit, as well in equity as at law, for the recovery of land.

The effect of this construction of the statute would, in my opinion, have been to have entitled the plaintiffs to redeem the entirety, for I do not see how justice can properly be done unless the mortgagee, receiving the whole amount of the mortgage money, is compelled to give back the whole estate. There is no principle on which the mortgage money could be apportioned in such a case, and the mortgagee compelled to receive a proportionate part according to the value of that part of the estate which the mortgagor retained in possession; and paying the whole sum secured, the mortgagor can only have justice done to him by having returned to him the whole security. I find nothing in the statute against this mode of working out the redemption which is that authorized by *Rakestraw* v. *Brewer*.

I omitted to mention a point which was considered of some weight in the Court of Appeal. It was suggested that the case on which the Chief Justice rested his judgment was not sufficiently made by the pleadings. I feel compelled to hold that the whole case for setting aside the sale, which is comprised in the fact that Andrew Faulds really purchased in Harper's name, is fully and sufficiently made by the 13th and 14th paragraphs of the bill already set forth, and in such a way as to satisfy all the requirements of equity pleading according to the rules prevalent in the most technical times. It is true that the bill does not expressly pray that the sale so impeached should be set aside, but as this is a necessary preliminary to the relief by way of redemption specifically prayed, it is clear that the plaintiffs are entitled to avail themselves of the prayer for general relief as sufficientf or this purpose. At all events this court would be bound under the statute 43 Vic. ch. 34 sec. 1, to

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amend the prayer, if it should be necessary to do so, it being apparent that no surprise was operated by the omission of a specific prayer.

The order of the Court of Appeal should be reversed and the decree of the Divisional Court restored, but it should be prefaced by a declaration that the purchase of the lands at the sale under the decree by the defendant, Joseph Harper, was for the benefit of and as a trustee for Andrew Faulds, and that it was fraudulent and void in equity as regards the said Andrew Faulds and all persons claiming under him, save the defendant, Joseph Lane, who, it should be declared, is a purchaser for valuable consideration without notice, and as such entitled to retain the benefit of his purchase, subject to the mortgage made by him in the pleadings mentioned. And it should be ordered and decreed accordingly. Further, there should be added to the decree a direction that the mortgage should be deposited in court, and it should be declared that the plaintiffs have a lien upon it and the money secured thereby for the amount which may be found due to them; and Lane should be ordered to pay the mortgage money into court as it becomes due. As the decree was varied by the Divisional Court there appears to be some slight verbal errors in the 3rd paragraph of it which must be corrected.

As regards the costs, the plaintiffs are entitled to be paid their costs by the defendants, the Harpers, up to and inclusive of the hearing, and the appellants are entitled to be paid by the same defendants their costs of the re-hearing in the Divisional Court; and of the appeals to the Court of Appeal and to this court. Subsequent costs and further directions are properly reserved by the decree.

Lane, as a purchaser for value without notice, is of course entitled to his costs, which his co-defendants,

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the Harpers, must be ordered to pay to him.

Sir W. J. RITCHIE C.J. and FOURNIER and TASCHEREAU JJ., concurred.

HENRY J.—This is an action brought by the appellants to redeem certain real estate transferred by mortgage by William Faulds, their father, to Andrew Faulds, who was his father, dated the 29th April, 1857, to secure $1,900 and interest.

William Faulds died 1st July, 1858, in possession of the mortgaged premises, intestate, leaving his widow, Matilda, who is still living, and six children. Elijah Washington, born in 1844; James Linda, in 1848; Eliza Jane, in 1850—died unmarried in April, 1868; William Martin, born 23rd May, 1852; Wesley Bell, born 24th February, 1855, and Matilda Elizabeth, born 24th November, 1857.

After the death of the mortgagor, Andrew Faulds, the mortgagee, filed a bill of foreclosure in chancery, and obtained a decree for the sale of the mortgaged premises the 26th June, 1861. The sale, of which the mortgagee had the conduct, took place on the 12th of April, 1862. At that sale Joseph Harper, a son-in-law of Andrew Faulds, became the purchaser for $1,600.

Andrew Faulds conveyed the mortgaged premises to Harper on the 16th of June, 1862, and on the same day Harper reconveyed to Andrew Faulds.

On the 29th December, 1879, the surviving executor of Andrew Faulds, under a power of sale in his will, conveyed the mortgaged premises to James C. Lane, one of the defendants, and the latter on the same day executed a mortgage thereon to Margaret Harper, another of the defendants, to secure the payment of $4,780.29, she being then the only one interested in the estate of her late father.

In 1862, after the execution of the deed to Harper, and

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the reconveyance to him by the latter, Andrew Faulds took possession of the premises and continued to hold them till he died, and the defendant, Margaret Harper, and others with and under her, kept possession thereof until the sale to Lane took place, and the latter has held the possession since.

The appellants, as the surviving heirs of William Faulds, the mortgagee, contend that the sale of the mortgaged premises by Andrew Faulds to Harper was in fact no sale in law, and that Harper was merely the agent of Andrew Faulds to purchase the property for him. That such was the case was, I think, abundantly proved, and the six learned judges before whom this case has been heard have so decided. I think their decisions cannot be questioned by this court. The right of the appellants to redeem in the absence of a legal sale is not and cannot be questioned, and for reasons readily suggested to a legal mind no valid sale was made.

The defence of the statute of limitations and laches are pleaded as a defence, and it is therefore necessary to ascertain if the right of the appellants to recover was barred when this action was commenced, as it was by bill of complaint filed on the 27th February, 1880. The law in force as to the limitation of suits in 1862, when Andrew Faulds went into possession, is to be found in the Consolidated Statutes of Upper Canada, passed in 1859, chap. 88. Sec. 21 limits the right of redemption, where the mortgagee has been in possession, to twenty years, and by section 16 the right is then extinguished. Other limitations are enacted in other sections of the Act before the 45th section, which provides that:—

If at the time at which the right of any person to bring an action to recover any land shall have first accrued, as hereinbefore mentioned, such person shall have been an infant, then such person, or the person or persons claiming through him, may, notwithstanding

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the period of twenty years hereinbefore limited shall have expired, bring an action to recover such land at any time within ten years next after the time at which the person to whom such right shall have first accrued as aforesaid shall have ceased to be under any such disability or shall have died.

That section clearly and unmistakeably applied to the provisions of section 21.

By sec. 8 of chap. 1 of the Consolidated Statutes it is provided:

That the said Consolidated Statutes shall not be held to operate as new laws, but shall be constructed and have effect as a consolidation and as declaratory of the law as contained in the said Acts and parts of Acts so repealed, and for which the said Consolidated Statutes are substituted.

Sec. 9 of the last mentioned Act provides:

But if on any point the provisions of the Consolidated Statutes are not in effect the same as those of the repealed Acts, then as respects all transactions, matters and things subsequent to the time when the said Consolidated Statutes take effect, the provisions contained in them shall prevail.

We need not, therefore, as to this point refer to any of the repealed statutes, for the provisions of the Consolidated Statutes operated from the date they were passed. The provisions of section 45 are, no doubt, applicable to those of section 21, and that the words in the second line of the former of the two sections, "to bring an action to recover any land" includes an action for redemption of mortgaged premises. The authorities go to sustain that proposition. The law relating to disabilities operated until the Act of 1874 was passed. The object of that Act, as stated in the preamble, is to lessen the time for bringing certain actions—in some cases from forty to twenty years, and in other cases from twenty to ten years, "and also to lessen the time for redemption of mortgages," &c. No other object is stated, nor is it stated that the Act is to have any other effect.

By sec. 21 of the Consolidated Statutes the time for

bringing an action for redemption was 20 years. By sec. 8 of the Act of 1874, the time was reduced to ten years—so that the obvious intention of the Act as stated in the preamble was carried out. The words of the two sections are exactly alike with the exception of the substitution of the words "shall have" for the word "has" in the 21st section, and the word "ten" for "twenty." The principal difference between the two Acts arises from the fact that the disability clause, in the Act of 1874, forms section five, which precedes the provision in section 8, by which the right to redeem is limited to ten years.

Section 5 provides:

That if at the time at which the right of any one "to bring the action or suit to recover any land shall have first accrued," shall be under the disability of infancy, then such person or the person claiming through him, "may, notwithstanding the period of ten years or five years (as the case may be), hereinbefore limited, shall have expired," bring an action to recover such land at any time within five years after the disability ceased.

Section 8 provides:

That where a mortgagee shall have obtained possession of any land comprised in his mortgage, the mortgagor shall not bring any action or suit to redeem, but within ten years next after the time the mortgagee obtained such possession, unless in the meantime an acknowledgment in writing of the title of the mortgagor or of his right of redemption signed by the mortgagee and given to the mortgagor or some person claiming the estate, &c.

It is contended on the part of the respondents that the provisions of section 5 must be limited to those cases referred to in the previous sections, and therefore that they cannot properly be extended or applied to the cases referred to in section 8, and that contention has been sustained by three out of the four learned judges of the Court of Appeal, but a different conclusion was arrived at by the learned Chief Justice in the Court of Appeal, by two other learned judges in the Division Court, and by the learned Vice-Chancellor. Indepen-

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dently of this diversity of opinion, it must be admitted that the question is not easy of solution.

From a consideration of the object stated in the preamble to the Act and the position of the sections in the Consolidated Statutes, and in the absence of any good reason that I have been able to find for making the change by which ten years' possession by a mortgagee would absolutely bar the rights of infants incapable in the eye of the law of protecting their own rights, I can hardly arrive at the conclusion that it was so intended. To sustain that conclusion it is only necessary to give a case that is not unlikely to occur. A property is mortgaged for an amount equal to a small percentage of its value by a man who at his death leaves two or three infants, not one of whom are over five or six years of age at the time the mortgagee enters into a possession, as he is entitled to do—he holds that possession for ten years and the right to redeem of the infants, not one of whom is then over sixteen or seventeen years, is forever barred. I cannot think that such was ever deliberately intended to be the result of the change of position of the sections in the Act of 1874 from that in the Consolidated Statutes, and the whole difficulty has been caused by that change. Previous to the Act of 1874 we may safely say that the policy was to protect the rights of infants in such cases by legislative enactments, and I have never heard that the soundness of that policy was questioned in any civilized country. Before the making of such a sweeping change of policy we would naturally expect to hear that the question of changing it had been urged and publicly debated and considered, and I think we are not going out of our way in a case like the present, to suggest, as the result of our knowledge of parliamentary procedure and the knowledge we, as part of the public, are in a position to obtain of the agitation of important public measures, to say that the propriety

of making the change contended for in that policy was not publicly debated or agitated. From every consideration I have been enabled to give to the subject I cannot but feel, and say, that the change in the relative position of the sections was not intended to affect the rights of infants. I am quite aware of the decisions in England to which reference is made in the judgments of the two learned judges of the Court of Appeal, in which a different conclusion was arrived at, but which I consider it unnecessary in this case to criticise, as a decision on the point to determine it, is, in my opinion, unnecessary.

In order to lay a foundation for the defence of the statute of limitations, as pleaded in this case, or to obtain the aid of section 8 of the Act of 1874, it is necessary to establish the position that the possession taken of the mortgaged premises by the mortgagee, and subsequently held by him and those claiming through him, was that of a mortgagee. Looking at the defence let us see how it bears upon the point. It is that Andrew Faulds, the mortgagee, after the death of the mortgagor, obtained an order for foreclosure and sale—that he, as authorized by the order and according to its terms, sold the mortgaged premises to the defendant Harper—that the latter paid him the amount for which the same was sold, upon which he (a month or two after the sale) made the necessary conveyance to Harper—that he subsequently on the same day purchased the same premises from Harper and obtained from him a conveyance in fee simple thereof, upon which he went into possession as such purchaser from Harper and retained that possession till he died, and that the possession of the same has been since held by his devisees, who claim under his last will and testament. That such was the nature and character of the possession proved and contended for on the trial, on the

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part of the defence, one has only to read the evidence of defendants, Harper and his wife. How, then, can the limitation in section 8 before referred to apply? Andrew Faulds clearly, by all the evidence on both sides, took possession, not as a mortgagee by virtue of the grant by mortgage to him, for by his own acts he relinquished that position as soon as he made the sale and conveyance to Harper, and how can he or those claiming under him be permitted for any purpose to assume it again. The object of the statute of limitations was to protect the interests of a mortgagee, who, acting on his right under the mortgage entered into possession as such mortgagee. Before, therefore, he or those claiming through him can evoke the aid of that statute, it must be shown that he entered as such mortgagee and held as such for the prescribed period. Where, then, in this case, is the evidence to sustain such a position? None that I can discover; but, on the contrary, abundant that he did not enter as such mortgagee.

The possession that Andrew Faulds took was that of a purchaser from Harper and those claiming through him are equally affected with him. There is a statute of limitation applicable to that kind of possession by which the rights of others may be barred in ten years. An action to redeem, where the mortgagee has not entered, as such, into possession of the mortgaged premises, is, as I before stated, covered by the general provision in regard to the bringing of actions to recover land as referred to in section 5 of the Act of 1874, which provides for the disability of infants. As to the plaintiffs, Wesley Bell Faulds and Matilda Elizabeth Faulds, the action was brought within the limitation of five years after the disability of infancy had expired.

There is also another important position to be considered. The alleged sale to Harper was fraudulent and void, and the nature and character of the possession

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was *ab initio* fraudulent. Andrew Faulds entered into possession as a *bonâ fide* purchaser from Harper, who, it was alleged, had become a *bonâ fide* purchaser from the former under a sale by which he, Harper, by the conveyance from Andrew Faulds to him, gave him a title in fee simple of the mortgaged premises, and by that sale and conveyance the equity of redemption of the heirs of William Faulds, including the appellants in this case, was forever barred. By the course adopted Andrew Faulds fraudulently got possession of the property, and he and the others holding under him managed to retain that possession. The statute well provides that where the possession of land is obtained by fraudulent means the operation of the statute of limitation commences to run only from the time of the discovery of the fraud by the party or parties interested or from the time when the same might have been discovered.

There is no evidence which shows that the fraud alluded to was discovered by, or known to, any of the appellants until about a year before the commencement of this action. It is not shown that either of the parties to it ever spoke of or admitted it, or that any one of the appellants had any knowledge of it up to the time I have stated, and how, and from whom, were they to learn the nature of the hidden and secret transactions between Andrew Faulds and Harper. It must be recollected that at the time of the sale the eldest of the appellants was but eighteen, and the youngest but five years old. None of them, much less the younger ones, would know at that time anything about property or their rights in regard to property, and would not be likely afterwards to know much more, or to suspect that anything was wrong or fraudulent as to the property in question; and in such a case, I think actual knowledge or something very much the same

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should be shown, and nothing of the kind has been shown. But how can such a position be claimed—that is laches after knowledge of the fraud when the defence set up denies that any such fraud existed, and two of the defendants, Harper and his wife in their evidence, swear that the purchase by Harper was *bonâ fide* and not for Andrew Faulds? The statute of limitations therefore cannot be a bar to the recovery by the appellants. In that case all the appellants are entitled to redeem, and the question that was considered by the learned Vice Chancellor and the learned Judges of the Divisional Court as to shares or interests to be decreed to be redeemed will not arise.

If my views in regard to the matter lastly considered be not sustained, but that it should be adjudged that the younger ones of the appellants are entitled to redeem, then I concur in the views of the learned judges of the Divisional Court, and am of the opinion that a decree for the redemption of the whole of the mortgaged premises should be passed in the usual form with costs in all the courts.

Appeal allowed with costs.

Solicitor for appellants: *T. H. Luscombe.*

Solicitors for respondents: *Street & Becher.*

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*May 6.

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*Jan. 12.

THE QUEBEC WAREHOUSE COMPANY (PETITIONERS IN THE COURT BELOW) ..... APPELLANTS;

AND

THE CORPORATION OF THE TOWN OF LEVIS (APPELLANTS IN THE COURT BELOW) ..... RESPONDENTS.

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

Expropriation—Right of Way—Cost of—Guarantee—By-law—Ultra vires—Injunction—44 and 45 Vic. ch. 40 sec. 2—Construction of.

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

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Under 44 and 45 Vic. ch. 40 sec. 2 (P.Q.), passed on a petition of the Quebec Central Railway Company, after notice given by them, asking for an amendment of their charter, the town of Levis passed a by-law guaranteeing to pay to the Quebec Central Railway Company the whole cost of expropriation for the right of way for the extension of the railway to the deep water of the St. Lawrence river, over and above $30,000. Appellants, being ratepayers of the town of Levis, applied for and obtained an injunction to stay further proceedings on this by-law, on the ground of its illegality. The proviso in section 2 of the Act, under which the corporation of the town of Levis contended that the by-law was authorized, is as follows: "Provided that within thirty days from the sanction of the present Act, the corporation of the town of Levis furnishes the said company with its said guarantee and obligation to pay all excess over $30,000 of the cost of expropriation for the right of way." By the act of incorporation of the town of Levis, no power or authority is given to the corporation to give such guarantee. The statute 44 and 45 Vic. ch. 40, was passed on the 30th June, 1881; and the by-law forming the guarantee was passed on the 27th July following

Held, reversing the judgment of the Court of Queen's Bench, L.C., appeal side, and restoring the judgment of the Superior Court, that the statute in question did not authorize the corporation of Levis to impose burdens upon the municipality which were not authorized by their acts of incorporation or other special legislative authority, and therefore the by-law was invalid, and the injunction must be sustained. (Ritchie C. J. *dubitante.*)

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

By the Quebec statute, 44-45 Vic. chap. 40, the Quebec Central Railway Company was authorized to construct a railway from certain wharves in the town of Levis to the frontier of the State of Maine, using for that purpose such portions as it might see fit of the Levis and Kennebec Railway, which it had acquired at sheriff's sale.

The second section of this statute enacts that in constructing the line of railway, the company shall be

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bound to continue from the present terminus of the Levis and Kennebec Railway into Notre Dame ward, and erect a station there, and thence through certain other wards and certain villages to arrive at deep water in Lauzon ward. This obligation, however, was only imposed upon the company "provided that, within "thirty days from the sanction of the present Act, the "corporation of the town of Levis furnishes the said com- "pany with its valid guarantee and obligation to pay all "excess over thirty thousand dollars of the cost of expro- "priation, for the right of way upon the said described "route, in so far as the said route traverses the parish of "Notre Dame de Levis, Notre Dame and Lauzon wards "in the town of Levis, and the villages of Bienville and "Lauzon, following the brown line shown on the plan "of the said company, to be deposited for reference in "the Public Works Department of this Province, to the "point of intersection with the red line upon said "plan."

The statute was sanctioned on the 30th of June, 1881.

On the 27th of July following, the corporation of the town of Levis passed a by-law (referred to at length in the judgments of this court) which purports to declare and enact that it "engages by these presents to pay, and guarantees to pay, to the said company" the said excess of cost of expropriation beyond $30,000, provided the line passes according to the brown line to the intersection with the red line on said plan. The by-law, so far, followed the wording of the statute, but it also added to its proviso a qualification which is not found in the statute, and says: "The whole such as shown in the "said plan at the time of the passage of the said Act, "and according to the breadth and depth at that time "estimated and reported on by the engineers of the "grounds to be expropriated on said survey."

The Quebec Warehouse Company the appellants, as

proprietors and ratepayers within the town of Levis, applied for a writ of injunction to restrain the corporation and the railway company from carrying out or acting upon this by-law, and on the 16th of August the writ issued returnable on the 1st September, 1881.

The grounds invoked in support of the injunction were:—

1. That the corporation had no power to enter into any such guarantee or contract.

2. That the by-law was not in conformity with the law which gives it the right to grant aid to railways, that it was not accompanied with the formalities prescribed by that law, and that it made no provision for any assessment or for a sinking fund to meet the liability to be incurred under it.

3. That the by-law was null because it fixed no amount and assumed an unlimited liability.

4. That the by-law referred to a guarantee for a line not mentioned in the statute, but mentioned in a certain report made by engineers.

5. That the by-law was illegal and null.

In answer to these pretentions the corporation pleaded:—

1. That at the time of the issuing of the writ of injunction, the by-law had been adopted and published as required by law and within the delay fixed by the statute, that the delay for giving the guarantee had also expired, that nothing more could be done to give the guarantee or to proceed further upon or in virtue of the by-law, that the powers of the corporation were at an end in this matter, that there was nothing left which the corporation could be restrained or prevented from doing, and that consequently the writ of injunction was without cause, object or effect.

By a second plea, the corporation contended that the by-law was valid and authorized by its act of incorpora-

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tion, and by the statute above referred to; that the only possible effect of the variance between the by-law and the statute, would be to restrict the liability of the corporation, and that the Warehouse Company have no interest in setting it up.

Upon the issue thus joined between the parties, the Superior Court in the first instance declared the injunction perpetual, on the ground that the by-law was *ultra vires*. Upon appeal to the Court of Queen's Bench for Lower Canada, this judgment was reversed and the injunction was dissolved, the respondent being declared authorized by law to adopt the by-law.

Irvine Q.C., for appellants.

Languedoc for respondents.

The points of argument relied on by counsel and cases cited are reviewed in the judgments hereinafter given.

Sir W. J. RITCHIE C.J.—The questions to be decided in this case are entirely points of law, there being no controversy as to the facts.

An Act was passed by the Legislature of the Province of Quebec, in the year 1881, amending the charter of the Quebec Central Railway Company. This Act authorized the company to extend their line to the deep water of the river St. Lawrence, and obliged them to continue it "from the present terminus of the said Levis and Kennebec Railway, in the parish of Notre-Dame de Levis, into Notre-Dame ward, in the town of Levis, and erect a station there; thence, traversing Lauzon ward, in the said town of Levis, and the villages of Bienville and Lauzon, to arrive at deep water in said Lauzon ward; provided that, within thirty days from the sanction of the present Act, the corporation of the town of Levis furnishes the said company with its valid guarantee and obligation to pay all excess over thirty

thousand dollars of the cost of expropriation for the right of way upon the said described route, in so far as said route traverses the parish of Notre-Dame de Levis, Notre-Dame and Lauzon wards, in the town of Levis, and the villages of Bienville and Lauzon, following the brown line shown on the plan of the said company to be deposited for reference in the Public Works Department of this province, to the point of intersection with the red line upon said plan."

After passing of this Act, the council of the town of Levis passed a by-law, which is as follows:—

By-law concerning the railway to be built by the Quebec Central Railway Company:

Seeing that by the Statute of this province, adopted at the last Session of the Legislature of the Province of Quebec, and entitled "An Act to amend the plans of the Quebec Central Railway," it was, amongst other things, declared that the intended road to be constructed should be according to the plans mentioned in the said Act, provided that within thirty days of the sanction of the said Act the corporation of the town of Levis engages by its legal authority to pay to the said company, and guarantees to pay to it, for the whole cost, over and above the thirty thousand dollars appropriation, for right of way on the line mentioned in said Act, always providing the said line passes through the parish of Notre-Dame de Levis and Notre-Dame and Lauzon wards, in the town of Levis, and villages of Bienville and Lauzon, according to the brown line marked on the plans of the said company, deposited for reference in the Department of Public Works of this province, just to the point of intersection with the red line on said map.

Considering that it is opportune to give the said guarantee and obligation, in order to secure in the interests of this town, the building of the said road according to the brown line in the said plan, it is by the present by-law declared and enacted:—

The corporation of the said town fully appreciating the value and advantage which will accrue to it by the said Act, and in order to give effect to it (the corporation) engages by these presents to pay, and guarantees to pay to the said company, the whole cost over and above the thirty thousand dollars expropriation, for right of way on the line mentioned in said Act passes through the parish of Notre-Dame de Levis and Notre-Dame and Lauzon wards, in the town of Levis, and the villages of Bienville and Lauzon, according to the

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brown line marked on the plan deposited as aforesaid. just to the point of intersection with the red line on said plan. The whole such as shown in the said plan at the time of the passage of said Act, and according to the breadth and depth at the time estimated and reported on by the engineers of the grounds to be expropriated on said survey. The present obligation and guarantee must be applied to and cover the cost of expropriation of the necessary ground to erect a station of the said road, such as projected, in Notre-Dame ward of this town.

GEORGE COUTURE,
Mayor.

The appellants being ratepayers of the town of Levis, and having an interest in the expenditure of the funds of the corporation, applied for and obtained an injunction to stay further proceedings on this by-law, on the ground of its illegality, and it is the legality of that by-law which is now in question.

The parties admitted that the various publications of notice required by law to be made respecting the by-law were duly made. The inclination of my mind was to confirm the judgment of the court below and dismiss the appeal, but the rest of the court being strongly of opinion to reverse, I do not feel sufficiently strong in my opinion to differ from them; I, therefore, assent to the dismissal of the appeal, but with hesitation and doubt.

STRONG J.—The decision of this appeal depends entirely upon the question whether the 2nd section of the Act of the Province of Quebec, 44 and 45 Vic. chap. 40, conferred power upon the corporation of the town of Levis to give the guarantee mentioned in that clause to pay the excess over $30,000 of the costs of expropriation required for the extension provided for by the Act, and concurring in opinion with the minority of the Court of Appeal, and the judgment of Mr. Justice McCord in the Superior Court, I am of opinion that no such authority was conferred. It is manifest that such

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a guarantee would be altogether *ultra vires* of the general statutory powers of a municipal corporation in the Province of Quebec, and that the by-law authorizing it must be altogether void unless it can be referred to some special legislative authority. Then the only authority of the kind which has been or could have been invoked is this section 2, which appears to me to be altogether insufficient for the purpose. There are no enabling words in this clause, the material part of which is as follows:

> Provided that within thirty days from the sanction of the present Act the Corporation of the Town of Levis furnishes the said company with its valid guarantee and obligation to pay all excess over $30,000 of the cost of expropriation.

This provision does not assume to give the power; it rather assumes that the council already had or would obtain it. It is impossible, having regard to the general principles upon which private acts of parliament and acts imposing taxation and public burdens are to be construed, to say that a provision of this kind contained in a private act—to which the general public are in no sense parties—expressed in this indirect way, can have the effect of authorizing the imposition of a serious public burden. Such a power is not even necessary to be implied from the language used, and even if it were, necessary implication would be insufficient, direct and express words granting the power being indispensable in such a case. I construe the act as saying that the extension may be constructed, provided the Levis Council, either already having or procuring by legislation the right so to do, shall give the required guarantee; just this and no more is what is said, and this is insufficient to sustain the impeached by-law. It is well established by authority that an erroneous assumption in an Act of Parliament of a particular state of the law has not the effect of altering the law so as to make it

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conform to the mistaken impression of the legislature. See the cases collected in Maxwell on Statutes (1).

I am of opinion that the appeal should be allowed, the injunction discharged and the action dismissed in the Superior Court with costs to the appellants in all the courts.

FOURNIER J.—I am of the opinion expressed by Mr. Justice McCord in his judgment. It is shown very clearly that the town of Levis had not the power to vote money for the railway. We find no special statute—except that passed at the instance of the Quebec Central Railway for their own purposes—in which it is incidentally assumed that if the corporation pass a by-law for $30,000, such work shall be done. Evidently the writer of the bill thought the power existed, but it is clear that the town had no such power, and Judge McCord has given very strong reasons for the decision that there is no authority in the town to pass such a by-law.

HENRY J.—I am of opinion that the corporation of Levis had not the power to impose the tax that has been contested here, and I am also of opinion that the proceedings by injunction were justifiable. The time had passed, of course, for the carrying out of what was intended, provided the railway company objected to it; but, if they chose to consent to it, it was within the power of the corporation to have passed the resolution for taxation at any time afterwards. Therefore, in my opinion, the injunction was the proper remedy to stop them from agreeing with the railway company to carry out what was mentioned in the Act of Parliament. It is true, the Act of Parliament laid an obligation on the railway company to take a particular course, provided the corporation were willing and took the proper means for

(1) Ed. 2, p. 374 to p. 381.

paying a certain amount. I presume it was understood and believed at that time that the corporation had power under its charter to impose the tax; so no power was given by that Act to impose that tax. As there was no power given to the corporation to impose the tax upon the inhabitants, and their charter did not give it to them, I hold, therefore, that there was no authority for imposing the taxation upon the inhabitants of the town. Under the circumstances, then, I think the plaintiff is entitled to recover, and that the injunction should not have been dissolved.

GWYNNE J.—This is a proceeding by petition under the provisions of the statute of the Province of Quebec, 44th and 45th Vic. ch. 40, at the suit of the Quebec Warehouse Co. as ratepayers of the town of Levis, praying for an injunction to restrain the corporation of the town of Levis from proceeding further with carrying out the requirements of a certain by-law, passed by the council of the corporation, and which as is contended is *ultra vires*, or in any way to act thereon. The only objections made to the right of the petitioners to maintain the proceeding instituted by them are:—1st. That the by-law, the validity of which is impugned, is a good and valid by-law, and is authorized by Act of the Legislature of the Province of Quebec, 44th and 45th Vic. ch. 40.

2nd. That the by-law having been passed, as it appeared to have been two days before the filing of the petition praying for an injuction, nothing remained to be done under it that could be restrained by injunction; and

3rd. That no injury can be sustained by the petitioners justifying the interference of the court by way of injunction.

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Co. v. *Worksop Local Board of Health* (1); *MacCormack* v. *The Queen's University* (2); *Pattison* v. *Gilford* (3); and *Evan* v. *The Corporation of Avon* (4); were relied upon by the learned counsel for the respondents for the purpose of establishing, as he contended that they do establish, that according to the practice prevailing in the English courts, as to granting injunctions, the petitioners in the present case have no right to the relief by way of injunction prayed for by them, but these cases, rightly understood, do not support that contention. In *The Manchester, Sheffield & Lincolnshire Railway Co.* v. *The Worksop Local Board of Health*, the plaintiffs, who were owners of the Chesterfield and Gainsborough Canal which runs through Worksop, filed their bill whereby they prayed for an injunction to restrain the defendants, the district board of health, from diverting water from the canal and from fouling and polluting the water in the canal by using it to cleanse drains and sewers; and, also, to restrain them from permitting a sewer already constructed by them to communicate with a covered drain or watercourse at the bottom of the Doncaster road, and a tunnel under the plaintiffs' railway, or from using the same without the consent in writing of the plaintiffs first obtained for that purpose.

V. C. Sir W. P. Wood, before whom the application for the injunction first came, being of opinion that the case, which was peculiar in its circumstances, was properly one for an action at law, made an order which, though not in terms for an injunction, had the effect of an injunction until further order, with liberty to the plaintiffs to bring an action. On appeal from this order the Lords Justices slightly varied it, directing the appli-

(1) 3 Jur. N. S. 304.
(2) 15 W. R. 738 and Ir. L. Rep. 1 Eq. 160.
(3) L. R. 18 Eq. 259.
(4) 29 Beav. 144 and 6 Jur. N. S. 1361.

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cation for an injunction to stand over until further order, with liberty to either party to apply to the Court as they might be advised either before or after the hearing. Upon the case being brought to a hearing before the Master of the Rolls, although he was of opinion that the course suggested by the Vice Chancellor would, under the circumstances of the case, have been the most satisfactory to have been adopted, nevertheless he made a decree granting to the plaintiffs an injunction to restrain the defendants from permitting to remain open, and also from opening or permitting to be opened, any side sewer or other sewer in the plaintiffs' bill mentioned so long as the said main sewer shall run through the said covered drain in the plaintiffs' bill mentioned, or otherwise discharge itself into the canal of the plaintiffs, all parties to have liberty to apply as they might be advised, and the plaintiffs to be at liberty to bring such action as they might be advised. In pronouncing judgment the Master of the Rolls, Sir John Romilly, said:—

I think it impossible for this Court to grant a mandatary injunction to compel the defendants to undo all the works which, as they allege, are absolutely necessary to a plan they will have to form for the drainage of this district under the duties imposed upon them by the Legislature, and by which they will, as they allege, carefully guard against the evil apprehended by the plaintiffs. If it should hereafter appear that the defendants are not acting *bonâ fide*, that their assertions are devoid of truth, this court must deal with them as best it can, but at present I am of opinion that this court must give faith to the solemn and repeated assertions that they do not intend to inflict this injury upon the plaintiffs.

And being of opinion that the Acts under which the defendants exercised their power, did not justify them polluting the water of the canal, or entitle them to drain their sewer into it without the sanction and consent of the plaintiffs, he made a decree for an injunction to issue to the extent above stated. That case is obviously distinguishable from the present one, as also is *Mac-*

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Cormack v. *The Queen's University*. In that case a petition was filed by three graduates of the university as petitioners, praying that it might be declared that a royal charter granted to the university in 1866, was inconsistent with one granted in 1864, and that a resolution of the senate accepting the supplemental charter might be declared void; and for an injunction against doing any act to accept the same, or conferring any degrees in pursuance of its provisions; to this suit the university and the members of the senate were made parties respondents, but the attorney general was not a party, and the point adjudged was that the granting of university degrees is a branch of the royal prerogative, as also is the deputing of the power to a university, and that if the acceptance of the supplemental charter by the senate alone was, as was contended by the petitioners, invalid, no degrees could be conferred under it, and if, notwithstanding the university or senate should affect to exercise the power, they would be arrogating to themselves the exercise of the Queen's prerogative, and moreover, there would be injury to the public by the giving of titles which were represented to be valid degrees, but which upon the supposition would be worthless, and if, on the contrary, the petitioners were wrong in their view as to the invalidity of the acceptance of the charter, then they would be, by their suit, seeking to interrupt the due exercise of the Queen's prerogative by those to whom she had deputed it, and to deprive all the Queen's subjects who might claim degrees under the powers conferred by the supplemental charter, of the advantages to which they are entitled; and so that the rights either to be asserted by the petitioners, or to be defended against them, were those of the Queen and the public, and that the attorney general alone was the proper person to represent such

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rights. Upon the authority of *Evan* v. *The Corporation of Avon*, it was held that a graduate as a member of a corporate body, equally as any other plaintiff, in order to maintain a suit against the corporation must show some injury to himself as an individual to be redressed or prevented, and it was held that the conduct of the majority of the senate in assuming to accept the supplemental charter on behalf of the university, and proceeding to act under it and grant degrees under it, was not an injury to an individual graduate which the law could recognize. In *Evan* v. *Avon* it was decided that a suit, against a corporation not within the operation of 5 & 6 Wm. IV. ch. 76, to enforce public trusts, must be filed by the attorney general and not by an individual. In that case a single burgess filed his bill against a municipal corporation not within the Municipal Corporations Act, and praying for an injunction to restrain them from selling certain property and for an account. The Master of the Rolls, pronouncing judgment dismissing that bill upon a general demurrer filed thereto, says:

Primâ facie an ordinary municipal corporation, which is not within the Municipal Corporations Act, and it is admitted that this corporation is not within that Act, has full power to dispose of all its property like any private individual, and the burthen of proof lies on the person alleging the contrary to establish a trust. The trust may be of two characters, it may be of a general character or of a private and individual character. For instance, a person might leave a sum of money to a corporation in trust to support the children of A.B., and to pay them the principal upon attaining twenty-one, that would be a private and particular trust which the children could enforce against the corporation if the corporation applied the property for their own benefit; on the other hand, a person might leave money to a corporation in trust for the benefit of the inhabitants of a particular town, for paving, lighting or such like, that would be a general trust for the benefit of all the inhabitants, and the proper form of suit in the event of every breach of trust, would be an in-

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formation by the attorney-general at the instance of all or some of the persons who were interested in the matter. If there was a particular trust in favor of particular persons, and they were too numerous for all to be made parties, one or two might sue on behalf of themselves and the other *cestuis que trustent* to enforce the private and particular trust.

And the Master of the Rolls being of opinion that no trust in favor of the plaintiff was sufficiently alleged on the face of the bill, dismissed it. In *Pattison* v. *Gilford* the plaintiff, who was tenant for a term of years of the right of shooting over an estate the owner of which advertised it for sale in lots as suitable for building on, but gave full notice of the right of shooting, filed his bill for an injunction to prevent the intended sale, and the Master of the Rolls, Sir G. Jessel, dismissed the bill. In delivering judgment, he likened the notice of the intended sale which had been published by the defendant to information expressly given to the public who might contemplate becoming purchasers, that "there were some plots, one of which was particularly pointed out very eligible for building purposes, but recollect there is a right of shooting over all the plots, and you take subject to that right, and you must be careful not to make such an erection as will interfere with the right of shooting." The principle upon which he proceeded was that laid down by Lord Cottenham in *Harris* v. *Taylor* (1), where it was held that if an act threatened to be done could by any possibility be done in such a way as not to prejudice the right of the party complaining, it would not be restrained. The principle, says the Master of the Rolls, is this:—

> If you say the defendant is going to do an unlawful act you must prove that it is necessarily unlawful, it is not enough to say it may be unlawful.

The case of *Winch* v. *The Birkenhead, Lancashire & Cheshire Ry. Co., and others* (2), has more application to

(1) 2 Ph. 209. (2) 16 Jur. 1035.

the present case than any of the above cited cases. What was asked by the plaintiff, who was a shareholder in the B. L. & C. Ry. Co. was that an injunction should be granted restraining that company from acting upon an agreement, which, as was contended, was *ultra vires*, entered into by and between them and two other railway companies, who were also defendants, and the injunction was granted. The Vice-Chancellor, Sir James Parker, giving judgment, says :—

I can see nothing in all that has taken place to prevent Mr. Winch, who is a shareholder in this company, from coming and seeking to restrain an infringement of the constitution of this company as it is established by law. Seeing that upon the evidence there was an intention, not disputed or contradicted, to act on this agreement on obtaining the sanction of a meeting of shareholders without going to Parliament, I think the plaintiff is entitled to an injunction in the terms of his notice of motion to restrain the Birkenhead Company from making over to the London & North-Western Railway Company, the Birkenhead Company line of railway, plant, or property, or any part thereof, on the footing of the agreement, and that the L. & N. W. Ry. Co. may in like manner be restrained from taking possession of the said lines of railway, &c., &c., on the footing of the agreement.

In *Hoole* v. *The Great Western Railway Company* (1) Lord Cairns L. J. and Sir John Rolph L.J were of opinion that if an individual shareholder of a company, having an interest, complains of an act of the whole company or the executive of the company as *ultra vires*, he may maintain a bill in his own name without suing on behalf of others to restrain the corporation from doing any act which is *ultra vires*.

In *Russell* v. *Wakefield Water Works Company* (2) Sir G. Jessel M. R., pointing out the exceptions to the rule laid down in *Foss* v. *Harbottle* (3), says :—

There are cases in which an individual corporator sues the corporation to prevent the corporation either commencing or continuing the doing of something which is beyond the powers of the corporation. Such a bill may be maintained by a single corporator not suing

(1) L. R. 3 Ch. 262. (2) L. R. 20 Eq. 481.
(3) 2 Hare 461.

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on behalf of himself and of others as was settled in the House of Lords in a case of *Simpson* v. *Westminster Palace Hotel Company*. If the subject matter of the suit is an agreement between the corporation, acting by its directors or managers, and some other corporation or some other persons, strangers to the corporation, it is quite proper and quite usual to make that other corporation or person a defendant to the suit, because that other corporation or person has an interest, and a great interest, in arguing the question and having it decided once for all, whether the agreement in question is really within the powers or without the powers of the corporation of which the plaintiff is a member, so that in those cases you must always bring before the court the other corporation.

In *Simpson* v. *Westminster Palace Hotel Company* (1) the Lord Chancellor, Lord Campbell, states the law to be that if an attempt to do an act which is *ultra vires*, is made by a joint stock company, although the act be sanctioned by all the directors and by a large majority of the shareholders, any single shareholder has a right to resist it, and a court of equity will interpose on his behalf by injunction. In *Cohen* v. *Wilkinson* (2) Lord Chancellor Cottenham held the right of an individual member of a company to restrain the company from applying its funds to a purpose different from that to which he had subscribed, to be well settled by the court; and in *Carlisle* v. *The South-Eastern Railway Company* (3) he held the right to file a bill to restrain a railway company from declaring a dividend under circumstances which would be a violation of the Act of parliament incorporating the company, was a right common to all the shareholders, and that such a bill upon behalf of a plaintiff and all other shareholders, except the directors, would be one of the ordinary description in which the practice of the court permits such representation in pleading. In *Patterson* v. *Bowes* (4) the Court of Chancery for Upper Canada in 1853 held the principle upon which *Winch* v. *Birkenhead Railway Co.*; *Cohen* v.

(1) 6 Jur. N.S. 185.
(2) 1 McN. & G. 481.
(3) 1 McN. & G. 689.
(4) 4 Gr. 170.

Wilkinson, and *Carlisle* v. *The South Eastern Railway Co.*, were decided to be applicable in the case of a municipal corporation, and entitled a ratepayer of the city of Toronto to maintain a bill on behalf of himself and all other ratepayers of the city against the mayor and the corporation of the city, to compel the former to account to the corporation for various large sums of money alleged to have been realized by him by the purchase of certain debentures of the corporation from persons who became entitled to them for value, such sums so alleged to have been realized by the mayor being alleged to have accrued by reason of certain by-laws of the corporation to the passing of which the mayor had been a party.

This practice has been pursued in the courts of Upper Canada and Ontario ever since, and upon the authority of what is said by the Lords Justices in *Hoole* v. *The Great Western Railway Co.*, by the Master of the Rolls in *Russell* v. *The Wakefield Waterworks Co.*, and by Lord Campbell in *Simpson* v. *Westminster Palace Hotel Co.*, and upon principle, it appears to me that a corporator, who is or may be injuriously affected in his rights or property by an Act of the executive of a municipal corporation which is *ultra vires*, may seek redress by process of injunction to restrain the corporation from committing the act, if it be not yet committed, or from doing any thing under or in furtherance of such act, if already committed, equally as such person could apply for and obtain an order of the court for the quashing of a by-law of the corporation, which was not within the power and jurisdiction of the corporation to pass; and as the Act 41 Vic. ch. 14 specially authorizes the proceeding by way of injunction in such a case in the courts of the Province of Quebec, it cannot, I think, be doubted that in the present case the complainants have such an interest, and are or may be exposed

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to such prejudice as entitles them to maintain the proceeding instituted by them in this case, if the obligation purported to be entered into by the executive of the corporation of the town of Levis, with the Quebec Central Railway Company be, as it is charged to be, *ultra vires*.

It is urged that the obligation having been completely entered into, as it appears to have been, just two days before the proceedings in this case were instituted, the complainants are now too late to object; but what is complained of is that the entering into the obligation was illegal as *ultra vires*, and as it purports to be an obligation to pay in a future event what may prove to be a very large sum of money, which could be paid only out of trust funds under the control of the executive of the corporation, in which every corporator is interested as a *cestui que* trust, if any such funds there be, or by levying a rate upon all the ratepayers of the town, the levying of which might involve the ruin of all of such ratepayers; what the complainants have a right to restrain and what they seek to restrain, is the doing of anything under or in furtherance of, or in discharge of the illegal obligation so entered into, and among such things to restrain the delivery of the document purporting to be the obligation of the corporation of the town of Levis to the Quebec Central Ry. Co., and to restrain that company from receiving and acting under it as a legal obligation or agreement. For determining whether it be or be not a legal obligation or agreement the present proceeding seems to be the most proper, the most convenient and effectual to be adopted, instead of the complainants standing by and looking on without complaint at the railway company incurring, it may be, an enormous expense upon the faith of the obligation and agreement being legal, and only taking proceedings to

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avoid the obligation and its effect after such expense should be incurred. The case of *Blake* v. *The City of Brooklyn*, decided by the Supreme Court of the State of New York (1) and the cases upon which it proceeded, to which we have been referred by the learned counsel for the defendants, are quite distinguishable from the present case. In *Blake* v. *The City of Brooklyn* the matter complained of was an alleged injury to certain real estate of the plaintiff, which the corporation of the city of Brooklyn were proceeding to have filled up under authority claimed to be vested in them to make local improvements in the city, and the court held that in the absence of an allegation that the injury occasioned by the filling up of the lots would be irreparable, or that such filling up would cause any damage or injury whatever to the lots, an injunction to forbid the filling up would not be; but that the plaintiff should assert his remedy, if any, at law. And it was also held that an injunction to restrain the collection of an assessment not yet laid for the expense of such filling up ought not to be granted, and that the court would not interfere by injunction to review or correct such proceedings of a municipal corporation unless they were productive of peculiar or irreparable injury or must lead to a multiplicity of suits. In that case the plaintiff was the sole person concerned in the injury complained of. In the present case the obligation and agreement which is impugned, if enforced, may produce irreparable injury to all the ratepayers of the town of Levis, and unless the validity of the agreement shall be enquired into and determined in a suit instituted like the present, the questioning its validity would of necessity lead to a multiplicity of suits. But as the Act 41 Vic. ch. 14 specially authorizes the proceeding by injunction if the act complained of is *ultra vires*, and

(1) 26 Barb. 301.

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as the Superior Court in the Province of Quebec dispenses law equally upon equitable as upon legal principles, the above cases can have no application whatever to the present suit. The only point, therefore, open to enquiry is whether the obligation or agreement which is impugned was or not *ultra vires* of the municipal council of the corporation of the town of Levis. That town was incorporated and has its powers defined and prescribed by the Statute of the Parliament of Canada, 24 Vic. ch. 70, as consolidated and amended by the Act of the Province of Quebec 36 Vic. ch. 60, and it is admitted that under these Acts the corporation had not any power or authority whatever to enter into the agreement purported to be entered into with the Quebec Central Railway Company, nor had it any power to enter into such an agreement unless such power be given by an Act passed by the Legislature of the Province of Quebec, entitled "An Act to amend the charter of the Quebec Central Railway Company," 44 & 45 Vic. ch. 40. The second section of that Act enacts that the said company shall be bound to continue their line from the present terminus of the Levis and Kennebec Railway along a particular course specified in the Act.

Provided that within thirty days from the sanction of the present Act, the corporation of the town of Levis furnishes the said company with its valid guarantee and obligation to pay all excess over thirty thousand dollars of the cost of expropriation for the right of way upon the said described route, and in default of said guarantee and obligation being so furnished, the said company shall be relieved of the obligation to adopt the route and erect the station described in this section, and shall have the right to avail itself of the provisions of section one of this Act.

Now, this Act does not profess to confer upon the corporation of the town of Levis or upon the municipal council thereof any greater powers than were already conferred, nor to subject the ratepayers of the town to any greater burthen than were already imposed upon them by the Acts of incorporation of the town. The

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clause in question seems to have been inserted in this Act, which is an Act, as its object indicates, promoted by and in the interest of the Quebec Central Railway Company, under the mistaken impression that the corporation of the town of Levis had power to enter into the obligation and agreement mentioned in the section, but promotors of legislation—and legislators themselves—are not exempt from the human frailty of acting under erroneous impressions. As then it is admitted that, apart from the Act 44 & 45 Vic. ch. 40 the council of the municipality had no power whatever to enter into such an obligation as that which is impugned, and as that Act does not confer any additional powers upon the council nor subject the ratepayers to any additional burthens, but only authorizes and requires the railway company to adopt a particular route in the event of the corporation entering effectually into a legal obligation, into which, as now appears, it cannot legally enter, the plaintiffs are entitled to a perpetual injunction restraining the corporation of the town and the Quebec Central Railway Company from proceeding further in any way by or under or in virtue of the instrument of the 27th day of July, 1881, purporting to be an obligation or guarantee of the corporation of the town of Lévis, and restraining the said railway company from accepting it as a legal obligation or as having any binding effect or validity whatever, and from acting under it.

The appeal, therefore, should be allowed with costs, and a perpetual injunction be ordered to issue in the court below to the above effect.

Appeal allowed with costs.

Solicitors for appellants: *Irvine & Pemberton.*

Solicitors for respondents: *Bossé & Languedoc.*

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*Feb'y. 26.
*June 23.

THE NEW BRUNSWICK RAILWAY COMPANY (DEFENDANTS) } APPELLANTS;

AND

ISSACHER N. ROBINSON (PLAINTIFF)..... } RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

Railway Company—Sparks from engine—Proper care to prevent emission of—Use of wood or coal for fuel—Contributory negligence.

R. owned a barn situated about two hundred feet from the New Brunswick Railway Company's line, and such barn was destroyed by fire, caused, as was alleged, by sparks from the defendants' engine. An action was brought to recover damages for the loss of said barn and its contents. On the trial it appeared that the fuel used by the company over this line was wood, and evidence was given to the effect that coal was less apt to throw out sparks. It also appeared that at the place where the fire occurred there was a heavy up-grade, necessitating a full head of steam, and therefore increasing the danger to surrounding property. The jury found that the defendants did not use reasonable care in running the engine, but in what the want of such care consisted did not appear by their finding.

Held, reversing the judgment of the court below, that the company were under no obligation to use coal for fuel and the use of wood was not in itself evidence of negligence; that the finding of the jury on the question of negligence was not satisfactory, and that therefore there should be a new trial.

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

The facts of the case sufficiently appear in the judgments of the court.

Weldon Q.C., for appellants.

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

As to the right to use wood in locomotives. See *Rex.* v. *Pease* (1); *Falconer* v. *C. & N. A. R. R.* (2); *Toledo R. R. Co.* v. *Corn* (3); *Spaulding* v. *The Chicago & N. W. R. R. Co.* (4); *Collins* v *N. Y. Central & Hundson R. R. Co.* (5). Ordinary and regular care was taken and proper appliances used. *Ball* v. *G. T. R. Co.* (6); *Jeffery* v. *Toronto & Grey & Bruce R. R. Co.* (7); *Freemantle* v. *London & N. W. R. R.* (8).

Gregory, for respondent, relied on *Dumnioch* v. *London & North Staffordshire Ry. Co.* (9); *Vaughan* v. *Taff Vale Ry. Co.* (10); 1 Redfield on Railways (11).

Sir J. W. RITCHIE C. J.—No doubt plaintiff has the right to use his barn as he pleases, but knowing that the Legislature has permitted the running of locomotives on the railway passing his barn, if he chooses to place in his barn combustible materials, and to leave it in such a condition that such combustible materials are exposed to sparks from the engine, though provided with all the usual and requisite appliances for preventing the escape of sparks, and the prevention of accidents, and an accidental spark should ignite such combustible material and cause the destruction of the barn and its contents, the owner must submit to the risk, as a consequence of the Legislature having permitted the use of a dangerous agent; and the question is: Have the defendants used all reasonable precautions and appliances to prevent accidents? It cannot be supposed that the best appliances will absolutely avoid all danger from the emission of sparks; and therefore it behooves parties, through whose premises the railway runs, to

(1) 4 B. & Ad. 30.
(2) 1 Pugs. (N.B.) 179.
(3) 71 Ill. 493.
(4) 33 Wisc. 582.
(5) 5 Hun 499.
(6) 16 U. C. C. P. 22.
(7) 23 U. C. C. P. 553.
(8) 2 F. & F. 340.
(9) 4 F. & F. 1058.
(10) 5 H. & N. 679.
(11) 5 Ed. p. 475.

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understand the risk to which the sanction of the Legislature, in the public and general interest of the country, to the running of locomotives, has subjected them. And, if they choose to leave their property unnecessarily exposed, as in this case, it is their own imprudence, and they must bear the loss.

I think the fair result of the evidence is, that the fire took place from a spark from the locomotive getting into the hay and igniting it; and if the hay had not been left in the exposed condition it was, the fire would not, in all human probability, have taken place.

There was, in my opinion, evidence most proper for the consideration of the jury, as to whether the plaintiff was not guilty of great negligence in placing such a combustible article as hay in a barn so near the railway, with such openings as exposed such combustible material to fire from sparks from passing locomotives.

I think the correct rule was laid down in *Collins* v. *N. Y. Cen. & Hudson R. R. Co.* (1), "that one whose property is exposed to risk or injury from or by reason of its location, as where it is situated in a position of constant exposure to fire on the side of a railroad, must use such care as prudence would dictate in view of the unavoidable perils to which it is subject."

The Legislature, then, having allowed the company to run a locomotive on this railway, if parties place combustible materials in such near contiguity to the railway that there is reasonable grounds for believing that they are liable to become ignited from sparks from the locomotive, even though all proper appliances for preventing sparks and all precautions and care are taken, the parties will be liable for contributory negligence if they omit reasonable care on their part to protect their property. Thus, if the plaintiff's barn, when the railway came into operation was, or while locomotives were

(1) 12 S. C. Rep. N. Y. 502.

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running is, open, so that under such circumstances sparks would be liable to enter and ignite combustible materials such as hay or straw housed therein, the plaintiff would, in my opinion, be guilty of contributory negligence if he placed such combustible materials in such a barn without having taken the care and precaution of closing the openings through which sparks might enter and lodge in the hay, there being, in my opinion, reciprocal duties as well on those who have combustible material near to the railway as on the railway company to use reasonable care and precaution.

In *Radley et al* v. *London & North Western Railway Co.* (1), Lord Penzance says:

The plaintiff in an action for negligence cannot succeed if it is found by the jury that he has himself been guilty of any negligence or want of ordinary care which contributed to cause the accident.

But there is another proposition equally well established, and it is a qualification upon the first, namely, that although the plaintiff may have been guilty of negligence, and although that negligence may, in fact, have contributed to the accident, yet if the defendant could in the result, by the exercise of ordinary care and diligence, have avoided the mischief which happened, the plaintiff's negligence will not excuse him.

This proposition, as one of law, cannot be questioned. It was decided in the case of *Davies* v. *Mann* (2), supported in that of *Tuff* v. *Warman* (3), and other cases, and has been universally applied in cases of this character without question.

There is nothing whatever in the judge's charge relative to contributory negligence, though a question is left to the jury on this point. This last question, as appears by the judge's notes, was submitted at Mr. Gregory's request and prepared by him.

I think there was non-direction (tantamount to misdirection) in not pointing out to the jury the duty of plaintiff, and what would constitute contributory negligence, and stating distinctly to the jury the law in reference thereto. I think the charge defective also, in

(1) 1 App. Cas. 754.
(2) 10 M. & W. 546.
(3) 5 C. B. N. S. 573.

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reference to the fuel used.

The Act which allows the use of locomotive engines, necessarily allows the use of such fuel for propelling them as is ordinarily used in the place where the locomotive is run, and if there is a difference as to the emission of sparks in the use of different descriptions of fuel, and there are different recognized precautions in use suitable to each description of fuel, and the precaution applicable to the particular fuel used is adopted, the railway company cannot be held liable for the consequences of a spark escaping and causing damage, no actual negligence being shown on their part. The legislature has sanctioned and authorized the use of dangerous engines, subject to the party using them taking all reasonable precautions. The railway company must use and carry fire along the railway for propelling their engines, and the statute has not limited the company to the description of fuel to be used. If then the company use a well known and ordinary description of fuel, and take all reasonable and known precautions consistent with the use of such fuel, and in spite of such precautions, sparks escape, the company cannot be held liable for the consequences, because they did not use another well known and ordinary description of fuel taking the usual precautions applicable to the use of such fuel. The use of wood cannot be said to be an illegitimate use of the locomotive; if not, and damage results from its use independently of negligence, the party using it cannot be held responsible. In other words, by using wood instead of coal the effect of the legislative authority to run the locomotive is not removed, and they are not left to their liabilities at common law, viz., that of using a highly dangerous machine at the peril of the consequences if it causes injury to others.

In the Supreme Court of New Brunswick *per* Ritchie

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C.J., in *Falconer* v. *The E. & N. A. Railway Co.* (1):— "The fact that an accident has occurred is not of itself "evidence of negligence, because its occurrence is "quite consistent with due care having been taken. The "plaintiff is not entitled to have his case left to the jury "unless he gives some affirmative evidence of negligence. "*Hammock* v. *White* (2). In *Daniel* v. *The Metropolitan* "*Railway Company* (3), Willes, J., says, that to entitle a "plaintiff to recover in an action for negligence, he must "establish in evidence circumstances from which it may "fairly be inferred that there is reasonable probability "that the injury resulted from the want of some precau- "tion to which the defendant might and ought to have "resorted."

See Wharton on Negligence (4); *Sheldon* v. *The Hudson R. R. R. Co.* (5); *Collins* v. *N. Y. C. & H. R. R. R. Co.* (6).

The use of coal has not been adopted by reason of its being a safer article of fuel, the use of wood or coal has been determined with reference to economy and convenience. When railways were first established in New Brunswick wood was universally used by locomotives as being the cheapest and most economical fuel. In localities where wood became scarce and dear, and coal more easily obtainable, coal was substituted, so with steamboats in the bay of Fundy and harbor of St. John, coal is universally used; on steamboats plying on the river St. John, wood is generally, if not universally used, and so with reference to fuel in ordinary use in the city of St. John and its neighborhood. The period is not very remote when wood was the fuel in general use, now coal is the article of fuel ordinarily used. In the part of New Brunswick through which this railroad runs (with the exception of the city of Fredericton and

(1) 1 Pugs. (N.B.) Rep. 183.
(2) 11 C. B. N. S. 588.
(3) 3 L. R. C. P. 216.
(4) Pp. 869, 870, 872.
(5) 29 Barb. 227.
(6) 5 Hun. 503.

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its immediate vicinity,) wood ever has been and is the general ordinary fuel of the country.

June is by no means a month in New Brunswick characterized by excessive drouth.

Railroad companies having used all proper care to guard against accident, if injuries occur, they are *damnum absque injuria*.

The appeal should, in my opinion, be allowed with costs.

STRONG J.—Although a motion for a non-suit was made at the trial and over-ruled, leave to move to enter a non-suit was not reserved. Two of the objections to the directions of learned judge specified in the notice of motion are as follows, viz: 1. That there was misdirection in not instructing the jury that there was no evidence that the barns of the plaintiff caught fire from the locomotives of the defendant. 2. That if there was any evidence that they did so catch fire, then the learned judge should have told the jury that there was no evidence to submit to them as to negligence on the part of the defendants in the running of their train or locomotive on the day in question, and therefore the defendants were not liable for the loss. The only evidence to show that the fire was caused by sparks from the defendants' locomotive was that on the day on which the fire occurred a train passed along the railway, and a short time afterwards the respondent's barns, situated about 200 feet from the line of railway, were discovered to be on fire. In the absence of authority I should have doubted if this was sufficient to make a case for the consideration of the jury upon the question of the origin of the fire. I should have thought it not sufficient to prove that the fire might have originated from the sparks thrown out of the locomotive, but that the plaintiff was bound to prove something further to connect the fire with the passage of the engine. In *Free-*

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mantle v. *N. W. Ry. Co.* (1) such evidence was, however, held sufficient to make a *primâ facie* case for the consideration of the jury. But from this case I should have thought the plaintiff was bound at least to have given some evidence to show there was no other probable cause to which the fire might have been ascribed; but, assuming there was evidence for the jury, and that they were warranted in their finding as to the origin of the fire, I am of opinion that the plaintiff was bound to go further and give some evidence of negligence, such as the omission to use all proper and reasonable means to arrest the sparks by means of known contrivances for that purpose, and that in the absence of all proof of negligence the onus was not cast upon the defendant of proving that they had adopted and used such precautions; in other words, that it was for the plaintiff to make out his case in the first instance by proving negligence in such a case as the present, as in all other cases of action for negligence. The only evidence of negligence given by the plaintiff was that so strongly relied on by the learned counsel for the respondent at this bar, that the defendants were guilty of actionable negligence in having used wood instead of coal for fuel. It was shown that the locomotive was one adapted for the use of wood. So that the question is just reduced to this: Is a railway company guilty of negligence in burning wood instead of coal in a country in which wood is a kind of fuel in common use? I cannot agree that this is any evidence of negligence. If it were, a railway company would be bound to consume coals as fuel when procurable, though involving a much greater outlay than the use of wood—a proposition so unreasonable as to be wholly untenable. If the fuel used was of an unusual or dangerous kind, then there would be no doubt *primâ*

(1) 10 C. B. (N.S.) 80.

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facie grounds for imputing want of care, but when it is of a kind in common use for railway purposes, as in the present case, numerous American authorities show that railway companies are justified in using it.

I am not able to concur in the view that contributory negligence on the part of the plaintiff was shown by the fact that he maintained his barns in a dangerous proximity to the railway. I apprehend that a landowner has a right to make any use of his land he pleases, and is entitled to be protected in that use against injury from the culpable negligence of others. Upon this point I refer to *Fero* v. *Buffalo, &c., Ry. Co.* (1); *Grand Trunk Ry.* v. *Richardson* (2).

I am of opinion that a rule for a new trial without costs should have been granted, and that this appeal must consequently be allowed with costs.

FOURNIER J. concurred.

HENRY J.—This is an action to recover damages alleged to have been sustained by the setting fire to and burning of the respondent's sheds, barns and buildings by means of sparks of fire which issued from a locomotive railway engine of the appellants while passing the premises of the respondent, and it is charged that the same was caused by the negligence and unskilful working of the railway, and the locomotive used thereon and the negligent and unskilful management of the appellants and their servants of the locomotive engine, and the fire and burning matter therein contained; and it was alleged that the locomotive engine was so insufficiently constructed that sparks from the fire therein and portions of the burning matter escaped from the locomotive engine and set on fire and burnt the sheds, barns and buildings, together with certain hay, farming utensils, plant, tools and goods of the respondent. The appellants

(1) 22 N. Y. 209. (2) 91 U. S. 454-473.

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pleaded that they were not guilty. The appellants, by their charter, were authorized to contract for and eqnip and operate certain lines of railway, including the one in question.

The jury having found that the respondent's barns were burned by means of sparks from the appellants' engine, I do not consider it necessary to question the correctness of their finding. The law is fully settled that where legislative sanction is given to the use of locomotive engines, there is no liability for any injury caused by their use if every known means are adopted to prevent the escape of fire from them and necessary precaution is taken consistent with their ordinary use. As a reasonable result of the evidence the court below did not find, and I think properly, that there was want of any of the necessary precautions on the part of the appellants, and that every means in their power had not been used to prevent the escape of sparks from their engine, but founded their judgment solely on the fact that during the very dry weather at the time the fuel used was wood, and that coal should have been used as not so dangerous or likely to set fire to property on the line. In one of the questions submitted to the jury: "Did the defendants use reasonable care and caution in the material used for fires on the day in question?" They answered: "No, they did not, considering the surroundings, the state of the weather, the season of the year, the state of the country along the line, the dryness of the material and its then liability to ignite flame from sparks." To another question: "What is the ordinary material used in the country—that is wood or coal?" They answered: "If for domestic purposes wood, locomotives wood and coal." In answer to the question: "Was the fire caused by the negligence of the defendants?" They answered: "Yes," but did not point out wherein the

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negligence consisted. In answer to another question: "Supposing the jury arrived at the conclusion that fire was caused by sparks from the engine, and that sparks caused the damage, do the jury find that though wood was used, if reasonable care was used, the fire might and likely would not have occurred?" They answered: "Yes." And to the question: "Supposing wood was the proper fuel, was the running of the engine conducted with reasonable care?" They answered: "No." Notwithstanding all these questions and answers, it does not appear to me that the findings amount to negligence, for which the appellants would be answerable. The want of reasonable care suggested in the last two questions is in no way definite. It might mean want of care in running with an engine not properly constructed to prevent the emitting of fire or sparks, or it might be the want of care in the use of the engine. I think the court below was right in not founding their judgment upon such vague findings, particularly under the evidence. The judgment is founded on the proposition that if fuel of wood is more likely to do injury than fuel of coal, a railway company must be held to use the former at the peril and risk of paying damages for all injuries occasioned thereby which would not have had happened had coal fuel been used There are many objections to such a ruling, and one, a practical one, which would be the difficulty of determining the question. It is known that what are called hoods are used near the top of every locomotive smoke-stack to prevent egression of lighted sparks, and if those used where wood is the fuel were placed on smoke-stacks for coal they would clog up and the draft would be practically destroyed; and if those intended for coal were used with fuel of wood, the sparks would not be restrained. I take it that if the proper hood is used for coal or wood, as the case

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may be, and still an injury is done by the emission of sparks, the company is not answerable. The use of wood for fuel in railway engines is not unlawful, but greater precautions are necessary in regard to the sparks. Being lawful if properly used it may be so used at all times with impunity, and the only obligation imposed by law is to use the proper and well-known precautionary measures and means. There is no evidence that such were not used and employed in this case. To entitle the plaintiff to recover, in an action such as the present, he must prove negligence by showing the proper preventive means were not used on the occasion. In this case he has not done so, and it would be a wrong and and dangerous course to leave the rights of parties to be dealt with and decided upon by the speculative decision of a jury on the probable results of the use of wood instead of coal—I cannot find any precedent for such a submission, and I can discover no principle to sustain it. The law governing cases of this kind, is founded on the immunity awarded to those using locomotive engines on railways, and they have the right at all times, and at all seasons of the year, and in every state of the railway surroundings to use wood for fuel, and they cannot be charged as for negligence for doing what the law permits. The jury found that for locomotives wood as well as coal was the ordinary fuel. I take it a railway company can legally use either at its option, and with the proper precautionary means and appliances can legally use the one as well as the other, and with the same immunity from the consequences of damages done to the property of others.

I think the judgment appealed from should be reversed and a new trial granted with costs.

GWYNNE J.—This is an action brought by the plaintiff against the New Brunswick Railway Company as

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defendants, to recover compensation for a barn and contents, alleged to have burned by sparks of fire permitted to escape from an engine of the defendants through the negligence, as was said, of the defendants and of their servants. The negligence charged in the declaration, as it was when amended at the trial, is thus stated:—

> Yet the defendants and their servants not regarding their duty, so negligently and unskilfully built, used and worked the said railway, and the locomotive used thereon, and managed the said locomotive, and the fire and burning matter therein contained, and the said locomotive engine was so insufficiently constructed, that sparks from the said fire and portions of the said burning matter escaped and flew from the said locomotive engine, to and upon the sheds, barns and buildings of the plaintiff, whereby the same, with their contents, were burned, and destroyed to the plaintiff, damages of $250.

At the trial the plaintiff tendered evidence for the purpose of establishing that wood (which was the fuel burned in the engine from which the sparks which set fire to the plaintiff's building were said to have proceeded) emitted more sparks than coal. Evidence of this nature was objected to as inadmissible, but was received, and the case as the evidence proceeded was chiefly rested upon the contention that the defendants should for this reason have used coal instead of wood, and that the use of wood under the circumstances was, therefore, such negligence as rendered the defendants liable in this action. The defendants produced evidence to establish that the engine was quite new and was furnished with the best apparatus to arrest the escape of sparks therein and in use in wood burning engines, which this engine was. This evidence was not much questioned, the case for the plaintiff having been rested upon the use of wood instead of coal, and the fact that when passing the plaintiff's place a great pressure of steam was used, the consequence of such

increased pressure being to cause more sparks to be emitted than happens under a light head of steam. This latter point was met by the defendants showing that the grade there was steep and an ascending grade to draw the train up which a greater pressure of steam was necessary. There were several objections taken by the defendants' counsel to the evidence offered by the plaintiff, and which was received by the learned judge who tried the case, for the purpose of establishing (as there was no direct evidence upon the point) that the fire which burned the plaintiff's building proceeded from the engine which had passed along the railway close to the plaintiff's barn immediately before the fire broke out, but all that evidence was, I think, clearly admissible. It was also objected by the defendants' counsel that the learned judge wrongly rejected evidence offered by him to show that the plaintiff's property destroyed by the fire had been insured in an insurance office, and that he had been paid for his loss by the insurers, but that evidence was, I think, rightly rejected. The defendants' counsel also desired to put questions to the witnesses under examination for the purpose of obtaining evidence that wood was the fuel in ordinary use upon railways in New Brunswick. This evidence was rejected, but, in my opinion, was admissible and proper to be taken into consideration by the jury upon the question whether the use of wood on the engine in question without more, and in the absence of all other negligence, was, in the opinion of the jury, such negligence as should make them responsible in this action, and more especially was it material upon one of the questions submitted by the learned judge to the jury, namely, "What is the ordinary material used in the country, that is, wood or coal?" The learned judge, in submitting the case to the jury, told them that the plaintiff

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was not entitled to recover unless the damage of which he complained was caused by the negligence of the defendants, and that the plaintiff must establish this negligence to the satisfaction of the jury. He told them further that the defendants had a right to run their railway, but that they must use all proper appliances, care and diligence in working their trains, so as not to do damage to the people through whose property their line passes. This care, he said, extended as well to the construction of all the machinery as to the fuel used. He told them that the mere fact of sparks from the engine igniting the plaintiff's property, does not fix liability on the defendants to pay damages; that there must be negligence on the part of the defendants, and that it was incumbent on the plaintiff to establish this negligence, and that if not proved to their satisfaction the defendants were entitled to succeed. With this charge, as far as it goes, it must, I think, be admitted that the defendants have no just ground of complaint, but it fails to draw the attention of the jury to the points upon which the plaintiff relied as establishing, and upon which the jury were to say whether, in their opinion, under all the circumstances bearing upon the point he had established, that the defendants were guilty of, and, if any, of what, negligence to justify the jury in rendering a verdict against them in this action. The learned judge, however, together with the above charge, submitted certain questions to the jury, and among them the following:—

1. Did the defendants use reasonable care and caution in the material used for fires on the day in question?

2. Did the defendants use reasonable care and caution in the material used for firing purposes?

3. What is the ordinary material used in the country, that is, wood or coal?

4. Could the defendant have reasonably procured coal

instead of wood at the time?

5. Was the fire caused by the negligence of the defendants?

6. Would the use of coal have materially reduced the risk of fire?

7. Supposing the jury arrive at the conclusion that the fire was caused by sparks from the engine, and that the issue of sparks caused the damage, do the jury find that though wood was used, if reasonable care was used, the fire might not, and likely would not, have occurred?

8. Supposing wood was the proper fuel, was the running of the engine that day conducted with reasonable care?

The two first of the above questions which appear to be one and the same, are, as it seems to me, susceptible of two constructions, and which was intended does not very clearly appear, namely,—whether the use of wood, as the material to create the motive power, constituted in itself without more a want of reasonable care and caution, or whether there was a want of reasonable care and caution in the manner in which the wood was used upon the particular engine in question. If this latter was what was intended it would have raised a question, material no doubt, but one which was scarcely suggested at the trial, namely, whether the engine was or not supplied with all proper appliances and contrivances for arresting the escape of sparks, and upon that point the jury should have been asked directly whether the defendants had been guilty of any, and, if any, of what negligence in that particular. If the former was what was intended, then, I think, the question should have been accompanied with some direction explanatory of the circumstances which would make the use of wood as the material for creating the motive power to constitute, if it would constitute, want of reasonable care and caution.

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To these questions the jury answer in, as it appears to me, a very vague and unsatisfactory manner, not pointing at all to what they considered to be that want of reasonable care and caution which they find to have existed. In the question, as expressed in the first of the above formulas they answer: "No, they did not, considering the surroundings, the state of the weather, the season of the year, the state of the country along the line, the dryness of the material and its then liability to ignite flame from sparks." And to the question as put in the second of the above formulas they simply answer "No;" but what it was that in the opinion of the jury the defendants neglected to do, which they ought to have done, or did which they ought not to have done, which in the view of the above circumstances detailed in their answer they considered to constitute the want of due care, there is no suggestion whatever, so as enable the court to judge whether there was any evidence to support such finding, or to justify a verdict against the defendants, a point of great importance, especially as it appears to me in this description of action, in which the known tendency of juries is so great to render verdicts against railway companies under the influence of sympathy with the plaintiff, instead of in accordance with the facts established in evidence.

To the third of the above questions they replied: "If for domestic purposes wood—for locomotives wood and coal;" thereby establishing that wood is a material ordinarily in use in New Brunswick for creating motive power in locomotive engines.

To the 4th and 6th of the above questions they answer "yes."

Now, although coal could have been procured by the defendants, as found by the jury in answer to the 4th of the above questions, and although the use of coal

might have materially reduced the risk of fire, it by no means follows as a conclusion of law, that the use of wood upon a railway, which for its entire length passes, as was said in the evidence, through a wooded country, where wood is procurable at every station, and which the jury by their answer to the third of the above questions, have found to be a fuel in ordinary use upon locomotives in New Brunswick, is in itself (even though the best appliances known to science and to practical experience to arrest sparks are used, and the utmost care in managing the engine is taken) such negligence as entitles the plaintiff to recover in this action. Whether the defendants were or not guilty of negligence, is a matter of fact to be expressly found by the jury, and what is the particular act or default, which in the opinion of the jury constitutes negligence in each case, should be clearly found and not be left in doubt, for what the jury might rely upon as constituting negligence, the law might pronounce not to be. In cases of this nature, therefore, there should be no doubt as to the acts or defaults which the jury in each case rely upon as constituting the negligence which subjects the defendants to liability. In the present case the answers of the jury leave in the utmost doubt what it is that they rely upon as constituting the negligence of which the defendants are guilty. If they meant that the mere use of wood instead of coal without more, constituted the negligence relied upon, the effect of that finding would be to pronounce it to be illegal for the defendants to use wood-burning engines at all, unless at the risk of insuring all persons against damage by fire escaping from such engines, even though the best possible appliances should be used and the utmost care should be taken to prevent the escape of sparks, and this is a proposition which cannot, I think, receive any countenance

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in a wooded country described as New Brunswick is to be throughout the entire length of the railway. But the jury do not say, as matter of fact, that this is the negligence of which they find the defendants to be guilty, and that they did not mean to find it to be so would appear from their answer to the 7th of the above questions, in which, by answering the question simply in the affirmative, they, in effect, say, in the words of the question, that though wood was used, if reasonable care was used, the fire might, and likely would, not have occurred. Now, what the want of care here referred to is, is not suggested; all that is said is that if something, not stated what, had been done, or it may mean that if something, not stated what, had not been neglected to be done, it is likely, but not clear, that the fire might not have occurred. The jury do not find any defect in the appliances used to arrest sparks; during the trial that point was scarcely questioned by the plaintiff; they do not find any want of care in the management of the engine to which they find that the fire was attributable. So likewise in their answer to the 8th question, while by answering "no" to the question as put to them they in effect find that even supposing wood to have been proper fuel, still that the running of the engine that day was not conducted with reasonable care, but what want of care they find to have existed and whether it consisted of omission or commission there is not the slightest suggestion. Such answers, finding nothing definitely and leaving in the greatest uncertainty what the jury intended to find to have been done by the defendants which ought not to have been done, or to have been omitted to be done which ought to have been done, are, in my opinion, altogether too loose, vague and uncertain to support a verdict against the defendants. As then the jury has not found that

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there was or whether there was or not any defect in the construction of the engine used upon the occasion of the fire occurring as a wood burning engine, nor any want of proper appliances to arrest the escape of sparks, or any defect in the appliances which were used for that purpose which could and should have been avoided, and as, in my opinion, the mere fact that more sparks are liable to escape from wood than from coal does not make the use of wood as a motive power negligence subjecting the defendants to liability, and as there is so much doubt appearing upon the answers of the jury to the questions put to them, as to what they intended to find to have been done or omitted to be done by the defendants, which constituted negligence subjecting them to liability to the plaintiff, I think the case should be remitted to another jury, who should be required to state what is the particular negligence, if any, of which they shall find the defendants to have been guilty; and that the appeal should be allowed with costs, and a new trial.

Appeal allowed with costs.

Solicitors for appellants: *Weldon, McLean & Devlin.*

Solicitor for respondent: *John C. Winslow.*

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*May. 12.

THOMAS CULTER JONES, AMBROSE SNOW, AND THOMAS B. FLINT (DEFENDANTS)..... } APPELLANTS;

AND

JOSEPH R. KINNEY, ASSIGNEE UNDER THE INSOLVENT ACT OF 1875 AND AMENDING ACTS, OF THE ESTATE AND EFFECTS OF THOMAS B. FLINT, AN INSOLVENT (PLAINTIFF)..... } RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Insolvent Act of 1875 *and amending Acts—Mortgage of Insolvent's Property—Transfer within thirty days in contemplation of Insolvency—Fraudulent preference under section* 133*—Merchants Shipping Act.*

F., a ship-owner in Yarmouth, N. S., employed as his agents in Liverpool J. & Co., the defendant J. being a member of their firm, and as agents in New York he employed the firm of S. & B., of which the defendant S. was a member. In the course of his dealings with these agents he became indebted to both firms for acceptances by them of his drafts, made when he was in want of money, towards the payment of which they received the freights of his vessel and remittances in money. On one occasion he said that he would give to the Liverpool firm a mortgage on the "Tsernogora" or the "Magnolia" when they should require it, and in a subsequent conversation with a member of the firm he agreed to give such mortgage on certain conditions which were not carried out. He also promised the firm in New York to give them security in case anything happened, and mentioned as such security a mortgage on the "Tsernogora." According to F.'s own statement he had sufficient property to pay his liabilities when these conversations took place. A few weeks after these conversations took place, F. executed a mortgage of $\frac{20}{64}$ shares of the "Tsernogora" in favor of the defendants J. and S. and had the same recorded, and within thirty days thereafter a writ of

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

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attachment in insolvency was issued against him. The plaintiff, who was appointed assignee of F.'s estate by his creditors, filed a bill to have the mortgage set aside, claiming that it was void under section 133 of the "Insolvent Act of 1875." The defendant J. did not answer the plaintiff's bill, and the other defendants denied that the mortgage was made in contemplation of insolvency, and also claimed that as it was made under the provisions of the "Merchants' Shipping Act" (Imperial), it was not affected by the "Insolvent Act of 1875." The judge in equity, before whom the cause was heard, made a decree in favor of the plaintiff and ordered the mortgage to be set aside, and the Supreme Court of Nova Scotia dismissed an appeal from that judgment. On appeal to the Supreme Court of Canada,

Held, affirming the judgment of the court below, Henry J. dissenting, that the promise to give security "in case anything should happen" could only mean "in case the party should go into insolvency," and that the transfer was void under section 133 of the "Insolvent Act of 1875."

Held, also, that the provisions of the "Merchants' Shipping Act" did not prevent the property in the ship passing to the assignee under the Insolvent Act.

APPEAL from a decision of the Supreme Court of Nova Scotia (1) affirming the judgment of the judge in equity.

The facts of the case are fully reported in the judgments delivered by the court, and in the report of the case in the court below.

Pelton Q.C., and *Gormully* for the appellants, contended that the plaintiffs could not set aside the mortgage from Flint to Snow and Jones: 1st, because the mortgage was not executed in contemplation of insolvency or in violation of the Insolvent Act, but in good faith for sufficient consideration, without knowledge of insolvency and in pursuance of a previous agreement, and fresh advances, and extended accommodation and payments were made and given on the faith of such agreement by the defendant Snow, and the firm of which he was a partner, to the defendant Flint, and on this branch of the case relied on the following cases:

(1) 5 Russ. & Geld. 244.

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Campbell v. *Barrie* (1); *Allan* v. *Clarkson* (2); *Ex parte Winder in re Winstanley* (3); *Ex parte Wilkinson in re Berry* (4); *Bittlestone* v. *Cooke* (5); and *Bills* v. *Smith* (6); and Williams on Bankruptcy (7); and *McWhirter* v. *Thorne* (8). And because under "The Merchant Shipping Act of 1854" (Imperial), and the Colonial Laws Validity Act (Imperial), and under the Statutes of Canada, the right and title of the defendant Snow under the mortgage could not be defeated or affected in any way by the provisions of the Insolvent Act and amendments; citing McLachlan on Shipping (9); Merchant Shipping Act, 1854 (10); Statutes of Canada, 1873 (11); *Bell* v. *Bank of London* (12); *Kitchen* v. *Irvine* (13); *Cahoon et al* v. *Morrow* (14).

Bingay Q.C. and *Graham* Q.C. for respondent.

1. There is no repugnancy between the Merchants' Shipping Act, 1854, and the Insolvent Act, 1875. There may be an incidental interference in the operation of the latter as there is in Canada in respect to legislation of the Dominion and the provinces, but there is no conflict between the two Acts. See *Citizens' Insurance Co.* v. *Parsons* (15) B. N. Act, secs. 91, 56. All Dominion legislation and all the provisions of the Civil Code respecting ships would be repugnant if the Insolvent Act is. The Dominion Parliament has full power under the B. N. A. Act to legislate in respect to insolvency and shipping. The Merchant Shipping Act provides for title to shipping. The Insolvent Act says a trader in insolvent circumstances cannot make

(1) 31 U. C. Q. B. 279.
(2) 17 Gr. 570.
(3) 1 Ch. D. 290.
(4) 22 Ch. D. 788.
(5) 6 E. & B. 296.
(6) 6 B. & S. 314.
(7) P. 269.
(8) 19 U. C. C. P. 302.
(9) (Ed. 1862), pp. 39, 42, 44.
(10) Section 72.
(11) Ch. 128 Sec. 43.
(12) 3 H. & N. 730.
(13) 28 L. J. Q. B. 46; 5 Jur. N. S. 118.
(14) 1 Old. 148.
(15) 4 Can. S. C R. 215.

a transfer. *Bell* v. *Bank of London* (1); *Lindon* v. *Sharpe* (2).

2. The onus is on defendant to show that the alleged previous agreement which is used to support this transfer was made *bonâ fide*, and when the insolvent was in such circumstances that he could lawfully make such a transfer. *Wilkinson re Barry* (3).

There must be other evidence than that of the parties to the agreement. *Morton* v. *Nihan* (4).

The agreement was to postpone the security until Flint was on the verge of insolvency, and cannot support the transfer. Kerr on Fraud (5); *Ex parte Burton* (6); *Ex parte Kilner* (7).

The section of the English Bankruptcy Act is different, and the agreement cannot be imported into our statute, except on the theory that it was an agreement such as in equity would be specifically performed. Even in such case, if a secret agreement can be used to support a transfer, the sections respecting fraudulent preferences are useless.

Sir J. W. RITCHIE C. J.—The facts and pleadings, as stated in the judgment of the judge in equity, are as follows:—

This is a bill at the instance of a creditor assignee under the insolvent Debtors' Act to set aside a bill of sale by way of mortgage by Thomas B. Flint, one of the defendants, to Thomas C. Jones and Ambrose Snow, also defendants. The bill sets out that a mortgage on $\frac{22}{64}$ shares owned by him in the ship "Tsernogora" was executed by the defendant Flint in favor of the defendants Jones and Snow on the 15th April, 1879, in pursuance of an alleged previous agreement made with them severally to give them security *pro ratâ* on the ship for advance made by them severally to him in his business. That Flint was then largely indebted and in insolvent circumstances, and that on the 13th day of May, 1879, and within thirty

(1) 3 H. & N. 730.
(2) 6 M. & G. 895.
(3) 22 Ch. D. 788.
(4) 5 Ont. App. R. 20.
(5) 2nd Ed. 223.
(6) 13 Ch. D. 102.
(7) 13 Ch. D. 245.

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days from the making of the mortgage, he was placed in insolvency and the plaintiff appointed assignee. That the defendant Flint's shares in the "Tsernogora" formed the principal part of his assets, and that the mortgage had been made fraudulently and in contemplation of insolvency. The bill prayed that it be set aside and the registry cancelled, &c.

Thomas C. Jones, defendant, one of the mortgagees, did not appear. Flint and Snow the other mortgagees appeared and answered separately, Flint denying that he was in insolvent circumstances, and that the mortgage was made in contemplation thereof, and both of them setting up a previous verbal agreement that Flint would give to Snow and his partners, the firm of Snow & Burgess, security for further advances to be made by them to him, which advances to a large amount had been made by them to him in reliance upon such agreement or promise, and that such agreement was made with Flint without any knowledge on their part of his being in insolvent circumstances.

It appeared by the evidence that Flint, who was a barrister by profession residing at Yarmouth, in the Province of Nova Scotia, was and had been for some years previously, a ship-owner. He owned shares in several ships which he employed in general carrying trade. His agents in Liverpool, England, were T. C. Jones & Co., and in New York Snow & Burgess. At the time of his failure he owned property, valued at schedule rates, as follows:—

Real estate	$ 9,350
Mortgage on real estate	800
Personal chattels	1,300
Shares in "Tsernogora"	12,500
Shares in four other vessels	10,450
Debts and balances due him	3,500
Total	$37,800

LIABILITIES.

Direct	$ 36,000
Indirect	40,000
	$ 76,000

The assignee proved that these properties were scheduled at higher rates than they would bring, the bulk of his real estate was mortgaged for its full value and about the same time as the mortgage on the "Tsernogora" Flint's share in two other vessels were mortgaged and other securities given by Flint to creditors some of whose claims had not matured. All of the parties in whose favor Flint had endorsed to the amount of $40,000 in all were really in insolvent cir-

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cumstances, and to his knowledge were then badly strapped (to use his own expression) for money. Their temporary solvency depended on the stability of parties abroad and especially upon Charles Gumm & Co., of Liverpool, England, and their failure which was evidently not entirely unanticipated by Flint and the news of which was received by him before the execution or registry of the mortgage to Jones and Snow, threw the whole of them including Flint into a state of hopeless insolvency.

It is needless to discuss the evidence to show that Flint knew or at least feared that he was about to become insolvent and whatever promises he made to the mortgagees to give them security it appears to me to be so clear on his own evidence that he was induced to give the security at that time by the fear of insolvency at a very early period that it would be a work of supererogation to insert in this judgment the elaborate analysis of the evidence on that point of the case which I have prepared. What I have to say on another ground of defence will incidentally throw some further light upon it.

The defendant's second defence set out in the Bill was that admitting the mortgage to have been made in contemplation of insolvency the statute did not apply because it was made to fulfil an agreement which had been previously made between the parties which agreement was not made in contemplation of insolvency and that the court would uphold the conveyance made in pursuance of that agreement as if it had been made at the time and under the circumstances attaching to the agreement.

He informs us in his evidence that he had a conversation with Alfred Snow, one of the firm of Snow & Burgess, at their office in New York, about 1st November, 1878, more than six months before the mortgage was executed. That for some time previous to that date he had been in the habit of drawing on Snow & Burgess when he wanted money and at the same time sending them as collateral security joint and several notes from himself and the parties in Yarmouth for whom he was in the habit of endorsing, viz., Rogers & Co., Horton, Kelly & Lewis. The amounts of these drafts were paid as they became due by freights of Flint's vessels and by remittances from him to them. Mr. Snow at that conversation told him that they objected to the note as collateral security for the drafts and asked for other security and Flint promised that he would "give them security in case anything should happen." He mentioned among other things the "Tsernogora," "they said they would leave it to me to protect them, they had security at the time in collateral notes, I did not increase my indebtedness to them, they were not consulted with reference to the mortgage before my giving it, they

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did not demand the mortgage previously to its being given, the giving of the mortgage was voluntary on my part.' In his cross-examination he says that "they consented to continue the business with the understanding that they were to be kept secured." But he subsequently modifies this by the statement "that he agreed to give them collateral notes whenever I drew on them and told them I would give them a mortgage on the 'Tsernogora' in addition to the notes should they want additional security." This they never did, they received the collateral notes with every draft without demanding additional security or even mentioning the matter after that conversation.

He states that he had this conversation and promise in his mind when he put Snow's name in the mortgage. His original intention was to give each of the parties—Jones & Co. and Snow & Burgess—a separate mortgage each on ten shares of the ship, and he had a week previously made drafts of these mortgages, but finally, obviously on receipt of news of Gumm & Co.'s failure, he hurried the two into one brief mortgage and hastened to the office of the registrar to get the mortgage entered as soon as possible.

While I am by no means prepared to say it is necessary that a previous arrangement to give a security must be such a technical binding contract that specific performance could be enforced in equity, or damages for a breach recovered at law, after a careful consideration of the evidence, I find it extremely difficult to say, that in this case there was any *bonâ fide* agreement binding or not binding, to give the mortgage; but assuming there was, I think the evidence abundantly shows that the mortgage was to be given as the mortgagor says only, "in case anything should happen," which I can only take to mean "insolvency," and that when actually given, it was given in contemplation of insolvency, and therefore a violation of sec. 133 of the Insolvent Act of 1875, which enacts:

If any sale, deposit, pledge or transfer be made of any property real or personal by any person in contemplation of insolvency, by way of security for payment to any creditor, or if any property, real or personal, movable or immovable, goods, effects, or valuable security, be given by way of payment by such person, to any creditor whereby such creditor obtains or will obtain an unjust preference

over the creditors, such sale, deposit, pledge, transfer or payment shall be null and void, and the subject thereof may be recovered back for the benefit of the estate by the assignee, in any court of competent jurisdiction; and if the same be made within thirty days next before a demand of an assignment, or for the issue of a writ of attachment under this Act, or at any time afterwards, whenever such demand shall have been followed by an assignment, or by the issue of such writ of attachment, it shall be presumed to have been so made in contemplation of insolvency.

In view of the object and policy of this Insolvent Act being to secure a general and equal distribution of an insolvent estate among all the creditors of the insolvent, and with that view to prevent preferential dealing with creditors with a view to insolvency, can it be said that this promise to give security in case anything should happen, was not by its very terms to be carried out only in the event of insolvency, or with a view to insolvency? And, as clearly established by the evidence, it was, in furtherance of this intention, only given when ruinous insolvency had overtaken the mortgagor.

The authorities, in my opinion, clearly establish that any promise that a creditor shall have priority in the event of bankruptcy is contrary to the policy of the bankruptcy laws and void.

In *ex parte Burton in re Tunstall* (1) the marginal note is as follows:—

Shortly before a trader filed a liquidation petition he executed a bill of sale of substantially the whole of his property, to secure the repayment of an advance which had been made to him two months previously. At the time when the advance was made the borrower agreed to give a bill of sale to secure it; but the agreement was that the bill of sale was not to be signed until the tender "lost confidence" in the borrower. *Held* (reversing the decision of Bacon C.J.), that this amounted to an agreement to postpone the giving of the bill of sale until the grantor should be on the verge of bankruptcy; and that, consequently, on the principle of *ex parte Fisher* it could not support the deed.

(1) 13 Ch. D. p. 102.

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James L.J.:

There we held that it is a fraud on the bankrupt law for a man to undertake to give his creditors a bill of sale when required, that is to say, when the circumstances of the debtor shall be such as to require the creditor to demand it. That decision established an exception upon an exception. That which is void is an assignment of all a man's property for a past consideration. But a court of equity regards that which has been agreed to be done as done, and therefore it has said that, if it was really part of the understanding when the money was advanced that a bill of sale should be given, then that agreement would be the same thing as if the bill of sale had been actually given at the time. The bill of sale would be sustained by the previous agreement. But *ex parte Fisher* established this exception upon that exception to the rule, viz., that if the bargain be not an out-and-out one, but only an agreement to give the bill of sale when required, then it is only a device to enable the debtor to acquire false credit, and the creditor is not entitled to avail himself of it in the event of the debtor's bankruptcy. It is a fraud on the bankrupt law. To my mind that is exactly the present case. The bill of sale was not to be signed till the borrower had "lost the confidence" of the lender.

Thesiger L. J.:

The only question is whether, at the time when the advance was made, there was such an agreement to give the bill of sale as this court can give effect to. The debtor's evidence is that the bill of sale was not to be signed till Whitehead had "lost confidence" in him. If that evidence is not displaced it brings the case within the principle of *ex parte* Fisher, which is not to be frittered away by nice distinctions, and the evidence of Whitehead admits something of the same kind, for he says that the bill of sale was not actually signed till he had lost confidence in the debtor.

Ex parte Kilner in re Barker, Baggalay L.J. (1):

The principle applicable to cases of this description is enunciated by Lord Justice Mellish, in giving the judgment of the court in *ex parte Fisher* (2), in these terms: "Although we do not dispute the rule that where a sum of money is advanced on the faith of a promise that a bill of sale shall be given, such sum is to be treated as a present advance on the security of a bill of sale, we do not think this rule will protect transactions where the giving of the bill of sale is purposely postponed until the trader is in a state of insolvency, in

(1) 13 Ch. D. p. 248. (2) 7 Ch. App. 644.

order to prevent the destruction of his credit, which would result from registering a bill of sale. We think that such a postponement is evidence of an intention to commit an actual fraud against the general creditors." He dealt with the particular circumstances of that case, and said that there was evidence "from which we infer that it was understood between the bankrupt and Mr. Wells, from the commencement of the advances, that a bill of sale was to be given, if required, by Mr. Wells, though, for the purpose of protecting Mr. Ash's credit in the meantime, the giving of the bill of sale was purposely postponed until he was unable to go on, and was in a state of insolvency." Now I think it is clear from the way in which the principle is enunciated by Lord Justice Mellish, that it must be for the court in each case that comes before it to take into consideration all the surrounding circumstances, and to see whether, having regard to these circumstances, there is evidence of an intention to commit an actual fraud against the general body of creditors.

Thesiger L.J.:

She relies upon a prior agreement which she says supports the bill of sale on the principle laid down in *Mercer* v. *Peterson* (1) and cases of that class. Those principles are undoubtedly binding upon this court, but I cannot shut my eyes to the fact that their application in any particular case ought to be most carefully guarded, because it cannot be disputed that they do, unless they are applied with very great caution and under the most careful limitations, open the door to very considerable frauds. It appears to me, therefore, right that the court should require from any person setting up a bill of sale, executed under such circumstances as those which exist in the present case, very clear evidence that the agreement which is set for the purpose of rendering the bill of sale valid was a *bonâ fide* agreement, or, in other words, using the expression of Lord Justice Mellish in *ex parte Fisher* (2), that it was not an agreement that the bill of sale was to be delayed until such time as the trader should be in a state of insolvency, in order to prevent the destruction of his credit which would result from the registration. I think that the decision in *ex parte* Fisher supplied a most wholesome corrective to the dangers which, as it seems to me, may arise from the principles laid down in *Mercer* v. *Peterson* (3), and that we ought to apply the doctrines laid down by Lord Justice Mellish to their full extent, and to require, in this and similar cases, a very clear explanation of the reason why the

(1) L. R. 2 Ex. 304; Ibid. 3 Ex. 104.

(2) L. R. 7 Ch. 644.

(3) L. R. 2 Ex. 304; Ibid. 3 Ex. 101.

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giving of the bill of sale was delayed. Here no explanation whatever is given of the delay, and I should infer from the evidence that the intention of the parties at the time when the agreement of November, 1877, was made, that no bill of sale should be required until the debtor should be in a state of insolvency, in other words, the execution of the bill of sale was postponed for the purpose of protecting his credit.

I am clearly of opinion that the Dominion Parliament in legislating on the subject of bankruptcy and insolvency, had full power and authority to declare that an insolvent trader in Canada should not make a transfer of his property, including his ships registered in Canada in contemplation of insolvency, and that sec. 133 applies to this mortgage so made.

STRONG J.—Unless the mortgage which is impeached by the bill in this case can be referred to some prior agreement, it is clear that it must be held to be void as a voluntary preference within the terms of section 133 of the Insolvency Act 1875, for it was given within thirty days next before the issuing of the writ of attachment, and moreover, the mortgagor, Flint, is proved to have been insolvent at the time and the evidence shows that it was given voluntarily, that is without any pressure on the part of the mortgagees. The real question is, therefore: Was there a prior agreement come to in good faith, sufficient to make the security unimpeachable on behalf of the creditors? Flint in his evidence thus states the prior agreement to which he attributes the giving of this mortgage, he says: —"When I was in New York in the fall of 1878, I had a conversation with Snow and Burgess about drawing on them, and told them I would see my account protected in case anything happened, and mentioned amongst the securities the "Tsernogora." The learned judge in equity before whom this cause was originally heard, construed this reference to the

case of anything happening to mean in case there was any danger of loss to the creditors arising from the insolvency or probable insolvency of the debtor. In this, he was, I think, entirely right. Can we then consistently with authority hold that such an agreement as this, to give security in case of insolvency or apprehended insolvency, leaving it to the debtor himself to determine when the occasion has arisen, takes from the transaction of the mortgage the character of a voluntary preference which standing alone must be attributed to it. I am clearly of opinion that it does not The cases of *ex parte Fisher* (1), *re Tunstall* (2), and *ex parte Kilner* (3), are all in point to show that such an agreement is in itself invalid, as being a fraud on the Insolvency Act, and therefore one which can give no support to a security otherwise void as a voluntary preference. In the cases cited the security was *primâ facie* void under the Bankruptcy Acts as comprising all the debtor's property, and it was in each case sought to support it by proof of a prior agreement to give security "when required" or "if required," which was held insufficient, the court saying that it was a fraud on the Bankruptcy Act to agree with a trader that he should give security if he got into difficulties, but meanwhile should enjoy the benefit and credit of appearing to be the absolute and unencumbered owner of the property. The agreement in the present case seems still more objectionable for it leaves the giving of the security to the voluntary act of the debtor, who is himself to determine when it is to be given, and who, therefore, has it in his power, if he thinks fit so to do, to withold it altogether. There is no reason why the principle of the cases cited should not apply to the case of an agreement to give security on specific property as well

(1) 7 Ch. App. 636. (2) 13 Ch. D. 102.
(3) 13 Ch. D. 245.

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as on all the insolvent's property when the security is given under such circumstances that standing by itself it would be a fraudulent preference. The security being *primâ facie* void as a voluntary preference under the 133rd section of the Act the onus was on the mortgagees, if they could, to displace presumption by evidence. All they have shown for that purpose is a previous arrangement to give security which was in itself a fraud on creditors and on the Insolvency Act.

I see nothing in the point that ships registered under the Merchants' Shipping Act do not pass to the assignee. The Insolvency Act was clearly constitutional and has been so held by the Privy Council. No proper Insolvency Act could have been passed unless it made provision for the disposition of all the insolvent's property. Property in British registered ships must, therefore, like other property, be held to vest in the assignee. If, for the purpose of perfecting the assignee's title, it is requisite that some assignment of the vessel should appear on the registry the judge has power to compel the insolvent to execute such an instrument.

The appeal should be dismissed with costs.

FOURNIER J.—For the same reason I am in favor of dismissing the appeal. The court of Nova Scotia was unanimous in holding that the mortgage was given in contemplation of insolvency. The contention, that the moment a mortgage or bill of sale of a ship is registered, no matter by what fraudulent means it is obtained, the title is absolute and unimpeachable, is untenable. You can find nothing to support this view in the Merchants' Shipping Act. The provision in the statute is simply to afford a ready means of disposing of this kind of property, giving a power of sale to the mortgagee so that he may dispose of it in the most summary

manner. That is the only object of the law in giving that form of title and making it absolute, but it does not prevent the title being attacked by all regular modes. I do not consider that this kind of property is exempt from being attacked for fraud. For these reasons, viz: the contemplation of insolvency and that the title is not so absolute so as to prevent it being attacked for fraud, which are the reasons given by both the Equity judge and the majority of the Supreme Court judges, I am in favor of dismissing the appeal.

HENRY J.—I regret that I cannot come to the same conclusion on either of the two points which have been mentioned by the Chief Justice and my brother Fournier.

We are certainly governed by the decisions which the learned Chief Justice has referred to, and the law which he has laid down, but I maintain that the circumstances are different from those in the cases to which he has referred. It is under the 133rd section that the party respondent seeks to set aside this mortgage, and I may here state that the Insolvent Debtors' Act being in curtailment of common law rights of the parties must be strictly construed. The 133rd section says (1):

Now, that is the assumption that is made, and that is all that the Act says—that if it is done at any time and it is proved that it is an unjust preference that is given to a creditor and that it is done by the person in contemplation of insolvency, then it is void.

In the first place, we must see whether it was done in this case in contemplation of insolvency. We are to take the evidence of Flint, and if we come to the conclusion that his evidence is totally unreliable, we

(1) See p. 714.

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can come to the conclusion that it was done in contemplation of insolvency; but if his statement is true that it was not done in contemplation of insolvency, because he swears most positively that when that was done (and several cases have been decided in this court that favor the same position that he occupied) that it was not so done in contemplation of insolvency, that he expected to tide through, and that he expected by making this arrangement with Snow and Jones and Co., that he would be in such a position that he would be able to carry through his business, then the provision of that section has not been violated. That is his sworn testimony; it is not contradicted, nor do I see any reason to disbelieve it, and, therefore, I think that in this respect the allegation that the act complained of is against the provision of the statute has not been sustained by the evidence.

In the next place the presumption arising from the fact that the mortgage was given within thirty days, is capable of being rebutted, and I think the evidence here rebuts it to this extent, that if the parties under the agreement obtain advances from other parties on an undertaking to secure them, this clause has no effect whatever and the implication in respect of the thirty days is in fact completely negatived. Section 131 says:

A contract or conveyance for consideration respecting real or personal estate, by which creditors are injured or obstructed, made by a debtor unable to meet his engagements with a person ignorant of such inability, whether such person be his creditor or not, and before such inability has become public and notorious, but within thirty days next before a demand of an assignment or the issue of a writ of attachment under this Act, or at any time afterwards, whenever such demand shall have been followed by an assignment or by the issue of such writ of attachment, is voidable, and may be set aside by any court of competent jurisdiction upon such terms as to the protection of such person from actual loss or liability by reason of such contract, as the court may order.

Not one tittle of evidence is given to show that the

parties to whom the mortgage was given were aware of the inability on the part of Flint to meet his engagements. On the contrary the whole of the members of the firm swear most positively that they had no idea of it. What should the court do under such circumstances? They might make an order, under the terms of this clause of the Act, that the party should give up the security, but that he should be reimbursed for any advances that he had made in consideration of that security. I therefore think, under this clause of the Act, the plaintiff is not entitled to succeed, and he has not sought redress under that section of the Act, but under the 133rd section, which, I think, has a totally different object in view. Then we must also look to the 132nd section, which enacts:

All contracts or conveyances made and acts done by a debtor, respecting either real or personal estate, with intent fraudulently to impede, obstruct or delay his creditors in their remedies against him, or with intent to defraud his creditors, or any of them, and so made, done and intended, with the knowledge of the person contracting or acting with the debtor, whether such person be his creditor or not, and which have the effect of impeding, obstructing or delaying the creditors of their remedies, or of injuring them, or any of them, are prohibited and are null and void.

Under that section of the Act there is no evidence to show that the parties who obtained the mortgage had any fraudulent intention, or in fact, had any information that this party was making an assignment when in embarrassed circumstances. As to that part of the case then I think it is necessary to look at some of the evidence that has been given. I will not read it over. I have noted the different pages at which it is to be found, and have come to the conclusion that a careful reading of the evidence, and a comparison of the evidence of Flint, of Snow and others, will not establish the position that Flint was to give the security only when the other parties required it or became doubtful of him,

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or when in a state of insolvency; the evidence does not sustain any one or other of these positions; the advances were made solely on the condition that he was to secure them. Six months before this assignment was made, in the month of October, 1877, Allbright, a partner of Jones, who was one of the parties to this mortgage, objected to accepting further drafts, and told Flint that they did not wish to continue the business, that it was an unsatisfactory way of doing business, but they continued to do it on the promise of Flint that he would have them secured. In October, 1878, that is six months before this assignment was made, another conversation took place between Flint and Alfred S. Snow, and there again the evidence is that Snow said to Flint, when agreeing to continue the acceptance of his drafts, we trust to you to keep us secured; we will not go on at present, but under your promise to keep us secured we will accept these drafts of yours, and they went on and accepted drafts to something like the amount of $18,000, on the promise that he would keep them secured, and the very name of this vessel that was assigned afterwards was mentioned as one of the means of security. They swore most positively that if it had not been for that engagement they would have changed the business and refused to accept the drafts, but in consequence of that promise, not that he would give them a bill of sale on the vessel or a mortgage when they ceased to have faith in him or went into insolvency, but that he was to keep them secured. They go further and say that they expected it had been done before it was done. I therefore think that this is not a case in point. It is not a case the same as those referred to in the cases read by the learned Chief Justice. I take a different view of the evidence altogether from that taken by my learned brethren. The evidence is very particular and all the parties swore that they had no idea that Flint was

insolvent or in embarrassed circumstances. Reading the whole of the evidence carefully, it appears just to amount to this, "we will continue to advance to you and you will make us secure," and he promised to do so. If he failed to do that in proper time it was no fault of Snow or of Jones & Co.

There is another very important point connected with this which has not been very much touched upon by the learned Chief Justice. With all due deference I must differ from the construction of the Merchants' Shipping Act given by my two learned brethern. I have come to the conclusion, that if the transfer were given by an insolvent, the Insolvent Act of course touches the property, and if it were not for the provision of the Merchants' Shipping Act they might go behind the mortgage, and ascertain whether it was given contrary to the Insolvent Act or not, but I maintain that enquiry is prohibited by the Imperial statute. We are told, and it is admitted, that in England an insolvent court could not go behind a mortgage; but we are told in so many words, that in Canada, in contravention of the Imperial Act, that can be done which could not be done in England. We know that the Merchants' Shipping Act applies to all British possessions, and when it is provided that an Insolvent Act shall not effect mortgages, surely if an English Insolvent Act cannot, a Colonial Insolvent Act cannot override the provisions of the Imperial Shipping Act. Were it not for the Insolvent Act there would be no question in this case. And this, be it borne in mind, is not a question of fraud, there is no allegation of it, it is an unjust preference, and unjust because the statute makes it so. It is not fraudulent, but if it were proved to be fraudulent there might still be a difficulty under the Merchants' Shipping Act. Now what is the Merchants' Shipping Act, and what does it provide? The 43r

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section says:

Subject to any rights and powers appearing by the register book to be vested in another party, the registered owner of any ship or share therein shall have power absolutely to dispose in manner hereinafter mentioned, &c.

Such ship or share. That is in the case of the transfer of a ship. Section 66 says:

A registered ship, or any share therein may be made a security for a loan or other valuable consideration, and the instrument creating such security hereinafter termed a mortgage, shall be in the form marked "1" in the schedule hereto or as near thereto as circumstances permit; and on the production of such instrument, the registrar of the port at which the ship is registered shall record the same in the register books.

Now when we know that the Act is universal throughout all British territories, how can we say that that is to be contravened by a colonial law?

I said before that if it was a fraudulent transaction that was set up here, the case might possibly be different; but it is not so; it is a mere provision of the Insolvent Act passed by the Dominion of Canada, and that, it is said, overrides the provision of the English Act. But we are told that the provision in question only applies to England. How do we find that it only applies to England? It applies as generally as any other provision of it; it goes everywhere that that Act has operation, as part of it. How can it be said then that the Dominion Parliament is authorized to override an Imperial statute? The reason that Parliament had for passing that Act in England, we may surmise, but it is not necessary that we should; but I may mention that ships go all over the world, and a man owning a ship registered in England makes a mortgage on it and has his certificate from his port of entry that there are no incumbrances on that ship; he wants advances, and he is told "yes, I will give you advances, but you must keep me secure." Amongst other articles by which he might be secured is a certain ship and her name is

mentioned, and the party advances him two thousand pounds in a foreign port, but he says, "oh you did that in contemplation of insolvency," because four or five months afterwards he became insolvent. Now, the statute was intended to prevent anything of that kind taking place, and it was intended that a party should go to the registry and take conveyances from that registry. It is all provided for in the Act, and it seems to me perfectly plain and palpable that the intention of the British Parliament was that the registry or transfer of a ship or bill of sale was not to be affected by anything outside between parties, and unless fraud itself should vitiate the contract. Under these circumstances, for the reasons given in the judgment of Justice Wetherbee of Halifax, in which I concur, I am of opinion on that point that the appeal should be allowed. But there is another section of ch. 63 of the Imperial Act of 28 and 29 Vic., sec. 2, which reads as follows:—

> Any colonial law which is or shall be repugnant to the provisions of any Act of Parliament extending to the colonies, to which such law may relate, shall, to the extent of such repugnancy, but not otherwise, be and remain absolutely void and inoperative.

Here is the provision of the Act.

It must be repugnant or else it cannot override it, and here is a provision in the Imperial statute which says that any such colonial law shall have no effect whatever.

One answer was given to this in the argument at Halifax, and that was in reference to a provision in the Act that the Merchants' Shipping Act might be amended by a Colonial Act specially approved of by the Queen in Council, and it was argued on the part of the respondent that inasmuch as this Insolvent Act of Canada was passed and received the Queen's assent by the Governor General, that that satisfies that clause in the Act, but I maintain that it cannot affect it. The

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statute itself makes particular provision how it is to be done, that is by an Order of the Queen in Council; but that has not been done. The assent of the Governor General to a bill passed by the Dominion Parliament is very different from an Order of the Queen in Council; giving the royal consent to it is not sufficient for what is required by that clause of the Act.

Under the whole of the circumstances I think the appeal should be allowed.

TASCHEREAU J.—I agree with the learned Chief Justice that this appeal should be dismissed on the ground that the mortgage in question was clearly given in contemplation of insolvency. On the second point raised in the case, as to the effect of the provisions of the Merchants' Shipping Act, I have strong doubts. There seems to me to be a great deal of force in the reasons just given by my brother Henry on that part of the case, and if the judgment in the case were to depend on the conclusion I arrive at, I would certainly have taken more time to consider that important question.

Appeal dismissed with costs.

Solicitor for appellants: *Sandford H. Pelton.*

Solicitor for respondent: *James Went Bingay.*

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FRAUDULENT PREFERENCE — *Facilitating the recovery of judgment — Rev. Stats Ont., chap.* 118, *secs.* 1 *and* 2.] On the 28th March, 1882, a writ was issued by C. *et al* (respondents) against one M. for the recovery of the sum of $32,155.33, and said writ was duly endorsed, in accordance with the provisions of the Judicature Act, with particulars of the claim of the respondents for the said sum of $32,155.33 on an account previously stated and settled between C. *et al.* and M., such amount being arrived at by allowing to M. a discount of 5 per cent. for the unexpired balance of the term of credit to which M. was entitled on the purchase of the goods. No appearance was entered by M. to the writ, and on the 8th April judgment was recovered for the amount, and on the same day writs of execution were issued. M. *et al.* (appellants), creditors of M., instituted an action against him on the 8th April, 1882, and obtained judgment on the 14th April, and on the same day writs of execution were issued

The stock-in-trade was sold by the sheriff at public auction, under all the executions in his hands, to the respondents, who were the highest bidders.

On a trial in an interpleader issue, to try whether appellants' execution against M. was entitled to priority over that of respondents, and whether the judgment of the latter was void for fraud, and as being a preference; and whether respondents executions were void as against appellants' execution, on account of their having issued them before the expiration of eight days from the last day for appearance, Mr. Justice Armour directed a verdict or judgment to be entered in favor of the appellants. That judgment was reversed by the Queen's Bench Division of the High Court of Justice of Ontario, whose judgment was affirmed by the Court of Appeal for Ontario. On appeal to the Supreme Court of Canada:

Held, affirming the judgment of the Court of Appeal,—That what the debtor did in this case did not constitute a fraudulent preference prohibited by R. S. O., chap. 118, and that the premature issue of the execution of the respondents was only an irregularity, and not a nullity. MACDONALD *v.* CROMBIE — — 107

GARNISHEE—*Promissory note overdue in hands of payee—Garnishee clauses, C. L. P. Act—Payment by drawer into court by order of a judge,*

GARNISHEE.—*Continued.*

effect of Appeal—Final judgment—Supreme and Exchequer Court Act, 1875, *sec.* 25—*Supreme Court Amendment Act*, 1879, *Sec.* 9.] An action was brought by respondent as endorsee of a promissory note made by appellants in favor of one J. A., and by him endorsed to respondent. The appellants pleaded that the amount of the note had been attached in their hands by one of A.'s judgment creditors and paid under the garnishee clauses of the Common Law Procedure Act of P.E.I., transcripts of secs. 60 to 67 inclusive, of the English C. L. P. Act, 1854. To this plea respondent demurred on the ground that the debt was not one which could properly be attached, and on the 5th February, 1883, the Supreme Court gave judgment in favor of the respondent on the demurrer. No rule for judgment on the demurrer was taken out by the respondent. On the 19th March following an order was obtained to ascertain amount of debt and damages for which final judgment was to be entered, and judgment was signed for the respondent on the 2nd May following. The appellants then appealed to the Supreme Court of Canada.

Held, reversing the judgment of the court below, that an overdue promissory note in the hands of the payee is liable to be attached by a judgment creditor under the C. L. P. Act, and that payment of the amount by the garnishee to the judgment creditor of the payee, in pursuance of a judge's order, is a valid discharge.

On motion to quash for want of jurisdiction, it was contended on behalf of respondent that the appellants should have appealed from the judgment rendered on the demurrer on the 5th February, 1883, and within thirty days from that date; but,

Held, that the judgment entered on the 2nd May, 1883, was the "final judgment" in the case from which an appeal would lie to the Supreme Court. ROBLEE *v.* RANKIN — 137

TITLE TO LAND — *Possession fraudulently obtained by defendant—Plaintiff not put on proof of title—Tax sale—Rev. Stats. Ont. ch.* 40 *sec.* 37; 33 *Vic. ch.* 33.] N., respondent, as assignee in insolvency of H., who bought a lot of land from the purchaser at a sheriff's sale for taxes, filed a bill in Chancery under the Ontario Administration of Justice Act against W. & O'N. (appellants), who were in possession, praying *inter alia* that defendants be ordered to deliver up possession of the lands and to account for the value of trees, &c., cut down and removed. W. by his answer adopted O'N.s possession and claimed under conveyance from the Crown and impeached the validity of the sale for taxes. O'N. by his answer alleged he was in possession under W. At the trial it was proved that H. gave a lease of the lot to one T. for four years, and that O'N. went to T, while he was still in possession, and by fraudulent representations induced T. to leave the place and thereby obtained possession for the benefit of W. The Court of Chancery for Ontario held that appellants were obliged to yield up possession to the respondent before asserting any title in themselves. The Court of Appeal for Ontario varied the decree by declaring that the decree was to be without prejudice to any proceeding the appellant W. might be advised to take to establish his title to the lands in question within two months from the date thereof.

Held, Per Ritchie C. J, and Strong, Fournier and Henry JJ., affirming the judgment of the courts below,—that the appellants, having gone into possession under T., were estopped in this suit from disputing their landlord's title, and that the respondent was entitled to an injunction to restrain appellants from committing waste and to an account for waste already committed.

Per Strong J.—The decree made by the Chancellor would have constituted no bar to a subsequent action at law or suit in equity by W. to impeach the tax sale, and should not have been varied by the Court of Appeal.

Per Gwynne J.—The case should have been disposed of upon the issue as to the valibility of title upon which the plaintiff had by his bill rested his case; and as the appellants had failed to prove that the taxes had been paid before the sheriff's sale, the Ontario statute, 33 Vic., ch. 23, had removed all errors and defects, if any there were, which would have enabled the true owner, at the time of the sale, to have avoided it, and pursuant to the provisions of ch. 40 sec. 87, R.S.O., the respondent was entitled to recover possession of the land in

TITLE TO LAND.—*Continued.*

question and to have execution therefore, but not to an order for an injunction or any direction for an account, the statute authorizing title to real property to be tried in a Court of Chancery not justifying a judgment of a more extensive character than would have been pronounced in a court of common law if the action had been brought there. White *v.* Nelles — — — — — 587

TRADE MARK — *Copyright — Head-line copy book—Name "Beatty"—Right of party to use his own name—Goods sold to deceive public.*] G. carried on business in partnership with B., a part of the business being the sale of a series of copy books designed by B., to which was given the name "Beatty's Head-line Copy Book" The partnership was dissolved by B. retiring and receiving $20,000 for his interest in the business.

After the dissolution B. made an agreement with the Canada Publishing Co. to prepare a copy book for them, which copybook was prepared and styled "Beatty's New and Improved Head-line Copy Book," which the said Co. sold in connection with their business.

G. brought a suit against B. and the Co. for an injunction and an account, claiming that the sale of the last mentioned copybook was an infringement of his trade mark. He claimed an exclusive right to the use of the name "Beatty" in connection with his copy book, and alleged that he had paid a larger sum on the dissolution than he would have paid unless he was to have the exclusive sale of these copy books.

Held, affirming the judgment of the Court of Appeal, Henry and Taschereau JJ., dissenting, That defendants had no right to sell "Beatty's New and Improved Head-line Copy Book" in any form, or with any cover, calculated to deceive purchasers into the belief that they were buying the books of the plaintiff. The Canada Publishing Company *et al. v.* Gage — 306

TRUST AND TRUSTEE—*Construction of trust—Member of Synod—vested rights—Commutation fund.*] The sum received for commutation under the Clergy Reserve Act was paid to the Church Society of the Diocese of Huron, upon trust to pay to the commuting clergy their stipends for life, and when such payment should cease then "for the support and maintenance of the clergy of the Diocese of Huron in such manner as should from time to time be declared by any by-law or by-laws of the Synod to be from time to time passed for that purpose." In 1860 a by-law was passed providing that out of the surplus of the commutation fund, clergymen of eight years and upwards active service should receive each $200, with a provision for increase in certain events. In 1873 the plaintiff became entitled under this by-law, and in 1876 the Synod (the successors of the Church Society) repealed all previous by-laws respecting the fund, and made a different appropriation of it.

Held, affirming the judgment of the court below, Fournier and Henry JJ. dissenting,