REPORTS

—OF THE—

SUPREME COURT

—OF—

CANADA.

REPORTED BY

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1881.

JUDGES

OF THE

SUPREME COURT OF CANADA,

DURING THE PERIOD OF THESE REPORTS.

The Honorable WILLIAM JOHNSTONE RITCHIE, C.J.

" " SAMUEL HENRY STRONG, J.

" " TÉLÉSPHORE FOURNIER, J.

" " WILLIAM ALEXANDER HENRY, J.

" " HENRI ELZÉAR TASCHEREAU, J.

" " JOHN WELLINGTON GWYNNE, J.

ATTORNEY-GENERAL OF THE DOMINION OF CANADA:

The Honorable JAMES MACDONALD, Q. C.

ERRATA.

Page	*Line*	*For*	*Read*
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	16 " "	(2)	(3)
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"	note (2)	315.	513.
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A TABLE

OF THE

NAMES OF THE CASES REPORTED

IN THIS VOLUME.

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S.

W.

Y.

TABLE OF CASES CITED.

A.

B.

C.

D.

E.

NOE CHEVRIER .....APPELLANT; 1879

*Feb'y.18,22.

AND

HER MAJESTY THE QUEEN.....RESPONDENT. 1880

March 1.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Petition of Right—Demurrer—9 Vic., c. 37—Right of the Crown to plead prescription—10 years prescription—Good faith—Translatory title—Judgment of confirmation—Inscription en faux—Improvements, claim for by incidental demand—Arts. 2211, 2251, 2206, *C. C.* (*L. C.*); *Art.* 473, *C. P. C.* (*L. C.*)

N. C., the suppliant, by his petition of right, claimed, as representing the heirs of *P. W. Jr.*, certain parcels of land originally granted by Letters Patent from the Crown, dated 5th January, 1806, to *P. W. Senr.*, together with a sum of $200,000 for the rents, issues and profits derived therefrom by the Government since the illegal detention thereof.

The Crown pleaded to this petition of right—1st, by demurrer, *defense au fonds en droit*, alleging that the description of the limits and position of the property claimed was insufficient in law; 2nd, that the conclusions of the petition were insufficient and vague; 3rd, that in so far as respects the rents, issues, and profits, there had been no signification to the Government of the gifts or transfers made by the heirs to the suppliants.

These demurrers were dismissed by *Strong*, J., and it was *Held*, That the objection taken should have been pleaded by *exception à la forme*, pursuant to art. 116 C. C. P., and as the demurrer was to all the rents, issues and profits as well those before as those since the transfer, it was too large and should be dismissed, even supposing notification of the transfer necessary with respect to rents, issues and profits accrued previous to the sale to him by the heirs of *P. W. Jr.*

This judgment was not appealed against.

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

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As to the merits the defendant pleaded—1st. By pre-emptory exception, setting up title and possession in Her Majesty under divers deeds of sale and documents; 2nd. Prescription by 30, 20 and 10 years. An exception was also fyled, setting up that these transfers to petitioner by the heirs of *P. W. Jr.* were made without valid consideration, and that the rights alleged to have been acquired were disputable, *droits litigieux*. The general issue and a supplementary plea claiming value of improvements were also fyled.

To first of these exceptions the petitioner answered that the parties to the deeds of sale relied upon had no right of property in the land sold, and denied the legality and validity of the other documents relied upon, and inscribed *en faux* against a judgment of ratification of title to a part of the property rendered by the Superior Court for the district of *Aylmer, P. Q.* To the exception of prescription the petitioner answered, denying the allegations thereof, and more particularly the good faith of the defendant. To the supplementary plea, the petitioner alleged bad faith on the part of defendant. There were also general answers to all the pleas.

On the issues thus raised, the parties went to proof by an *enquête* had before a Commissioner under authority of the Court, granted on motion, in accordance with the law of the Province of *Quebec*.

The case was argued in the Exchequer Court before *J. T. Taschereau*, J., and he dismissed the suppliant's petition of right with costs. Whereupon the suppliant appealed to the Supreme Court of *Canada*.

Held, (*Fournier* and *Henry*, J. J., dissenting.) 1. That before the Code, and also under the Code (art. 2211), the Crown had, under the laws in force in the Province of *Quebec*, the right to invoke prescription against a subject, which the latter could have interrupted by petition of right.

2. That in this case the Crown had purchased in *good faith* with translatory titles, and had, by ten years peaceable, open and uninterrupted possession, acquired an unimpeachable title.

3. That in relation to the *Inscription en faux*, the Art. 473 of the Code of Procedure is not so imperative as to render the judgment attacked an absolute nullity, it being registered in the Register of the Court.

4. That the petitioner was bound to have produced the *minute*, or draft of judgment attacked, but having only produced a certified

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copy of the judgment, the inscription against the judgment falls to the ground.

5. That even if *S. O's* title was *un titre précaire*, the heirs by their own acts ceded and abandoned to *L.* all their rights and pretensions to the land in dispute, and that the petitioner *C.* was bound by their acts.

Held, also, That the *impenses* claimed by the incidental *demande* of the Crown were payable by the petitioner, even if he had succeeded in his action.

Per *H. E. Taschereau* and *Gwynne*, J.J., That a deed, taken under 9 *Vic.*, c. 37, sec. 17, before a notary (though not under the seal of the Commissioners) from a person *in possession*, which was subsequently confirmed by a judgment of ratification of a Superior Court, was a valid deed, that all rights of property were purged, and that if any of the *auteurs* of the petitioner failed to urge their rights on the monies deposited by reason of the customary dower, the ratification of the title was none the less valid.

APPEAL from a judgment rendered by Mr. Justice *J. T. Taschereau* in the Exchequer Court of *Canada*, dismissing appellant's petition of right with costs.

The suppliant, as representing the heirs of one *Philemon Wright Jr.*, by his petition of right, claimed from Her Majesty certain parcels of lands forming part of lots Nos. 2 and 3 in the 5th range of *Hull*, held by the Government of the Dominion of *Canada*, and including portion of the works, booms and canals, known as the *Gatineau* works, and demanded $200,000 for rents, issues and profits derived therefrom by the Government since their illegal detention thereof. The petition set up Letters Patent from the Crown to *Philemon Wright Senr.*, a transfer from *Philemon Wright Senr.* to *Philemon Wright Jr.*; the marriage of *Philemon Wright Jr.* to *Sally Olmstead* without marriage contract; the death of *Philemon Wright Jr.*, in Dec., 1821, leaving 8 children, issue of his marriage with *Sally Olmstead*; the right of dower in the widow, called customary dower, consisting in the usufruct for the wife and ownership

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for the children, after death of the husband, of the real estate held by *Philemon Wright Jr.*, at the time of his marriage with *Sally Olmstead*; and the donations and transfers by the children of *Philemon Wright Jr.* to the suppliant, executed in favor of the suppliant after the death in 1871 of their mother, who, subsequent to the death of *Philemon Wright Jr.*, had married one *Nicholas Sparks*.

The crown pleaded to this petition of right: 1st, by demurrer, *defense en droit*, because the petition failed to describe by a clear and intelligible description the limits and position of the lots in question, as in the possession of Her Majesty; and, also, because the petition was insufficient in law in so far as the petitioner had failed to allege any signification to Her Majesty of the deeds of gift or transfer in virtue of which he claimed the said property and said rents, issues and profits, which he estimated to amount to $200,000.

These demurrers were argued before *Strong*, J., and the following judgment was rendered, and was not appealed from:—

"The Court having heard the parties on the demurrers by the said defendant firstly, secondly and thirdly pleaded. Considering that as to the said demurrer in the cause *firstly* pleaded the objection thereby taken to the petition, should, pursuant to article 116 of the Code of Civil Procedure of the Province of *Quebec*, have been taken and set forth by way of exception to the form of the petition, and not by way of demurrer. And considering further, that the position, boundaries and extent of the land of which the petitioner prays to be declared proprietor are set forth with sufficient certainty and particularity in the petition, doth dismiss the said demurrer first pleaded with costs, *distraits* to the Attorney for the said petitioner.

"And considering, with respect to the demurrer in

this case by the said defendant *secondly* pleaded, that the said second demurrer is addressed to the whole of the petitioner's claim to the rents, issues and profits of the lands in the petition mentioned, and that by virtue of article 1,498 of the Civil Code of the Province of *Quebec*, the petitioner is entitled to recover so much of the said rents, issues and profits as have accrued since the sale and transfer to him the petitioner as alleged, without shewing any notice or signification to have been made of the said deeds of sale, and transfer to the Crown or its officers, whereby it appears that, assuming the pretention of the defendant to be right as regards the rents, issues and profits, accrued prior to the date of the said deeds of sale and transfer, the conclusion of the said second demurrer is too large, and covers a portion of the petitioner's conclusions in respect of which he is entitled to recover, *doth dismiss* the said demurrer secondly pleaded with costs, *distraits* to the Attorney for the petitioner.

"And as to the demurrer in this cause *thirdly* pleaded, considering that the grounds of the said demurrer are the same as those severally comprised in the first and second demurrers, for the reasons already given as to the first and second demurrers *doth dismiss* the said demurrer so thirdly pleaded with costs, *distraits* to the Attorney for the said petitioner."

As to the merits the defendant pleaded—1st. Prescription by 30 and 20 years; 2nd. Prescription by 10 years; 3rd. By exception, setting up title and possession in Her Majesty under divers deeds of sale and documents to the Crown, the deeds relied upon being a notarial deed from *Sally Olmstead*, 12th Sept., 1849, to Her Majesty, of 21 acres, 1 rood and 25 perches of the property claimed by suppliant; two notarial deeds by one *Andrew Leamy et ux.*, dated respectively 27th March, 1854, and 7th May, 1855, of 65 acres and 2 perches of

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the property, and a deed of sale and quit claim, dated 3rd Feb., 1853, and registered after the *fiat* was granted, alleged to have been executed by some of the heirs in favor of *Leamy;* 4th. By exception, alleging that by 9 *Vic.*, c. 37, the Commissioners of Public Works were authorized to take possession of the lands and water-courses necessary, in their judgment, for the construction of Public Works, and to contract and agree with all persons, guardians, tutors, &c., and all such contracts and agreements, and all conveyances and other instruments made in pursuance thereof, were declared to be valid and effectual to all intents and purposes whatever, and provision was thereby made for the payment of the compensation to be paid for such land and waters, to the owner and owners, occupier or occupiers thereof; that in conformity with said statute, and the law in force in that behalf, the said Commissioners of Public Works caused the said titles or conveyances to Her Majesty the Queen to be deposited with the Prothonotary of the Superior Court, in the District of *Ottawa*, said Court representing the Court of Queen's Bench, and fully complied with all and every the requirements of said statute and of law, in order to obtain the confirmation of said several deeds or conveyances; and that by judgments in due form of law, rendered in said Court, and now in full force and effect, the said titles and conveyance were confirmed and the claims of the persons under whom petitioner set up title were thereby barred.

An exception was also fyled, setting up that the donations to petitioner were made without legal and valid consideration, and by concert and collusion with the donors and with knowledge of the titles and possessions of the Crown, and that the rights alleged to have been acquired by the donations were uncertain, disputed, and disputable, *droits litigieux.*

A *défense en fait*, or general issue, was also fyled.

The answers to the pleas of prescription denied that Her Majesty the Queen and her *auteurs* had been in possession, use and occupation of the land in said petition mentioned, peaceably, openly, uninterruptedly, and in good faith, and with good and sufficient title, and alleged specially that *Sally Olmstead* had no right to convey the property referred to, having only a usufruct; that the judgments of ratification could not affect the rights of the real owners; that the judgment of confirmation had been entered in the Register from a pretended draft of judgment illegally made, and signed by the Prothonotary, and was null and void; and that *Leamy* had only an usufructuary possession derived from *Sally Olmstead*.

A motion for an *Inscription en faux* was made by petitioner against the judgment of ratification of title and against the draft of the judgment, and also against the register in which the judgment was registered.

An incidental *demande* was put in on behalf of the Crown, setting up that improvements had been made on the property since the occupation by defendants, and that the value of these improvements should be set off *pro tanto* against any rents or revenues.

Issue was joined on this incidental *demande*, and an admission given as to certain improvements having been made. And the incidental *demande* came up for hearing with the merits of the case.

The other allegations of fact in the pleadings and the oral and documentary evidence given at the trial, sufficiently appear in the judgments hereinafter given.

The case was argued on the merits in the Exchequer Court before *J. T. Taschereau*, J., who delivered the following judgment:

"Le pétitionnaire réclame en cette cause contre Sa Majesté la Reine:

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"1o. La propriété d'une étendue de terre que Sa Majesté possède comme formant partie des Lots. 2 et 3, du 5e rang du township de *Hull*, en la Province de *Québec*;

"2o. Une somme de $200,000 comme fruits et revenus de cette étendue de terre qu'il allègue être illégalement détenue par le gouvernement de Sa Majesté.

"Le pétitionnaire fonde sa réclamation sur un grand nombre de tîtres, et notamment sur plusieurs actes de donation produits en cette cause comme émanant des héritiers de feu *Philémon Wright*, concessionnaire originaire de ces lots de terre en vertu de lettres patentes en date du 3 janvier 1806.

"Sa Majesté en réponse à cette pétition a plaidé:

"1o. Insuffisance dans la description de l'étendue et du site actuel des parties de lots de terre en question et comme possédés par Sa Majesté.

"2o. Insuffisance dans la pétition, en autant qu'elle n'allègue pas que le pétitionnaire ait signifié au gouvernement de Sa Majesté les divers actes de donation, cessions ou transports en vertu desquels il (le pétitionnaire) réclame la propriété des lots et les fruits et revenus qu'il estime à la somme de $200,000 et la propriété des dits lots de terre.

"3o. Par exception péremptoire en droit, Sa Majesté a plaidé prescription de 10 et 20 ans, et de plus celle de trente ans (30 ans).

"4o. Sa Majesté a invoqué au soutien de sa défense divers documents, entre autres:

"1o. Un acte de vente fait et passé pardevant Mtre. *R. A. Young* et confrère, notaires, le 7 mai, 1855, consenti par *Andrew Leamy* et *Erexina Wright*, son épouse, au gouvernement du *Canada*, contractant par la ministère de *W. F. Coffin* et *Thomas McCord*, Ecr., pour et au nom du Commissaire des Travaux Publics.

"2o. Un acte de ratification (dudit acte de vente), passé

à *Québec*, devant Mtre. *Petitclerc* et confrère, notaires publics, le 19 mai, 1855, des deux lots de terre vendus à Sa Majesté par l'acte ci-dessus mentionné comme portant date 7 mai, 1855.

" 3o. Que cet acte de vente du 7 mai, 1855, fut déposé au bureau du Protonotaire de la Cour Supérieure pour le District d'*Ottawa*, conformément à un statut de la Législature du *Canada*, 9 Vic. ch. 37, établissant les Travaux Publics et que cet acte a été confirmé par jugement de cette dite cour, prononcé le 3 juillet, 1856, et qu'en conséquence, en vertu des diverses sections du dit statut et du dit jugement, tout droit de propriété, hypothèque, droit de mineurs, et même *douaire non ouvert*, si aucuns existèrent, ont été purgés et entièrement éteints, quant aux immeubles acquis par le gouvernement de Sa Majesté.

" 4o. Sa Majesté a également invoqué un titre de donation fait et passé à *Hull*, le 6 février, 1865, devant *Larue* et confrère, notaires, par lequel acte, *Andrew Leamy* et la dite *Erexina Wright*, vendirent au gouvernement de Sa Majesté, représenté par l'Honorable *Charles Chapais*, en sa qualité de Commissaire des Travaux Publics, un certain lot de terre y désigné et en a obtenu un jugement de confirmation aux mêmes effets que celui ci-dessus énoncé.

" 5o. Sa Majesté a également invoqué en sa plaidoirie divers autres actes pour appuyer sa défense et elle en allègue l'enregistrement, conformément à la loi.

" La pétitionnaire *Chevrier* a répliqué, spécialement, que le jugement de confirmation du 3 juillet, 1856, par la Cour Supérieure du District d'*Ottawa*, était faux, et il s'est inscrit en faux contre cet acte et a plaidé mauvaise foi à l'encontre des différentes prescriptions invoquées par Sa Majesté, et a prétendu que les divers titres d'acquisition ci-dessus énumérés, n'étaient pas dans la forme pre-

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scrite par le 9 Vic. ch. 37, et qu'en conséquence Sa Majesté n'en pouvait tenir aucun avantage.

"Comme l'on voit, cette cause est très compliquée et soulève nombre de questions importantes. Et j'avoue que la plaidoirie orale des habiles avocats des parties m'a beaucoup aidé dans le *délibéré*. Je suivrai dans le cours de mes observations, autant que possible, l'ordre dans lequel les différents points de la demande et de la défense, m'ont été présentés.

"Insuffisance des allégations de la déclaration ou pétition.

"Le pétitionnaire dit que le gouvernement de Sa Majesté est actuellement en possession de 159 acres de terre, situés dans les Nos. 2 et 3, du 5e rang du Township de *Hull*, y compris un étang (*a pond*) ; il ne donne pas les tenants et aboutissants de ces 159 acres, ni l'étendue ou superficie de l'étang ; cette irrégularité, si elle eût été plaidée par exception à la forme serait fatale et aurait indubitablement entraîné le renvoi de la pétition quant à présent et sauf à se pourvoir; mais Sa Majesté n'a pas plaidé par exception à la forme, mais bien par une défense ordinaire en droit. Tout l'effet de cette dernière défense a été de mettre le Requérant sur ses gardes, et s'il eût demandé à amender cette partie de sa pétition *ab initio*, ou même pendant l'instance, je lui aurais accordé ce droit d'après la règle 57, Cour d'Echiquier, page 231 du Manuel de Mr. *Cassels*, mais le pétitionnaire n'en a rien fait, pas même lors de la plaidoirie devant moi. Aujourd'hui, si j'avais à prononcer en faveur du pétitionnaire, je ne pourrais savoir ni indiquer où se trouvent les 159 acres de terre en question, y compris le *pond* (étang), dans le 2 ete 3e rang, je ne sais où arrêter au nord comme au sud, à l'est comme à l'ouest. Je serais dans l'impossibilité de prononcer d'une manière certaine avec une base si incertaine. Pourrais-je même aujourd'hui renvoyer les parties à rectifier cette

irrégularité ? C'est possible, mais cet amendement n'obligerait-il pas le pétitionnaire à recommencer l'enquête *ab initio* après une plaidoirie nouvelle de la part de Sa Majesté, car je ne puis d'avance prévoir les conséquences d'un tel amendement sur la plaidoirie. Mais je crois qu'à cet étage de la cause le pétitionnaire n'a pas droit de demander à faire cet amendement : je considère que le droit d'amendement qu'accorde la règle 57, (page 231, Manuel *Cassels*), ne s'applique qu'au temps de l'instruction de la cause et non au temps de la plaidoirie (argument) de la cause, après que les parties l'ont terminé. D'ailleurs le requérant n'a fait aucune demande de permission, ce qui met fin à la question.

"Ainsi, en supposant pour un instant que sur tous les autres points, je serais convaincu de la légalité des pétitions du pétitionnaire, je suis d'opinion qu'il devait faillir relativement à cette irrégularité à laquelle il n'a pas voulu y remédier et qui a pour effet de rendre impossible un jugement en sa faveur.

"Sa Majesté a plaidé que le pétitionnaire n'est pas saisi d'un droit d'action contre elle, tant pour la propriété réclamée que pour les fruits et revenus au montant de $200,000, parce qu'il n'a pas signifié à Sa Majesté avant de produire sa pétition de droit, ni en aucun temps depuis, les actes de donation sur lesquels il fonde cette pétition. C'est un principe incontestable d'après le Code Civil, que le cessionnaire de droits de créances et de droits d'actions n'a pas de possession utile à l'encontre des tiers tant que l'acte de vente n'a pas été signifié et qu'il n'en a pas été délivré copie au débiteur. De fait il n'est pas saisi du droit d'action, il ne peut poursuivre sans avoir au préalable effectué cette signification, son droit n'est pas né et n'existera que lors de cette signification des transports, ou donations, qu'il tient des prétendus héritiers, ou représentants, de feu *Philémon Wright*.

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"Les décisions de nos plus hauts tribunaux sont en ce sens, surtout depuis les articles 1570, 1571 du Code Civil Canadien.

"Les articles 1689 et 1690 du Code *Napoléon* dont la rédaction est en termes équivalents à ceux de notre Code Civil Canadien, et M. *Troplong* en son traité de la vente, No. 909, démontre que les actions, même de droits immobiliers, ne peuvent être cédées qu'à la charge d'une signification du tître de cession.

"Mr. *Toullier*, Vol. 17, continuation de *Duvergier*, page 215, No. 18, énonce cette même doctrine, même quant aux cessions de droits d'actions immobiliers. Telle est la loi, surtout en la Province de *Québec*, depuis le Code Civil Canadien.

"Il n'y a aucun doute que les actes de donation, ou cession, que lui ont faits les représentants *Wright* ne contiennent ;—

1o. Qu'un transport de fruits et revenus ;

2o. Qu'une cession de droits d'action pour recouvrer ces fruits et de droit d'action contre Sa Majesté pour recouvrer certains immeubles. Or, tout cela est transport de droits d'action, exigeant signification au débiteur pour que le cessionnaire en soit légalement saisi et puisse les exercer en justice.

"Le pétitionnaire prétend que le tître principal que Sa Majesté invoque, et cité en sa défense comme vente par *Andrew Leamy* et *Erexina Wright*, son épouse, exécuté le 7 mai, 1855, par-devant *Young* et collègue, est nul et ne peut produire les effets que Sa Majesté prétend en résulter.

"Cet acte d'acquisition est évidemment basé sur la 9 *Vic.* ch. 37, et le pétitionnaire invoque la section 17 de cet acte comme contraire à la validité de ce contrat, sur le principe que cet acte n'a pas été exécuté sous le seing du commissaire. Cet acte n'est pas un écrit sous seing privé ; il a été exécuté en première instance par-devant

notaires, entre Messieurs *W. F. Coffin* et *T. McCord*, comme se portant fort du commissaire-en-chef, et promettant de le faire ratifier par acte de mai, 1855, passé à *Québec* par-devant Mtre. *Jos. Petitclere* et collègue, notaires, et aussi contresigné par *Thomas Begley*, Secrétaire du Bureau des Travaux Publics. Le pétitionnaire prétend que cet acte est nul parce qu'il n'a pas été scellé du sceau du Commissaire, mais il me semble que le seul objet de cette section 17 de la 9 Vic. ch 37, exigeant le sceau du Commissaire, était pour éviter toute erreur sur l'interprétation à donner à aucun écrit sous seing privé du Commissaire, comme une lettre que l'on pouvait, ou voudrait, interpréter comme un contrat liant le gouvernement.

"Indubitablement la législature ne pouvait avoir en vue de prohiber comme contrat l'acte le plus solennel en la Province de *Québec*, savoir celui reçu et exécuté par des officiers publics aussi bien connus que les notaires publics. Il me semble que le fait seul d'exécuter de tels actes par-devant des notaires publics, leur donne un caractère d'authenticité beaucoup plus prononcé que s'ils étaient passés sous seing privé, quoique revêtus du sceau du commissaire. Je considère cette section 17 comme suggestion d'un mode de contrat, mais non exclusive de toute autre manière de contracter suivant les lois de la Province de *Québec*. De plus, on voit à la section 8 de cet acte 9 *Vic.*, ch. 37, que l'emploi des actes passés par-devant des notaires est admis comme valable. Cette section 8 dèclare que ces contrats notariés seront exemptés de la formalité de l'enregistrement, admettant évidemment, la forme du contrat notarié. Cet acte de vente et ceux de méme nature que Sa Majesté a invoqué dans sa défense ont dû être soumis au procureur général et être approuvés par lui, puisque les applications pour leur confirmation ont été faites en son nom pour Sa Majesté la Reine, et j'avoue

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que je trouve en ces circonstances une haute autorité à l'appui de la légalité des titres en question en cette cause, et notamment de celui du 7 mai, 1855.

"De plus, ces titres ont été approuvés par le tribunal de la Cour Supérieure, qui les a confirmés, et personne ne s'en est plaint, que plus de vingt ans après, et cette plainte vient de la part d'un acquéreur de droits litigieux. Ces actes me paraissent parfaitement légaux, et il ne me reste sur cette branche de la cause qu'à considérer l'effet qu'ils pourraient légalement produire vis-à-vis des auteurs du pétitionnaire.

La Législature par son statut, 9 *Vic.*, ch. 37, a décrété emphatiquement que de tels actes suivis d'un jugement de confirmation par la Cour Supérieure écarterait à toujours en faveur de Sa Majesté toute réclamation hypothécaire, tout droit de propriété quelconque, même le douaire non-ouvert, laissant aux créanciers, ou propriétaires du fonds, à faire valoir et exercer leurs droits sur le prix de vente déposé entre les mains du Protonotaire de la Cour Supérieure. Tout ceci a eu lieu. Cette législation peut paraître exorbitante de prime abord, mais elle est sage et conforme aux exigences du service public qui ne doit pas souffrir des délais. Si les auteurs du pétitionnaire n'ont pas jugé à propos de se présenter pour recevoir leur créances comme représentant le douaire coutumier, ils n'ont qu'eux-mêmes à blâmer. Mais à ce propos je vois que Mr. *Andrew Leamy* et son épouse, *Erexina Wright*, les vendeurs, ont reçu sur la distribution des deniers du prix de vente une somme de £933 2s. 4d., et je remarque dans le dossier de la cause qu'il se trouve nombre de documents sous forme de transports, ou cessions, (*quit-claims*) par les héritiers *Philémon Wright*, à Mr. *A. Leamy*, constatant que *Leamy* et son épouse étaient aux droits de ces héritiers, ou représentants, *Philémon Wright*, ce qui expliquerait probablement l'esprit de libéralité avec le-

quel ils ont fait donation sans garantie au pétitionnaire de ces prétendus droits ou réclamations qui, pour une cause ou une autre étaient sortis de leurs mains. Je remarque aussi qu'un autre créancier, *John O'Meara*, a reçu £430 14s. 2d. et que plusieurs des héritiers, ou représentants légaux de feu *Philémon Wright*, qui étaient parties opposantes à la confirmation du tître de Sa Majesté, du 7 mai, 1855, ont retiré leur opposition. Si les autres intéressés ne se sont pas présentés pour recevoir leur part du douaire, ils n'ont qu'eux seuls à blâmer et leurs droits sont à jamais perdus, si le jugement de confirmation du tître de Sa Majesté et de la distribution des deniers n'est pas déclaré faux, tel que le pétitionnaire le demande en cette cause.

" En abordant cette branche de la cause qui se rapporte à l'inscription de faux que le pétitionnaire a formulée contre le jugement du 3 juillet, 1856, disons de suite, que le moyen principal du pétitionnaire, et en réalité le seul qu'il puisse invoquer est celui tiré du fait que le projet (*draft*) ou minute de ce jugement n'est pas paraphé par le ou les deux juges qui l'ont prononcé, car du reste le dossier de la cause est complet, le jugement incriminé est entré au dossier, il a été réguliérement enregistré au bureau d'enregistrement du comté d'*Ottawa* 14 jours après sa reddition, et ce dans le livre B, Vol. 6, p. 554, sous No. 416, sous le certificat du régistrateur, lequel certificat n'est pas attaqué, et ce n'est que vingt ans après tout cela, que l'on se réveille pour contester l'authenticité de ce jugement. J'ai dit que le régistre de la Cour Supérieure constate toute la procédure de la cause et même l'entrée du jugement, mais il semblerait que cette entrée n'aurait été faite que longtemps après. Je dirai même que le régistre a été tenu avec une négligence bien regrettable, quoique toute la procédure y soit complétement entrée depuis le dépôt de l'acte de vente jusqu'au jugement final. Il ne manque donc que la

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paraphe du juge sur la minute, et ici s'élève la question de savoir si l'article 473 du Code de Procédure du *Bas-Canada* est tellement impératif que la cour y doive trouver une cause de nullité insurmontable, s'il n'est pas observe à la lettre ? Je ne le crois pas, à moins que l'article le prononce en termes formels. Cet article est, suivant moi, suggestif plutôt qu'impératif. Le juge ou le greffier par suite de cette négligence peuvent être blâmés, et même condamnés à des dommages sérieux, à défaut par l'un d'avoir paraphé la minute, et par l'autre d'avoir entré au régistre un jugement dont le juge n'a pas paraphé la minute. Dire que le plaideur souffrira de la négligence d'un officier public au point d'en être ruiné, et ce soit par l'oubli ou négligence, c'est ce que je ne puis admettre, surtout dans un cas comme celui-ci, où il ne manque que cette paraphe et que le dossier est régulier et constaté par son enregistrement au bureau du régistrateur du district d'*Ottawa*. M. *Poncet*, 1er vol. Traité des Jugements, pages 228, 229, 230 et suivantes, traite cette question en maître, et je suis heureux de le trouver de mon opinion. Sans doute la loi est stricte et elle doit l'être, mais son caractère principal est celui de l'équité et de la justice, et je le demanderai à tout esprit impartial, dans un cas comme celui qui nous occupe, pourrait-on légalement ruiner un simple individu par suite d'une telle omission. Je dis non avec toute confiance.

"Le pétitionnaire *Chevrier* a beaucoup insisté sur le fait que la minute du jugement (*draft of judgment*) n'a pas été signée ou paraphée par le ou les juges qui l'ont prononcé le 8 juillet, 1856, mais la preuve de cette omission me paraît insuffisante.

"En effet ce document (la minute), produit sous le No. 26 des exhibits de Sa Majesté, n'est pas paraphé par le juge, mais le pétitionnaire aurait dû noter que ce document No. 26 n'est qu'une copie du projet (*draft*

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of judgment) puisqu'elle est ainsi produite et certifiée comme telle copie. Le pétitionnaire aurait dû faire produire la minute elle-même; ce n'est que contre une copie qu'ils s'est inscrit en faux; et pour réussir dans la preuve de son faux il aurait dû demander à la cour d'ordonner aux avocats de Sa Majesté de produire la minute même. C'est une mesure de toute nécessité qu'il aurait dû prendre, et à défaut son inscription de faux dirigée contre la minute doit être renvoyée. Il aurait pu à cet égard examiner le greffier de la Cour Supérieure du District d'*Ottawa*, lequel vit encore, et qui aurait pu produire la minute ou jetter sur la matière quelques nouvelles lumières. Sa Majesté, ni ceux qui la défendent aujourd'hui, se trouvant sur la défensive, n'avaient rien à produire, leur position était celle de la défensive. Je considére cette objection comme insurmontable et comme mettant fin à l'inscription de faux, quant à ce qui concerne la minute, car cette minute n'a pas vu le jour sous cette inscription. La minute n'étant pas produite, l'inscription contre elle tombe, et par contre-coup celle contre la copie du jugement entrée au registre doit éprouver le même sort, puisqu'en réalité la seule chose que l'on pût reprocher au jugement consistait en l'absence de la paraphe du juge sur la minute et qui n'est pas nécessaire sur la copie du jugement tirée du régistre. Cette objection peut paraître futile; je la considère pour le moins aussi importante que celle de l'omission de la paraphe du juge sur la minute d'un jugement entré au régistre, accompagné de toutes les autres formalités de la reddition d'un jugement, suivi de l'enregistrement de ce jugement et de plus de vingt ans de possession sans trouble, si ce n'est celui que lui cause le pétitionaire qui ne se présente ici que comme acquéreur de droits litigieux, qualité que les tribunaux ont mission de ne pas accueillir aveuglément.

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"Suivant les prétentions du pétitionnaire, le jugement qu'il attaque n'aurait jamais été prononcé, il serait un faux, mais il ne peut nier que la cause dans laquelle ce jugement est allégué avoir été prononcé a existé et il existe encore; le greffier actuel le dit, et l'a prouvé clairement, or je me demande, quelle serait la conséquence d'un jugement que je rendrais aujourd'hui, ou que tout tribunal, en appel par exemple, et que maintiendrait l'inscription de faux contre le jugement de confirmation? Serait-ce de donner gain de cause au pétitionnaire sur tous les points et de faire condamner Sa Majesté à l'indemniser? Non, indubitablement, si ce n'est quant aux frais de l'inscription et à la déclaration du faux du jugement. Je ne pourrais condamner Sa Majesté à remettre les terres réclamées au pétitionnaire. La seule conséquence serait que la cause serait reportée à l'état où elle était avant le jugement du 3 juillet, 1856. Le dossier de cette cause, dans la quelle la demande de ratification a eu lieu au nom de Sa Majesté, est encore en existence, et son instance n'a pas été affectée par la péremption, et si aujourd'hui le jugement était déclaré faux la cause pourrait être continuée jusqu'à jugement final sur nouvelle demande, ou application, que Sa Majesté ferait d'un plaidoyer depuis *darien-continuance*, et alors Sa Majesté pourrait faire suivre ce plaidoyer d'un jugement dont on aurait soin de ne plus oublier la paraphe sur la minute.

"Je crois que je pourrais me dispenser de tout commentaire ultérieur, vu que les divers tîtres de propriété en cette cause suivis de leur ratification en justice, comme je l'ai déjà fait remarquer, assurent à Sa Majesté un droit incontestable à la propriété de ses divers terrains, mais comme les parties en cette cause ont traité la question de prescription, je dois en dire quelques mots.

"Je dirai d'abord que la couronne comme tout indi-

vidu peut prescrire. L'article 2211 du Code Civil Canadien le déclare en termes formels, et de plus consacre ce droit comme ancien, en ces termes :

" Le Souverain peut user de la prescription. Le moyen qu'à le sujet pour l'interrompre est la pétition de droit outre les cas où la loi donne un autre remède.

" La Législature, en adoptant cet article comme droit ancien, a tranché une question qui a pu être douteuse, mais qui se trouve définitivement réglée aujourd'hui.

" D'abord, quant à la prescription de dix ans, il est incontestable que Sa Majesté ayant été de bonne foi dès le moment de ses diverses acquisitions dont elle ignorait les vices, si toutefois ces vices existèrent, a par l'espace de dix ans à compter des diverses dates de ses tîtres d'acquisition, à l'encontre du prétendu douaire coutumier de *Sally Olmstead*, dont le mari est mort le 28 novembre, 1812, époque à laquelle le douaire s'est ouvert quant à la mère et aux enfants, avec cette différence que la prescription contre la mère a couru à compter du décès de son mari, et contre les enfants à compter de leur majorité, même du vivant de leur mère, suivant l'article 1449 du Code Civil Canadien. Or tous ces enfants étaient majeurs depuis plus de dix ans à l'époque des acquisitions de Sa Majesté des terrains en question en cette cause.

" S'il existait un vice dans la possession de Sa Majesté il ne lui a pas été dénoncé par interpellation judiciaire (ou pétition de droits) conformément à l'article 412 du Code Civil Canadien qui règle cette question comme ancien droit : ' Le possesseur est de bonne foi lorsqu'il possède en vertu d'un tître dont il ignore les vices ou l'avènement de la cause résolutoire qui y met fin. Cette bonne foi ne cesse néanmoins que du moment où ces vices ou cette cause lui sont dénoncés par interpellation judiciaire.' L'Honorable Juge *Loranger* a admis ce

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principe dans la cause de *Lepage* vs. *Chartier* (1), savoir, que pour prescrire par dix ans contre un douaire et faire les fruits siens il suffit que le tiers acquéreur ait été de bonne foi au moment de son acquisition, et que la connaissance subséquente du vice de son tître ou de celui de son prédécesseur ne peut lui préjudicier. Je ne vois rien au dossier de cette cause pour me faire croire un instant à la mauvaise foi du Gouvernement de Sa Majesté, au moins à l'époque de la passation des divers actes d'acquisition que Sa Majesté invoque en cette cause. Inutile de remarquer ici que la plaidorie en cette cause de la part de Sa Majesté n'énonce pas que cette possession de dix ans avec tîtres ait été entre présents et non-absents, car c'était matière d'exception chez le pétitionnaire, le principe étant que dans ces cas la preuve de l'absence incombe à l'excipient. Je crois également que Sa Majesté a prouvé son plaidoyer de prescription de trente ans. En effet elle possède les terrains en litige en vertu d'acquisition à tîtres singuliers, elle peut invoquer sa possession en vertu de ses tîtres, ce qui lui donne vingt-six ans de possession, et elle peut y joindre celle d'*Andrew Leamy* et *Erexina Wright*, qui a été d'environ trois ans, et celle de Madame *Sparks* elle-même. On a prétendu que le tître de Madame *Sparks* était précaire et sa possession infectée de ce vice et ne pouvait servir à Sa Majesté pour compléter, environ deux ans manquant pour accomplir les 30 ans de prescription.

"Je suis porté à croire que le titre de Madame *Sparks* en est un non-attaché de précarité, je l'interprète comme un arrangement de famile entre elle et ses enfants, par lequel cette femme, *Sally Olmstead*, a renoncé à son droit à un douaire sur une étendue de plus de 591 acres sur lesquels elle pourrait réclamer 295 acres en usufruit pour s'en tenir à la propriété pleine et

(1) 11 L. C. Jur. 29.

entière de 159 acres, plus l'étang (*pond*) dont il est ci-devant question, et qu'elle vend le 29 septembre, 1853, comme à elle appartenant, suivant l'acte exécuté par-devant *R. A. Young* et confrère, notaires, à *Aylmer*. Le fait que cette vente ait été faite sans autre garantie que celle de ses faits et promesses, ne milite pas contre les droits de la couronne : elle a usé de ces 159 acres de terre comme à elle appartenant, et elle pourrait les vendre ainsi après les avoir possédés depuis le partage ou arrangement de famille du 5 mars, 1838, ce qui donnerait à Sa Majesté le bénéfice d'une prescription trentenaire plus six ans.

"En supposant pour un instant que le titre de Madame *Sparks* fût précaire, ce que je ne crois pas, les héritiers de *Philémon Wright* et de Madame *Sparks* ont effectué en faveur de M. *Leamy* dès 1836 et 1838, des cessions et abandons de tous leurs droits et prétentions aux terrains réclamés en cette cause, et en ce moment leur cessionnaire en ayant cause, M. *Chevrier*, est lié par les actes de ses auteurs et prédécesseurs et surtout par les déclarations et désistements (*quit-claims*) des prétendus douariers représentés par M. *Chevrier;* ces actes de désistement (*quit-claims*) constituent une rénonciation au douaire de leur mère.

"La rédaction de ces actes de désistement, rénonciations et *quit-claims*, peut laisser quelque chose à désirer, mais ce qu'il y a de bien certain en ces actes c'est l'intention d'abandonner à M. *Leamy* et à ses successeurs tous les droits et prétentions qu'ils pouvaient avoir à aucun titre sur les terrains en question en cette cause,

"Maintenant, le grand nombre de ces enfants, petits-enfants, ou représentants de *Philémon Wright* ont-ils prouvé leur généalogie, ou même droits successifs ? C'est une question tres-problématique et dans la discussion de laquelle il vaut mieux ne pas entrer, et ce dans l'intérêt de ces enfants.

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"Je passe par-dessus nombre de questions d'assez faible intérêt, croyant en avoir déjà dit assez pour motiver le renvoi de la pétition ; cependant je signalerai une autre seule difficulté que le pétitionnaire aurait à surmonter : elle n'a pas été signalée par la défense, mais que je me considère tenu d'indiquer ici, vu qu'elle est très-sérieuse et que si le jugement que je vais prononcer était porté en appel, comme j'ai tout lieu de croire qu'il le sera, l'objection pourrait y être soulevée et le requérant pris par suprise. Cette difficulté vient de ce que le pétitionnaire n'a pas prouvé ou même essayé de prouver l'enregistrement des droits de succession des descendants dans les immeubles en question. Cette formalité est essentielle et formellement requise par l'article 2098 du Code Civil Canadien qui énonce : 'Que la transmission par succession doit être enregistrée au moyen d'une déclaration énoncant le nom de l'héritier, son degré de parenté avec le défunt, le nom de ce dernier et la date de son décès, et enfin la désignation de l'immeuble, et que jusqu'à ce que l'enregistrement du droit de l'acquéreur ait lieu, l'enregistrement de toute cession, transport, hypothèque en droit par lui consenti affectant l'immeuble est sans effet.'

"Ainsi les cédants ou donateurs de M. *Chevrier*, n'ayant jamais fait enregistrer leurs droits successifs tel que requis par cette article, ils n'en étaient pas légalement saisis de manière à céder à M. *Chevrier* ces mêmes droits ; M. *Chevrier* n'a donc qu'un vain tître à ces propriétés, il ne pouvait les réclamer sans montrer que les donateurs s'étaient soumis à cette forme de transmission par succession impérativement exigée par cet article 2098 du Code Civil Canadien. M. *Chevrier* n'a donc qu'un tître sans effet, il ne peut donc pas espérer un jugement favorable.

"Disons de suite à propos des fruits et revenus de ces terrains au montant de $200,000 que M. *Chevrier*

réclame, que supposant pour un instant que Sa Majesté dût être condamnée à remettre à M. *Chevrier* ces terrains, Sa Majesté ne pouvait être condamnée à les payer, vu que Sa Majesté a possédé en vertu de bons tîtres, justes tîtres et de bonne foi depuis le moment de ses acquisitions de ces terrains, car suivant l'article 412, ayant un tître valable, en ignorant les vices, surtout au moment de ses acquisitions, elle a fait les fruits siens et ne peut être condamnée à les remettre.

"Et quant aux impenses que Sa Majesté a réclamées à un montant trés-élevé, elle devrait dans tous les cas lui être payées par le pétitionnaire, dans le cas ou il aurait réussi à établir ses droits aux terrains en question. Le renvoi pur et simple de la pétition me semble être une conséquence inévitable des objections que j'ai indiquées dans les pages précédentes, et en conséquence je renvoie la pétition de droit de M. *Chevrier* et je le condamne à payer les dépenses encourues par Sa Majesté sur la défense en cette cause."

From this judgment the suppliant appealed to the Supreme Court of *Canada.*

Mr. *Fleming* for appellants :

The defendant demurred to the petition on the ground of insufficiency of the description of the property, and want of notification to the Government of the transfer of the rights of the heirs to the suppliant. These demurrers were all dismissed by *Strong*, J. This judgment is sound in law. See arts. 116, 119 and 52 C. P. C. L. C., *Pothier* Procédure Civile (1), *Pigeon* Procédure Civile (2); *Cameron* v. *O'Neill* (3); C. C. L. C. art. 1570 and 1571; Code Nap. art. 1689, 1690; *Laurent* Code Civil (4).

Moreover, Mr. Justice *Strong's* judgment has not been

(1) 3 Vol. p. 123.
(2) 1 Vol. p. 140.
(3) 1 L. C. R. 160.
(4) Vol. 24 p. 141, No. 496.

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appealed against by way of a cross appeal, and it therefore remains in force.

The first plea relied on by respondent is that of thirty years' prescription. To complete the time of this prescription, the defendant has to join the possession of *Leamy* and Mrs. *Sparks*. Now, the possession of Mrs. *Sparks* was that of a dowager, *douairiere*, only, and she could not prescribe against her title, and *Leamy* having only acquired the usufruct could not prescribe either, and consequently there was no prescription during their occupation of which the Crown might avail itself, and its own possession was too short.

The quit claims produced show nothing contradictory of the property being held by *Sally Olmstead*, as dower. With respect to her share the expression is "allotted to her use." Now, this exactly coincides with the rights of a dowager—which is the use or enjoyment of the property subject to dower.

Had the quit claims simply said "allotted to *Olmstead*," there would be nothing contradictary to the right of dower, it would be merely an omission of the mention of the title by which that portion was to be held, and consequently the character of the title must be held to be in accordance with the rights of the person to whom it was allotted; if an heir, then she would hold as heir; if it had been community property, then as *commune*; if left to her by will, then as legatee; but as no other title than that of dowager is shewn, then the allottment must be considered to have been made to her, according to her only apparent rights, viz.: that of dowager.

That it was given to her in any other way is moreover contradicted by her own statement in the deed of the 7th December, 1852, by which she sells to *Leamy* her right of dower on the property.

The next point I will take up has reference to the

title which Her Majesty got through the Commissioners of Public Works under 9 *Vic.*, ch. 37.

The defendant, by exception, sets up the sale by *Leamy* and wife to Her Majesty, represented by the Commissioner of Public Works, before *Young* & Colleague, notaries public, on the 7th of April, 1855, purporting to convey the land in question in this case, along with other pieces, and also a deed of donation of the 6th February, 1865, by which *A. Leamy* and wife made a donation to the Crown of a certain piece of land forming part of lots Nos. 2 and 3 in the 5th concession of *Hull*, and two judgments of confirmation of these deeds, one rendered on the 3rd July, 1856, and duly registered in the registry office for the county of *Ottawa*, and the other on the 14th February, 1866, and also duly registered, and that these judgments, rendered under the provisions of the 9th *Vic.*, ch. 37, sec. 9, forever barred all rights of property in the land mentioned in the deed thereby confirmed.

First the suppliant submits that the title in itself is not in the form required by the statute 9th *Vic.*, ch. 37, sec. 17; to render it valid the deed must be signed by the *Commissioner, countersigned by the Secretary, under the seal of the Commissioners*, "and no other deed shall be held to be the act of the Commissioners."

Then also *Leamy* does not come within the category of persons mentioned in the Act, and thereby authorized to convey property not their own—viz.; tutors, curators, administrators, and others holding a representative character: the Act shows the confirmation could only be applied for with respect to contracts made either with the persons above mentioned, or persons holding as proprietors; whereas *Leamy* was not one of the class enumerated in the Act, and held only as usufructuary, not as proprietor, and the property was not dealt with as belonging to an unknown proprietor.

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Moreover, the judgment of confirmation was only authorized by the Act with respect to lands which could have been expropriated, to wit, to such portions of the lands which were included in plans submitted by the Commissioners to the Legislature, and approved of, as the Commissioners might deem necessary for the construction of public works.

Until the Legislature had thus authorized the construction of a public work and designated the site of it, the Commissioners were destitute of authority to expropriate, and consequently could not ask for or obtain a valid judgment of confirmation, and there was no evidence, nor even any allegation, that such plan had ever been submitted to, or approved of by the Legislature.

Upon this point the appellant cited the following authorities :—*Abbott* on Corporations (1); *Green's Brice ultra vires* (2); *Pothier Vente* (3); *Guyot*, Repertoire de Jur. (4); *Potter's Dwarris* on Stats. (5)

Supposing, however, that the deed was not so absolutely null as to be unsusceptible of ratification, still it is not a title of which Her Majesty can be presumed to have any knowledge.

Her Majesty is presumed to be cognizant of all acts *legally* performed by her agents acting within the scope of their authority, and of no others.

But in this case, as it has been clearly shown, the deed itself was illegal and a contract *ultra vires*, and consequently Her Majesty cannot be reputed cognizant of it. See *Pothier*, Prescription (6).

Her Majesty's commissioners must therefore be considered as holding possession by virtue of the law which allowed them to take possession without a title, rather than under a title which is null. This proposi-

(1) P. 214, No. 60.
(2) P. 867, sec. 1.
(3) No. 31.
(4) *Vo.* Ratification Vol. 14, p. 455.
(5) P. 381.
(6) No. 30.

tion is almost self-evident, and hardly needs authorities to support it. See *Dunod*, Prescription (1).

The next proposition which the appellant will submit is that until the Civil Code was passed there was no petition of right in the Province of *Quebec* by which a subject could interrupt prescription.

[TASCHEREAU, J.: The Privy Council have declared that the Code has the effect of a declaratory law as to what was the old law.]

I think I will be able to show that the Court has the right to say what was the law previous to the Code; that is only a matter of opinion. I will admit that theoretically the petition of right has always existed, but there was no machinery in existence; and even up to this day in the Province of *Quebec*, bills providing for such machinery have always been rejected by the Legislature. Then when you cannot bring an action *contra non valentem agere nulla currit prescriptio.*

As to the prescription of ten years the appellant contends that the Crown, in order to avail itself of this prescription, should have held the property under a just title, in good faith, openly and publicly as proprietor. The good faith required is a belief that the party from whom the property was acquired was the real proprietor of it; the just title is a title which would be a valid transfer, if the person making it was the legal proprietor. In this case, the title set up from the Crown, not being under seal as was required by the Act 37 *Vic.*, chap. 37, sec. 17, which provides that these deeds shall be so executed, and that no others shall be held to be the act of the Commissioners, was null, and consequently could not be the base of prescription. Moreover, the agents of the Crown were aware of the defect in *Leamy's* title, as is proved in the first place by the letter of Mr. *Merrill*, Superintendent of Public Works, *Ottawa*, to *Thomas Begley*,

(1) Part 1 chap. 4 p. 22.

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Secretary of Board of Works, under date of the 16th April, 1853, in which he states *Leamy* has only a right of dower on part of the property, and gives the names of the heirs of *Philemon Wright* as proprietors; 2nd, by the deed of 4th April, 1855, from *Leamy* to Commissioners, in which it is stated that difficulties may arise respecting his title, and security is exacted from him; Thirdly, by the correspondence between the officers of the Department of Public Works here and at *Quebec*, in which it is repeatedly stated that with respect to that part part of the property which *Leamy* obtained from *Sally Olmstead*, he had only a life interest.

The third plea of prescription, viz., twenty years, is merely that of ten years applied to absentees—it is open to the same objection as those urged against that of ten years, and it is therefore unnecessary to discuss it.

The Crown is not accused of being a trespasser, it is merely contended that the Crown took possession with the consent of *Leamy*, who had a right to hold or transfer possession during the lifetime of Mrs. *Sparks*.

The Crown subsequently got from *Leamy* and wife what its agents supposed to be a valid title, during Mrs. *Sparks*' lifetime. In reality, the Crown holds without a title.

As the agents of the Crown were aware that *Leamy's* title would expire at Mrs. *Sparks*' death, they knew they could not legally hold the property after that date; the Crown is consequently bound to account for the rents, issues and profits from that date.

The fifth exception sets up the deed of 1849 from *Nicholas Sparks* and wife to the Crown; deeds of 1855 from *Leamy* and wife to the Crown; alleges that Her Majesty was in possession under these deeds, and that donations to petitioners were made collusively with intent to defraud Her Majesty, of whose titles the parties thereto were well aware.

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With respect to this plea, I cannot see how the donations could injure Her Majesty, as the petitioner claimed no greater rights than the parties from whom they held, and, consequently, it made no difference to Her Majesty whether these rights were urged by the petitioner or by the heirs.

The petitioner expressly denies the execution of the alleged sale by the four heirs of *Philemon Wright Jr.*, in February, 1853, impugning it as a forgery.

The document in question was never produced, nor registered when *Leamy's* title was questioned by the agent of the Crown, and if it had been genuine *Leamy* would surely have then produced it.

One of the subscribing witnesses was dead, and the other, being examined, said he did not know whether he was present at the execution of it or not, or whether it ever was executed by the alleged parties to it. Moreover, two of these parties, *Philemon Wright* and *Sally Wright* swore positively that they never signed it; of the other two, one was dead, and the fourth, Mrs. *Leamy*, could not be affected by it, as she could not contract with *Leamy*, her husband.

By the seventh exception the defendant alleged that the rights transferred to petitioner were litigious, and prayed that the petition should be dismissed.

The petitioner contends that the rights are not litigious, that, even supposing they were, the defendant could only ask to be subrogated in the right of the petitioner, paying all cost and charges, and, consequently, the conclusion of this exception was wrong, and moreover, this plea should have been urged *in limine litis*, and could not be pleaded as a subsidiary plea.

I will now take up the *inscription en faux*:

The petitioner inscribed *en faux* against the copy of the alleged judgment of confirmation of title of the 3rd July, 1856, and against the register from which the

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said judgment was copied, and the pretended draft of judgment, all of which he said were false, no such judgment having ever been rendered.

On this issue the parties went to proof, and it was established: that according to the entries in the minute book the case had been inscribed for hearing in law on the 1st July, 1856; that it never was inscribed for hearing on the merits; that no judgment had ever been rendered; that according to the judge's diary, the last proceeding in the Court was the hearing on law, on which the case was taken *en delibéré*. With respect to the book called a register, it was shown that it was never seen by the prothonotary until four years after his appointment; it was delivered to him by the former prothonotary, who, in the interval, had been entering up judgments.

The only draft of judgment to be found in the record was produced by the present prothonotary; and was not paraphed by the judge by whom it purported to be rendered.

The initials or paraph of the judge on draft is the only legal evidence of the rendering of the judgment.

Now, even supposing other evidence could have been adduced to show that a judgment had been rendered in this case, no evidence has been brought by the other side, for the sham register, being a book, made up out of the office of the Prothonotary, by a person having no authority to keep a register, can have no more probative effect than if they had fyled a copy of *Scott's Waverly Novels*.

On the necessity of the signature of the Judge, and its necessity to establish the rendering of a judgment, the following authorities were cited:—Code of Civil Procedure, art. 473 and art. 474; Ordinance 1667, Titre 26, art. 5; Code de Procédure Napoléon, art. 138; *Denizart* Vo. Minute (1); *Bonnier* Procédure Civile (2).

(1) Vol. 3, p. 350, No. 12. (2) Vol. 1, Nos. 778 and 779.

The ordinance of 1667, title 26, art. 6, abolished the formality of the pronunciation of judgment, but maintained the *dictum* which was also called the *arrêté*.

But in *Canada* the Courts have not observed the rule with respect to the *dictum*, and the only record recognized by law and the jurisprudence of the Courts has been for many years the minute or draft paraphed by the Judge and the transcript or copy of that minute entered in the register.

It is the duty of a Judge, when a judgment has been rendered, to sign or paraph the draft. The presumption of the law is that the Judge performs his duty; consequently, if the draft is not paraphed, that no judgment has been rendered. To controvert this presumption the strongest evidence would be required. But so far from this being the case, the other original registers of the Court, namely, the "Rôle de Droit," minute-book and diary, all show that not only was no judgment rendered, but that the case was not even inscribed for final hearing.

Now all these books are recognized registers of the Court (vide Rules of Practice, S. C. No. 50), and, as such, authentic, and entitled to more credit than the register of judgments, as they are originals, whereas the latter is only a transcript. Where, then, is the proof of the rendering of the judgment?

Mr. *Laflamme*, Q. C., followed on behalf of the appellant:—

As to the want of signification, the various French authors show that the objection could only be urged by a person prejudiced by not having been notified, and that in this case the defendant did not even pretend to have suffered, or to be liable to suffer any prejudice thereby.

Moreover, the formal notice or signification required by the law of the Province of *Quebec* could not be car-

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ried out in this Province; substantially, notice has been given by the submission of the petition, and the documents on which it was based, by Her Majesty's Attorney General, and the sufficiency of that notice has been admitted by the fiat of the Administrator of the Government thereon.

The learned counsel referred on this point to *Troplong* De la Vente (1); *Marcadé* (2); *Duvergier* (3).

Then as to prescription:

The title deed relied upon principally by the Crown is that of the 7th May, 1855. We contend that this deed was not at the time of its execution a perfect deed, and therefore cannot be relied on for prescription. By the Act creating this corporation the commissioners are obliged to affix their seals to all documents, writings, &c. We do not say they could not execute a deed before a notary, but that they should comply with the requirements of the 17th sec. of 9th Vic., c. 37, in notarial deeds as well as in other writings. Analogous provisions exist in the law of the Province of *Quebec*, viz.: Donations, if not executed before notaries, were an absolute nullity and produced no effect whatever. Then, could the Crown prescribe until this petition of right Act was passed. If subjects had the right of interrupting prescription by petition of right, it certainly was an *error communis* that such a right did not exist in the Colony, and the authorities quoted show that where there is a reasonable obstruction, prescription does not run. Then has the Crown purchased in *good faith*.

Bona fides, says *Pothier*, *nihil aliud est quam justa opinio quæsiti domini. Voët* expresses the same idea. *Bona fides est illœsa conscientia putantis rem suam esse.* We find that there is in these ideas a view comprehending more than the third party whose property is pre-

(1) P. 390, on art. 1690. (2) Vol. 6, p. 339.
(3) Vol. 2, No. 206, p. 239.

scribed. The possessor must be conscious of the validity of his title, as to the right and capacity of the one with whom he treats. For without this how could he believe himself proprietor of the thing.

These therefore are the conditions which the possessor must combine to enable him to have that undoubted belief which is called good faith. He must first have no knowledge that any one but the person who transfers the thing is proprietor. Secondly.—Be convinced that the one who conveys had the right and capacity to alienate. Thirdly.—Receive it by a contract free of fraud and of any other vice. See *Troplong* on Prescription (1).

There can be no doubt that at the time the Government purchased from *Leamy*, in 1854, they had doubts as to the validity of his title, and before the deed of the 7th May, 1855, they were officially informed of the rights of the heirs of *Philemon Wright Jr.*

The question therefore is, can the Crown prescribe against a subject on more favourable conditions than a subject can prescribe against a subject? If a subject could not take the property with such knowledge, how can it be said that the officer of the Crown or a Board of Works could do so?

Mr. *Robertson*, Q. C., for respondent:—

It is undoubted, that a Judge, at the hearing on the merits, may revise the decision of a Judge of the same Court, previously given on a *défense en droit*, and also that on an appeal from a final judgment, the merits of the judgment on such *défenses* come up for adjudication. The Supreme Court therefore can legally decide on the three *défenses* fyled generally to the portion of the petition claiming to have plaintiff declared proprietor of all the land now held by Government, on lots 2 and 3; and as to the necessity of signification upon the

(1) 2 Vol., Nos. 915, 927, 930, and 931.

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Government of the deeds of donation and transfer, so far as respects the rents, issues, and profits.

Reference was then made to *Pigeau* (1); *Merlin* Repertoire (2); C. C. L. C. art. 1571; *Charlebois* v. *Forsyth* (3).

It is submitted that the Crown can invoke prescription under article 2211 of the Civil Code.

Before the Code, it was decided in appeal in *Lower Canada* that the Crown could invoke the thirty years' prescription against a petitory action brought to recover portion of the lands covered by the fortifications of the city of *Quebec: Laporte* and *The Principal Officers of Her Majesty's Ordnance* (4).

As to the ten years' prescription it is clearly made out.

What the English form of art. 2251, Civil Code, calls a translatory title and the French "*un titre translatif de propriété*," and the Contume *juste titre*, is a title capable and fit on its face to convey title.

See Grande Coutume by *Ferriere*, on art. 113, p. 359, where he says: One of the conditions is that the possession be founded on a *juste titre*, *i. e.*, that possessor has a *cause légitime*, capable of transferring the *domaine*, such as purchase, donation, will, judgment, &c, not a lease, or loan, or precarious title.

The titles to the Crown in this case are manifestly translatory, they are *deeds of sale*, deeds in the usual form, and authentic, and perfect.

The possession of the Crown has been for more than ten years, and if its good faith is impugned, the bad faith must be clearly established by the petitioner.

As to the plea of confirmation or ratification of title, the statute 9th *Vic.*, c. 37, was in force when the ratifications in question in this cause were obtained.

In ordinary cases of ratification, hypotheques alone are purged; but in cases where the Crown obtains or

(1) 1 Vol., p. 10.
(2) *Verbo* "aboutissans."
(3) 14 L. C. Jur. 135.
(4) 7 L. C. R. 486.

expropriates land for public purposes under the statutes referred to, it is submitted, that rights of mortgage and hypotheques, and rights of property also, are equally purged, and the claim of the owners converted into a claim on the monies deposited in Court.

Under this statute the commissioners had the right to deposit the monies in the Court; the compensation-money was to represent the land; and parties claiming rights of property were bound to fyle their oppositions; and it will be seen that oppositions were actually fyled in this cause by some of the parties, donors to the plaintiff, namely, by *Pamelia Wright* (Mrs. *McGoey*), *Serina Wright* (Mrs. *Pierce*), and *Hull Wright.*

The judgments of the Court at *Aylmer*, ratifying the titles, evidently went on the ground that not only were hypotheques purged, but claims of property were also purged. The judgment in No. 136, *ex parte* Her Majesty, for ratification, recites that the parties above named, also *Ruggles Wright*, were opposants; that the application of Her Majesty was made under the 9 *Vic.*, c. 37; that all the formalities required had been shewn to have been complied with, and the oppositions of *Pamelia Wright* and others had been discontinued with costs.

As to the *Inscription en faux*, it is submitted that it does not lie against the Register, as stated in the demurrer to certain of the *moyens de faux;* next, that it is very doubtful, under our jurisprudence, whether a judgment can in any case be attacked by an *Inscription en faux;* that no *faux* are proved, the evidence of the witnesses being wholly worthless, and insufficient to set aside either the judgment or Register.

The ordinance of 1667, tit. 26, art. 5, in force in *Lower Canada*, says: The presiding judge shall see that at the close of the sitting, and on the same day, the

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clerk has written, he shall sign "*le plumitif*," and paraph each *sentence*, judgment, or *arrêt*.

The plumitif is defined as being the original and primitive paper on which a summary of the judgments is written, which are rendered in open Court. *Répertoire de Jurisprudence*, *vo.* "*Plumitif.*"

The plumitif is never signed in our practice. The draft of judgment, when drawn by the Prothonotary, and approved, is initialed, or signed by the Judge.

In *France*, the *feuilles d'audience*, or original drafts of judgments, are kept till the end of the year.

The learned counsel referred to *Healy* v. *Corporation of Montreal* (1); art. 1207 and 1220 C. C. L. C.

In *Carter* v. *Molson* and *Mechanics' Bank* v. *Molson*, recently decided in the Superior Court, *Montreal*, by *Dorion*, J. (not reported), it was held no inscription *en faux* lay against a judgment.

The learned counsel then argued on the facts of record that it appeared that the division agreed to on the 5 March, 1838, ought to be held as a family arrangement, under which *Sally Olmstead* obtained a title to the 159 acres, reserved for her dower, and that the evidence adduced did not establish bad faith on the part of the Crown.

Mr. *Lacoste*, Q. C., followed on behalf of the respondent.

It is contended that Her Majesty cannot invoke prescription, because it was practically impossible to exercise the right of petition of right, and that there was common error as to the existence of this right. The case of *Laporte* v. *The Principal Officers of Her Majesty Ordnance* (2), clearly shows that the right existed. Then also ignorance of the law is no excuse.

The first plea of prescription is that of thirty years.

(1) 17 L. C. R. 409. See also Starkie, Ev., 212, 213.

(2) 7 L. C. R. 486.

To succeed on that plea I admit Her Majesty is bound to join her possession to that of her *auteurs*. Now, if the Court hold that Mrs. *Sparks* had a precarious title, her possession cannot be joined to that of the Crown, but it seems to me that the estate was divided in 1838, among the heirs, not as a *partage provisoire*, but forever. See art. 2094.

However, the Crown relies also on the plea of 10 years' prescription in good faith with translatory title. As to the deed of 1849, there can be no question of bad faith. The learned counsel then argued that on the evidence adduced the appellant had failed, as the burden was on him to prove that the crown was in bad faith, if *bad faith* can ever be imputed to the Crown.

Then, as to the plea under the Statute 9 *Vic.* c. 37; it is said the deed is not valid, because it was not passed in accordance with the provisions of the act, viz.: *Signed and sealed.* If that construction is to be put upon the act, how can you explain sec. 5 of the act which expressly recognizes transfers made before notaries and declares such deeds to be valid. Then, that the Crown could purchase from other persons than those specially mentioned in sec. 8, sufficiently appears by the following section, which declares that the money will stand in lieu of the land, and one of the effects of the judgment of ratification is to bar all claims.

We find also, that by the deeds of transfer to the petitioner, some of the parties thereto assumed the quality of heirs of *Sally Olmstead*; if so, as warrantor of her acts, the suppliant could not call in question titles derived from her. More than this, one of these heirs, Mrs. *Leamy*, was the co-vendor with *Leamy* to the Government, and she, in any case, had no rights to transfer to the suppliant.

The following additional authorities were then referred to by the learned counsel on the question of the

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inscription en faux. French Code of Proc., art. 214 to 251; *Sirey* (1865), Code, *vo. Faux. Bioche*, Dict. de Proc. 1850, *vo. Faux*, No. 44—56, No. 197. *Palsgrave* v. *Ross* (1). The omission to sign a judgment in a Register will not authorize a Court to treat it as *non-existant* when an authentic copy is produced. 9 *Dalloz*, Juris du Royaume, p. 616, Note 3.

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

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RITCHIE, C. J.:—

The property claimed by the petitioner was granted to *Philemon Wright*, 3rd May, 1806. On the 25th April, 1808, *Philemon Wright* conveyed this property to his son *Philemon Wright Jr.* On the 4th May, 1808, *Philemon Wright Jr.* married *Sarah, alias Sally Olmstead*, without any marriage contract.

Philemon Wright Jr. died 5th Dec., 1821, intestate, leaving his widow and eight children issue of the said marriage.

The real estate in question, having been acquired previous to the marriage, continued, notwithstanding the marriage, the sole and absolute property of *Philemon Wright Jr.*, subject to the customary dower (*douaire coutumier*) of the wife, which consisted of the usufruct or life enjoyment of one-half of the real estate owned and possessed by the husband at the date of the marriage, the absolute property of which would revert to the children, issue of the marriage, or their representatives, after the death of the widow.

On 20th November, 1826, the widow married *Nicholas Sparks*, and died on the 9th October, 1871.

After the death of *P. Wright Jr.*, his heirs made a division or *partage* of their father's estate between themselves and the said *Sally Olmstead*, and caused a plan to be made by one *Anthony Swalwell*, a surveyor,

(1) 2 L. C. Jur. 95.

of the several portions, and on the fifth day of March, 1838, by certain agreements entitled quit claims or transfers, seven in number, all bearing date on the day and year last aforesaid, under their hands and seals, duly made before witnesses, and all duly registered in the Registry Office of the said County of *Ottawa*, the said several heirs, with the exception of *Wellington Wright*, ratified the said survey and partage or division made; and the possession of the several lots so previously occupied and enjoyed and the rights of *Sally Olmstead*, their mother, to certain portions of said lots 2 and 3, in said 5th range of *Hull* aforesaid, hereinafter mentioned, were also thereby ratified and acknowledged.

In and by each and every of said quit claims and transfers, it was declared:

That the said *Philemon Wright*, junior, *Hull Wright*, *Pamelia Wright*, *Horatio Wright*, *Erexina Wright*, *Sally Wright*, as surviving heirs of their late father, having mutually agreed *to divide the inheritance of their late father*, have caused the same to be surveyed by *Anthony Swalwell*, Deputy Surveyor, who having ascertained the quantity of land in lots nos. 2, 3 and 4 in the 5th Concession of the Township of *Hull* to be 591 acres, 1 rood 24 perches, including a certain pond of water, the said portions of said land, having been sub-divided, the following portions have been allotted to each, that is to say:—

To *Philemon Wright*.....	43	acres	2 roods.
" *Hull Wright*.....	43	"	2 "
" *Pamelia Wright*.....	49	"	
" *Horatio Wright*.....	53	"	1 rood 24 p.
" *Wellington Wright*.....	48	"	
" *Serina Wright*.....	60	"	
" *Erexina Wright*.....	65	"	
" *Sally Wright*.....	70	"	
" *Sally Olmstead*, their mother, the pond of water inclusive.....	159	"	

With all of which the said heirs declared themselves satisfied, and that in order the better to secure to each other a legal title to the said portions of land aforesaid,

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the said heirs did grant remise and release, and forever quit claim by each of said deeds to each heir severally the lot hereinabove referred too, and shown on said plan of said *Swalwell*, and describing each portion by metes and bounds, to have and to hold to each heir the said portion so allotted to his or her use and behoof forever, so that the said heirs so conveying said several lots should not, nor should any person claiming from them, have claim or demand any right or title to the said several premises whatever.

The plaintiff now claims a certain undivided interest in the 159 acres so set apart for the use of the said *Sarah Olmstead*, under deeds from the heirs of *Philemon Wright Jr.*, on the ground that the same was set apart to the said *Sally Olmstead* as and for her dower in her husband's estate, and that the same on her death reverted to the heirs of the said *Philemon Wright Jr.*

Of the nine deeds set up in the petition, the *first* and *eighth* are set up as being from *Philemon Wright* as one of the children of *Philemon Wright Jr.* The *third* and *fourth* from *Sally* or *Sarah Wright* (Mrs. *Boucher*). The *second* and *sixth* from *Erexina Wright*, otherwise called *Elizabeth Wright*, (Mrs. *Leamy*). The *seventh* from *Pamelia Wright*, (Mrs. *McGoey*). The *ninth* and last from *Philemon Wright*, *Mary Jane Wright*, (Mrs. *Allan*), *Serina Wright*, (widow *Olmstead*), *Ellen Wright*, (widow *Whitney*), as the children of *Hull Wright*. The consideration of some of these deeds is as follows:

> The present gift *inter vivos* and conveyance is thus made for and in consideration, firstly, of the friendship which the said donors entertain towards and for the said donee; secondly, of the gratitude they, the said donors, feel for him, said donee, for services rendered and being rendered by the latter to the former.

It is claimed on behalf of the Crown, in the first place, that this *partage* was a family arrangement, that the quantity of land set off to the widow was much less in

quantity than half her husband's land, and that it was the intention of the parties that the widow, in taking so much less than she was entitled to, was to have the absolute right and title to the part so allotted to her, and that the same was given to and accepted by her in lieu of her dower, or life interest in the half of the estate; and that the Crown, by deeds from the widow and her husband, and from *Leamy* and wife, who likewise claim a portion under deeds from the widow and late husband, became vested with the absolute ownership of the land. Failing in this contention, it is claimed that the property was acquired and taken possession of by the Crown, for the use, maintenance and construction of certain public works, under powers conferred by the 9 *Vic.*, c. 37 of the statutes of *Canada*, and that the same was conveyed to the Crown, and that the title of the crown (as to part if not the whole) was afterwards duly confirmed by a judgment of confirmation, whereby all claims to the lands, to which such confirmation extended, were forever barred; and lastly, that if the conveyances and confirmation were not of themselves sufficient to vest the legal title in the Crown, then that the Crown had acquired a legal title to the property by prescription.

If the first proposition could be established there would be an end of the case, but I can find no sufficient evidence to sustain this contention. On the contrary, I think the evidence leads to a conclusion the reverse, though certainly the conduct of the parties would tend to a strong suspicion that such may have been the case. No necessary inference can, I think, be drawn from the quantity of the land set apart to the widow, as being less than half the property which the law gives her, because it would, I think, be unreasonable to suppose that in a block of 590 acres, on rivers such as the *Gatineau* or *Ottawa*, every acre would be

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exactly of the same value, or that it would be possible to divide the lot into nine portions of relatively equal value by giving an exact half in quantity to the widow and eight other portions, each containing exactly the same quantity, to the eight heirs. Thus, we see, in the *partage* among the heirs of the balance, after deducting the portion set apart to the widow, there is quite as great a discrepancy in the quantities awarded to them respectively. Two get only 43 acres each, while all the rest get many more, ranging in excess from 6 up to 17 acres; therefore, I think the inference may fairly be, that the *partage* was based on and governed by the value of the respective lots, and not on the quantity of land each share contained, and so, though the widow may not have had allotted to her the use of half her husband's property in extent, she may have had it in value. Then again, we find that while, as among and for the security of the heirs, quit-claims and transfers were made, securing to each heir, by legal documentary title, the absolute interest in the lot appropriated to him or her respectively, no such quit claim or transfer is made to the widow, nor do we find her a party to any such quit claim. If it was deemed necessary that the title of the heirs should be so secured to them, *a fortiori* the right of the widow, who, as widow, had only an usufructuary interest, still more required, if it was intended that she should be the absolute owner, a solemn relinquishment and conveyance of the rights of the heirs to her in the portion allotted to her.

It is true the deed made by the widow and her husband on the 12th September, 1849, whereby they sold, as their sole and absolute property, a portion of this land so allotted to Her Majesty the Queen, which deed I shall have occasion more particularly to refer to on another branch of this case, certainly shows that she, at

that time, claimed to be absolute owner of the property and dealt with it as such, but this can in no way be used directly or indirectly to establish the fact that she was such owner, and if it could, it must, on the other hand, be observed that on the 7th December, 1852, dealing with another part of the 159 acres and her interest in it, she deals with it as if she had a right of dower only. It is a somewhat singular circumstance, that in this deed is expressly excepted the portion sold and conveyed to Her Majesty, which portion was most certainly sold and conveyed as the absolute property of the vendors, and this would rather lead to the supposition that, as they had sold to the Crown, so they were selling to *Leamy* as the absolute proprietors; the language of the deed to *Leamy* can only be reconciled with this idea, on the supposition that in transferring what had been allotted to her, if absolutely, for and in lieu of dower, she in common parlance continued to call it her dower, and whoever drew the deed did the same, possibly considering that the words of the deed "the said dower and *all other rights whatsoever belonging to the said Sarah Olmstead*, and which the latter claims as her right of dower" would cover all her rights, whether as dower or absolute owner. However this may be, I cannot bring my mind to the conclusion that there is sufficient legal evidence to justify me in saying that there was a binding agreement between the heirs and the widow, whereby the portion allotted to the latter was not simply as and for her dower, but was set apart as her absolute property in lieu of her dower, however much I may suspect such to have been the intention, in view of what has been said and of the fact that the parties have so long slumbered on their rights, if they had any. If this is so, then it follows that the deeds from *Sparks* and wife to the

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Crown, and from *Sparks* and wife to *Leamy*, could not convey the legal estate in this property.

A deed of quit claim or transfer to *Leamy* has also been produced purporting to be signed by *Horatio*, *Elizabeth*, *Sarah* and *Philemon*, children and heirs of *Philemon Wright Jr.*, dated the 3rd February, 1853, whereby they sold and quit-claimed all their rights, claims and pretensions to the 159 acres allotted to their mother. This instrument is alleged not to be genuine, in fact to be a forgery. On behalf of its authenticity *Jas. Goodwin*, a witness to this paper, proves his own handwriting, but has no recollection of the transaction. He says: "Without my own signature being there, I should not have recollected any thing about it." He knew *Doyle*, the other witness, who was a bar keeper to *Leamy*, who he understood died in the year 1853, or 1854. *Jas. Leamy* was killed, he says, in the year 1860, or thereabouts. He says: "I have seen *Jas. Doyle* write very often, I have not seen him sign his name very often, but he kept *Leamy's* books when I stopped there, and to the best of my judgment that is his signature" And being asked as to his recollection of being asked to be a witness, or to his supposing from his signature being there that he was called as a witness, he says: "All I can swear to is, that is my signature, but I have no recollection seeing the party sign the document."

Robert Farley cannot swear positively to signature of *Doyle* after a lapse of 20 years, but gives his opinion and belief as strongly as could be done after so long a lapse of time. He also says the words "third," "February" and "three," and the signature "*John Doyle*," appear to be written by the same party, and also the signature "*H. G. Wright.*"

James Clarke produces four receipts, which were written by him and signed in his presence by *Philemon Wright*,

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H. G. Wright, and *Sarah Wright*. He looks at paper *U. U.*, and says: "I believe the signatures *H. G. Wright*, *P. Wright* and *Sarah Wright* are written by the same persons as those who signed said receipts in my presence."

Here, then, we have one of the subscribing witnesses proved to be dead, but his handwriting very clearly proved by the other subscribing witness produced, who proves his own signature, though he does not recollect the transaction, which, after a lapse of 20 years, is not to be wondered at. This evidence, under the English jurisprudence would prove this document without any evidence of the handwriting of the parties to it, but, in addition to this, we have the fact very clearly established, that the paper must have been in existence at or about the time it bears date, because it is proved that *Doyle*, the witness, died in 1853 or 1854. In addition to which we have very strong evidence of the handwriting of *Horatio*, *Elizabeth*, *Sarah* and *Philemon Wright*, not only by a person who had seen them write, but also by the production of and comparison with a genuine document, the signatures to which are unquestionably proved to have been written by these parties respectively.

It is true *Philemon Wright* denies his signature, and produces entries in a memo. to show he was not in *Hull* at the date of the paper. *Sarah Boucher* denies her signature, and alleges in support of that statement that she was not on speaking terms with Mr. and Mrs. *Leamy*, and not until 8th October, 1853.

On cross-examination she is asked: "Can you give any other reason in respect to said signature not being yours, than not speaking to or being on speaking terms with Mr. and Mrs. *Leamy*?" She answers "I do not know, I never seen or spoke to any of the parties." This witness also says: "The signature, '*Sally Wright*,'

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set and subscribed to the exhibits of the defendant at *enquête* numbered *R. R. S. S.*, now shewn, are my signatures. Q. Do you not think there is a resemblance between the signatures *Sally Wright* and *Sarah Wright* in these exhibits? A. Yes, there is. Q. Would you sometimes sign *Sarah Wright* and sometimes *Sally Wright?* A. Yes."

I think very little of the fact that *P. Wright Jr.* was in the woods on the date of this paper, or that *Sarah Wright* was not then on speaking terms, if we are bound to take this evidence as conclusive, because it by no means follows that the paper must, to be genuine, have been signed on the day it bears date. I think it would be a most dangerous thing to allow interested parties by such evidence as this, after a lapse of 20 years, and the death of the other party to an instrument and of one of the witnesses, to destroy a document and reap the benefit of the property purporting to be conveyed away by him by such instrument.

Unsatisfactory as this evidence is, I think the evidence of the only other two witnesses called is, if possible, more unsatisfactory. *Alex. Heney* and *Chas. Desjardins* are called as experts or *quasi* experts. The evidence of experts under the most favorable circumstances is to be received and acted on with very great caution. It is only necessary to read this evidence, I think, to show that it ought not to have any weight whatever.

Alexander Heney:

Q. Look at the exhibit marked "U.U." now shown to you in this cause, and produced by the plaintiff, and say whether or not the words "third," "February" and "three" at the end of the said document are in the same hand-writing as the signature *John Doyle* in your opinion. A. I think the words "third," "February" and "three" and *John Doyle*, were by the same pen and the same hand.

Q. Will you look at the signatures *H. G. Wright*, on receipts exhibits X and XX, and on exhibit U.U., fyled by defendant, and say whether you think the signatures on the said exhibits X and XX

are in the same hand-writing as on the exhibit U.U.? A. I do not think the signature *H. G. Wright* on the exhibit U.U. is in the same hand-writing as the signatures *H. G. Wright* on the exhibits X and XX.

Q. Have you been in the habit of seeing different signatures for a length of time, and state how long? A. I have more particularly for about twenty-four years.

Cross-Examined—My reason for thinking that the words referred to in my examination-in-chief, are in the hand writing of *John Doyle*, is that the stress of the pen and ink appears to be the same.

Q. Please state what is your reason upon which you stated in your examination-in-chief that the signature *H. G. Wright* on the said receipts are not in the same hand-writing as the signature *H. G. Wright* on the exhibit U.U.? A. The reason is because the signature on the receipt X is not so well written and not so closely connected as the one on the exhibit U.U.

Q. Did you ever see the said *Horatio G. Wright* sign his name? A. Never.

Q. Are you prepared to give an opinion whether or not the signature *P. Wright* on the exhibit XXX, now shown to you, is or is not in the same hand-writing as the signature *P. Wright* on the exhibit U.U.? A. No I am not. I never seen any of the parties mentioned in the exhibit U.U. sign their names.

In my examination-in-chief, I stated I had been in the habit for about twenty-four years of seeing different signatures, I mean that I saw them in the course of my business as landing waiter and otherwise. I do not mean that I was ever examined as a witness in a dispute regarding signatures.

Charles Desjardins:

Q. Are you in the habit of comparing or examining signatures, and for how long had you occasion to do so? A. Yes as insurance agent and telegraph operator for about eight years.

Q. Will you take communication of defendant's exhibit U.U., and say whether you think the words "third," "February," "three," at the end of the said document are or are not in the same hand-writing as the signature *John Doyle* subscribed thereto as a witness. A. I believe they are.

Q. What do you think of the signature *H. G. Wright* on the said exhibit U.U.? A. I think it is in the same hand-writing as the words "third," "February," "three," and the signature *John Doyle*.

Q. Will you compare the signature *H. G. Wright* on defendant's exhibits X and XX with the signature *H. G. Wright* on said exhibit

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U.U., and say whether you think they are or are not in the same hand-writing? A. I don't think they are.

Q. What difference do you see between the signatures on exhibits X and XX and signature on exhibit U.U. A. I don't think it is in the same hand-writing at all.

Cross-Examined—I am not acquainted with any of the signatures on the exhibits to which I have referred, that is the receipts and the exhibits U.U. I have not been examined as an expert in cases of disputed signatures.

Q. Can you state the differences between the signature of said receipts X and XX, and the said exhibit U.U.? A. The letter "H" in the exhibit X and XX differs from the letter "H" in the exhibit U.U. and the first limb being longer in the two receipts than in the exhibit U.U. and the strokes in both limbs of the letter "H" in exhibit U.U. are heavier and farther apart than in the two receipts, and the turn in the last limb of the letter "H" in exhibit U.U. is different. The letter "G" in exhibit U.U. differs from the same letter in the two receipts, and the upper loop being heavier and more open in exhibit U.U. than the same letter in the receipts. And the tail of the "G" on exhibit U.U. differs from the other on the exhibits XX, being turned down in exhibits U.U., and not turned down in exhibits X and XX. The letter "W" in exhibit U.U., is not started the same way, and is more open or straggling, and the finishing limb is turned down, and heavier than the same letter in exhibits X and XX. The rest of the letters in the exhibit U.U. differ materially from the same letters in the said receipts.

When we know how little reliance is to be placed on the testimony of even professional experts, to allow evidence of this kind with reference to the signatures of persons such as these, who, from the signatures, are but rough writers, and who, it is very evident, were not in positions called on to sign their names so often as to give their signatures a set established character, to overthrow solemn sealed instruments in reference to the title to real estate, where the possession of the property has, for upwards of 26 or 27 years, gone in entire consistency with the instrument assailed, and when the parties have remained perfectly quiet, and where their quiescence appears now only to have been disturbed by

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the plaintiff's procuring deeds of gift and starting this controversy; I say, to overthrow instruments on such evidence and under such circumstances, and where, as we shall see hereafter in another branch of the case, some of these very parties had been parties to and assented to the judgment of confirmation of the Crown's title, would be, in my opinion, to jeopardize and shake to the very foundations the security of property. Therefore, I am not prepared to say this is a forged instrument.

There can be no doubt that the proper officers entered upon and took possession of the property for the use of the Public Works of the Province of *Canada*, as by law they were authorized to do, and it cannot be doubted that the property was purchased from parties in possession, who, in dealing with the Crown, claimed to be the absolute and lawful owners thereof, and it is not disputed that the Crown paid the full value therefor, and has continued in peaceable, continuous, uninterrupted, public and unequivocal possession as proprietors of the property in dispute, a portion from the 12th Sept., 1849, the remainder from 7th May 1855; and that the Crown has exclusively dealt with it as public property and has placed on the premises extensive improvements of a public character, involving a very large expenditure of the public money, and of a character and for a purpose wholly inconsistent with any use to which the same premises would or could have been applied had they continued private property.

The notarial deed from *Sally Olmstead*, or *Sparks*, and her husband to the Crown, before referred to, is dated 12th September, 1849, whereby *Sarah Olmstead* and *Nicholas Sparks* her husband granted, bargained, sold, assigned, transferred, and made over from thenceforth and for ever, with promise of warranty against all gifts, dowers, mortgages, substitution, alienations and other

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hindrances whatsoever, to Her Majesty, Queen *Victoria*, Her heirs and successors, represented by the Honorable *Etienne Taché*, Chief Commissioner of Public Works of the Province of *Canada*, a certain tract of land required for the use of the *Gatineau* works, and in said deed particularly described, containing 21 acres, 1 rood and 25 perches (of the land now claimed by appellants), *which said vendors are lawfully seized thereof by virtue of a good and sufficient title*, the aforesaid thereby bargained and sold tract of land being holden by the tenure of free and common socage, free and clear of every charge, burden and incumbrance as the said vendors now thereby declared, excepting such burthens, &c., as might be charged and imposed thereon by the Letters Patent from the Crown, in consideration of £107 7s. 0d., being the value of the said 21 acres 1 rood and 25 perches, at the rate of £5 cur. per acre, agreed upon by the said vendors and the said commissioners, which said £107 7s. 0d. was paid previous to the passing of said deed, whereof the said vendors did thereby acknowledge payment and grant discharge, *dont quittance générale et finale.*

On the 24th April, 1854, by deed between *Leamy* and wife of the one part, and the Honorable *J. Chabot* and Honorable *H. Killaly*, Commissioners of Public Works, *Bartholomew Conrad Augustus Gugy*, acting on behalf of the Commissioners of Public Works, binding himself to cause these presents to be duly ratified by the Commissioners within 15 days after execution, pending which time the Government, who were in possession of the thereinafter mentioned and described property, should not be disturbed or molested by the said *Andrew Leamy* or his said wife of the other part; after reciting that the Commissioners of Public Works deemed it necessary "to acquire, for the use, benefit and advantage of the public, possession of certain

pieces or parcels of land situated in the Township of *Hull*, &c., which *Leamy* and wife *claimed* to be theirs," the deed witnessed that *Leamy* and wife sold, &c., unto Her Majesty The Queen, her heirs and successors, the land described, being parcel of the property now claimed. The said deed then recited that a tender and notification had been made by the Commissioners of Public Works to *Leamy* for two of said pieces of land by the notices on the 21st April, then inst., which, not having been accepted, it was necessary to estimate the value thereof, together with the other pieces above described, by experts to be nominated under the provisions of the Acts regulating that subject in force in the Province of *Canada*. It then proceeds to nominate experts on the part of Her Majesty and on the part of *Leamy* to assess the value of the land, together with the value of the use and occupation thereof, or of such part thereof as may have been used or occupied by the Government or its agents for the time so occupied, &c.

It then recites :

And whereas difficulties or doubts may arise *as to the validity of title* of the said *Andrew Leamy* and his said wife with regard to the aforesaid four pieces or parcels of land, and it is necessary that security, *caution*, shall be given to Her said Majesty the Queen in that respect by him, therefore, to these presents personally came, intervened and was present, *James Leamy*, also residing in *Bytown* aforesaid, inn-keeper, who, after having had reading and taken communication of the foregoing premises, did and doth hereby voluntarily become the security, *caution*, for and on behalf of the said *Andrew Leamy* and his said wife, and doth hereby bind himself conjointly with the said *Andrew Leamy* and his said wife to the due performance of all the obligations which the said *Andrew Leamy* and his said wife have entered into aforesaid, and this in the same manner as if he were the principal or principal obligé to these presents, provided always that should this deed not be ratified, no right of action whatever shall ever be exercised by the said *Andrew Leamy* and wife, or either of them, against the said *Bartholomew Conrad Augustus Gugy*, or for the due execution of these presents.

By deed, made on the 7th May, 1855, by *Andrew*

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Leamy and wife, and *Wm. Foster Coffin* and *Thomas McCord*, for and on behalf of the Honorable The Commissioner of Public Works for the said Province of *Canada, se portant forts pour eux*, and thereby obliging themselves to cause those presents within fifteen days after the execution thereof to be ratified in due form of law by the said commissioners, of the other part; the parties covenant, that whereas the said commissioners have deemed it necessary to acquire for public purposes certain pieces of land situate in the Township of *Hull*, &c., which the said *Andrew Leamy* and wife claim to be theirs, the deed witnessed that said *Leamy* and wife sold and assigned unto Her Majesty, her heirs and successors, accepting thereof by and through the aforesaid Commissioners of Public Works, all the following pieces, *inter alia*: Secondly, a strip of land (describing it), save and except, however, out of the said strip two portions of these, represented and colored, one red and the other yellow on the plan No. 2, also annexed to those presents, the said two exempted portions being one of them so much of the said strip as is comprised in that share of the estate of the late *P. Wright Jr.* alloted by a *partage* or division thereof, made between his heirs and *Czarina Wright*, wife of one *James Pierce*, and the other of them, so much of the said strip as is comprised in that part alloted in the said *partage* to *Sally Olmstead*, widow of the late *P. Wright Jr.*; and the said partage or division being represented and shewn by a sketch or plan thereof made for the said heirs by one *Anthony Swalwell*, D. P. S.

By another deed between the same parties of the same date, under the number 1032, the said *Andrew Leamy* and his wife sold, transferred and assigned, with promise of warranty against all gifts, debts, dowers, claims, mortgages and other incumbrances whatsoever, to Her Majesty the Queen, accepting thereof by the Commis-

sioners of Public Works, duly represented and acting by the said *William Foster Coffin* and *Thomas McCord*, those certain other lots or pieces of land, *inter alia*: Secondly, a piece or parcel of land, for the most part covered with water, the water covering the same being portions of the south and south-east parts of lots numbers two and three in the fifth concession of the Township of *Hull*, colored yellow on the plan number one, annexed to the said deed of sale entered into by the said parties, bearing even date with these presents, describing it and forming part of the 159 acres claimed by petitioner. Thirdly, a portion of the west bank of the *Gatineau* River (describing it): "Until intersected by the boundary line between the share allotted to *Wellington Wright* in the *partage* amongst the heirs of the said *Philemon Wright Jr.*, according to the sketch or plan of the said *partage* made by *Anthony Swalwell*, D. P. S, and the share allotted by the said *partage* and according to the said plan to *Sally Olmstead*, widow of the late *Philemon Wright Jr.*, as will appear by the first mentioned plan, No. 2, upon which plan the said portion is represented and colored yellow." The deed contains a provision that the price agreed on shall be paid into the hands of the prothonotary of the Superior Court, district of *Ottawa*.

In the view I take of the case, it is not necessary to stop to enquire whether the proceedings to expropriate this property were strictly in accordance with the statute or not.

The property having been taken possession of by the Crown, and the Crown having obtained these deeds, we find from the records of the Superior Court, district of *Ottawa*, that the following took place:

"In the Superior Court, *exparte*:

"On the application of the Hon. Her Majesty's Attorney General for *Lower Canada*, for and on behalf of Her

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Majesty, The Queen, for a judgment of confirmation and *Ruggles Wright* the elder opposant, and *Pamelia Wright, et al.*, opposants, and *John O'Meara* opposant *en sous ordre* (subordinately)."

The Prothonotary certifies he cannot after diligent search find any of the oppositions in the above case.

Then we have an appearance by attorney :

SUPERIOR COURT.

Exparte.

The Attorney General for *Lower Canada* on application for ratification, and *Andrew Leamy et al.* vendors.

I appear for the vendors mentioned in the deed of sale, ratification of which is sought by the said petitioner in this cause, for the purpose of contesting or otherwise defending the interests of the said vendors against any parties opposants claiming the purchase money filed in this cause.

Alymer, 1st July, 1856.

(Signed,) PETER AYLEN,
Attorney for A. Leamy, et al.

I consent for the Attorney General }
T. MCCORD, *Attorney.* }

The next document is the notice as follows :

IN THE SUPERIOR COURT.

Exparte.

The Honorable the Attorney General for *Lower Canada* on behalf of our Lady, the Queen. Application for confirmation of title; and *Pamelia Wright et al*, opposants.

To T. G. FENWICK, Esq.,
Attorney for Opposants.

SIR,—Take notice that the following are the grounds of the *defense au fonds en droit*, herewith filed to the opposition of the said opposants. Because the alleged fact that the said opposants, at the time of the passing of the title, a judgment of confirmation of which is sought to be obtained in this cause, were the proprietors of any portion of the property conveyed by the said title and the said *Andrew Leamy* and *Erexina Wright* were not, and had no right to convey the said property, does not, in law, justify the conclusions of the said opposition, in so far as by the same it is prayed that the said opposants be declared the proprietors of any property described in the said title, to the exclusion of Her Majesty; and that no confirmation of the said title be granted, unless upon payment to the

said opposants of a portion of the compensation money deposited in Court. Because any claim of proprietorship which the opposants may have had, or pretend to have, to any portion of the property described in the said title, and the consideration money for which has been deposited into Court, was and is converted by law into a claim upon the money so deposited, and cannot affect the right of Her Majesty to obtain the confirmation of title sought for in this cause.

Aylmer, 26th June, 1856.

Received copy.
T. G. FENWICK,
Attorney for Opposants.

For the Attorney General,
T. MCCORD,
Attorney.

Replication of opposants filed 27th June, 1856. Oppositions well founded in law, and allegations true.

Cause inscribed for hearing 30th June, 1856, of which attorney admits notice same day. On 3rd July, opposant, *Ruggles Wright* moves by his attorney to be permitted to withdraw and discontinue his opposition filed by him in this cause upon payment of costs. On 3rd July,

IN THE SUPERIOR COURT.

Exparte.

The Honorable the Attorney General for *Lower Canada* on behalf of our Lady the Queen, applicant for confirmation of title, and Divers, opposants.

Motion on behalf of Her Majesty that sentence or judgment of this Honorable Court be now granted, confirming the title of Her Majesty in this cause deposited with the Prothonotary of this Court.

Aylmer, 3rd July, 1856.

For the Attorney General,
T. MCCORD, Attorney.

to which is appended

We consent.

JOHN DELISLE, Attorney for *Ruggles Wright*, Opposant.
T. G. FENWICK, Attorney for *Pamelia Wright* and others, Opposants.

Then we have the copy of the judgment rendered as follows:

Province of Canada,
District of Ottawa.

1880 No. 136. IN THE SUPERIOR COURT.

CHEVRIER v. THE QUEEN. The third day of July, one thousand eight hundred and fifty-six.

PRESENT: The Honorable Mr. Justice Smith; William K. McCord, Esquire, Circuit Judge.

Ritchie, C.J. Exparte on the application of the Honorable Her Majesty's Attorney General for *Lower Canada* for and in behalf of Her Majesty the Queen, for a sentence or judgment of confirmation;

and

Ruggles Wright, the Elder, of the Township of *Hull*, in the said District of *Ottawa*, Esquire opposant;

and

Pamelia Wright, of the Township of *Hull* aforesaid, wife of *Thomas McGoey* of the same, lumberer, and by him duly authorized in this behalf, and the said *Thomas McGoey* as the husband of the said *Pamelia Wright*. *Serina Wright*, of *Hamilton*, in *Upper Canada*, wife of *James P. Pierce*, of the same place, yeoman, by him duly authorized in this behalf, and the said *James P. Pierce*, as the husband of the said *Serina Wright*, and *Hull Wright*, of the said Township of *Hull*, yeoman opposants;

and

John O'Meara, of *Ottawa* city, formerly called *Bytown*, in *Upper Canada*, merchant,

opposant *en sous ordre*.

The Court taking into consideration that the said Honorable Her Majesty's Attorney General for *Lower Canada*, for and in behalf of Her Majesty the Queen, did under an Act of the Legislature of the Province of *Canada*, passed in the ninth year of Her Majesty's reign and intituled: "An Act to amend the Law constituting the Board of Works," on the twenty-third day of June, one thousand eight hundred and fifty-five, lodge in the office of the Prothonotary of the said Court in the said District of *Ottawa*, deed of sale made and executed before Messrs. *R. A. Young* and colleague, Notaries Public, on the seventh day of May, one thousand eight hundred and seventy-five, between *Andrew Leamy*, of the Township of *Hull*, in the District of *Ottawa*, trader, and *Erexina Wright*, wife of the said *Andrew Leamy*, and by him duly authorized for the due effect thereof, of the one part and *William Foster Coffin*, Esquire, of the city of *Montreal*, and *Thomas McCord*, Esquire, of the Village of *Aylmer*, both acting for the effect thereof, for and on behalf of the Honorable the Commissioners of Public Works for the Province of *Canada*, *se portant forts pour eux*, of the other part, together with the Ratification thereof, made and executed before Messrs. *Petitclerc* and colleague, Notaries Public, on the nineteenth day of May, in the year of Our Lord one thousand eight hundred and fifty-five;

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Being a sale by the said *Andrew Leamy* and his said wife, to Her Majesty Queen *Victoria*, Her heirs and successors of the following pieces and parcels of land and water, that is to say :—(Here follows the description).

And further, that the said Attorney General of Her Majesty has caused to be given and published three several times in the course of four months in the *Canada Gazette*, the public notices in that behalf required by law, of his intention to make application to this Court on the first day of February, one thousand eight hundred and fifty-six, for a sentence or judgment of confirmation of the said title deed.

And further, that the said public notices have been publicly and audibly read at the church door of the Parish Church, in the Village of *Aylmer*, in the said District of *Ottawa*, and in the said Township of *Hull*, wherein the said pieces and parcels of land and water are situated, at the issue of and immediately after Divine service in the forenoon, on the four Sundays next before the said first day of February, one thousand eight hundred and fifty-six, and the said notices were posted at the door of the said church on the first Sunday on which they were read as aforesaid, as appears by the certificate of *William K. Hodges*, one of the sworn bailiffs of this Court.

And the Court further considering the summary petition of the Attorney General of Her Majesty, made and filed in that behalf on the said first day of February, one thousand eight hundred and fifty-six, and that due proof hath been adduced of the observance of all and every the formalities required by law; also that the opposition of the said *Ruggles Wright*, the Elder, by him filed with the Prothonotary of the said Court, to and against the confirmation of the said Title Deed has been discontinued with costs, and that the opposition filed with the Prothonotary of the said Court to and against the confirmation of the said Title Deed, by the said *Pamelia Wright* and others, has also been discontinued with costs, doth adjudge, order and decree that the purchase or acquisition made by Her said Majesty Queen *Victoria*, of the said pieces and parcels of land and water, and of all and singular the rights, members and appurtenances whatsoever thereto belonging or in any wise appertaining under and by virtue of the said Title Deed, be and the same is hereby confirmed; and thereupon that all claims in, to or upon the said pieces and parcels of land and water or some portion thereof be and the same are hereby barred, and that Her said Majesty Queen *Victoria*, Her heirs and successors, be and remain the incommutable proprietors of the said pieces and parcels of land and water, to have and to hold the same unto Her said Majesty Queen *Victoria*, Her heirs and successors for ever,

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discharged of and from all privileges and hypotheques with which the said pieces and parcels of land and water may have been encumbered previous to or at the time of the aforesaid purchase or acquisition made by Her said Majesty Queen *Victoria*.

And the Court doth further order and adjudge that the Prothonotary of the said Court do deliver to the said Attorney General of Her Majesty the said Title Deed of sale filed in his said office.

And the said Court proceeding to make the distribution of the amount of purchase money deposited with the deed of sale, being the sum of one thousand and one hundred and four pounds, sixteen shillings and two pence currency,

£1404 16s. 2d. Less however the sum of seven pounds ten shillings and four pence deducted for poundage to the Prothonotary of the said Court, doth adjudge and order

£7 10s. 4d. by and with the consent in writing of the said vendors and of record in this case, that the sum of one thousand three hundred and ninety seven pounds five shillings and ten pence be paid and distributed

£1397 5s. 10d. as follows:

1st. That the said opposant *John O'Meara* be paid the amount of his debt, interest and costs as claimed in and by his said opposition to wit; for his said debt the sum of four hundred and thirty pounds fourteen shillings and two pence..... £430 14s. 2d.
for the interest accrued thereon up to this day, the sum of twenty eight pounds eight shillings and six pence..... £28 8s. 6d
and for his costs of opposition the sum of five pounds and ten pence..... £5 0s. 10d.

£464 3s 6d.

2nd. That the remaining balance of nine hundred and thirty-three pounds two shillings and four pence be paid to the said vendors *Andrew Leamy* and *Erexina Wright*..... £933 2s. 4d.

£1397 5s. 10d.

which sum being duly paid the Prothonotary shall be discharged.

Ten words erased are null and void.

(Draft,) Certified a true copy.

(Signed,) AIMÉ LAFONTAINE,
Prothonotary Sup. Co.
Dis. and Co. Ottawa.

This was certainly on its face a good and perfect con-

firmation by a Court of competent jurisdiction of the Crown's title, and, I think, put the Crown, from the moment it was adjudged for the Crown, in good faith, with a title on its face good and authentic.

Then, what does the Code declare in reference to prescription. Art. 2,206 of the Civil Code declares:

Subsequent purchasers in good faith, under a translatory title, derived either from a precarious or subordinate possessor, or from any other person, may prescribe by ten years against the proprietor during such subordinate or precarious holding.

Art. 1,449:

The purchaser of an immovable, which is subject to or hypothecated for dower, cannot prescribe against either the wife or children so long as such dower is not open. Prescription runs against children of full age during the lifetime of their mother from the period when the dower opens.

Art. 2,251:

He who acquires a corporeal immovable in good faith, under a translatory title, prescribes the ownership thereof, and liberates himself from the servitudes, charges and hypothecs upon it by an effective possession in virtue of such title during ten years.

Art. 2,253:

It is sufficient that the good faith of subsequent purchasers existed at the time of the purchase, even when their effective possession only commenced later. Knowledge acquired since will not vitiate the title (1).

Art. 2,193:

For the purposes of prescription, the possession of a person must be continuous and uninterrupted, peaceable, public, unequivocal, and as proprietor.

Art. 2,194:

A person is always presumed to possess for himself and as proprietor, if it be not proved that his possession was begun for another.

Art. 2,202:

Good faith is always presumed; he who alleges bad faith, must prove it.

(1) See *Lepage* v. *Chartier*, L. C. Jur. 29.

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Then as to what will amount to interruption:

Art. 2,224, after providing that a judicial demand in proper form served, &c., creates civil interruption, provides that:

> No extra judicial demand, even when made by a notary or bailiff, and accompanied with the titles, or even signed by the parties notified, is an interruption, if there be not an acknowledgment of the right.

Now with reference to prescription, I cannot assent to the proposition contended for by the appellant, that the Crown could not acquire by prescription before the Code, and that before the establishment of the Exchequer Court of *Canada* the Crown could not prescribe against the subject.

Art. 2,211, which declares, as old law, that the Crown may avail itself of prescription, and says the subject may interrupt such prescription by means of a petition of right apart from the cases in which the law gives another remedy, in express terms negatives the proposition thus put forward, and which I am bound to accept as an authoritative exposition of the law.

What, then, is the position of the Crown in reference to this property? It must be admitted the Crown entered lawfully and has held possession continuously and peaceably for 26 or 27 years. Now, assuming that a documentary title has not been shewn, and that the expropriation has not been regular, and that the judgment of confirmation did not do what it professes to do, viz., bar all claims and make the Crown "the incommutable proprietor" of the property, is not the Crown in a position to invoke a 10 years' prescription as claimed on its behalf with respect to that portion of the property conveyed by Mrs. *Sparks* and her husband to the Crown? Wholly apart from the 9 *Vic.*, c. 37, I think the deed from *Sally Olmstead* and *Sparks* to Her Majesty, having been duly passed as a deed of sale in

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authentic form, was a conveyance which, if the grantors had been the owners of the property, would have conveyed the title to Her Majesty, and, therefore, was a translatory title sufficient in law to base a prescription; and without discussing whether bad faith can be attributed to the Crown, it is, to my mind, abundantly clear that as to this deed there is no pretence for saying that there is the slightest evidence of bad faith at the time the deed was executed in September, 1849. There is not a particle of evidence to show that the Crown or any of its officers had any knowledge or intimation that the interest of Mrs. *Sparks* was precarious or subordinate, or that she and her husband were not what they professed to be, and that they sold as the absolute owners of the property; and it cannot be disputed that, from the date of that deed till the present time—a period of upwards of 30 years—the Crown has been and still is in the continuous and uninterrupted, peaceable, public, unequivocal possession as proprietor. Under such circumstances I am at a loss to understand how it can be successfully contended that the exception claiming a 10 years' prescription has not been made out.

As to the deeds from *Leamy*, they stand in a somewhat different position, because it is claimed to be shewn that by divers letters and documents from the Public Works Department, dated respectively 11th April, 1853, 16th April, 1853, 27th April, 1853, 18th May, 1855, and also a direct intimation from two of the parties interested in the property in these words:—

Hull, April 26, 1855.

To the Honorable the Commissioner of Public Works:

SIR,—

We desire to state for your information and for the information of the Government, that the proposed sale of land in the township of *Hull*, by Mr. *A. Leamy* to the Government, is made without the sanction of the individuals who are mainly interested as pro-

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prietors of that land; that we are personally interested in the land, and have an incidental interest towards another portion included in the proposed sale. You will use this information as you deem mete, and should it prove of any benefit to the public service, it will be most gratifying to

Your most obedient, humble servants,

(Signed,) THOMAS MCGOEY.
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that the Department and the officers engaged in buying this property for the Crown had knowledge of the defects in *Leamy's* title, and so subsequently taking a deed from him and his wife as absolute owners placed the Crown in bad faith. It must be borne in mind, that though Mrs. *Sparks* and husband's deed to *Leamy*, on its face dealt with and conveyed her interest in the property as simply a right of dower, *Leamy's* deed to the Crown distinctly stated on its face that he and his wife were the absolute owners, and it must be likewise remembered that he had a quit claim dated 3rd February, 1853, from the heirs of *Philemon Wright* of all their interest in the lot assigned to the widow, and this may possibly account for the deed from the widow to him dealing only with the question of dower. If this quit claim must be treated as I have already pointed out, I think it must be as a genuine document.

When the deeds were made by *Leamy* and wife to the Crown, he was actually in the position of absolute owner by force of the widow's deed and the quit claim of the heirs; and if so, the Crown purchasing from him as owner, and receiving a deed of sale in authentic form to convey the interest, without reference to the Public Works Act, surely the Crown cannot now be said by the person claiming under these very heirs to have purchased in bad faith? But it is said the Crown on the face of one of the deeds took security or *caution*. I think this should have no prejudicial effect; as difficulties had been started, the officers of the Government no doubt felt it their duty to take every precaution, even if it

might be considered excessive caution, to secure the public against any possible difficulty arising. I do not think it is a reasonable presumption that the Crown, or the officers of the Crown, should desire to take a bad title, still less to buy from a person whom they knew to be falsely putting himself forward as owner, and take a deed from him as owner, when they knew, or had reason to believe, the property belonged to others, and this too when they had an Act of Parliament under which the property and an undeniable title could be acquired in defiance of the real owner.

But the good faith of the Crown does not rest on this alone. Application is made to the Superior Court for a confirmation of this title from *Leamy*, and there we find the very parties who signed the so called protest opposing the confirmation, and though the oppositions could not be found, from the *defense au fonds en droit* filed to the oppositions, we can readily discover what had been alleged by them against the confirmation, viz., "That they, the opposants, were the proprietors of the property conveyed, and that *Leamy* and wife were not and had no right to convey the property, and that confirmation of title should not be granted unless upon payment to the said opposants of a portion of the money deposited in Court." Instead of making good the oppositions, what do we next find? One of the opposants moving to be permitted to withdraw and discontinue his opposition; and on the 3rd July, 1856, when motion is made on behalf of Her Majesty that a sentence or judgment of the honorable Court be now granted confirming the title of Her Majesty in the cause deposited with the Prothonotary, all the opposants, including *McGoey* and *Hull Wright*, consenting by their respective attornies to such judgment.

But as the petitioner has attempted to fasten bad faith on the Crown, through the communications which passed

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between the different officers in respect to the property, there would seem to be no impropriety on a question of this kind in looking at all that passed, and reading all the communications, rather than selecting some and rejecting others. If we do this, the letter written on the 24th July, 1856, after the judgment obtained by the attorney of Record to the Commissioners of Public Works, which is as follows :—

AYLMER, 24th July, 1856.

To the Honorable the Commissioners of Public Works, Toronto:

GENTLEMEN,—

I beg to enclose herewith the deed of sale of the 7th May, 1855, from *Andrew Leamy* and his wife to Her Majesty, the ratification thereof by the Honorable *Frs. Lemieux* under date 19th May, 1855, and an enregistered copy of the judgment of confirmation, which I obtained at the last term of the Superior Court, in this district, and which fully completes for the Government exclusive title to the lands purchased under the above deed, at the same time that it frees them from all incumbrances. I have also effected a purchase from Dr. *Church* of that portion of his property, which had been assumed by you for the *Gatineau* works. * * * *

I have the honor to be,

Gentlemen,

Your obedient servant,

(Signed,) T. MCCORD.

would show very conclusively that from that time those representing the Crown believed, and acted on the belief, that by that judgment the exclusive title of the Crown, free from all incumbrances, was fully completed; and from that time the Crown should be held to be in good faith.

But, wholly apart from this, after this judgment, thus passed and unappealed from, has remained in the records of the Court unchallenged in any way by any party for any cause whatever for upwards of 23 years, is it not asking too much of this Court to say, that in favor of a party claiming under deeds of gift from these very people, and actually from the widow of *Leamy* who made the deeds,

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that the Crown has not acted in good faith, and has not been for ten years, in the words of the article of the Civil Code, in good faith "in the continuous and uninterrupted, peaceable and public, unequivocal possession" of the land now claimed as proprietor thereof.

After giving this case much more than ordinary consideration, I have arrived at the conclusion, that under the deed of September, 1849, the Crown purchased by a good translatory title 21 acres, 1 rood and 25 perches of this property, and has since possessed the same as absolute owners, and nothing has since taken place to disturb or interrupt this possession, and that the Crown has a legal title by ten years' prescription.

As to the 65 acres acquired under *Leamy's* deeds, though there may be some doubt as to the right of Mrs. *Sparks* to sell the legal estate, yet as it was shown *Leamy* got deeds from the very heirs through whom the petitioner claims, and as the title was confirmed by a judgment of a Court of competent jurisdiction, at any rate from the date of the judgment of confirmation, if not from the date of the deeds, the Crown has been in good faith, and therefore acquired a legal title by prescription of 10 years.

FOURNIER, J.:—

The property claimed by the suppliant, the present appellant, is part of lots 2 and 3, containing two hundred acres each, in the 5th range of the township of *Hull*, originally granted to *Philemon Wright*, by Letters Patent from the Crown, on the 5th January, 1806.

On 25th April, 1808, the said *Philemon Wright*, by indenture, transferred and ceded the said lots of land, together with some other property, to *Philemon Wright Jr.*, his son.

Philemon Wright Jr. married *Sarah, alias Sally, Olmstead* on the 4th May, 1808, without having previously

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made a contract of marriage, and the above property, by the sole operation of the law, became subject to the customary dower of *Sally Olmstead* and the children issue of her marriage with said *Philemon Wright*. He died about the 4th December, 1821, leaving as his sole heirs and representatives, *Philemon Wright*, now *Philemon Wright*, senior; *Hull Wright*, now deceased; *Pamelia Wright*, now wife of *Thomas McGoey*, of the said Township of *Hull*, yeoman; *Horatio Wright*, now deceased; *Wellington Wright*, also deceased; *Serina Wright*, also deceased; *Erexina Wright*, now widow of the late *Andrew Leamy*; and *Sarah Wright*, now widow of the late *Andrew Boucher*; to wit, eight children, all issue of his marriage with the said *Sarah Olmstead*, his wife, who became seized and possessed of his estate, according to the laws of the said Province of *Quebec*, *equally for one undivided eighth each.*

Wellington Wright, one of the said heirs, died at *Ottawa*, about the year 1856, leaving no issue and without having made a will; leaving his surviving sisters and brothers his heirs-at-law.

Hull Wright, also one of the said heirs, died without having made a will, about the 22nd April, 1857, leaving eleven heirs-at-law, nine of whom were the lawful issue of his marriage with *Suzan Morehead*, to wit: *Philemon Wright*, *Isabella Wright*, *Samuel Wright*, *Pamelia Wright*, *Sarah Wright*, *Suzanna Wright*, *Serina Wright*, *Mary Jane Wright*, *Helen Wright*, and two children issue of his marriage with *Mary Sully*.

Horatio Wright, another of *Philemon Wright's* heirs, died intestate, without issue, and leaving as his heirs-at-law his brothers and sisters.

Erexina Wright also died without issue or will, thus leaving the surviving brothers and sisters the

heirs-at-law of *Philemon Wright*, each for one-fifth jointly with her nieces and nephews for one-fifth as representing *Hull Wright* their father deceased.

In 1862 *Suzan Wright*, daughter of *Hull Wright*, died in *Ottawa* leaving as issue of her marriage with *Melvin Whiting*, *Emma Whiting*, the sole heir of her mother's rights in the succession of *Philemon Wright Jr.*

So the only representatives of the said *Philemon Wright Jr.*, above-mentioned and of his three children, deceased, *Horatio Wright*, *Wellington Wright*, and *Serina Wright*, are :—

1st. *Philemon Wright*, of the said City of *Hull*, carpenter.

2nd. *Pamelia Wright*, of the said Township of *Hull*, wife of *Thomas McGoey*, of the same place, yeoman.

3rd. *Erexina Wright*, of the Township of *Hull* aforesaid, widow of the late *Andrew Leamy*, in his lifetime of the same place, lumberer.

4th. *Sarah, alias Sally, Wright*, of the Township of *Nepean*, in the County of *Carleton*, in the Province of *Ontario*, widow of the late *John Boucher*.

5th. The said children of the said *Hull Wright*, to wit :—1. *Philemon Wright*, of the said City of *Ottawa*, saddler; 2. *Mary Jane Wright*, of the said City of *Ottawa*, wife of *David Allen* of the same place, carpenter; 3. *Serina Wright*, of the said City of *Ottawa*, widow of the late *George Holsted*, in his lifetime of the said Township of *Hull*, trader; 4. *Helen Wright* of the said City of *Ottawa*, widow of *Melvin Whiting*, in his lifetime of the same place, laborer; 5. *Samuel Wright*, now absent from the Dominion of *Canada*; 6. *Pamelia Wright*, now of *Burlington*, in the State of *Iowa*, wife of *John Sharp*; 7. *Isabella Wright*, now absent from the Dominion of *Canada*; 8. *Emma Wright*, of the City of *Chicago*, in the State of *Illinois*,

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wife of *James D. Fanning*, of the same place; 9. *Alfred Wright*, of *Cleveland*, State of *Ohio*; 10. *Sarah, alias Sally, Wright*, represented by her said children, issue of her marriage with the said *Richard Olmstead*, viz:—1st. *Alexander Olmstead*; 2nd. *Edith Olmstead*. 3rd. *Howard Olmstead*; 4th. *Charles Olmstead*; and 11. *Suzanna Wright*, represented by her daughter, issue of her marriage with *Melvin Whiting*, viz:—*Emma Whiting*.

The appellant, in virtue of several deeds of donation mentioned in the petition, which were duly executed and registered, became the sole owner of the rights of the said heirs of *Philemon Wright* in a property, being part of Lots Nos. 2 and 3, in the 5th Range of the Township of *Hull*, containing 159 acres of land and water, the metes and bounds being given as follows in the said deeds of donation, to wit:—

"Commencing at a post planted in the fifth range line on the boundary between lots number one and two, thence in a westerly direction following the said fifth range line a distance of forty chains and six and one half links to a post planted at the intersection of said fifth range line with the centre line dividing lot number three; thence in a northerly direction at nearly right angles to the said fifth range line, following the said centre dividing line of lot number three, a distance of forty chains to a post planted; thence in an easterly direction parallel to the said fifth range line, a distance of thirty-five chains, more or less, to the water edge of the River *Gatineau*; thence following down stream the water edge of the River *Gatineau* a distance of five chains, more or less, to a post planted; thence in a southerly direction, parallel to the aforesaid centre dividing line of lot number three, a distance of thirty-five chains, more or less, to the place of beginning."

This property, by a certain deed of partition and division, (*partage*), to which reference will be made here-

after, between the heirs of *Philemon Wright Jr.*, on the one part, and *Sally Olmstead* his widow, of the other part, was set apart for her use and benefit by virtue of her customary dower.

Sally Olmstead was married subsequently to *Nicholas Sparks* the 20th November, 1826, and died in *Ottawa* on the 9th October, 1871.

It is from this *Sally Olmstead*, who had but the *usufruct* of this property, that the government derive their title to that part of the property, which they alleged to have purchased by certain deeds mentioned in their defence.

The suppliant claims this property, together with a sum of $200,000 for the rents, issues and profits derived therefrom by the government, since their illegal detention thereof.

The crown pleaded to this petition of right: 1st. by demurrer, *defense en droit*, because the petition fails to describe by a clear and intelligible description the limits and position of the lots in question, as in the possession of Her Majesty; and, also, because the petition is insufficient in law in so far as the petitioner has failed to allege any signification to Her Majesty of the deeds of gift or transfer in virtue of which he claims the said property and said rents, issues and profits, which he estimates to amount to $200,000.

2nd. By peremptory exception averring that Her Majesty became and was seized and possessed of said premises by various deeds of sale and alleged *inter alia:*

That by deed of sale duly made and passed before *Larue*, notary public, and witnesses, at *Hull*, aforesaid, on the 12th day of September, 1849, *Sarah Clmstead*, or *Sally Olmstead*, of *Bytown*, in *Upper Canada*, wife of *Nicholas Sparks*, of *Bytown*, aforesaid, and by her said husband duly authorized, together with her said husband, for divers good and valid considerations in deed mentioned, sold, transferred, conveyed and made over to Her Majesty the tract or parcel of land in said deed described as follows, to wit:

A certain tract, piece and parcel of land required for the use of

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the *Gatineau* Works, and described as follows, to wit: A certain tract, piece or parcel of land commencing at the edge of the *Gatineau River*, on the south side, on the boundary line between lots number one and two, in the fifth concession of the said township of *Hull*; thence on the boundary line between lots one and two aforesaid, south, two degrees and fifteen minutes, magnetically, thirty-two chains to the edge of the outlet of the *Gatineau Pond;* thence westerly along the edge of the outlet of the Pond, and northerly along the edge of the Pond, to a point north, fifty-six and three-quarters degrees west, magnetically, nine chains and seventy links from where the said distance on the said boundary line terminated at the edge of the *Gatineau Pond;* thence north, thirteen and three-quarters degrees east magnetically, twenty-eight chains to the edge of the *Gatineau River;* thence along the river edge with the stream to the place of beginning, being south twenty-two degrees magnetically, three chains and fifty-six links, more or less, containing by admeasurement twenty-one acres, one rood, and twenty-five perches.

That by a certain other deed, duly made and passed before *Young* and his colleague, notaries, at *Aylmer*, aforesaid, on the said 7th day of May, 1855, under the number 1032, the said *Andrew Leamy* and the said *Erexina Wright*, his wife, by her husband thereto duly authorized, for divers good and valid considerations in said deed mentioned, sold, transferred and assigned, with promise of warranty against all gifts, debts, dowers, claims, mortgages and other incumbrances whatsoever, to Her Majesty the Queen, accepting thereof by the Commissioners of Public Works, duly represented and acting by the said *William Foster Coffin* and *Thomas McCord*, those certain other lots or pieces of land in said last mentioned deed described as follows, to wit:—

Secondly.—A piece or parcel of land, for the most part covered with water, the water covering the same being portions of the south and south-east parts of lots numbers two and three in the fifth concession of the township of *Hull*, colored yellow on the plan number one, annexed to the said deed of sale entered into by the said parties, bearing even date with these presents, and executed before us, the said notaries above referred to, described as follows:

Commencing at the point C of the said plan, on the side line between numbers one and two in the concession aforesaid, about two rods south of the high water line of the creek represented on the said last mentioned plan; thence south westerly to point B, on the line between the fourth and fifth ranges of the said township of *Hull;* thence westerly along the concession line aforesaid to the point A on the said plan; thence north-westerly and south-

easterly, being also about two rods west of the *Gatineau Pond* to point K on said plan; thence south-westerly to point L at the water edge of *Gatineau Pond*; thence south-westerly along the margin of the pond to point M on said plan; thence south-easterly through the water of the said pond to point J on the eastern margin of the said pond; thence southerly, south-easterly and north-easterly, following the windings of the said pond to point O on the said line between the lots numbers one and two in the fifth range of the township of *Hull* aforesaid; thence following the course of the said line, in a southerly direction to point C, the place of beginning, containing by admeasurement sixty-five acres and ten perches, be the same more or less.

3rd. By peremptory exception, the Crown also relied on a deed of ratification passed before Mr. *Petitclerc* and colleague, notaries public, the 19th May, 1855, of these two lots of land sold to Her Majesty by the deed above mentioned and bearing date the 7th May, 1855. The Crown also averred that this deed of sale, in conformity with the statute, 9 *Vic.*, c. 37, was deposited with the prothonotary of the Superior Court, in the district of *Ottawa*, and that it was duly confirmed by judgment of said Court rendered on the 3rd July, 1866, and that by reason thereof, and in virtue of the provisions contained in the statute, all claims to the lands (including dower not yet open) as well as all hypothecs and incumbrances thereon were barred.

4th. Prescription of 30, 20 and 10 years. There was also the general issue and a supplementary plea claiming value of improvements.

To the exception of prescription the petitioner answered, denying the allegations thereof, and more particularly the good faith of the defendant.

To the 4th and 5th exceptions the petitioner answered, denying that the parties to these sales had any right of property on the land they sold, and denying the legality of the sales and of the judgment of confirmation.

To the 6th exception, the petitioner answered that the

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pretended renunciation by the heirs in favor of *Leamy* is a forgery.

To the 7th the petitioner replied generally.

To the supplementary plea, the petitioner alleged bad faith on the part of defendant. There were also general answers to all the pleas.

The two points raised by the demurrer, to wit: the insufficiency of the description of the property claimed and the want of the signification of the transfer of the issues and profits, after argument on the demurrer, were decided by Mr. Justice *Strong* in favor of the appellant. There has been no appeal from this judgment.

Mr. Justice *J. T. Taschereau*, who rendered the final judgment in the case, from which the present appeal is brought, having stated, that admitting the suppliant ought to succeed on the merits, he would yet be unable to obtain judgment in consequence of the insufficiency of the description of the property claimed, it becomes necessary for me to deal with this part of the case.

It was not by demurrer, but by an exception to the form, *exception à la forme*, that the Attorney General for Her Majesty should have objected to this alleged irregularity or insufficiency of the description of the property in question. The judgment delivered by Mr. Justice *Strong* is in accordance with Art. 116 C. C. P. Even Mr. Justice *Taschereau* admits that this irregularity should have been objected to by an exception to the form (*exception à la forme*), but adds, if he had to give a judgment in favor of the suppliant, he could not state nor indicate where the 159 acres of land and water were situated. Mr. Justice *Strong*, on the contrary, was of opinion that the situation, the boundaries and the extent of the land claimed, were sufficiently described in order to enable the Court to adjudicate upon the petition. By reading the description given

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in the petition, it is easily ascertained what property is claimed. If the appellant had proved that the Government were in possession of the whole 159 acres, a better description by metes and bounds could not be given. The difficulty, if any, arises, that having a right to claim but one part of the property, it must be ascertained. This, at first sight, may seem difficult, but is easily done by establishing the number and the proportion of shares of the heirs represented by the appellant in the property in question.

As will be hereafter demonstrated, by digesting the titles, the proportion the appellant represents is 47 undivided 55ths, in 88 acres, 1 rood and 29 perches of these 159 acres.

For these reasons, I am of opinion that this ground was insufficient, and that the judgment dismissing this part of the defence should be affirmed, and that the final judgment ought to have maintained the same principle.

The second ground of demurrer, which relates to the want of signification of the transfer, not having been decided on the merits by Mr. Justice *Strong*, as he dismissed it because it had been improperly pleaded, had to be decided upon by the final judgment. This has been done by Mr. Justice *Taschereau*, who decided that the appellant should have signified to Her Majesty the transfer of the rents and profits of the property before filing their petition of right. It is now a well settled rule of law that a transferee of a debt cannot claim it from the debtor until the deed of transfer has been delivered to him. The appellant in this case not having caused this signification to be made, cannot now claim, as representing the heirs of *Philemon Wright Jr.*, the rents and profits due and accrued before he became the owner.

This long debated question has been definitely settled

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since the publication of the Code, and the decisions of the Courts are now in accordance with the law, although it is well known they were not in the province of *Quebec* when the Custom of *Paris* was in force.

For these reasons, the petition, in so far as it prays for the rents and profits due and accrued before the date of the execution of the deeds of grant to the appellant, must be dismissed. It should be dismssed also because the rents and profits transferred by the heirs *Wright* did not belong to them, but were, on the contrary, as we shall see hereafter, the property, in her capacity of dowager, of their mother, who died on the 9th October, 1871.

The principal question, and, no doubt, the one upon which depends the determination of this appeal, is that which has reference to the validity of the deed by which Her Majesty purchased this property notwithstanding the rights and pretensions of the appellant. I refer to the deed of sale (exhibit of the respondent), dated 17th May, 1855, to the Crown, represented by *William F. Coffin* and *Thomas McCord*, Esquires, as attorneys for the Commissioners of Public Works, from *Andrew Leamy* and *Erexina Wright*, his wife.

Before examining this point it is necessary, I believe, to ascertain if, in the absence of any adverse title, the titles relied upon by the appellant are sufficient in law to enable him to recover the property claimed.

This property, as I have before stated, was originally sold by letters patent dated 3rd January, 1806, to *Philemon Wright*. He was, no doubt, the only true and lawful owner of it when on the 25th April, 1808, by deed in due and valid form, he transferred it together with other lots to *Philemon Wright Jr.*, his son. The latter being possessed of this property at the time of his marriage, as before stated, having died intestate, the property fell to his heirs-at-law, who became

proprietors immediately after his death, subject to the customary dower of their mother. The pleadings tried to raise some doubts on this part of the case, and the crown relied on the absence and irregularities of some of the registers according to law in the place where the marriages, births and deaths of the family of *Philemon Wright Jr.* and of his issue took place. Mr. Justice *Taschereau*, in his judgment, uses the following language :—

> Now, there are a great number of *Philemon Wright's* children, grandchildren and representatives, have they established their filiation or successive rights ? It is very doubtful, and, in the interest of the children, it is better not to discuss it.

This objection has not before this Court the importance which was given to it before the Court below. The appellant, knowing of the impossibility of getting those necessary certificates, and of the irregularities in the keeping of the registers, specially alleges the fact in his petition, and claimed the benefit of producing secondary evidence to prove the legal filiation of his *auteurs*. This proof has been given, and it is so complete that the Crown before this Court on the argument did not rely on any such irregularity. For this reason I will not review the parol and written evidence adduced on this part of the case. I cannot say more than to my mind, it completely establishes the filiation of the heirs of *Philemon Wright Jr.* These heirs, therefore, had a good and valid title to the property in question, and could validly dispose of it, as they did, to the appellant, unless it can be shewn that at the time they executed the divers deeds of donation in favor of the appellant, mentioned in the petition, they had previously alienated their rights in the said property. The defence has tried to supply this proof, and, in support, have fyled a large number of deeds, the greater part of which have no reference whatever to

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the property in question. In order to dispel the confusion that exists, it will be necessary to examine the details of certain transactions which took place between the heirs in relation to this property, and also between some of these heirs and strangers to the family.

The most important transaction is that which took place by an agreement in writing, dated 5th March, 1838.

By this agreement, the heirs of *Philemon Wright Jr.*, after having ascertained by survey made by *Anthony Swalwell*, Deputy Surveyor, that the quantity of land in lots No. 2, 3 and 4, in the 5th concession of the township of *Hull*, was 591 acres, 1 rood and 120 perches, including a certain pond of water, the said portions of said land having been sub-divided, allotted the following portions to each, that is to say:

To *Philemon Wright*,	43	acres,	2	roods.	
" *Hull Wright*,	43	"	2	"	
" *Pamelia Wright*,	49	"			
" *Horatio Wright*,	53	"	1	"	24 p.
" *Wellington Wright*,	48	"			
" *Serina Wright*,	60	"			
" *Erexina Wright*,	65	"			
" *Sally Wright*,	70	"			

This division is followed by the following declaration: "and to *Sally Olmstead*, our mother, one hundred and fifty-nine acres."

This portion was reserved to her in lieu of her dower, as it is amply established by the deed of sale she executed in favor of *A. Leamy* in 1852, and which will be spoken of hereafter. The heirs then and there signed, in favor of each other, certain quit claims or transfers to validate the division and allotment of the land in question. It cannot be said that this agreement or partition gave any right of proprietorship to *Sally Olmstead*, who did not even sign one single one of these quit claims or

transfers. The effect was to limit her dower to the *usufruct* of these 159 acres, but it gave her no right of proprietorship over the same, which remained the undivided property of the heirs. It is, however, contended that this division, in so far as it affects her, gave her proprietary rights over this portion. Such an interpretation is in direct opposition to the terms made use of in the agreement and cannot be entertained. Moreover, this partition, being signed and executed by the tutors, was an absolute nullity in law.

Now, having shown the heirs to be proprietors of the portions of land allotted to them, I find that several of them sold, not their share in the 159 acres, but their allotted portions. The first was *Wellington Wright*, who on the 11th January, 1837, sold to *Nicholas Sparks* (one of the vendors to Her Majesty,) all his rights, title and interest in the 48 acres which were allotted to him in the said lots 2, 3 and 4. This sale was confirmed by his co-heirs on the 5th March, 1838. On the same day, 11th January, 1837, *Horatio Wright*, another of the heirs, sold to the same *Nicholas Sparks* the 53 acres, 1 rood and 24 perches, which were allotted to him by the above partition.

The 30th April, 1839, *Sally Wright* and *William Colter*, her husband, gave a lease to *Andrew Leamy* of the 70 acres allotted by the said division to *Sally Wright*, and on the 1st of May, 1859, executed a release with all rights of property to the same *Andrew Leamy*.

The defence also alleges another deed of sale, dated 23rd May, 1859, before *Young*, N. P., from *P. Church* to Her Majesty, of a strip of land forming part of the 60 acres allotted to *Serina Wright* by the deed of partition and quit claim to her.

By referring to all these deeds of sale and quit claims by the said heirs, to wit: *Wellington Wright*, *Horatio Wright*, *Sally Wright*, wife of *W. Colter*, and *Serina*

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Wright, it is clearly established that they only sold the portion of land which had been allotted to each of them by the deed of partition and quit claim of the 5th March, 1838. There is no mention of their rights in the 159 acres, the *usufruct* of which was enjoyed by their mother, *Sally Olmstead*, for her dower, and there is not a single expression to be found in these deeds which might be interpreted as evidencing the intention of alienating their rights in the dower.

The only document which refers to the dower for the time is Exhibit 14, produced by the Crown, and registered on the 17th April, 1876.

With reference to this document, I will here remark that the statement contained in the respondent's factum, which reads as follows: "And the *seven* heirs had, by Exhibit 14, transferred their rights to *Andrew Leamy* in respect to the 159 acres in question," is entirely inaccurate. There are only four instead of *seven* of the heirs, which are named in that document, to wit: *H. G. Wright*, *Elizabeth Wright* (Mrs. *Leamy*), *Sarah Wright*, and *Philemon Wright*.

By this document, dated the 3rd February, 1853, these four heirs would appear to have transferred, for good and valuable consideration, previously received, all their rights in the above property subjected to the dower as follows: "All right, title, interest, claim of whatever nature, either as heirs or otherwise, which we or any of us now have, or may hereafter have, to or, upon the following lot of land and premises, to wit: that piece or parcel of land and pond of water heretofore belonging to *Philemon Wright Jr.*, in his lifetime, of *Hull* aforesaid, and which, at a division or partition of his property between his heirs and his widow, *Sarah Olmstead*, was set apart *to and for the use of* the said *Sarah Olmstead*, as will appear by reference to a diagram drawn by *Anthony Swalwell*, surveyor, annexed

to a transfer made by the said *Sarah Olmstead* to the said *Andrew Leamy*."

At the foot of this document, we find subscribed the names of *H. G. Wright*, *Elizabeth Wright*, *Sarah Wright* and *P. Wright*, which, the defence alleges, are the true signatures of the parties, and witnessed by *James Goodwin* and *John Doyle*.

The appellant contends that the document is a forged one.

One of the witnesses to the document, *James Goodwin*, admits his signature, but says: "I have not the slightest recollection of the names being set to said document, nor the place where it was signed. Without my own signature being there, I should not have recollected anything about it." To the following question: "Have you any recollection of being asked to be a witness to said document by any one, or is it by your signature being there that you supposed you were called a witness?" He answers: "All I can swear to is, that is my signature, but I have no recollection *seeing the party sign the said* document."

Further on he says: "I have no recollection of the signing in my presence, I could not swear whether I was present or not when they signed."

It is proved that the other witness, *John Doyle*, is dead. Being examined as to the genuineness of his signature, *Goodwin* says that, to the best of his judgment, it is his signature. *M. Farley*, who was examined on this point, says: "From the long lapse of time that has taken place, I would not undertake to swear that the signature, *John Doyle*, is his signature, that is to say, to swear positively to it, but my impression is that it is his signature."

The defence also endeavored to prove by witnesses that there was a resemblance between the signatures of *P. Wright*, *Horatio G. Wright* and *Sarah Wright*, com-

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pared with their present writings. Altho' such proof is generally of little value, in this case the evidence in support of their contention is very weak.

The witness *Clark*, who produced some receipts in order to compare the signatures, says that he believes the signatures at the foot of this document, U. U. No. 14, *H. Wright*, *P. Wright* and *Sarah Wright* were written by the parties who signed the receipts he produced; but at the same time declares that once only he saw *P. Wright* sign in his presence, but never saw him write. He points out a difference between the signature of *H. G. Wright* on the exhibit U. U. and the receipts signed by him.

This evidence, in absence of any proof in rebuttal, would certainly not be sufficient to declare these signatures genuine. Yet, in this case, there are the declarations of two of the parties, who swear that they never signed such a document. Both are interested in the suit, and their evidence, therefore, would not be of much weight were it not corroborated by certain statements of facts which could have been rebutted. The first declares that at the time this document is purported to have been executed and signed, to wit: 3rd February, 1853, he was passing the winter of 1853 at the *Upper Gatineau*, where he was making lumber in the shanties. He produced his memorandum book containing the following entry: "February 3, 1853, *J. McCondy*, 32." This fact, which was not contradicted, proves positively that the document does not contain his genuine signature. As to *Sarah Wright*, it is proved that for seven years she had not been on speaking terms with *Mr.* and *Mrs. Leamy*, and that the first time she spoke to them it was on the occasion of her second marriage. This fact tends to corroborate her denial of her signature. The other alleged parties to this document were not examined, but we find *H. E. Wright* one year later

informing, by an official letter, the Government that he is one of the proprietors of the property *Leamy* intended to sell. He was dead several years when the evidence on this petition was taken. If he had signed the document U. U. in favor of *Leamy*, it is not probable that he would have sent this protest. *Elizabeth* or *Erexina Wright* is Mrs. *Leamy*. Admitting even that this is her true signature, there can be no doubt that, as regards her, it is an absolute nullity. She was at the time under the control of her husband, *sous puissance de mari*, and no contract or deed affecting her immovable property could be executed by her in favor of her husband. The law forbids it. She could, however, authorized by her husband, have sold *these* rights to a third party, but this she has not done, as can be ascertained by referring to the deeds in which she appears with her husband.

There is, however, another ground which is sufficient to render the document in question of no value, supposing it to be genuine, and this covers all the alleged signatures. It is that a document or deed such as that one, purporting to convey real estate, not having been registered, cannot affect the petitioner who has purchased these rights, and has had his divers deeds of donation, &c., registered previously, as I have shown above.

Then, also, in order that the Crown may set up successfully these quit claims, they must come within the 4th section of ch. 35, Cons. Stats., *L. C.*, "an Act respecting land held in Free and Common Socage, and the transmission and conveyance thereof." Now, according to the laws of *England*, these quit claims are invalid, because no consideration is mentioned.

To summarize, this document is of no value: 1st. because the signatures have not been legally proven; 2nd. inasmuch as it affect Mrs. *Leamy's* share, it is an absolute nullity; 3rd. if it was really signed by the

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parties, the purchaser (*Leamy*) has lost all the rights he acquired in virtue of that document, because he did not have it registered. In the deed dated 7th May, 1855, as well as in the other deeds, it is evident Mrs. *Leamy* did not sell any property of her own, but simply joined her husband in the sale of certain rights he had purchased from Mrs. *Sparks*, in order to give the purchaser a release of her dower or other matrimonial rights she might have upon the property sold thereby.

The different deeds themselves, which I have separately reviewed, prove conclusively that the heirs of *Philemon Wright Jr.* have never alienated any share of their proprietary rights in the said 159 acres *set apart* for the dower of *Sarah Olmstead*, their mother, and a good reason for their not doing so before, no doubt, was because their mother, who had the *usufruct* of the property, only died on the 9th October, 1871.

Although it has been established that the heirs of *Philemon Wright* have not alienated their rights in this property, (with the exception, perhaps, of *Erexina Wright*, Mrs. *Leamy*, as to two acres,) Her Majesty has, nevertheless, obtained conveyances of a certain portion of this property.

The examination of the title deeds of the *auteurs* of the Crown, which will be made hereafter, in respect to the plea of prescription relied on by the Crown, will show that these conveyances were made by persons who were not proprietors. But first, it is necessary to refer to the all important question raised on this appeal, viz: whether the conveyances of the property in question were made in conformity with the provisions of 9 *Vic.*, c. 37, and whether the confirmation of this second title, which was granted of one of the conveyances on the 3rd July, 1856, by the Superior Court sitting at *Aylmer*, has the effect of divesting the lawful proprietor of his rights in the property.

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This statute, passed in amendment of 4 and 5 *Vic.*, c. 38, establishing the Board of Works, makes special provisions in reference to the powers of the commissioners in entering into agreements for the purchase of property for the public works of the province. The principal sections of the Act, which it is necessary to refer to in the present case, are the following:

By sec. 5 it is enacted:

That the said commissioners shall have power, by writing under their hands and seals, on behalf of the province, to make and enter into all necessary contracts, agreements, stipulations, bargains and arrangements with all and every person or persons whomsoever, upon, for, or respecting any act, matter or thing whatsoever, relative to the public works of this province * * *.

Sec. 8 says:

That it shall be lawful for the said commissioners to authorize their engineers * * * to enter into and upon any and all grounds to whomsoever belonging, and to survey and take levels * * * as they may deem necessary for any, or all, of the purposes and objects under the management and control of the said commissioners, as aforesaid; and the said commissioners, in and for the said purposes, shall, at all times, have power to acquire and take possession of all such lands or real estate, and to take possession of all such streams, waters and water courses, the appropriation of which, for the use, construction and maintenance of such public works as aforesaid, shall, in their judgment be necessary; and that the said commissioners may, for that purpose, contract and agree with all persons, seigniors, bodies corporate, guardians, tutors, curators and trustees whatsoever, not only for and on behalf of themselves, their heirs, successors and assigns, but also for and on behalf of those whom they represent, whether infants (minor children), absentees, lunatics, idiots, femes-covert, or other persons otherwise incapable of contracting, who are, or shall be possessed of or interested in such lands, real property, &c.

After providing for the mode of compensation for such lands, &c., and tenders, in case of parties refusing to agree on compensation, the section goes on to say:

If the owner or owners of such land * * * do not reside in the vicinity of such property so required, then notice shall be given in

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the *Official Gazette* and in two distinct newspapers, published in, or adjoining, the district in which such property is situate, of the intention of the commissioners to cause possession to be taken of such lands * * * and after thirty days from the publication of the last notice, possession may be taken accordingly; and all land * * * contracted for, purchased, or otherwise acquired by the said commissioners in manner aforesaid, shall be vested in, and become, and be, the property of Her Majesty * * * and the respective conveyances thereof, not being notarial deeds, shall be brought to and recorded and enrolled in the office of the Registrar of this province, but being so enrolled, or being notarial deeds, need not otherwise be made by matter of record, and such conveyances may be accepted by the said commissioners on behalf of the Crown.

Sec. 9 enacts:

That in *Lower Canada* the compensation awarded as aforesaid, or agreed upon by the said commissioners, and any party who might, under this Act, *validly convey the lands, or lawfully in possession thereof as proprietor*, for any lands which might be lawfully taken under this Act without the consent of such proprietor, shall stand in the stead of such land; and any claim to, or hypothec, or encumbrance upon the said land, or any portion thereof, shall be converted into a claim to or upon the said compensation.

After providing for payment of such compensation, and deposit of an authentic copy of the conveyance or award in the hands of the prothonotary of the then Queen's Bench (now Superior Court), in case the Commissioners shall have reason to think that hypothecs or claims exist, in order to purge the same, the clause further enacts:

And proceedings shall be thereupon had upon application on behalf of the Crown for the confirmation of such title in like manner as in other cases of confirmation of title, except, that in addition to the usual contents of the notice, the prothonotary shall state that such title (that is the conveyance or award), is under this Act, and shall call upon such persons entitled to, or to any part of the land, or representing or being the husband of any parties so entitled, to file their oppositions for their claims to the compensation, or any part thereof, and all such oppositions shall be received and adjudged upon by the Court, and the judgment of confirmation shall forever bar all claims to the lands or any part thereof (including dower not yet open), as well as all hypothecs or encumbrances upon the same;

and the Court shall make such order for the distribution, payment or investment of the compensation, and for the securing of the rights of all parties interested as to right and justice, according to the provisions of this Act and to law shall appertain.

Sec. 17 enacts:

That the chief commissioner, for the time being, shall be the legal organ of the commissioners, and all writings or documents signed by him and countersigned by the secretary, and sealed with the seal of the chief commissioner, *and no others*, shall be held to be acts of the said commissioners.

Though there have been several amendments to this statute, these provisions have not been changed,—they are even now to be found in the statute of the Dominion, 31 *Vic.*, ch. 12, respecting the Public Works.

Such were the formalities and provisions by which the commissioners were bound, in order to make a *valid* contract for the purchase of the property in question. Have these provisions been complied with, in order that Her Majesty may avail herself of the extraordinary and exceptional advantages which are attached to the confirmation of a title obtained under this act?

The first instrument invoked by Her Majesty, and set up in the 4th plea or exception, is one passed in authentic form before *Larue*, notary, and witnesses, at *Hull*, on the 12th September, 1849. By this deed *Sarah Olmstead*, authorized by her husband, *Nicholas Sparks*, sells to Her Majesty, represented, as therein stated, by Hon. *Etienne Taché*, Commissioner of Public Works, the property which is therein described, and which forms part of the land claimed by the appellant, and of which *Sarah Olmstead* had only the *usufruct*, as we have before ascertained.

The Commissioner of Public Works mentioned as representing Her Majesty, Hon. *E. Taché*, was not a party to this instrument; he did not sign or seal it. It does not state that the contract is entered into in re-

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ference to Public Works, pursuant to the Statute 9 *Vic.*, ch. 37. The consideration is declared to have been paid by *Horace Merrill*, Superintendent of the Slides, "representing Her Majesty on the part of the Commissioner of Public Works," but it is not stated in virtue of what authorization he thus acted, nor did he sign the deed. Moreover, it does not appear by the record that this conveyance has ever been accepted by the commissioner, as provided in the 8th section, "and such conveyance may be accepted by the commissioner on behalf of the Crown." No deed of ratification or confirmation of this title deed was ever obtained by the Crown. Under these circumstances it is apparent that the acquisition of this property was not made in accordance with the provisions of the 9th *Vic.*, ch. 37. 1st. Because it was not purchased from a person who had power, under the statute, to convey; 2nd. Because the commissioner had no authority to delegate his powers under the act for the purpose of acquiring property, the statute only authorizing him to contract; 3rd. Because he was authorized to enter into contracts on behalf of the province only by writing under his hand and seal; 4th. Because he did not subsequently *accept* the conveyance under his hand and seal, the 17th section enacting that no writing or document shall be held to be the act of the commissioner unless signed and sealed by him, and countersigned by the secretary. Now, this instrument not being executed in conformity with the provisions required by law, is necessarily void and of no value. The commissioner could not purchase property otherwise than as provided by the statute which created the Board of Works and defined the powers of the commissioners. A similar interpretation has been given to the same clause by Sir *William Richards*, in the case of *Wood* vs. *The Queen*.

It will also be seen, that many of these defects above

stated are to be found in the second title deed relied on by Her Majesty, as to the acquisition of another portion of this property, to wit: in the conveyance by *Andrew Leamy* and *Erexina Wright*, his wife, dated the 7th May, 1855, and bearing the notary's number 1032. The Commissioners of Public Works do not appear as present at the time of the execution of this conveyance. In their stead Messrs. *Coffin* and *McCord*, not specifying their authorization, enter into an agreement obliging themselves *se portant forts pour eux* to have the deed of sale ratified within fifteen days thereof. On the 15th May, 1855, this conveyance was ratified by notarial deed passed at *Quebec*, before Mtre. *Petitclerc* and colleague, notaries, by Hon. *Francois Lemieux*, then Commissioner of Public Works, *Thomas Begley*, Secretary, but it was not *sealed with his seal*, as required by the 17th section of the Act.

By examining the abstract of titles of *Leamy* and his wife, the vendors, it is shown that they had acquired from *Sarah Olmstead* (who had only the dower, *douairiére*,) their rights in the property sold, and that they had, as she had, only a precarious title, and that the statute did not authorize them to sell such property to the Commisioners of Public Works.

Let us see who really were the parties authorized by the statute to sell to the commissioners? They are enumerated in section 8:

> Seigniors, bodies corporate, guardians, tutors, curators, and trustees whatsoever, not only for and on behalf of themselves, their heirs, successors and assigns, but also for and on behalf of those whom they represent, whether infants (minor children), absentees, lunatics, idiots, femes couvert, or other persons otherwise incapable of contracting, who are or shall be possessed of or interested in such lands, real property, streams, waters and water courses, as aforesaid.

We find here a large number of persons whose quality of legal representatives of the proprietors would not have been sufficient in law to enter into a contract

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of sale, had not the law, in the public interest, authorized them to do so.

The question then arises, are there other persons, besides those just enumerated, who can legally convey a property pursuant to the statute? The proprietor and the proprietor only, and the law says so in the most positive and unequivocal terms. In the following section it is there stated: "any party who might, under this Act, *validly* convey the lands or is *lawfully in possession thereof as proprietor*." The first part of this sentence refers evidently to those who are named in section 8, and the latter part to the proprietors designated by the following words: "those who are *lawfully* in possession as *proprietors*." Only these two classes of persons are authorized *to give a title* to the commissioners. Thus, a person who has only, say the usufruct, the right of dower, who is a tenant, or a squatter, could not give a valid conveyance, and all contracts entered into with them by the commissioners, affecting the property, would be absolutely null and void, and consequently do not come within the class of *such* titles as can be *validly* confirmed under the 9th section.

It must be borne in mind that this statute has introduced exceptional legislation, and must therefore, as all laws relating to the expropriation of the property of the subject, be rigorously and strictly construed. We cannot extend its provisions, even if it were in the public interest.

In this instance, if it is reasonable to suppose that the commissioners were authorized to purchase from the lawful proprietor, or from those who, (altho' they could not otherwise legally convey,) were authorized in their legal representative quality of proprietor to sell, surely it is impossible to go so far as to contend that this statute has authorized the purchase of *A's*

property from a third party, which would be the case if the Crown had the right to acquire the property from the *usufruitiere*.

The commissioners, in order to avail themselves of the benefit of that statute, must have purchased from some person who was *lawfully* in possession as *proprietor*, or who had the representative character of the proprietor such as *curator*, *tutor*, &c. *Leamy* had not any such representative character, and he was not the proprietor.

Nor can the acquisition made from *Leamy* be justified or validated on the ground that the real owners, proprietors, could not be found, for the statute has made provision for such a case in the 8th section. It provides that it shall be the duty of the commissioners to give notice in the official *Gazette*, and in two distinct newspapers, of their intention to cause possession to be taken of the necessary land, and after thirty days from the publication of the last notice, the law authorizes them to take possession.

The commissioners did not think proper to adopt this mode of acquiring this property, but they purchased from *Leamy*, whom they knew was not the proprietor, as is clearly established by the writings (which will be hereafter mentioned) of Messrs. *Begley*, Secretary of the Board of Works; *Coffin*, *Merrill*, *&c*, writings which informed them that the heirs of *Philemon Wright Jr.*, whose names were given, were the lawful proprietors of the land they required. Was it not their duty to purchase from these heirs; and if they did not wish to make a contract with them because *Sally Olmstead*, in virtue of her dower, or *A. Leamy*, as her assignee or representative, was still in possession of the property, could they not at least have proceeded against them, as they might and were bound to do against an unknown or absent proprietor, in conformity with the provision

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contained in section 8, to which I have just referred? But, no, instead of doing so, they thought it proper to enter into a contract with a person whom the statute did not authorize to sell.

In my opinion, therefore, the two conveyances above cited, in so far as they are said to convey more than usufructuary rights, must be considered void, as being executed contrary to the provisions of the statute and conferring no right on Her Majesty.

These two conveyances are also void in consequence of of the non-compliance with an essential formality imposed by the statute, the affixing of the seal of the commissioner. This objection, at first sight, may seem but a technical objection, which should not entail such a grave consequences as the avoidance of a conveyance which would otherwise be valid. The statute provides, it is true, for the acquisition of property by deeds in authentic form, but it does not relieve the commissioner from the obligation of affixing his seal to such deeds; on the contrary, it declares that no other writing or document, than those bearing such seal, shall be held to be the act of the said Commissioner. The provision being "*no other*," it cannot be denied that non-compliance with such a formality, when it is enacted by statute, will invalidate any document. The authorities cited hereafter establish this point beyond doubt, though the text of the law ought to be sufficient. The Commissioners of Public Works were, by virtue of the 9 *Vic.*, c. 37, constituted a corporation, which could only make a contract or enter into an agreement in the manner prescribed by the Act, to wit: by a writing under section 8, and by affixing the seal of the chief commissioner, as provided in sec. 17, the latter section enacting, as I have before stated, that all writings and documents shall be signed and sealed by the chief commissioner and countersigned by the secretary, and *no others* (*writings* or documents)

shall be held to be the acts of the commissioners. This formality of affixing the seal of the chief commissioner not having been complied with in either of these two conveyances, they cannot, for this reason also, be held to be the acts of the commissioners, and therefore cannot have any validity or effect under that statute.

In *Marshall Wood vs. The Queen*, a case to which I have before referred, decided by the late Chief Justice *Richards* in the Exchequer Court, the Crown, by demurrer to a petition of right claiming value of work done for and accepted by the Department of Public Works, averred: that by the express terms of the 7 sec. 31 *Vic.*, c. 12, (*D.*) any such contract or agreement must have been signed and sealed by the Minister of Public Works, and charged that no such contract was in fact signed and sealed; and it was held that the words in the 7 sect. of the Public Works Act, (which is a re-enactment of sec. 17 of 9 *Vic.*, c. 37, relating to Public Works,) "no contract shall be *binding* on the Department unless signed and sealed by the Minister or his Deputy," must be considered imperative.

We now come to the fifth plea or exception, in which the Crown invokes the judgment of confirmation, dated 3rd July, 1856, pronounced by the Superior Court at *Aylmer*, confirming the deed of sale by *Leamy* and his wife above cited, 7th May, 1855, No. 1032. The statute provides the mode to obtain the ratification of deeds of acquisition made by the commissioners pursuant to the statute, and says proceedings shall be had for confirmation "of *such* title in like manner as in other cases of confirmation of title." The prothonotary is bound in the notice to be given to the interested parties to state that the demand for confirmation is made in virtue of the statute 9 *Vic.*, c. 37. It also enacts that "the judgment of confirmation shall for ever *bar* all claims to the lands or any part thereof (including dower not yet open,)

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as well as all hypothecs and incumbrances upon the same."

This disposition of the law is exceptional, and is a derogation to the laws in force, which would only have purged the hypothecs and incumbrances on the real estate, but would not have barred any rights of the lawful proprietor, who would still, notwithstanding the ratification, have been at liberty to claim them. But it can be easily understood that the Government, being desirous of purchasing real estate for the public interest, and in order to build public works, would wish to become the absolute owner, so that they might not be exposed to be ejected. This is what appears to me to have been done by the statute, but at the same time the proprietary rights of the subject have been respected. It was no doubt for the purpose of vesting in the commissioners an absolute title that the statute provided that they should contract with the person *lawfully in possession as proprietor*, imposing on them the duty of finding the true owner. If they do not purchase from him, it must be from the tutor, curator or other person having the legal quality of representing him, or they must adopt the special mode of proceeding provided for when the proprietor is not known or a non-resident.

The declaration that the judgment *shall bar all claims to the lands* cannot affect the proprietor; it does not say he shall forfeit his rights, if he does not pray to have them recognized by opposition, as the law supposes that these rights have been acquired, and that the proprietor sold all his interest before a judgment for confirmation can be asked for on behalf of the Crown. Therefore, if it is not the proprietor who has made the conveyance as provided for in the statute, then the confirmation cannot bar his rights without contravening the provision which imposes on the commissioners the duty of purchasing from him. The statute itself protects

him from such an effect of a judgment of confirmation. In such a case the confirmation does not affect his proprietary rights any more than if the property had not been purchased by the Crown. The forfeiture of all rights of property here mentioned has only reference to the proprietary rights of those persons who did not convey themselves, but who sold by their representatives authorized by the statute, viz.: tutors, curators, &c., or to an unknown proprietor, when the statutory provisions in his favor have been complied with.

Since the statute imposed on the commissioners the duty of taking a deed from the *person lawfully in possession as proprietor*, the law cannot have intended to confirm a title deed taken from the proprietor's neighbour. It would be a spoliation which was never intended, and which was not enacted. The confirmation of a title deed under the civil law does not bar the claims of the proprietor (1).

Then is the title of the Crown, not having been taken in conformity with the statute, *a valid* title, in virtue of the right of the Crown to purchase independently of the statute? In my opinion, it would have been necessary for the person acting for the Crown to show he has been specially authorized, but then the title of the Crown would not be a title taken under the authority of ch. 37, 9 *Vic.*, and therefore could not *bar* the claims of proprietors, nor would the ratification of *such* a title *bar* the proprietors' claims (2). It is unnecessary to say more on this point, as the Crown has entirely relied on the statutory title.

The title deed being null and void,—first, because it was not obtained from the person *lawfully in possession as proprietor;* secondly, because it is not in the form required by the statute, viz.: not having

(1) C. C. Art. 2081, sub. 7. (2) See C.C. Art 2081.

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affixed to it the seal of the commissioner; thirdly, because it was in fact a purchase *with notice* of the *proprietary* rights of third parties—; the confirmation of *such* a title (not being *such* a title as provided by the Act), cannot affect, in any way, the rights of the heirs of *Philemon Wright Jr.*

When a law is passed which is derogatory to the law in force, and has the effect of depriving a subject of his property, a strict compliance with all the provisions of the statute is an absolute necessity. It is a well known rule of law which it is not necessary to support by authority, and which this Court has applied in the case of *Nicholls* v. *Cummings* (1). If there be any need of authority I cannot find any more applicable to this case, or words more appropriate than those made use of in that case by the Hon. Mr. Justice *Ritchie*, now Chief Justice of this Court. These words, I should also add, have been cited approvingly by Mr. Justice *Gwynne* in another case before this Court of *McKay* v. *Chrysler* (2.) They are as follows:—

"When a statute derogates from a common law right and *divests a party of his property*, or imposes a burthen on him, every provision of the statute beneficial to the party must be observed. Therefore, it has been often held that acts which impose a charge or a duty upon the subject must be construed strictly, *and* I think it is *equally clear that no provisions for the benefit or protection of the subject can be ignored or rejected.*" And again, at p. 427, Mr. Justice *Strong* says: "it needs no reference to specific authorities to authorize the proposition, that in all cases of interference with private rights of property in order to sub-serve public interests, the authority conferred by the Sovereign (here the Legislature) must be pursued with

(1) 1 Can. S. C. R. 422. (2) 3 Can. S.C. R. 436.

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the utmost exactitude as regards the compliance with all pre-requisites *introduced for the benefit of parties whose rights are to be affected.*"

I will now take up the pleas of prescription invoked by the Crown. The first is that of thirty years. The first point to be discussed is whether the Crown can plead prescription. It is not important to know what opinion prevailed on this point before the publication of the Civil Code, but I will here state, contrary to the opinion expressed by the learned counsel for the Crown, that there can be found no judicial decision in the Province of *Quebec* recognizing the right in the Crown to plead prescription. The case of *Laporte* v. *Principal Officers of Artillery* (1), does not support this allegation. However, the Code has since settled the difficulty by enacting under art. 2211: "The Crown may avail itself of prescription."

By giving to the Crown the right of availing itself of the plea of prescription, it necessarily follows that the Crown, as between subject and subject, can be allowed to do so only on the ordinary conditions imposed by law on a subject who wants to avail himself of the advantages of prescription. There is no exemption of any of the conditions in favor of the Crown, and these are, for the purposes of the prescription of 30 years, a continuous, and uninterrupted, peaceable, public, unequivocal possession, and as proprietor. All these elements are essential.

In the present case this prescription would only be available with respect to the property acquired on the 12th September, 1849, from *Sarah Olmstead* and *Nicholas Sparks*, her husband, if the Crown were allowed to join to its possession that of its vendors. From the date of this deed till the date of *fiat* on the present petition of right, the Crown has only possessed this property 27

(1) 7 L. C. R. 486.

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years. In order to complete this prescription it would be necessary for it to join Mrs. *Sparks'* possession, provided the latter, under her title and possession, could prescribe.

I have before stated that Mrs. *Sparks* had only the title which her dower gave to the possession of these 159 acres, part of which she sold by deed of the 12th September, 1849. She could not claim that property under any other title. Her possession must be in accordance with her title, which was in virtue of her dower, and this necessarily is a precarious title. The deed of sale to *Leamy*, dated 7th May, 1852, contains a formal declaration by Mrs. *Sally Olmstead*, that she had possession of this property in virtue of her dower, and she then only sold such rights as she had in virtue of her dower. The other deed of the 29th Sept., 1853, does not contain this admission. In this deed she sells all her rights in the property. In any event the admission in the first deed is evidence against her, and she could not, unless by proving it was an error, retract a declaration so made in conformity with her title. We must here apply the principle of law thus stated by *Dunod:* "Celui qui a un titre est presumé posséder en vertu de ce titre—*ad primordium tituli posterior refertur eventus* (1.)" It is this fundamental principle which prohibits the *usufruct* and the *tenant* to secure a title by prescription of the property he holds as such, and that even by lengthy possession. See also *Merlin* (2):

Comme chacun est présumé posséder en vertu d'un titre, on doit dans le doute, expliquer la possession par le titre qui existe et la reduire à ces termes; conséquemment, si ce titre est infecté d'un vice capable d'empêcher la prescription, c'est-à-dire s'il est inhabile à transférer la propriété, c'est indubitable que la possession même la plus longue sera sans effet.

The possession of Mrs. *Sparks*, being derived from a precarious title, in virtue of her dower, was want-

(2) Rep. de Juris. *Verbo* "Prescription."

ing one of the essential conditions, viz.: "a possession unequivocal, and as proprietor." In order that the Government might avail themselves of this possession, they would have had to prove that there has been interversion of her title, that instead of possessing under precarious title, she held, as proprietor, or produce a deed by which Mrs. *Sparks* acquired the absolute ownership of the immovable property of which she could only claim the *usufruct*. There is no evidence that she ever possessed this property otherwise than in conformity with her title of *douairière*, and there has been no deed produced which shows that she acquired the property subjected to the dower.

From the above statement of facts, it is clear that the Crown has not possessed, either in its own name, or by joining with Mrs. Sparks' possession, *as proprietor* during thirty years, that portion of the 159 acres of land which was acquired by the deed of the 12th September, 1849, and consequently that plea of 30 years prescription cannot be maintained.

Then can the Crown be said to have acquired a title by 10 years prescription?

The plea is as follows:—

"That for more than ten years before the fyling of said petition, Her Majesty the Queen and her *auteurs*, had been in the possession, use and occupation of the land in said petition mentioned, of which the said petitioner prays to be declared proprietor, peaceably, openly, uninterruptedly, in good faith and with *good* and *sufficient* title, and Her Majesty thereby became, and was, and is owner and proprietor, and in possesion of said land, and was and is entitled to be maintained in possession thereof; and the said petition of the said Petitioner, by reason of the premises, ought to be dismissed with costs."

At the date of the execution of these conveyances the 10 years prescription was then governed by art. 13 of

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the *Custom of Paris*, which differs from the article in the Civil Code only in as much as the latter has made the term of 10 years applicable to absentees as well as to persons present. The Art. first relied on by respondent is Art. 2206 which enacts :

> Subsequent purchasers in good faith, under a translatory title in good faith, derived either from a precarious or subordinate possessor or from any other person, may prescribe by ten years against the proprietor during such subordinate or precarious holding.

By giving the term of ten years as new law, the Code virtually asserts that the prescription of ten years did not in the case in question exist under the old law, which, as we have already seen, required thirty years.

Merlin, when discussing the question of the interversion of titles, refers to only two decisions, the one of the 16th March, 1692, and the other of the 5th April, 1746, which maintained the plea of prescription of *thirty years* of a person who had purchased from a precarious possessor. The prescription invoked here, having commenced to run before the promulgation of the Civil Code, must be governed by the former laws, and, therefore, in my opinion, the only available prescription was that of 30 years, and not that of ten years.

But then art. 2251 is also relied on and it enacts :

> He who acquires a corporal immovable in good faith, under a translatory title, prescribes the ownership thereof and liberates himself from the servitudes, charges and impositions upon it by an effective possession in virtue of such title during ten years.

It is clear that under either of these articles, if a subject desires to avail himself of this prescription, he must have acquired under a translatory title, and in *good faith*. The expression *juste titre*, which is to be found in the *Custom of Paris*, has the same meaning as *translatory title* which is made use of in the Code. Another condition, says *Pothier* (1) : "*Il*

(1) Prescription No. 84.

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faut que ce titre soit valable" Thus we find, as some of the necessary conditions to prescribe, the three following: *translatory title, valid title, good faith.* Do we find these conditions in the present case? I have above shown by what mode the commissioners had the right of acquiring property.

Now, can it be said that the conveyance dated 7th May, 1855, by which the Government claim to have acquired another and the larger portion of this property, is on its face a translatory title of property? Is it not rather a sale by *Leamy* and his wife of whatever rights or claims they had on the real estate of which the Government were in possession for several years without a title. In order to correctly ascertain the true character of this conveyance, it is necessary to give the following important extracts:

Whereas the said Commissioners of Public Works have deemed it necessary to acquire for public purposes certain pieces or parcels of lands, situate in the aforesaid township of *Hull* which the said *Andrew Leamy*, and his said wife *claim* to be theirs.

Now, therefore, these presents and we the said notaries witness that the said *Andrew Leamy* and his said wife, have sold, assigned, transferred, conveyed and made over, and by these presents do sell, assign, transfer, convey and make over, with promise of warranty, against all debts, dowers. mortgages, claims, and demands generally whatsoever, unto Her Majesty, &c., &c., accepting hereof by and through the said Commissioners of Public Works, all and every the pieces and parcels of land and water, hereinafter described as follows: (Follows the description.)

To have and to hold the aforesaid sold pieces or parcels of land and water, first, secondly and thirdly described, unto Her said Majesty, &c., &c., from henceforth and forever. (Consideration, $1,404.16.)

And in consideration of the foregoing promises, the said *Andrew Leamy* and his said wife, have and by these presents do transfer and set over to Her said Majesty &c., all and every right, title, interest, claims or demand which they or either of them now have or ever had in or to the said above described and sold premises hereby fully divesting themselves thereof in favour of Her said Majesty.

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These extracts clearly prove that the sale was not executed by *Leamy* and his wife as *proprietors*. This deed cannot be said to contain one single expression from which it could be inferred that they were proprietors. They seem to have purposely omitted to assume that quality, and also to have prudently abstained from giving any information of their title to the properties they purported to sell or even to refer to it. They only sell their "claim," and "and all and every right, titles, interests, claims or demands." This naturally brings up the question of what consist these "claims and rights" conveyed and sold to the Government. In order to get a proper answer to this question it is necessary to refer to *Leamy* and his wife's title deed. We find, that by deed of 7th December, 1852, which I have before cited, *Leamy* and his wife acquired the usufructuary interest of *Sally Olmstead* over this property.

But, independently of this, it will be seen that the Government, in their own deed of the 7th May, 1855, (numbered 1032 by the notary), and the references therein to another deed, executed between the same parties, and numbered 1031 by the notary, were duly notified and informed of what rights and interests *Leamy* and his author Mrs. *Sparks* possessed, or at least placed in the position of obtaining exact information on the subject.

In describing the first lot sold, reference is made in the following words to a plan annexed to the deed No. 1031,—in order to give a more complete description of the lot:

> On the plan number two, annexed to a certain deed of sale entered into between the said parties bearing even date with these presents and executed before the said notaries, as upon reference to which will more fully and largely appear.

In the description of lot No. 3, in the same deed, the rights of the heirs of *P. Wright* and of their mother, Mrs. *Sparks*, are thus referred to:

Until intersected by the boundary line, between the share allotted to *Wellington Wright*, in the partage amongst the heirs of the late *Philemon Wright Junior*, according to the sketch or plan of the said partage, made by *Anthony Swalwell*, Deputy Provincial Surveyor, and the share allotted by the said partage and according to the said plan to *Sally Olmstead*, widow of the late *Philemon Wright Junior*, as will appear by the first mentioned plan, number two.

This plan is also annexed to the deed of sale, altho' a reference is specially made to the plan annexed to the deed of sale No. 1031, the only reason no doubt being that this last deed contained complete and full information respecting the division which took place between the heirs of *P. Wright.*

Then in the deed No. 1031, we find the following statement, which, as being referred to in the deed No. 1032, must be read as embodied in it. It is to be found in the description of the second lot:

So much of the said strip as is comprised in that share of the estate of the late *Philemon Wright Junior*, allotted by a partage or division thereof, made between his heirs and *Rosanna Wright*, wife of one *James Parie*, and the other options, so much of the said strips as is comprised in that part allotted in the partage to *Sally Olmstead*, widow of the said late *Philemon Wright Junior, and the said partage or divisions being represented and shown by a sketch or plan thereof, made for the said heirs by one Anthony Swalwell, Deputy Provincial Surveyor.*

In this deed it is stated that the arbitrators, to whom certain matters in dispute had been referred by the deed of the 24th April, 1854, to which I will refer later on, having delivered their award, the payment of a sum of £518. 0. 6 has been made to *Leamy* for the *use and occupation* for several years by the Crown of the property in question. This deed as well as the arbitrator's award was to be considered as annulled, "so far as they may be by these presents in part fulfilled."

A copy of *Swalwell's* plan, by which the division of the *Wright* estate was made, is annexed to this deed, as well as to the deed No. 1032.

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The Crown thus had *ample notice*, at the time of the purchase, of the precarious rights of the vendor, and at the same time was duly notified of the proprietary rights of the heirs of *P. Wright*.

Thus we find, in the expressions used in the title deed of the Crown and by the references therein to *Leamy's* rights, that the Crown evidently purchased nothing more than a precarious title, and, knowing that the sale was of an usufructuary right over certain property, no doubt paid a price estimated at the value of such *usufruct*.

Now, in my opinion, the Crown has not a *translatory* title of this property, because the Crown has only purchased, as I have just stated, *Leamy's* "*claims*" and nothing more, which consisted in the *usufruct* purchased from Mrs. *Sparks*. We may also infer that the reason why *Leamy* would only sell his "*claims*" was because he knew perfectly what they were. He was but a precarious owner.

It has also been said, that before executing a deed to the Government *Leamy* took from Mrs. *Sparks* another deed, in which she transfers to him all her rights and interest and omits to say they consisted in nothing more than the usufruct in lieu of her dower. But this conveyance, made without any guarantee, clearly puts *Leamy* in *bad faith*, and cannot give him more rights over the property than he had under the previous deed. The interversion of his title, from that of a precarious owner into one of an absolute owner from the same vendor, can only give him the right of prescribing by 30 years, in order to purge the defect in his title. Not being *proprietor*, he could only give to the Crown a title sufficient to prescribe by 10 years, by declaring in the deed that he was proprietor, and under such circumstances as would have justified the Crown in believing him. The following authority is in point:

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L'on entend par détenteurs précaires ceux qui possédent en vertu d'une convention, ou d'un titre *par lequel ils reconnaissent* le *droit d'autrui* (1).

* * * * *

Mais pour qu'un *acte de vente* fait par un *détenteur précaire*, puisse servir de base à une possession utile au profit de l'acquéreur il faut que la vente ait été faite a *titre de propriétaire*, et qu'elle ne soit entachée *ni de dol ni de fraude* (2).

The plea put forward by the Crown is that the Crown got a *just title, juste titre*, by the deed of the 7 May, 1855, but how can it be said the Crown purchased the fee simple, when by the deed itself it appears *Leamy* sold only his "claims," which were those of an usufructuary and precarious owner, as was shown by the reference in the deed to the division made by *Swalwell* of the property belonging to the estate of *P. Wright.* To these "claims" are reduced the rights of the Crown in this property, viz,: to the usufruct which *Leamy* had purchased from Mrs. *Sparks* and which he sold to the Government. It is also in evidence that the Crown has had the *use* and *occupation* of this property for a period of seventeen years since the 24 April, 1854, to the death of Mrs. *Sparks*, 9 Oct., 1871, which put an end to the usufruct. On this last date was opened the right of the heirs to claim possession of the property subjected to the dower. The *use* and *occupation* for such a long period was likely a fair value for the price paid, and in fact was *all* that the Government bought.

Another objection to this prescription is that the deed of 5 May, 1855, is not the real *title* deed of the Crown to this property. When the Crown obtained the conveyance of the 7 May, 1855, they had already been in possession of the property they were buying over one year. By deed, of sale dated 24 April, 1854, (Exhibit 39) *Leamy et ux.* had already bargained and sold these

(1) Rep. Gen. du Jour, du Pal. (2) Ibid. au No. 349.
Vo. Prescription No. 313.

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same lots to the Commissioners of Public Works, *Chabot* and *Killaly*, represented by the late Col. *Gugy*, as well as another lot which was not included in the sale of 1855. By comparing these two deeds carefully, it will be seen that the sale was not only of the same lots, but it is made in exactly the same language. In both deeds *Leamy et ux.* only sell "certain pieces or parcels of land which they *claim* to be theirs" as well as "all and every right, title and interest, claim or demand." And even in this deed the Government make the following important declaration, "*that they were at that time in possession of the property.*"

A remarkable feature to be noticed, and one which is important when the Crown relies on the prescription of ten years, is that by this deed the Crown thought proper to take security in order to guard itself against the invalidity of *Leamy's* title. The provision is thus worded:

> And whereas difficulties or doubts may arise as to the validity of title of the said *Andrew Leamy*, and his said wife with regard to the aforesaid *four* pieces or parcels of land, and it is necessary that security (*caution*) shall be given to Her said Majesty the Queen, therefore to these presents, personally came, intervened and was present *James Leamy*, also residing in Bytown, aforesaid, hotel-keeper, who after having had reading and taken communication of the foregoing premises did, and doth hereby voluntarily become the security (*caution*) for and on behalf of the said *Andrew Leamy* and his said wife, and doth hereby bind himself conjointly with the said *Andrew Leamy* and said wife, to the due performance of all the obligations which the said *Andrew Leamy* and his said wife have entered into aforesaid, and this in same manner as if he was the principal or *principal obligé* to these presents.

The doubt as to the validity of the vendor's title could not be more forcibly or more precisely stated. Then, can a title taken under such circumstances be a title such as meet the requirements contained in Art. 2251 of our Civil Code in order to prescribe?

Another objection is, that the title which the Crown

got is not translatory, because there has not been a strict compliance with the provisions of the statute I have indicated that a contract in order to be valid, *valable*, must be signed by the commissioner, countersigned by the Secretary of the Public Works, and that the seal of the chief commissioner must be affixed. The statute declares that any writing or document made otherwise shall not be deemed to be the act of the commissioners. Nor can I see anything in the statute which dispenses the Crown from conforming itself to the provisions of the 17th sec., because the *writing* would be passed before a notary. Other *notarial* deeds fyled in the case were signed and *sealed* by the commissioner. The seal is evidence, no doubt, that the party signs in his official capacity, and the fact that the deed is passed before notaries instead of in the presence of witnesses does not authorize me to put two constructions on the 17th sec., viz.: when the writing is made before witnesses, the seal is necessary, but when before notaries, the seal is not necessary. Corporations, when parties to a notarial deed, are obliged to affix their corporate seal, as well as when they sign documents passed simply before witnesses. And as a matter of fact the corporations of *Quebec* and *Montreal* have always affixed their seal to notarial deeds. Now the conveyances in question do not contain the seal of the chief commissioner, and for this reason are void. There is no need of citing further authorities on this point. The following are sufficient:—

When the statute under which a corporation acts restricts the action to a particular mode, none of the agents through whom the corporation acts can bind it in any other than the mode prescribed (1).

When a legislative power, from which a corporation derives its authority to act, prescribes a particular mode in which the act shall be performed, the corporation cannot lawfully perform the act in

(1) Abbott's Dig. Law of Corporations, p. 214, No. 60.

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any other manner. If not done in the manner prescribed, the act is a mere nullity and utterly void (1).

It is now, however, fully established that as the corporation will not, so neither will the other side, be bound by any agreement not sealed, if that agreement does not fall within one of the excepted cases (2).

This nullity being established, it follows that the Government have not such a valid (*valable*) title as will allow them to acquire by prescription. This proposition of law seems to me to be incontrovertible, but it may be as well to refer to some authorities on this point.

Pothier says:

> Pourqu'un possesseur puisse acquérir par prescription la chose qu'il possède, il faut que le titre d'où la possession procède, soit un titre *valable*. Si son titre est nul, un titre nul n'étant pas un titre, la possession qui en procède est une possession sans titre, qui ne peut opérer la prescription (3).

Merlin :—

> Quand le titre est frappé d'une nulité absolue, point de prescription. La loi résiste continuellement à l'éxécution qu'il pourrait avoir, elle le réduit à un pur fait qui ne peut être ni *confirmé*, ni autorisé, et qui ne produit aucun droit, aucune action, aucune exception (4).

The same doctrine is embodied in our Civil Code which has not altered the law on this point. Article 2254 is thus worded: "A title which is null by reason of informality cannot serve as a ground for prescription by ten years."

If we apply the law as laid down in these authorities to the informalities which exist in the two conveyances relied on by the respondent, the irresistible conclusion to be drawn is, in the words of *Pothier*, that the possession of the Crown is a possession without title, "*possession sans titre qui ne peut opérer la prescrip-*

(1) Ibid. p. 869, sec. 1.
(2) Green's Brice, *Ultra Vires*, p. 382.
(3) De la Prescription No. 85.
(4) *Verbo* Prescription.

tion." The condition of a valid (*valable*) title is not there. The absence of these two conditions is sufficient to dismiss the pleas of prescription.

It may be argued that the judgment of confirmation of the deed of 1855, admitting for the sake of this argument, that the suppliants *improbation* against this judgment should be dismissed, although not the confirmation of *such* a title as was authorized by the statute, was at least equal to a *translatory* title sufficient to serve as a ground for prescription by ten years. First, if the judgment of confirmation is of *such a title* as was not authorized by the statute, then the parties who applied for it, had no authority to do so, and therefore, it is a nullity. Second, a judgment of confirmation cannot give validity to a deed which is null and void. Third, a judgment *per se* is not a *translatory title.*

Or un jugement n'est rien de tout cela. La chose jugée n'est classée nulle part parmi les moyens d'acquérir la propriété ; elle n'est que la preuve d'un droit, elle n'est pas la source ; elle ne concède pas la propriété ; elle la déclare, elle sanctionne un titre pré-existant ; elle lui assure une force obligatoire ; mais ce n'est pas elle qui le crée. Quand on excipe de la prescription avec juste titre et bonne foi, on est obligé de nommer son auteur. Eh bien où trouver cet auteur, quand le possesseur n'invoque que la chose jugée (1).

It only remains for me now to consider the condition, of good faith. *Good faith*, according to *Pothier*, consists :

Dans la juste opinion que le possesseur a que la propriété de la chose qu'il possède, lui a été acquise.

And *Troplong* says :

C'est la croyance ferme et intacte qu'on est propriétaire. Elle n'a lieu qu'avec la conviction que nul autre n'a droit à la chose, qu'on en est le maître exclusif, qu'on à sur elle une puissance absolue.

Can the Government, who ordered a preliminary examination of *Leamy's* titles, be considered, after receiving the information they got through their agent's reports, as having, at the time of the purchase on the

(1) Troplong *Vo.* Prescription, p. 404.

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7th May, 1855, that just opinion and firm and intact conviction, *cette juste opinion, cette croyance ferme et intacte*, that they had become absolute proprietors? Certainly not. On the contrary the Government were informed of all the defects in *Leamy's* titles, and at the same time of the rights of the heirs of *Philemon Wright Jr.*

In *Troplong* we find that:

Il ne suffit pas d'avoir un juste titre soutenu d'une possession de dix et vingt ans. Sans la bonne foi la prescription décennale ne peut être invoquée. C'est elle qui purifie le titre de ses vices, et le réhabilite aux yeux de la conscience; c'est elle qui appelle sur le possesseur cette faveur et cet intérêt qui le font préférer au véritable propriétaire coupable d'avoir négligé l'exercise de son droit. C'est elle enfin qui fait de la prescription décennale un moyen d'acquérir tout aussi pur et tout aussi légitime dans le for intérieur, que les contrats et les titres successifs.

Sans la bonne foi exigée par l'art. 113 de la Coutume et l'art. 2251 C. C., un titre n'est pas un juste titre suivant la Coutume, ni translatif de propriété suivant le code. Le titre translatif n'existe pas sans cela, la bonne foi en est la première condition. Suivant *Laurent*, au No. 397 de la prescription pour qu'un titre de propriété soit véritablement translatif il faut qu'il ait les qualités suivantes:

Dans l'usucapion de dix à vingt ans, la loi ne se contente pas de la croyance du possesseur et de sa prétention, elle veut que cette *croyance* et cette prétention aient leur fondement dans un titre qui aurait transféré la propriété au possesseur, si son auteur avait été propriétaire, *de sorte que* le possesseur doit se croire *propriétaire en vertu de son titre.* C'est à raison *du titre* et de la *bonne foi* que la loi *abrége* la durée de la prescription (1).

Laurent says:

L'art du code déroge sous ce rapport au droit ancien, les coutumes exigeaient un *juste titre*, mais on interprétait cette condition en ce sens que le *titre* n'était considéré que comme un élément *de bonne foi* (2).

It is evident that the Crown has not complied with any of the essential requirements necessary to prescribe, when it is stated in the deed of sale that doubts exist

(1) *Vo.* Prescription 914. (2) De la Bonne Foi p. 430.

as to the validity of the vendor's title, and that it is necessary to take security in order to secure the Crown against the insufficiency or defect in the vendor's title.

As to the third condition, it has been shown that *Leamy's* title was clothed with a defect which prevented him from selling the fee simple, viz: precarious ownership.

Troplong cites *Voet* in support of his opinion (1):

Celui-là ne doit pas être considéré en état de bonne foi qui doute si son auteur était ou non maître de la chose, et avait ou non le droit de l'aliéner, car autre chose est croire autre chose est douter, et le doute n'est qu'un milieu entre la bonne et la mauvaise foi, entre la science et l'ignorance; de même que la silence de celui qu'on interroge, n'est, si on l'envisage en lui-même, ni une négation, ni une affirmation.

La preuve manifeste que celui qui doute ne prescrit pas, ressort de la loi *pro emptore*.

The same principle is enumerated in Rep Jour. du. P. (2):

Celui qui *doute* si son auteur était on non maître de la chose et avait le droit de l'aliéner ne doit pas être considéré comme étant de bonne foi, car le doute n'est qu'un milieu entre la bonne et mauvaise foi. Or la bonne foi (nécessaire pour prescrire) exige une croyance *ferme* et positive, une confiance entière dans le droit que l'on possède.

These authorities clearly prove that a deed positively stating that doubts exist as to the validity of the vendor's title, such as the present, cannot serve as a ground of prescription. But in this case we find the vendors, not only admitting that there may be some doubts as to the validity of their title, but they do not even declare that they are proprietors, nor do they claim to sell as such. I cannot see how, with such a title, prescription by ten years can be invoked.

But it may be contended that it is not on this deed

(1) *Vo.* Prescription No. 927. (2) No. 918, *Vo.* Prescription.

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that the Crown has relied to prescribe, but solely on the deed of the 7th May, 1855.

It is true the defense, which has set up many titles which have nothing whatever to do with the case, did not specially aver this deed of the 24th April, 1854. But in the general plea of prescription of ten years, the Crown alleges to have been in possession for ten years *in good faith and with good and sufficient title.* Then the Crown not only has the right to rely on this deed, but was bound to do so. *Pothier* says (1):

Car c'est au possesseur à justifier du contrat ou autre acte qu'il prétend être le juste titre d'où procède sa possession.

Then, how can it be said that the deed of the 7th May, 1855 is the title deed of the Crown to these lots of land? We have already seen that it is a sale of the same lots of lands as those already sold by the deed of the 24 April, 1854. Under which of these two deeds did the Crown become *proprietor*? Could the Crown thus purchase property which had been bought by another deed of sale and of which it had been in possession for several years? It is a canon of law, you cannot purchase what belongs to you, and for this reason the second deed is a nullity as a title to the property already sold; in any case, the second title cannot have added to the Crown's rights over this property. The following authority clearly demonstrates this proposition.

On ne peut vendre à quelqu'un la chose dont il est déjà propriétaire. "*Suæ rei emptio non valet sive sciens, sive ignorans emi.*" L. 16, H d. tet. La raison est que le contrat de vente consiste, suivant la définition que nous en avons donnée, dans l'obligation que contracte le vendeur de faire avoir la chose à l'acheteur; et par conséquent il consiste à rendre l'acheteur créancier de la chose qui lui est vendue; or il est évident que cela ne peut avoir lieu par rapport à une chose qui appartiendrait déjà à l'acheteur, car personne ne peut être créancier de sa propre chose; l'acheteur ne peut pas demander qu'on lui fasse avoir une chose qui est déjà à lui (2).

(1) Prescription No. 98. (2) Pothier vente No. 8.

This last deed cannot have any legal effect, in so far as it is relied on for the prescription of ten years.

This deed might, perhaps, have been available had *Leamy* in the meantime secured other rights than those he possessed over the properties sold, or if it had been executed to dispel any doubts as to the rights of the vendors as expressed in the first deed. But we find there is nothing of the kind. This second deed is couched in the very same language as the first; by it the vendors only sell their "claims," &c.

Under these circumstances, it would have been reasonable to suppose that the Crown, after declaring in the deed of 1854 that there were doubts as to the validity of *Leamy's* title, and exacting a security, would not have taken a second deed from the same vendors without previously having ascertained that all reasonable doubts no longer existed. But we find on the contrary, that the Crown in the interval, by means of its specially authorized agents, obtained direct and certain information that *Leamy's* title was in reality defective, as will be shown by the following documents:

1st. By the conveyance dated 7th December, 1872, Mrs. *Sparks* only sells to *Leamy* her right of dower, as follows:

She the said *Sarah Olmstead*, declared to have assigned, transferred and made over, and by these presents, doth sell, assign, transfer and make over from henceforth and forever, with warranty of her own acts only to Mr. *Andrew Leamy*, of the said Township of *Hull*, in the said County of *Ottawa*, in the said District of *Ottawa*, Lumberer, here present and accepting, all and all manner of dower and right or title of dower whatsoever, either customary or conventional, prefix, which the said *Sarah Olmstead*, might, or of right ought to have, or claim, in, to and out of that messuage, tenement, parcel or piece of land heretofore belonging to *Philemon Wright*, junior, her late husband, and which, at the division or partition thereof between her the said *Sarah Olmstead* and the heirs of the said *Philemon Wright*, was set apart to and for the use of her the said *Sarah Olmstead*, for the same reference to a diagram, drawn by *Anthony Swalwell*, Deputy Provincial Land Surveyor, and hereto annexed, after having been signed by the parties hereto and us Notaries, (excepting however,

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that certain piece and parcel of land heretofore sold by the said *Sarah Olmstead* to Her Majesty, *Queen Victoria*, for the use of the *Gatineau* Works, by virtue of a Deed of Bargain and Sale, bearing date and passed before *A. Larue*, one of the undersigned Notaries, in presence of witnesses, under the number two thousand two hundred and thirty-two, on the twelfth day of September, one thousand eight hundred and forty-nine, of which the said *Andrew Leamy*, hereby declares to have had and taken communication, and is therewith satisfied.

This title deed was taken communication of by the Crown's agent, as shown by the report of Mr. *Coffin*, exhibit 48, and it was in consequence of this report that they thought it necessary to take security in order to be indemnified for any risk which they had in consequence of their doubt on the validity of their title.

Then we have an extract from report of Mr. Snow, to the Superintendent of Public Works, dated 11th April, 1853, fyled as petitioner's exhibit No. 38 :

(No. 19,527.) HULL, April 11th, 1853.

SIR : I have the honor to acknowledge the receipt of your communication, with one from the Honorable the Commissioner of Public Works, in which it appears that my report of the survey of land at the *Gatineau* is not considered satisfactory or sufficiently explicit, particularly as relates to *Wm. Leamy's* property.

To make the matter as plain as possible, I may add that Mr. *Leamy's* property is held under only two kinds of tenure, viz. : One part to which he holds a good and sufficient deed, situated on the south side of the line between lots one and two in the 5th Range, east of which it includes both sides of the Range line. The other part to which his title is good merely during the lifetime of Mrs. Nicholas Sparks, it being a transfer of her right of dower. I here subjoin a description of each part to be acquired from Mr. *Leamy*, and also one of the land to be acquired from Mr. *Wright*, with a schedule.

HORACE MERRILL, Esq.,
Supt. of Ottawa Works, Bytown.

Then Mr. *Coffin* is instructed to consult with Mr *McCord*, in order to get over the difficulties :

27th APRIL, 1855.

SIR : I am directed to inform you that His Excellency the Governor General has been pleased to appoint *W. H. Coffin*, Esq., to

proceed to the *Ottawa*, for the purpose of taking such steps as he may deem necessary for the preservation of the peace and protection of property. Mr. *Coffin* has been instructed to consult and co-operate with you, so as, if possible, to have arrangements made and bonds entered into, of such a nature as may justify the commissioners in paying the whole of the award to the real proprietors, without any risk or further claim on them. * * * * *

In order to facilitate a settlement with Mr. *Leamy*, all the papers were sent to Mr. *McCord Jr.*, advocate, at *Aylmer*, and that gentleman yesterday reported fully on them; which reports and other documents are transmitted to you herewith. By it you will perceive that the hesitation on the part of the commissioners, to pay the award to Mr. *Leamy*, until title was shown by him, is fully justified; as, of the four separate portions of property required, it turns out that to the *first*, namely, a small piece of land on the east side of the River *Gatineau*, Mr. *Leamy* has no title whatever. To the *second*, being a strip along the west side of the river, he has title to only about half. To the *third*, and for the most important portion, his title exists only during the life of a woman between 65 and 70 years of age. To the *fourth*, namely, a strip along the south-west bank of the Creek, and extending to the centre of its waters, as shown on the map, his title is reported good.

The result of Mr. *Coffin's* operations are then given in the following extract from a report he sent to the Provincial Secretary:

During the pendency of these negotiations, however, in the interval between the signing of the first deed of sale and the final award of Mr. *Russell*, doubts had arisen as to the validity of the titles of Mr. *Leamy*, to a considerable portion of the property proposed to be conveyed to the Board of Works, and a formal protest was served on the Government on behalf of parties claiming residuary rights in the said property, denying *Leamy's* right to receive the same, and making the Government responsible in the event that *Leamy's* titles should ultimately prove to be insufficient.

The Board of Works most properly demanded and obtained communication by Mr. *Leamy's* titles to the lands in question, and submitted the same for examination and opinion to their counsel, *Thomas McCord*, Esq., of *Aylmer*, who, after careful and minute enquiry, pronounced that Mr. *Leamy* could give a valid title to certain portions of the said lands, but that with respect to the remainder, his title to one part was imperfect, and that to the rest he could give no title at all.

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Not only were the Government informed of the defects in *Leamy's* title by official communications, but, as the following clearly establishes the fact, they were informed of the names as well as of the rights of the heirs of *Philemon Wright Jr.*

BYTOWN, April 16th, 1853.

SIR: I have the honor to acknowledge receipt of your letter, dated March 24th, respecting Mr. *Snow's* report on the land about to be required round the *Gatineau* Pond and Creek, requesting me to call on Mr. *Snow* to report more fully on the subject.

I have obtained his report as requested, and herewith transmit the same to the department.

Mr. *Snow's* report does not mention the names of the heirs to that portion of the property purchased by Mr. *Leamy*, of which he only holds a temporary title, the description of this land is marked B in the schedule; if the names of these heirs are required, seven in number, they are as follows: *Philemon Wright, Hull Wright, Horatio Wright, Pamelia McGoey, Erexina Leamy, Cyrinne Pierre* and *Sally Cotter.*

I have the honor to be,
Your obedient servant,

THOMAS A. BIGBY, *Secretary Public Works, Quebec.*

HORACE MERRILL, *Supt. Ottawa Works.*

Amongst the documents produced, we find also that there was a protest sent by some of the heirs, protesting against the Government's intention to purchase this property from *Leamy*. The date of the protest is the 26th April, 1855, a few days prior to the sale made by *Leamy*, on the 7th May, 1855.

This document reads as follows:—

(Copy of No. 25765.)

Hull. April 26th, 1855.

To the Honorable the Commissioner of Public Works.

SIR,—

We desire to state for your information and for the information of the Government, that the proposed sale of land in the Township of *Hull*, by Mr. *A. Leamy* to the Government, is made without the sanction of the individuals who are mainly interested as proprietors of that land. That we are personally interested in the land, and have an incidental interest towards another portion

included in the proposed sale. You will use this information as you deem mete, and should it prove of any benefit to the public service, it will be most gratifying to

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Your most obedient humble servants,

(Signed,) THOMAS McGOEY. HULL WRIGHT.

These documents are so important that I have deemed it necessary to give at length, all the extracts which have any bearing on this cause. The inevitable result of this enquiry shows that the Government on 7th May, 1855, when they purchased from *Leamy*, knew for some length of time of the defects in the titles of *Leamy*, their vendor, and they also knew what rights the heirs of *Philemon Wright Jr.* claimed in the property they were purchasing. With such evidence, is it possible to believe that the Government had a just opinion and firm and intact belief, *une juste opinion ou la croyance ferme et intacte*, that they were proprietors and that no others had any rights to the property purchased ?

But independently of the question whether the Crown has acquired this property in good faith under a translatory title, these documents, in my opinion, conclusively bar the Crown from availing itself of the prescription of ten years,—on the ground that they constitute an acknowledgment by the Crown, whilst in possession of the property claimed, of the rights of the heirs of *P. Wright*, sufficient to interrupt civilly the prescription if it could have commenced—1st against the property purchased by the deed of 1849, if that deed was not defective for the reasons I have before given; and 2nd, against the property acquired by the deed of 24th April, 1854, and bought a second time by the deed of 7th May, 1855.

Art. 2227 C. C. enacts :

Prescription is interrupted civilly by renouncing the benefit of a period elapsed, and by any acknowledgment which the possessor or

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the debtor makes of the right of the person against whom the prescription runs.

Art. 2255 says:

After prescription by ten years has been renounced or *interrupted*, prescription by thirty years alone can be commenced.

Bearing in mind, that at the time of the execution of these reports and other documents the Government *were in possession* of the property claimed more than a year, it will be seen that the acknowledgment made in this case is sufficient in law to interrupt this prescription. First, what should be considered an acknowledgment? and, then, by whom need it be made? *Troplong*, whose opinion on this point is concurred in by all commentators on the Code *Napoléon*, thus lays down, the rule commenting on Art. 2248 C. N., which concords with our Art. 2227 C. C.

Et d'abord la reconnaissance peut-être expresse. C'est ce qui a lieu lorsqu'elle résulte des actes mentionnés aux arts. 1337, 1338 C.N.

Elle peut également résulter d'une lettre missive. * * * La reconnaissance n'a pas besoin d'être acceptée par le créancier. Il suffit qu'elle ne soit pas repudiée par lui pour qu'elle lui profite, nul n'étant censé vouloir perdre et s'appauvrir.

Now, in these documents we find that the Crown admits that Mrs. *Sparks* never possessed this property otherwise than in her capacity of usufructuary as dowage (*douairière*). This was certainly the act of the Crown, for it was made with its consent and knowledge, and by its specially authorized agents.

I do not think it can be shown that the Crown ever has notice of official acts done in its name otherwise than by reports addressed to the Government, as was done in this case through the Provincial Secretary.

Moreover, in this case we find that the officer charged with this duty had been authorized to act by Order in Council. To support the proposition that an acknowledgment made by such an officer is in law sufficient to

interrupt civilly prescription, authorities are not wanting:

La reconnaissance est suffisante lorsqu'elle émane d'un mandataire spécial (1).

It is conclusive, therefore, to my mind, that the Crown cannot avail itself of the prescription of ten years, and that if prescription commenced to run at all, it was civilly interrupted; consequently the Crown could only prescribe by thirty years from the date of the first purchase of this property.

Before concluding it may be well to refer also to the argument founded on the fact that some of the opposants (two, I believe,) after having opposed the confirmation of the title of the Crown, subsequently discontinued their oppositions with costs.

It is true that the judgment of confirmation mentions the fact that these oppositions were "discontinued with costs." But first if no answer could be given, it would be necessary to decide the important questions raised by the appellants by the improbation of this judgment, before any advantage could be gained. But how can we presume they have admitted they had no proprietary rights over the property for which a judgment of confirmation was asked? If in such cases it were permitted to surmise, we could as easily presume that the opposants, after having taken communication of the Crown's title and ascertained that the Crown had purchased, as it is evident by the title itself, only the usufruct of an immovable, withdrew their oppositions, because the title asked to be confirmed was not *such* a title as could affect their rights, not being taken from a person *in possession as proprietor*, and because the title deed itself acknowledged their rights.

Moreover, the argument of the Crown is based on a

(1) See Sirey—Codes Annotés, art. 2248, No. 10; Dalloz—Code Civil Annoté, art. 2248, No. 5, 14, 33, 34, 77.

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mere supposition, for the *oppositions* have not been produced, and it is impossible to say on what grounds they were made. The maxim of law "*de non apparentibus et non existentibus eadem est lex*" is here very applicable to the non-production of these oppositions.

After carefully examining the titles and weighing the evidence in the cause, I have come to the conclusion that the appellant has established: 1st. That the heirs of *Philemon Wright Jr.* have never alienated their rights in the 159 acres of land and water, which were set apart for the use and enjoyment of *Sarah Olmstead*, their mother, as dowager.

2nd. That the Government, by the title of the 12th September, 1849, obtained possession of 21 acres, 1 rood, and 25 perches; that by the conveyance of the 7th May, 1855, the Government, being a purchaser with notice, obtained a precarious title to 65 acres and 2 perches, of which they were in possession without a title for several years, making a total of 86 acres, 1 rood, and 27 perches out of the 159 acres of land and water belonging to the heirs of *Philemon Wright Jr.*, and that the balance of these 159 acres is in the hands of certain persons who are not parties to this suit.

3rd. That the appellant represents the following heirs of *Philemon Wright Jr*, and that the respective share of the heirs he represents in the said 86 acres 1 rood, and 27 perches, is as follows:

Philemon Wright..... $\frac{1}{5}=\frac{55}{275}$

Erexina Wright, wife of *T. Leamy*..... $\frac{1}{5}=\frac{55}{275}$

Sally Wright, wife of *Boucher*..... $\frac{1}{5}=\frac{55}{275}$

Pamelia Wright, wife of *A. McGoey* ..... $\frac{1}{5}=\frac{55}{275}$

P. Wright, Serina Wright and *Helen Wright*, children of *Hull Wright*..... $\frac{3}{11}$ of $\frac{1}{5}=\frac{15}{275}$

making his proprietary interest amount to 235 undivided 275ths, or $\frac{47}{55}$ undivided, in the said 86 acres

1 rood and 27 perches, now in the possession of the Government.

4th. That both conveyances to the Government are null and void, because they were not made in conformity with the provisions of 9 *Vic.*, ch. 37.

5th. That the judgment of confirmation which is alleged to have been granted of the conveyance of the 7th May, 1855, (the appellants having fyled against this judgment an improbation, which in my view of the case it is unnecessary to determine) not being the confirmation of *such* a title as was authorized by the statute, cannot affect the rights of the proprietor of the land thereby conveyed.

6th. That the quit claims alleged to have been signed by some of the heirs are null, and that the discontinuance of oppositions which have not been produced to the confirmation of a *title* cannot affect the proprietary rights of such opposants.

7th. That the titles of the Crown, being null by reason of informality, cannot serve as a ground for prescription.

8th. That the acknowledgment in writing by a special mandatory of the Crown, (while the Government were in possession of the property claimed), of the existence of the heirs of *P. Wright*, and of their rights, was sufficient to interrupt civilly the prescription of 10 years.

9th. That the Crown has not in law a title to the property claimed sufficient to prescribe the ownership thereof by 10 year's possession under Arts. 2206 and 2251.

I am, therefore, of opinion, that the petition, in so far as it prays for the rents and profits due and accrued before the date of the execution of the deeds of grant to the appellant, must be dismissed, and that the appellant should be declared proprietor of the following

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undivided *indivis* share in the said 86 acres, 1 rood and 29 perches now in the possession of the Crown, being a portion of the 159 acres belonging to the estate of *P. Wright Jr.* and which was subject to the customary dower of *Sally Olmstead*, to wit: $\frac{47}{85}$ths., and that he is also entitled to an account of the rents, issues and profits of the said property from the date of his acquisition of the same.

HENRY, J.:—

The legal questions involved in the consideration of this case are so numerous, and, at the same time, so intricate and important, that no little application, research and consideration were required to arrive at proper conclusions in regard to them.

For some time after the argument I was, in regard to one or two of the controlling points, inclined to sustain the judgment of my late learned brother *Taschereau*. I have since bestowed much thought and research upon all the questions involved, and I shall now proceed to state the result at which I have arrived.

The property in question in this suit was formerly owned by one *Philemon Wright Junior*. On his death, intestate, it became the property of his children, subject to the dower, or usufruct, of his widow *Sarah*, formerly *Sarah Olmstead*, subsequently Mrs. *N. Sparks*. Sometime after the death of *Philemon Wright* his real estate, with the exception of a part set out for his widow, was divided amongst his children, and deeds confirming the division passed between them. The widow did not release her dower to any of the lots, and therefore held it until her death. She might have disregarded this division and made a claim to dower in the whole of the lands, for all that appears in the case, unless her deed to *Leamy* in 1852 would have estopped her; nor did she release her right of dower to any of them. The part so

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set out for the widow includes that now in dispute. There is no conveyance from any of the heirs to her, and, she having died in 1871, several of the heirs conveyed their interest in that part of the property so held by her to the appellant.

It is contended that she derived a full title to the property she held, but I can see nothing in the case to justify that conclusion. She could acquire no such right as the widow of *Wright*, and whether she occupied during her life more or less than her legal share of the property could, in my view, make no difference. If more, she occupied any overplus by sufferance; if less, it was by her own act, and the fact could not turn her right to the usufruct into a superior title. Besides, she and those claiming under her are, in my opinion, estopped by her conveyance, which expressly limits her right to that of a life estate.

It is by a title derived from her that this action is defended, and if, for some of the reasons assigned, that title is sufficient to bar the legal right of the heirs, our judgment must be for the appellant. There was an attempt made at the trial to prove title out of some of the heirs, but there was not proof, in my opinion, of the execution of the deeds produced for that purpose.

I am of opinion for the reasons given by my brother *Fournier*, that the description of the property in the petition was sufficient; and also, that the appellant cannot claim for rents and profits accrued previous to the transfer to him of the property.

Several conveyances were given in evidence on the part of the Crown from heirs of *Philemon Wright* to *Leamy*; but, as they were only of the lands divided between the heirs and not of any part of that set apart for the widow and, therefore, no part of the land in dispute, I cannot see how they can, in any way, affect the issues before us. What the heirs, or *Leamy*, did with those

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other lots, cannot in any way affect the title of land not in any way referred to in the deeds in question. As the Crown did not purchase from the owners of the property, has it acquired a title independent of them and in opposition to their legal rights?

The question is not as to the abstract right of the Crown to purchase and obtain title from the legal owner, but whether, having purchased from other than the legal owners, and, by retaining possession for ten years, the latter are ousted of their title. If such a result has been reached in this case, it must be by virtue of the Civil Code and by statute. The statute by which the claim is principally supported is 9 *Vic.*, ch. 37.

Referring to Commissioners of Public Works, the 5th section provides that they shall have power, by instrument under their hands and seals, on behalf of the province, to make and enter into all necessary contracts, &c., relative to the public works of the province.

Section 8 provides that

> Said Commissioners, in and for the said purposes, shall, at all times, have power to acquire and take possession of all such lands or real estate, and to take possession of all such streams, waters, and water-courses, the appropriation of which for the use, construction and maintenance of such public works aforesaid as shall, in their judgment, be necessary.

Power is also given to the Commissioners to contract for the purchase from all persons, seigniors, bodies corporate, guardians, tutors, curators or trustees, lands and real estate. This provision only extends to a purchase from owners, or their representatives. It does not authorize the purchase from A of B's land. After this provision there is another necessary one for such objects, as follows:

> If the owner or owners of such lands, &c., do not reside in the vicinity of such property so required, then notice shall be given in the Official *Gazette* and in two distinct newspapers published in or adjoining the district in which such property is situate, of the inten-

tion of the Commissioners to cause possession to be taken of such lands, &c.

After thirty days from such notice possession was authorized to be taken, and the land to become vested in Her Majesty. Provision is also made for paying the amount of a valuation under the Act into Court.

Sec. 9 provides that in *Lower Canada* the compensation awarded as aforesaid, or agreed upon by the Commissioners, and any party who might, *under that Act*, validly convey the lands, or lawfully in possession thereof as proprietor for any lands taken under the Act, without the consent of such proprietor, shall stand in stead of such land, and any claim to a hypothec or incumbrance shall be converted into a claim to or upon the compensation. Provision is then made for proceedings of confirmation in either of the two cases mentioned—that is, where the purchase and conveyance is from the owner or his representatives, as stated in the clause ; and second, in the case of expropriation, without any such purchase. It is, in my opinion, only in one or other of those cases that there is provided any power of confirmation. The lands in question were not taken under the provisions for expropriation ; and if the widow of *Philemon Wright* could not give a title, then the provision by which the power of confirmation is given is inapplicable. The terms of the provision are plain as I read them. 1st. Where the conveyance is from the owner the confirmation is intended and provided to purge the lands from all hypothecs or other legal or equitable liens ; and, 2nd, where the title cannot be procured from one capable of making it according to the terms of the Act, the amount of the award is paid into Court for the parties entitled to it, to receive it in payment of the land which, in either case, becomes, by the confirmation, vested in the Crown. To apply the provision for confirmation to the

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case of a purchase from A of B's land, would, in my matured opinion, be doing what the Legislature did not mean and statute has not provided. There are other strong grounds mentioned by my learned brother *Fournier* which, in my opinion, are legitimate against the validity and efficacy of the confirmation in question. When private rights are invaded by a statute the mode and means provided by the statute must be strictly pursued, and the statute itself strictly construed; and, unless the provision be clearly and plainly applicable, no title can be acquired under it. I am fully of the opinion that the provisions for acquiring a title under the statute in question are inapplicable to the circumstances of this case, and, therefore, that the judgment of confirmation therein was *ultra vires* and void.

The only other defence that I think necessary to consider, concurring as I do generally in the judgment of my learned brother *Fournier*, is that of prescription by thirty or ten years, as claimed by the defence.

The claim of prescription of thirty years is not shown to rest on a proper foundation.

The possession of Mrs. *Sparks* must be characterized by her title, and as her possession was only of the usufruct during her life, and her title therefore precarious, and not as a proprietor, one essential element of the right of prescription was wanting. The possession of the Crown was under thirty years, and it therefore cannot defend by prescribing for any period before the conveyances.

The defence under a prescription of ten years is still open for consideration.

By article 2211 of the Civil Code, "the Crown may avail itself of prescription."

Availing itself of that right, and setting up a defence under it, subjects, in my opinion, the Crown to the same rules and principles as a subject would be.

Article 2206 of the Code provides that:

Subsequent purchasers *in good faith*, under a translatory title derived either from a precarious or subordinate possessor, or from any other person, may prescribe by ten years against the proprietor during such subordinate or precarious holding.

It is contended that the question of *bad faith* cannot be raised against the Crown, and should not therefore be considered, no matter the extent of bad faith shown on the part of the commissioners, or others acting for the Crown in the purchase of the land. That the King can do no wrong is a maxim well understood, and universally applied, and therefore bad faith cannot be imputed to the Sovereign. The ordinary maxim *respondeat superior* has no application to the Crown; for the Sovereign cannot, in contemplation of law, command a wrongful act to be done; and it is equally well established, that the Crown cannot be prejudiced by any laches or acts of omission of any of its officers. The doctrine is applicable this far, but here it ends. Where, however, a wrongful act is done, although directly by the Sovereign, as in the improper issue of patents, redress is given, on the principle or theory that the Crown was misinformed in the premises. No bad faith or wrongful act is imputed. When a patent is issued interfering with the rights of a previous patentee, the Crown is not, theoretically, charged with a breach of faith towards the first patentee, although a wrong was done to him for which he has a remedy. Independently of the principles upon which the maxim is founded, it would be *bad faith* in the Sovereign, and contrary to its own previous grant to both parties, to grant to one what it had no right to, and, by doing so, interfere with the previously acquired rights of the other. Still, those principles do not prevent justice being done to one or both of the parties. In every suit brought in the Exchequer Court against the Crown, the claim is founded

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on a wrong; but not on one imputed to the Sovereign; and redress is given, if the suppliant is entitled to it. He is not answered by the maxim that the Sovereign can do no wrong. Neither can I think that maxim furnishes an answer in this case. At page 60 of *Broom's* Legal Maxims, under the heading of the maxim just referred to, we find doctrines and principles applicable to the point under consideration. He says:

> With respect to injuries to the rights of property, these can scarcely be committed by the Crown, except through the medium of its agents and by misinformation or inadvertency, and the law has furnished the subject with a decent and respectful mode of terminating the invasion of his rights by informing the King of the true state of the matter in dispute, being by petition of right; and as it presumes that to know of any injury and redress it are inseparable in the Royal breast, then issues as of course, in the King's own name, his order to his judges to do justice to the party aggrieved.

The record teems with evidence that the Government, through its departmental and other officers, were, all along, aware of the precarious title they were getting from *Leamy* and Mrs. *Sparks*, as shown in the judgment of my learned brother, before alluded to; and of the attempts, from time to time made, to remedy the defects in it. As before asserted, if the Crown seeks the remedy of a statute or code, the whole, and not part of it, is invoked, and the Crown cannot ask to have any part of it eliminated. If the Crown adopts the acts of its subordinates, such as the purchase in this case, it must do so under the circumstances as they exist, and there is no principle that I am aware of that would give the Crown in this respect a higher or different position, than could be claimed by a subject. The ingredient of *bad faith*, although not necessarily communicated, is transmitted to the Crown with the conveyances; and independently of other important considerations is sufficient, in my opinion, to prevent the application of the prescription by ten years.

It is, however, desirable to consider the ingredient of

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bad faith in connection with the principles involved in the maxim that the King can do no wrong. If the law, as laid down in the extract from *Broom*, "presumes that to know of any injury and to redress it are inseparable in the Royal breast," and that the order from the Sovereign is "to do justice to the party aggrieved," it is important to consider whether it would comport with that order that any defence should be pleaded in direct violation of it. When the Sovereign orders that justice be done, it must, I think, mean the same justice that would be done between subjects, and by the same legal and equitable principles. I do not contend that the plea of prescription, if applied in its integrity, would necessarily amount to such a violation; but to apply the prescription, without one of its essential constituents and conditions, would I think do so. It would be in direct opposition, not only to the principle involved in the Code, but, in my humble opinion, to the principles which are involved in the maxim that the King can do no wrong, and, at the same time, derogatory to the assumed high moral and dignified position of the Sovereign. The servants of the Crown by *bad faith* acquire for the Crown a translatory title from one man of the property of another. The fact is brought to the notice of the Sovereign, who orders that justice be done; but the counsel of the Crown would desire to frustrate the equitable desire of the Sovereign by invoking part of an article of the Code and excluding the qualifying provision of it, by which that very question of bad faith would be withdrawn from consideration. This, in my opinion, would be giving to the counsel the right to oppose the Sovereign will, and prevent that justice being done which the Sovereign intended and ordered. I will not speculate as to the propriety of the Sovereign, in view of the high toned and elevated position he is assumed to occupy in regard to the redressing

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of wrongs done to an individual, pleading prescription, as it is not necessary in this case to do so; but, that the Crown should retain the title and possession of land belonging to others, obtained in bad faith by its servants in the way contended for here, would, I think, be contrary to every well founded principle of law, equity or honor. The Legislature, by the provision requiring *good* faith, has decreed that, without such, prescription of ten years between subjects shall be insufficient. No subject could therefore hold land, the title to which had been acquired contrary to such *good* faith. The title of every one is held good unless some one can prescribe for thirty years, or as a recipient of a translatory title in *good faith* for ten years. In this case there is no evidence of either the thirty years or of the good faith. The defence rests upon shewing good faith. It is a condition of the article and upon which the prescription by ten years depends. It is not for the suppliant to show *bad* faith. It is not necessary to impute it, but for the defence to establish *good faith*, which, I think, has not been done. One of three things, I think, must be assumed: first, that the Sovereign was not informed of the purchase before the presentation of the petition; second, that if informed the bad faith was not communicated; or third, that the bad faith was communicated. There is no evidence as to the first, nor is there anything to show any adoption by the Sovereign of the purchase. If the bad faith was not communicated, the Sovereign was deceived as to a fraud perpetrated, which, being subsequently informed of, the Sovereign wishes corrected. If it was communicated the prescription should not run. As to the true position of the Sovereign in this respect we have no evidence; but, taking the second alternative, which is the important one, and that a fraud was practiced on the Sovereign by suppressing the fact of the bad faith, the only honorable, consistent

and justifiable course for the Sovereign to take, on discovering it, would be, as has been done here, to require the fact to be inquired into and ascertained, and justice done. The Sovereign is the fountain of honor and dignity, and the law assumes, as before stated, that "to know of any injury and to redress it are inseparable." The order that justice be done cannot surely be alleged to be honestly or honorably carried out by taking a course to prevent it. The Sovereign must be presumed to intend what she orders; and what would be justice between subjects must be equally between her and one of her subjects; and what is meant by the order. If a man of high honor and principle ascertains that, by means of the bad faith of his servant, he is placed in a position to claim another man's property, I need not suggest what would be reasonably expected to be done by him. The Sovereign would not only be assumed on personal considerations to decline holding the property of one of its subjects, but, on the principles before referred to, must be held bound to have justice done; and not by eliminating one part of an article of the Code seek to prevent it. I am not dealing with any assumed merely sentimental question of high honorable principle in the breast of the Sovereign, but with constitutional doctrines underlying rights and liberties necessary for the government of the empire and the administration of justice, and requiring to be strictly maintained. The honorable and dignified position of the Sovereign in dealing with her subjects is too important to be frittered away; and it is as much the duty of Courts to uphold it as to administer the law in any other respect. I think, therefore, to give effect to the position as contended for would be placing the Sovereign in a position antagonistic to the important constitutional principles to which I have thought it necessary to refer.

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There is still another objection to the applicability of the alleged prescription of ten years independently of the question of bad faith.

The Civil Code by article 2227 provides that:

Prescription is interrupted civilly by any acknowledgment which the possessor or debtor makes of the right of the person against whom the prescription runs.

Article 2225 provides that:

After prescription by ten years has been renounced or *interrupted*, prescription by thirty years *alone* can be commenced.

The evidence in this case shews that the Government, by its active agents and officers, prior to 1855, purchased the property, a part of which is claimed by this petition, and received a deed of sale made by *A. Leamy* and wife to Her Majesty, dated the 24th of April, 1854. That deed contains the statement that the Government was then *in possession of the land* thus: "And the Government who are now in possession of the hereinafter mentioned property." Letters and reports dated in April and May, 1855—a year after the Government acknowledges to have been in possession—show that the Crown agents and officers had not only notice of the precarious title under the previous deed, but clearly, expressly and unequivocally acknowledged the proprietary rights of the parties against whom is invoked the prescription of ten years.

It seems to me that under such circumstances the prescription, if any, under previous titles would cease to run and be interrupted.

Article 2227 of the Code provides that:

Prescription is interrupted civilly by renouncing the benefit of a period elapsed, and by *any acknowledgment* which the possessor or the debtor makes of the right of the person against whom the prescription runs.

Troplong commenting on article 2248 of the Code Napoleon—which corresponds with the article last cited—says:

And first of all the acknowledgment can be made in express terms. The acknowledgment need not be accepted by the creditor. It can also be made by letter. It is sufficient for the creditor not to repudiate it in order that he may avail himself of it, nobody being supposed to give up any right, &c.

This Court is asked to say, under the circumstances in this case, that the prescription has not been interrupted and gives a right to defend this action.

The Sovereign, by her agents or officers, was *in possession* for a year before the acknowledgments were made; and the knowledge and dealings of an agent whose act in respect to other parties is adopted by his principal must be considered the knowledge and dealings of the principal.

In the words of Article 2227 the prescription was civilly interrupted by the acknowledgment *while in possession* of the proprietary rights of the persons against whom the prescription is invoked. Having once acknowledged this right—with the full knowledge of the title—the prescription was interrupted and therefore according to Article 2255:

After prescription by ten years has been interrupted, prescription by thirty years alone can be commenced.

It cannot be contended that by taking another deed from the same vendors subsequent to the acknowledgment the defect was cured, and the peculiar provisions of Article 2255 are to be rendered inoperative. On the contrary, in my opinion, it strengthens the opposite contention. After the acknowledgments of title in the authors of the suppliant, no further conveyances from the same vendors could remedy the defect in the title, as, *nemo sibi causam possessionis mutare posse*, or, as put by a French writer,—"toute qualité imprimée à un titre doit subsister indéfiniment."

It may be claimed that after the ratification by the Superior Court, supposing that to have been *intra vires*

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as relating to the title of the heirs, the holding was in good faith, and that it was a holding *animo domini* from that time. I don't think it should be so concluded. The knowledge of the title of the heirs existed before, at, and after the alleged ratification; but if the ratification divested that title we need not consider the question of prescription. If it did not from any cause do so, it cannot be taken as anything more than a further attempt unsuccessfully made, a void proceeding against the title of the heirs, and being inoperative cannot cure the bad faith previously existing. It must I think, be regarded only as another ineffectual struggle to deprive them of their rights in the property without removing the element of bad faith.

I am of opinion that the appeal should be allowed and judgment given for the appellant, to the extent stated in the judgment of my learned brother *Fournier*, with costs.

TASCHEREAU, J., concurred in affirming the judgment of the Exchequer Court.

GWYNNE, J. :—

The petition alleges, and it may be admitted to be true, that *Philemon Wright*, the younger, on or about the 4th day of May, 1808, being then seised in fee of Lots Nos. 2 and 3 in the 5th range of the Township of *Hull*, was married to *Sarah Olmstead* without any marriage contract, and that, being still seised of the same estate and other lands, he died intestate, leaving issue of that marriage, and his widow *Sarah*, him surviving.

The petitioner has produced in evidence a deed dated the 20th of November, 1822, appointing the said *Sarah Olmstead* tutrix of the children of the marriage, whose names and ages are therein respectively stated to be as follows :—1st. *Philemon Wright*, stated to be aged 14

years; 2nd. *Hull Wright*, aged 12 years; 3rd. *Pamelia Wright*, aged 10 years; 4th. *Horatio Gates Wright*, aged 8 years; 5th. *Wellington Wright*, aged 6 years; 6th. *Erexina Wright*, aged 4 years; 7th. *Serina Wright*, aged 2 years; and 8th, *Sally Wright*, aged 10 months.

Now, it is apparent that at some time before the year 1838, and during the minority of several of the children, an arrangement (which may well be believed to have been a family arrangement for the partition of the whole heritable estate whereof *Philemon Wright Jr.* died seised in the above lands among his eight children and his widow, the latter to take in fee a smaller portion of the estate than she would have been entitled to for her estate in dower), was verbally agreed upon, and that notwithstanding the minority of several of the children it was acted upon as if it had been perfect and effectual in law, for we find that on the 11th of January, 1837, *Wellington Wright*, who was then most probably himself a minor, and while his three younger sisters certainly were, conveyed the share allotted to him upon the partition to *Nicholas Sparks*, to whom *Sarah Olmstead* had been married in 1826, and on the same 11th January, 1837, *Horatio Gates Wright*, by a like deed, conveyed also to Mr. *Sparks* the share allotted to *Horatio*, by the same agreement for partition.

In these deeds *Wellington Wright* and *Horatio G. Wright* respectively describe the piece of land by each conveyed to *Sparks* as: "That part of the farm belonging to my late father, apportioned to me, as will appear on the diagram drawn by *Anthony Swallwell*, Deputy Provincial Surveyor, which piece of land is butted and bounded as follows"—&c., &c.; and the deeds contained covenants executed by each grantor respectively for further assurances to be executed by all and every other person or persons whomsoever having any

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claim, estate, right, title or interest in or to the piece of land thereby granted, &c., or any part thereof.

Then we find that by several deeds executed upon the 5th day of March, 1838, all in like form, the heirs of *Philemon Wright*, deceased, reciting the partition which had been agreed upon, purported to secure to each other the allotment assigned to each. The deed to *Erexina*, then the wife of *Andrew Leamy*, is as follows:

Know all men by these presents that we *Philemon Wright Jr.*, *Hull Wright*, *Pamelia Wright*, wife of *Thomas McGoey*, Esq.; *Horatio Wright*, *Serina Wright*, wife of *James Pearce*; *Erexina Wright*, wife of *Andrew Leamy*; *Sally Wright*, surviving heirs of the late *Philemon Wright Jr.*, of the Township of *Hull*, in the District of *Montreal*, in the Province of *Lower Canada, having mutually agreed to divide the inheritance left us by our late father*, we have caused the same to be surveyed by *Anthony Swallwell*, Deputy Surveyor for the Province of *Lower Canada*, who having ascertained the quantity of land in Lots numbers 2, 3 and 4, in the 5th concession of the said Township of *Hull, being the property* of our late father, hath computed the same to be 591 acres 1 rood and 24 perches, including a certain pond of water, *the said portion of land having been sub-divided, the following portions have been allotted to each*, that is to say:

To *Philemon Wright*,	43 acres	2 roods.	
To *Hull Wright*,	43 "	2 "	
To *Pamelia Wright*,	49 "		
To *Horatio Wright*,	53 "	1 "	24 perches.
To *Wellington Wright*,	48 "		
To *Serina Wright*,	60 "		
To *Erexina Wright*,	65 "		
To *Sally Wright*,	70 "		
To *Sally Olmstead*, our mother,	159 "		the said pond of water

inclusive, *with all which we are content.*

And in order the better to secure to each other a legal title to the said portions of land aforesaid, we the said *Philemon Wright*, *Hull Wright*, *Pamelia Wright*, *Horatio Wright*, *Serina Wright*, and *Sally Wright* by these presents do grant, remise, release, and forever quit claim unto the said *Erexina Wright*, her heirs and assigns all our right, title, interest and estate to the 65 acres of land, (described by metes and bounds), to have and to hold the above released premises to her, the said *Erexina Wright*, her heirs and assigns to her and their use and behoof forever, so that neither we the said *Philemon*

Wright, Hull Wright, Pamelia Wright, Horatio Wright, Serina Wright and *Sally Wright*, nor our heirs, nor any other person or persons claiming by, from or under us or them, or in the name, right or stead of us or them, shall or will by any ways or means have, claim or demand any right or title to the above released premises or to any part or parcel thereof.

This instrument is signed by all the parties named therein except *Wellington Wright*, who was then dead, and *Serina Wright* and her husband *James Pearce*, who, though living, were not parties executing it; although not executing this deed, *Serina* appears to have executed all the other deeds. Now, with reference to the recital in these deeds of the allotments which had previously been made, and which must have been made in the lifetime of *Wellington Wright* and during the minority of three at least of the children, if not also during the minority of *Wellington*, it is to be observed that the allotment stated to have been made to *Sally Olmstead*, the mother, is stated in precisely the same language as the allotments to all the others. The whole of the estate whereof the father died seised is stated to have been divided into nine parcels, and a parcel is allotted to each of nine persons, one of whom is *Sally Olmstead*, the mother. That one of the nine persons to whom the respective allotments are made is to take a different estate from the others is not stated; the contrary seems to be implied, for the agreement recited is not an agreement to divide presently among the heirs the residue of the estate whereof the father died seised, after deducting the one-half to which the mother was entitled as customary dower, and the reversion in such half (abiding the event of her death to come into possession of the latter half), nor is it an agreement to divide presently among the heirs the one-half, and to leave the other half to be divided at the death of the mother; the agreement is to divide presently the whole inheritance left by the

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father, and for that purpose to divide it into nine parcels and to allot a parcel to each of nine persons alike, one of such being the mother. It is not suggested, on the deed, nor yet by any evidence given in the cause, that the 159 acres allotted to the mother were so allotted as having a peculiar value equal to the value of half of the whole estate, nor that she had consented to take the 159 acres in life use as her customary dower, nor that the part of the 159 acres, which consisted of a pond of 71 acres, had any value. Nor is it likely that at that early period before the improvements subsequently made that it had. However, there is no suggestion that the 159 acres were to be enjoyed by the mother for her life only, or that they were a fair and reasonable equivalent for her customary dower in the 295 acres, the half of the estate, nor that the allotment was made upon that foundation, or with that view, or that the mother had agreed to any such arrangement, and in the absence of any suggestions or evidence of the above nature the recital in the deeds is more consistent with an agreement for partition having been made, as it might have been, if the parties were willing to concur in it, that the whole property should be divided into nine allotments, one to be given to each of the nine persons named, of whom the mother was one, to be enjoyed presently, in severalty in fee; and that this was the intention obtains confirmation, as appears to me, from the frame of a deed of the same date executed in favor of *Nicholas Sparks*, confirming to him *Wellington Wright's* portion conveyed to him by this deed of January, 1837. This deed is as follows:

Know all men by these presents that we *Philemon Wright, Hull Wright, Pamelia Wright,* wife of *Thomas McGoey,* Esq., *Horatio Wright, Serina Wright,* wife of *James Pierce, Erexina Wright,* wife of *Andrew Leamy,* and *Sally Wright,* surviving heirs of the late *Philemon Wright Jr.,* of the Township of *Hull,* &c., have mutually released and quitted claim to each other the several portions of our

late father's estate *allotted to us* by deed bearing even date with these presents; and, whereas, our late brother *Wellington Wright* did by deed, bearing date the eleventh day of January, in the year of Our Lord one thousand eight hundred and thirty-seven, for a certain consideration therein mentioned, relinquish his claim *to the certain* portion *of our father's property allotted to him*, in favor of *Nicholas Sparks*, Esq., of *Bytown*, and whereas it appears to us to be just and reasonable that the said *Nicholas Sparks* should be confirmed in his title to the said portion of our late brother. Therefore, &c., &c., &c.

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This deed appears to have been executed only by *Hull Wright*, *Serina Wright*, *Pamelia Wright*, and *Sally Wright*, although prepared for execution by all parties. It speaks however, as it appears to me, of the allotments made to each as the *certain* portion of each in their father's property, an expression precisely applicable, assuming the whole estate to have been divided and *Sarah Olmstead* to have taken one allotment equally with the others. Then, by deeds of lease and release, bearing date respectively the 30th of April and 1st May, 1839, *Sally Wright* and her husband, *William Colter*, bargained, sold and released to *Andrew Leamy*, his heirs and assigns forever, the piece of land, describing it by metes and bounds, which by the deeds of March, 1838, is said to have been allotted to *Sally Wright*.

We find next, that by a deed bearing date the 12th September, 1849, *Sarah Olmstead*, claiming this property as her own absolute property, by notarial deed executed by her and her husband, *Nicholas Sparks*, granted, bargained, sold, assigned, transferred and made over, with promise of warranty against all gifts, dowers, debts, mortgages, substitutions, alienations and other hindrances whatsoever, to Her Majesty Queen *Victoria*, Her heirs and successors, represented herein by the Honorable *Etinne Pascal Taché*, Chief Commissioner of Public Works of the Province of *Canada*, a certain piece of land, &c., &c., describing it—" The aforesaid hereby bargained and sold piece of land and premises being

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holden by the tenure of free and common socage, free and clear of every charge, burden and incumbrance," &c., &c.

Now, the piece of land hereby conveyed was part of the above allotment made to *Sarah Olmstead*, and this deed is only consistent with the fact that up to the time of its execution, in September, 1849, she was under the impression and belief that she was seised in fee simple of the portion allotted to her.

In the year 1852, *Andrew Leamy* plainly entertained the design of increasing his estate in these and the adjoining lots, for he purchased from one *Nancy Louisa Wright*, by a notarial deed, dated the 6th December, 1852, a part of lot No 2, in the 4th concession, and of lot No. 1, in the 5th concession, and a part of lot No. 28 in the long range of the Township of *Templeton*, on the east side of the *Gatineau* River, adjoining those lots whereof *Philemon Wright Jr.*, had died seised, and by another notarial deed, dated the 7th December, 1852, he purchased from Mr. *Sparks*, who, jointly with his wife, *Sarah Olmstead*, conveyed to *Leamy* the respective pieces purchased by *Sparks* from *Wellington* and *Horatio G. Wright*, free and clear of every charge, burden, &c., excepting such as are imposed by the Letters Patent from the Crown, comprehending the said pieces of land.

It would seem, that about this time the Commissioners of Public Works were making surveys, and contemplating acquiring more land in the locality for improvements about to be made in the *Gatineau* works, and it is not unlikely that those contemplated improvements may have operated in some measure in inducing *Leamy* to extend his estate by purchase. The knowledge that the Commissioners of Public Works would investigate the title of any lands they might be about to purchase, may have induced him to have been more particular in having the title of *Sparks* to the land he was about to

purchase from him looked into, than he would otherwise have been. Up to this time there does not appear to have been any doubt whatever raised, by any of the parties interested in the *Philemon Wright* estate, as to the right of *Sarah Olmstead*, then Mrs. *Sparks*, selling as absolute proprietor, the piece of land which, claiming to be such, she had sold to the Commissioners of Public Works in 1849. It seems that when *Leamy* was contemplating purchasing the lands in which *Sparks* was interested by purchase from *Horatio* and *Wellington Wright*, he also contemplated purchasing from Mrs. *Sparks* the residue of the 159 acres, including the pond allotted to her, after deducting the 21 acres 1 rood and 25 perches sold by her to the Commissioners of Public Works in 1849, and it is not improbable that *Leamy's* better knowledge, arising perhaps from his residing in the neighborhood, of the quantity and situation of the lands which the Commissioners were having inspected, and surveyed, and would require, induced him to make those purchases, and it is altogether likely that upon the negotiation of the purchase from *Sparks*, he had his title investigated and also that of Mrs. *Sparks* to the residue of the 159 acres allotted to her, which he contemplated purchasing also. It was probably at this time discovered that, however much the parties may have intended, and Mrs. *Sparks*, formerly *Sarah Olmstead*, may have believed that she held the 159 acres allotted to her in fee, as the children held their shares, and in lieu of her claims to dower in the half of her deceased husband's estate, yet that no deed may have been executed to her, as had been to the children in March, 1838, or if executed, that it was defective by reason of some of the children having been infants, and she may have then for the first time been awakened to the discovery that a title, which she may have considered to be, and which all her children may have considered and intended to be, perfect, was in

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truth imperfect, for the want of a deed executed by parties competent in law to bind themselves and their heirs, evidencing what may have been well known in the family to have been the intention of the whole family.

The petitioner relies upon a notarial deed executed upon this same 7th December, 1852, by Mrs. *Sparks* to *Leamy*, for the purpose of showing that, as he contends, the fact is *Leamy* knew that Mrs. *Sparks* had only a usufructuary interest for life as her dower, in the 159 acres. By this deed she, describing herself as *Sarah Olmstead*, declared that she sold, assigned, transferred and made over from thenceforth and forever, with warranty of her own acts only, to Mr. *Andrew Leamy*, all and all manner of dower and right or title of dower whatever, either customary or conventional, prefix, which she might, or of right, ought to have a claim into and out of that messuage tenement parcel or piece of land heretofore belonging to *Philemon Wright Jr.*, her late husband, and which, at the division or partition thereof between her the said *Sarah Olmstead* and the heirs of the said *Philemon Wright*, was set apart to and for the use of her the said *Sarah Olmstead*, excepting, however, that piece sold by the said *Sarah Olmstead* to Her Majesty for the use of the *Gatineau* Works by deed (1032), dated 12th September, 1849, to have and to hold unto the said *Andrew Leamy*, his heirs, executors, administrators or assigns, the said dowers and all other rights whatsoever belonging to the said *Sarah Olmstead*, and which the latter claims as her right of dower of, into and upon the said messuages, tenements, parcel or piece of land referred to in said diagram, and called *Sally Olmstead*, with the exception of the piece sold to Her Majesty, and the said *Sarah Olmstead* thereby substituted and subrogated the said *Andrew Leamy*, his heirs &c., &c., in and to all and singular her rights of actions for and

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in respect of said dowers, to be claimed in the said messuage tenement, parcel or piece of land referred to in said diagram and marked *Sally Olmstead*, excepting, however, what is before excepted.

It is quite consistent with this deed, notwithstanding its frame, that both *Sarah Olmstead* and *Leamy* may have well known that the intention of the family was that the former should enjoy the 159 acres in fee in lieu of her dower in her husband's estate, and that *Leamy* may have been advised that, whatever might be their belief or knowledge upon that point, if the fee had not been in law secured to her by a deed executed for that purpose by persons competent to bind themselves, it would be of no use to him, if he comtemplated selling to the Government, to take a deed in fee from *Sarah Olmstead* as from an absolute proprietor, if he could produce no deed showing such a title in her, and that under the circumstances his best plan would be to take a deed describing the title as it would be in the absence of a deed conveying the land to her in fee, and that, as he knew what the intention of the family had been, of which family he was a member by marriage at the time of the execution of the deeds of 1838, having been married to *Erexina Wright*, in 1835, he might run the risk of having the title made perfect by the family, so as to enable him to give a good title to the Commissioners of Public Works. It may be said that all this is mere suggestion; but after the death of the parties to this transaction, and 27 years after it took place, a suggestion of motives explanatory of conduct, which, from matters which do sufficiently appear, would seem to be very natural and highly probable, may well be put forward and relied upon in answer to suggestions of bad faith, for which purpose this deed is relied upon by the petitioner, and for the purpose also of adding weight and support to the *bona fides* of other instruments subsequently execut-

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ed which the Crown relies upon, and which are assailed by the petitioner as false.

It seems that at this time the Commissioners of Public Works, through their counsel, were taking the ordinary precautions usual in such cases of enquiring into the title to the lands they contemplated acquiring, and it seems reasonable to conclude from the letters and reports which passed between the Superintendent of Works and the Secretary of the Commissioners that, in so far as affected the title to so much of the land then contemplated being acquired, which formed part of the 159 acres alloted to *Sarah Olmstead*, the only title shown up to and in the month of April, 1853, was the title, whatsoever that might be, which appeared upon the transfers of *Horatio G. Wright* and of *Wellington Wright's* interests, sold and conveyed to *Sparks* by the deeds of January 7th, 1837; upon the releases of the 5th March, 1838; upon the deed of lease and release of 1839, executed by *Sally Wright* and her husband to *Leamy*; upon the deed executed by *Sparks* in December, 1852, conveying to *Leamy* the shares of *Horatio G.* and *Wellington Wright*; and upon the deed of the same month of December executed by Mrs. *Sparks*, formerly *Sarah Olmstead*, and her husband to *Leamy*. It may be admitted that the deed of release of 3rd February, 1853, had not as yet been communicated to any person acting in the investigation of the title upon the part of the Commissioners. That deed purports to bear date the 3rd of February, 1853, and to have been executed by *Horatio G. Wright*, *Elizabeth Wright*, *Sarah Wright* and *Philemon Wright* in the presence of *James Goodwin* and *John Doyle*—and to sell, transfer and make over unto *Andrew Leamy*, his heirs and assigns all right, title, interest and claim of whatever nature either as heirs or otherwise, which they or any of them then had or might thereafter have in, to or upon that piece of land and pond of water

heretofore belonging to *Philemon Wright Jr.*, in his lifetime, of *Hull, and which at a division of his property between his heirs and his widow, Sarah Olmstead, was set apart to and for the use of the said Sarah Olmstead*, as will appear by reference to a diagram drawn by *Anthony Swallwell*, surveyor, annexed to a transfer made by the said *Sarah Olmstead* to the said *Andrew Leamy*, executed before *A. Larue* on the 7th December, 1852, and part of which is now used for the purposes of the *Gatineau* boom.

Now, this deed is so framed as to be consistent with the fact that the 159 acres were intended by all parties to have been enjoyed in fee by *Sarah Olmstead* as her share on the partition, although that intention may not have been effectually executed in law. Nothing turns upon the fact of the signature of *Elizabeth Wright* (Mrs. *Leamy*) to this deed being void, for the title of the Crown, in so far as Mrs. *Leamy's* interest is concerned, requires not this deed to support it; for she is a party to the conveyances under the statute under which the Crown claims.

But the petitioner asserts that this deed is a forgery in so far as the signatures of *Sarah* and *Philemon Wright* are concerned. These two persons were called by the petitioner and severally denied the signatures of their respective names to be in their hand writing. *Sally Wright*, however, having been shown the deeds of lease and release of 1839, admitted that she had signed them, and upon being asked to compare those signatures with the signature of the name of *Sarah Wright* to the deed of February, 1853, she admitted that they resembled each other, and that she sometimes signed her name as *Sarah* and sometimes as *Sally*. *Philemon Wright*, upon being asked whether he had any reason for saying that the signature of "*P. Wright*" to the deed was not in his hand writing, said

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that he had—namely, that he was not in *Hull*, but was a long way off in the bush upon the 3rd February, 1853, the day of the date of the instrument, and much evidence was entered into in support of this his allegation, but, as it seems to me, very little weight is to be attributed to this evidence, for it may be quite true that upon the 3rd February, 1853, he was absent, as he says, in the bush, and yet the deed may be a perfectly good and honest deed; indeed, it may be so even though it should not have been executed by *Philemon Wright* until after the expiration of some months after the time at which it bears date. Where a deed is prepared for execution by different persons who may be living at places remote from each other, and for that reason is executed by the several parties at different times, it is usual to date the deed of the day that it is executed by the one who first signs it, and those who sign subsequently adopt the deed as of the date so given to it. A cautious and precise witness would in such cases insert above his signature as a witness, for refreshment of his own memory, the time and place where each party executed the instrument, but an omission to do so would not avoid the deed, Now, it may be that this deed was signed by all but *Philemon* (whose name is set last to it) upon the 3rd of February, 1853, and that *Philemon's* signature was subsequently obtained upon his return from the bush. In that case the deed would be perfectly good and valid, although what he said as to his absence in the bush on the day the deed bears date may be true. *Doyle*, who was one of the subscribing witnesses to the deed, died early in 1854, and his signature is proved. Another subscribing witness, who swore to its execution for registry in August, 1876, was called and proves his own signature. He says that he made the affidavit for registry upon the faith of seeing his signature as a subscribing witness, but that he has

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no recollection at this distance of time of the fact of being present at the execution of it. This is precisely the evidence which might be expected from him after the lapse of 23 years. He gave evidence that the name of the other subscribing witness, *John Doyle*, was in the handwriting of a person of that name whom he knew at that time living in *Ottawa*, as bar-keeper to one *James Leamy*. He had no recollection of the fact of seeing any party sign the deed, and he said that without his own signature he would not have recollected anything about it. Being asked on cross examination by the petitioner's counsel, whether it was not possible that the names of the parties to the document were not signed in his presence, he replied that he could not say it was not possible. He was then asked if he meant to say that he was positive that he was present and saw the parties to the document sign their names thereto, to which he replied "certainly not, I have no recollection at all." The following question was then put—"Then you cannot say that you were present when the document was signed?—to which he replied—"I cannot say that I was present when they signed." Upon re-examination, the following question was put to him:—"With reference to your last answer, do you mean to say that you recollect you were not present as a witness?"—to which he replied—"I say I have no recollection of the signing in my presence, I could not swear whether I was present or not when they signed." To my mind, what this witness intended to convey by all this was just what he had stated in his examination in chief, namely, that he had no actual recollection at all of the matter; that he could not swear to anything about it from recollection, but that there was his signature, upon the faith of which he made the affidavit for registration; and that there was, to witness's knowledge and belief, *Doyle's* name in *Doyle's* handwriting as a subscribing

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witness also. Unless the deed was executed by some persons representing themselves to be the parties respectively signing it, both this witness and *Doyle* must have been parties to a forgery. Now, it is impossible to read the witness's evidence as intending to convey that he could falsely have set his name as subscribing witness to the execution of a deed which he had never seen executed, and, if this be not what he intended, then his evidence is just what might have been expected from an honest witness after 23 years, who had no recollection of the fact of execution, but who saw his own signature and that of another person whom he knew set as subscribing witnesses to the execution, and who, upon the faith of such subscription, had, in 1876, made oath to the execution for registration.

There are many reasons which may be urged, and there is also other evidence which may be relied upon, in my judgment, in support of the genuine character of the deed. Firstly, The recitals in the deeds of March, 1838, afford evidence to my mind, that the intention of all the parties to the partition of *Philemon Wright's* estate recited in those deeds was that the whole of his estate should be divided into nine parts, of which his widow should take one part in satisfaction of and in lieu of her dower, and that it was with this intent that the 159 acres, of which 71 acres were pond, were allotted to her. Secondly, Then as to *Horatio* and *Wellington Wright*, the deeds executed by them respectively to *Sparks* are fairly, as it seems to me, open to the construction that they were selling the whole of their respective interests in their father's estate. Thirdly, When *Sarah Olmstead*, in 1849, sold the 21 acres 1 rood and 25 perches to the Government, there can be no doubt that she regarded herself as being, and claimed to be, the owner in fee of the 159 acres allotted to her. Fourthly, That she had so sold this piece, claiming to be seised in

fee, must have been known, we may fairly assume, to her children, and yet none of them, so far as appears, made any objection to her having so done, or disputed her right to do so. Fifthly, *Leamy* may have been advised to take the deed of December, 1852, in the frame in which it was, because of *Sarah Olmstead* being unable to produce a deed transferring the fee of the 159 acres to her, although as one of the family he may have known that the intention of all parties was that she should take the fee, and he may have relied upon getting the family to confirm his title in pursuance of, and with a view to giving effect to, such original intention, so as to enable him to deal with the Commissioners. In this view the frame of that deed cannot be appealed to, to his prejudice. Sixthly, Under these circumstances and in this view, the execution of the deed of the 3rd of February, 1853, would have been a proper act to be performed by the respective parties to that deed, and would have been but the fulfilment and discharge of a moral obligation resting upon those parties to give legal effect, so far as they could, to what had been agreed between the parties to the partition, and acted upon as if it had been legally effectuated. Seventhly, Under these circumstances, it would be reasonable that the deed should be executed without any consideration therefor being paid by *Leamy*. None appears or is pretended to have been paid by him; it merely states that it is executed for good and valid considerations previously paid. Eighthly, The withdrawal of all opposition by *Hull Wright*, *Pamelia Wright* and *Serina Wright* to the confirmation of the deed of May, 1855, subsequently executed by *Leamy* to the Government, also affords strong evidence in confirmation of the position that *Sarah Olmstead* was intended to have an estate in fee in the 159 acres, and that it was for this reason that the opposition

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was withdrawn; and Ninthly, The execution of the several deeds under which the petitioner claims, for the consideration of which evidence has been given, is quite consistent with the parties who executed those deeds believing that they had no beneficial interest to transfer, and is, to my mind, wholly inconsistent with their believing themselves to have any beneficial interest.

But, besides all these considerations, there is the evidence of one *Clark*, who having taken receipts from *Horatio*, *Serina* and *Philemon Wright*, which he produced, testified to his belief that the instrument dated the 3rd February, 1853, was signed by those persons; an opportunity of the comparison of the signatures of those persons with undoubted documents signed by them respectively has been also afforded us, which, I confess, instead of creating a doubt in my mind, confirms me in the belief that the signatures to the deed of February, 1853, are genuine.

It was argued, that if the deed was genuine it would have been brought forward by *Leamy* at once upon its execution. But who is to say? Certainly no one does say that it was not exhibited to Mr. *McCord*, the counsel taking the title upon behalf of the Commissioners. Its having been produced to Mr. *McCord*, we may conclude with certainty, would have had no effect whatever upon him, so as to have diverted his mind for an instant from taking the steps which he seems to have resolved to take, namely, to take a deed, under the Act of Parliament, executed by *Leamy*, as the best and most perfect title which in his judgment could be obtained, and the only one that he would recommend; and to procure a confirmation of it. Upon the whole, therefore, the evidence in favor of the genuineness of the deed appears to me to be immeasurably stronger than that offered against it.

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The fact of this deed not having been registered until after the registration of the deeds under which the petitioner claims, is, in my judgment, of no importance, for the title by the conveyance under which the Crown claims from *Leamy* and wife, which is made a good title by statute, and which deed was registered at the time of its execution, intervened (1). Moreover, at the time of the Code coming into force, the Crown was in open and public possession of the land as owner, and so within the exception enacted by article 2088 of the Code.

Then, by notarial deed dated the 27th September, 1853, *Sarah Olmstead* sold, ceded, transferred and made over, with warranty of her own acts and deeds, to *Andrew Leamy*, all the right, claim, title and interest, demand and property of the said *Sarah Olmstead*, of, in, to and upon that piece or parcel of land situate, &c., &c., and described on the plan drawn by *Anthony Swallwell*, surveyor, and which is of record in the office of *A. Larue*, one of the undersigned notaries, together with the pond of water included in the said piece or parcel of land, excepting, and the said *Sarah Olmstead* doth except and reserve out of said piece or parcel of land and pond of water, all that certain piece containing 21 acres 1 rood and 25 perches, sold to the Government by deed bearing date the 12th September, 1849. This deed is expressed to be made in consideration of £100 acknowledged to have been paid to her by *Leamy* previous to the 7th December, 1852, upon which day the said *Sarah Olmstead* declares that she delivered unto the said *Andrew Leamy* seisin and possession of the said piece or parcel of land so transferred and described as aforesaid.

With respect to this deed it may be observed that, if it was never intended that *Sarah Olmstead* should be the owner in fee of the piece allotted to her, in lieu of

(1) See article 2089, Civil Code.

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her dower in her deceased husband's estate, and if it was only allotted to her to enjoy the usufruct for life as her dower, there would have been no sense whatever in her executing this deed after having, in December, 1852, sold all her interest in the land, if her usufruct by way of dower was all the interest she was supposed to have; but if the deed of December, 1852, was executed under the circumstances and for the purpose which I have above suggested when dealing with that deed as the probable motive for its being executed in the frame in which it was prepared, then, if *Leamy* had afterwards procured the release of February, 1853, to be executed by the parties thereto, which, if executed by them, is fairly open to the construction that it was so executed in recognition and confirmation of the previous intention entertained at the time of the partition, that *Sarah Olmstead* should hold her allotment in fee, it was not unnatural or improbable that *Leamy* should have been advised to take a deed from *Sarah Olmstead*, conveying to him her estate in the land, whatever it might be, not describing it as dower, in support of *Leamy's* title to the whole lot in fee as against *McGoey* and *Hull Wright* and *Serina Wright*, in case they should persist in withholding their recognition of *Sarah Olmstead's* claim to the fee in accordance with the intention entertained at the partition. The execution of this deed affords to my mind strong evidence of the *bona fides* of the contention that such was the intention entertained by the parties to the partition at the time it was made.

I pass over the deed of March, 1854, executed by *Leamy* and wife, because by deeds subsequently executed by them, in May, 1855, that deed was vacated. It appears that subsequently to March, 1854, the Commissioners contemplated acquiring more land than was mentioned in that deed, and not being able to agree with *Leamy* as to the price, it was by mutual agreement referred to

Mr. *A. J. Russell* to set a price upon the several parcels. This *Russell* did, and the prices so set by him were adopted by *Leamy*, who thereupon agreed to accept those prices for the lands. Accordingly, two deeds were prepared, bearing date the 7th of May, 1855, and executed by *Leamy* and wife: by one of those deeds they conveyed to the Crown the 18 acres and 26 perches acquired by *Leamy* by the deed of December, 1852, from *Nancy Louisa Wright;* a strip of land, parcel of the allotment of *Wellington Wright*, conveyed by him to *Sparks* in January, 1837, and sold by *Sparks* to *Leamy* by deed of December, 1852, and a small strip forming part of the allotment of *Erexina Wright, Leamy's* wife. By the other deed *Leamy* and wife conveyed the following parcels of the said lots 2 and 3, in the 5th concession of *Hull*, namely: 1st, a strip of land on the east side of the *Gatineau* River; 2nd, 65 acres and 10 perches, parcel of the 159 acres allotted to *Sarah Olmstead*; and 3rd, a part of lot No. 2, particularly described in the deed. Of the lands comprised in this deed it is only with the 65 acres and 10 perches, as I understand it, that we have to deal. The price, however, representing all the lands comprised in this deed, as agreed upon between *Leamy* and the Commissioners in pursuance of the award of *Russell*, was paid into the hands of the Prothonotary of the Court of Queen's Bench for the district in which the lands lay, in pursuance of the provisions of 9th *Vic.*, ch. 37, sec. 9, for the advisers of the Commissioners seemed to have determined to rest upon a title acquired under that Act.

Now the 8th sec. of the Act had enabled the Commissioners to contract and agree as to the price of the lands they might require, with all persons possessed of or interested in such lands. And by the 9th section it was enacted that—In *Lower Canada* the compensation agreed upon by the Commissioners and any party law-

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fully in possession as proprietor of any lands which might be lawfully taken under the Act, without the consent of the proprietor, should stand in the stead of such land, and that *any claim to*, as well as any hypothec, or incumbrance upon the said land, or any portion thereof, *should be converted into a claim to or upon the compensation*, and that if the Commissioners should have reason to believe that any such claims, &c., &c., exist upon the land, &c., &c., &c., *or if for any other reason* the Commissioners should deem it to be advisable, it should be lawful for them to pay the money into the Court, together with an authentic copy of the conveyance, and that proceedings should be thereupon had for confirmation of such title, in like manner as in other cases of confirmation of title, *except that in addition to* the usual contents of the notice, the Prothonotary should state that such conveyance was under the Act, and should call *upon all persons entitled to, or to any part of the land*, or representing or *being the husband of any parties so entitled, to file their opposition for their claims to the compensation, or any part thereof*, and all such oppositions should be received and adjudged upon by the Court, and the adjudgment of confirmation should forever bar *all claims* to the land, or any part thereof, including dower not yet open, &c., &c., &c., and the Court should make such order for the distribution, payment or investment of the compensation, and for securing the rights of all parties interested, as to right and justice, according to the provisions of this Act and to law should appertain, &c.

From this Act it appears that the Legislature contemplated the Commissioners agreeing with a person in possession *animo domini* as to the price to be paid for the fee simple title to the land of which he was in possession, although he might turn out not to be seised of the whole of such estate. The Act, as it appears

to me, authorizes the Commissioners to agree as to the amount of compensation which is to stand instead of the land with a person in possession *animo domini*, that is, as a proprietor, although it might turn out that the title under which he claimed was imperfect, or that he was not sole proprietor, but that others were entitled to undivided interests in the land with him.

The provisions of the 9th section and of the last clause of the 8th section seem to me to have been framed for the precise purpose of meeting such a case and of vesting in Her Majesty, her heirs and successors, all land *contracted* for in manner aforesaid, and the object appears to have been to protect the Crown, when contracting with a person in possession as a proprietor, against the claims of all other persons to the land, or to anything but the compensation so agreed upon, in case any others should prove to be entitled to the land, or to some part thereof.

The Legislature has, by these two sections taken together, in effect declared, that a contract made with the commissioners by a person in possession as proprietor shall convert the claims of all persons interested in the land from claims to the land into claims for the compensation agreed to be paid for the land.

Now, that *Leamy*, when this deed of the 7th of May, 1855, was executed, was in possession as a proprietor, and that he believed himself to be, and that he claimed to be, absolute proprietor of the 159 acres allotted to Mrs. *Olmstead*, I do not think we can reasonably doubt; from the view which I take, as already expressed, it will be seen that, in my opinion, he had just and sufficient grounds for entertaining such belief, but, however this may be, there can be no doubt, I think, that he was in possession as proprietor, *animo domini*, and that he was a person competent, within the provisions of the Act, to agree with the Commissioners upon the price to

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be paid for the whole land, and so to convert the claims of all persons, if any others should prove to be interested in the land with him, into claims upon the compensation so agreed upon.

The deed having been executed under the 8th section, we find that proceedings were taken under the 9th sec. to obtain confirmation of that deed. These proceedings, as it appears to me, were not enacted so much for the purpose of making the title of the Crown *to the land* contracted for with *Leamy* by the Commissioners more perfect than it always was in virtue of the contract with *Leamy*, and the conveyance executed by him, which by force and effect of the 8th section in connection with the 9th had, as I think, in the existing circumstances converted the claims of all persons "*to the land or any portion thereof*" into a claim upon the said compensation, as they were inserted for the protection of the Crown against claims to the compensation.

But assuming the proceeding to confirmation to be a step necessary to complete the bar of all *claims to the land*, this step was taken, and upon being taken, *Hull Wright* and *Pamelia Wright*, the wife of *Thomas McGoey*, which *Hull Wright* and *Thomas McGoey* had, by letter of April 26, 1855, notified the Commissioners of Public Works that they were personally interested in the land, and *Serina Wright*, filed oppositions in the proper court in that behalf. The Act declares that such oppositions being made shall be received and adjudged upon by the Court, and such proceedings were thereupon had that these oppositions were withdrawn upon application of the opposants to the Court, which therefore adjudicated upon the oppositions by dismissing them. Now, when these parties, in conformity with a notice informing them that the deed sought to be confirmed was a conveyance executed by *Leamy* and wife for the purpose of

giving a title under the Act, and calling upon all persons entitled to any part of the land *to file their oppositions for their claims to the compensation* or to any part thereof, do file such oppositions and afterwards withdraw them, they must be considered as abandoning all claims. And after so withdrawing their claims such opposants cannot, in my opinion, be permitted, nor can any person claming through or under them be permitted, afterwards to impugn the title obtained by the Crown by reason of any imperfection, irregularity or defect, if any such should occur in the proceedings taken towards confirmation of the title *subsequently* to the withdrawal of such oppositions, and therefore it is not, in my opinion, competent for these parties, or for the petitioner as claiming through them, to attack the judgment of confirmation as he has done by the inscription *en faux* for an alleged omission to paraph the judgment. What injury could it work to the parties who had withdrawn their claims, if *subsequently* some irregularity or defect should occur? Plainly they would not be prejudiced by any such defect, and therefore, as it seems to me, upon no principle should they be allowed to make such an objection. I am of opinion, however, that the evidence which they offered in support of the inscription *en faux* was defective and insufficient, for the reasons given by the learned Judge of the Court of Exchequer in his judgment in that Court.

It is said, moreover, that the oppositions which were filed in Court were improperly withdrawn by the attornies of the opposants without their consent. In reply to this, it may be observed that this is an assertion of which no proof was offered, and if it were true, as asserted, that could not affect the title of the Crown to the land, for if the attornies of the opposants improperly withdrew the oppositions filed, without the consent of their clients, the utmost relief in such a

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state of things which the clients could obtain would be, to be reinstated in their oppositions, and that they should be permitted to reassert their claims *against the compensation*, which by the statute was made to stand in the place of the land. The improper and unauthorized withdrawal of the oppositions filed by the attornies, if such a thing did take place, would not revest the interest, if any, which the clients may have formerly had in the lands in them so as to enable them to convey such interests to the petitioner. It seems, therefore, to me, to be unnecessary to enter upon the point as to the transfers under which the petitioner claims being transfers of *droits litigieux*.

A point was urged to the effect that the deed executed by *Leamy* and wife, purporting to convey the land in question, was imperfect, by reason of its not having been executed under the hand and seal of the Commissioner of Public Works, as well as by *Leamy* and his wife, and that by reason of such imperfection the deed was not such a one as could have been confirmed under the Act. I do not understand this objection to be rested upon any provision of the Civil Code applicable equally to all cases of deeds of sale of lands, but that the objection is relied upon as applicable only to the cases of deeds of sale under the Act 9th *Vic.*, ch. 37, and that it is wholly founded upon the 17th section of that Act, which enacts :

> That the Chief Commissioner for the time being shall be the legal organ of the Commissioners, and all writings and documents signed by him and countersigned by the Secretary, and sealed with the seal of the Chief Commissioner, and no others, shall be held to be the acts of the Commissioners.

The observations I have already made, as to an objection taken in respect of any irregularity in the proceedings to obtain confirmation occuring *subsequently* to the withdrawal by the opposants of their oppositions

filed, would apply equally to this objection, if there were anything in it.

After notice given upon behalf of Her Majesty that she claims under the deed as a deed accepted by her under the Act, and after the purchase money agreed upon by the Commissioners had been paid into Court for the benefit of all having any claims to any part of the land, and after the opposants had come in and filed their oppositions in answer to a notice calling upon them to file their oppositions for *claims upon the compensation so paid into Court*, neither the opposants themselves, nor any person claiming under them, can, as it appears to me, be heard to say that the deed is defective for want of execution by the Chief Commissioner. The 17th section, however, has no reference to the case of a deed conveying lands to Her Majesty. The 8th and 9th sections relate to such deeds, and these sections declare that the lands purchased *or acquired* by the Commissioners shall be vested in Her Majesty, and that the conveyances may be *accepted* by the Commissioners upon behalf of the Crown, but this acceptance may be signified as it might be by any other purchaser, viz.: by payment of purchase money, the manual acceptance of the instrument and entry under it upon the lands. No better signification of the acceptance of the conveyance could be given than the lodging a copy of it together with the purchase money in Court, as the Act directs, for the purpose of obtaining confirmation of it, and the entry upon and continuous possession of the land under the conveyance.

The 17th section relates to those executory contracts which, to be *binding upon the Crown*, must be executed as directed in that section, and has no reference to a deed transferring title to Her Majesty. A deed executed by persons having authority to agree with the Commissioners upon the price to be paid for the whole fee, as

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provided in the Act, vests the whole estate in the Crown, barring forever the claims of all persons whomsoever upon the land, whether such deed should be signed by the Chief Commissioner or not, and converts their claims into claims for the compensation.

Upon the whole, I am of opinion, that the title of the Crown to the lands in question is unimpeachable; in my opinion, the intention of the parties to the partition of *Philemon Wright* the younger's estate appears to have been that *Sarah Olmstead* should enjoy in fee the 88 acres of land with the 71 acres of pond in satisfaction of her claim for dower, and she entered upon the land and exercised acts of ownership upon it upon the faith of such being the intention, and although legal effect may not have been given to that intention by a deed properly executed by the parties interested and competent to give a valid title, or, if executed, may have been lost, still, when she conveyed to the Crown the lands comprised in the deed of 1849, she was in possession *as proprietor*, claiming to be entitled as such, as I think we must reasonably infer, in virtue of a family arrangement, which she *then* in good faith believed to be acknowledged and regarded as good by all parties interested; and if the Commissioner of Public Works in good faith contracted with her, believing her to be in possession as proprietor, and agreed with her in good faith as to the price to be paid for the land, and in pursuance of such agreement took a conveyance from her and entered upon the land under such conveyance, and applied it to the public purpose for which it was acquired, the claims of all persons, if any others should prove to be entitled to the land, would, in my opinion, be converted under the provisions of the statute from claims to the land into claims to the compensation so agreed upon.

But, assuming confirmation of that deed to have been

a step necessary to make the title of the Crown to the land perfect under the statute (a step which does not appear to have been taken with reference to this deed), still the possession acquired by the Crown under that deed, executed and accepted in good faith and in the belief that it conveyed a good title, would make a basis for prescription to operate upon; and there is not a particle of evidence warranting the slightest imputation of bad faith to the parties acting for the Crown in taking title under that deed. Her Majesty's title, therefore, to the land coveyed by the deed of 1849 cannot, after twenty-seven years undisputed, uninterrupted possession under that title, be called in question.

It was contended that until the Code Her Majesty could not acquire title by prescription, but the article 2211 which declares that the Crown may avail itself of prescription is given as old law, and whatever may in truth have been the law of *France* upon that subject, we are concluded by the above article, which we must construe as declaring what was the law in *Lower Canada* before the adoption of the Civil Code, and this article must be read as declaring the right of the Crown by prescription to have accrued in the like cases and under the like circumstances as title by prescription would have accrued to the subject, that is to say, as appears by the 1st vol. of the Commissioners' Report upon prescription (1), by prescription during ten years against a proprietor present, and twenty years against an absentee.

The article 2251, which makes new law, providing for the future only, cannot alter or abridge in any respect the effect of the declaratory article 2211 as to what was the old law. Under article 2251, for prescriptions begun since the Code, ten years will be sufficient against absentees, where formerly twenty years would

(1) P. 539, sec. 92.

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have been required, but the old law prevails (unaffected by this or any provision in the Code pointing to the future) where the prescription began to run before the Code. This is specially provided by article 2270. It is clear, therefore, that prescription in favor of the Crown could begin before the Code, and could mature into a perfect title, where, in like circumstances, it would have done so in favor of a subject.

As to the residue of the land comprised in the deed of the 7th May, 1855, I have already expressed my opinion to be that, for the reasons already given by me, the title of the Crown is perfect under the provisions of the statute, but Her Majesty's title to this portion also is good by prescription. It is apparent, from the whole evidence, as it strikes my mind, taken even in connection with those notices of claim given in 1853, and in April, 1855, which the petitioner's counsel so much relied upon for the purpose of establishing bad faith, that the persons acting as advisers of the Commissioners were particular in taking care that there should exist no just ground for imputing to them any want of the most perfect good faith in the taking the title which should be accepted. It appears that an experienced counsel was employed to secure a good title, and he seems to have resolved to take title only under the provisions of the statute. Under his advice, a deed was taken from a party in possession of the land claiming to be absolute proprietor, but undoubtedly interested therein to a large amount, if not to the extent of the whole estate. Having taken what I can see no reason to doubt counsel believed to be a good deed under the statute, he must have communicated to the Commissioners of Public Works, the proper officers representing the Crown, the facts of the execution of the deed, and of its having been taken under the statute, for we find that upon the 23rd of June, 1855, the Commis-

sioners caused to be deposited the purchase-money, £1,404 16s. 2d., together with the deed of the 7th May, 1855, in the proper Court in that behalf, under the provisions of the statute. Now, from this date, at least, we must hold that the Commissioners of Public Works, representing the Crown, had notice from their counsel that the deed of the 7th May was perfected, and that it was taken under the statute. This, then, is the period at which the test is to be applied to determine whether the Commissioners had any reason to doubt the goodness of the title which they accepted by thus paying the purchase-money into Court, to be dealt with in accordance with the provisions of this statute in that behalf. The petitioner's counsel relied upon a passage in *Pothier* (1).

La bonne foi requise pour la prescription, étant la juste opinion que la possesseur a, que la propriété de la chose qu'il possède lui a été acquise, c'est une conséquence que lorsque mon procureur a acquis pour moi un héritage avant que j'ai été informé de l'acquisition, je ne puis néanmoins commencer le temps pour la prescription jusqu'à ce que j'ai été informé de l'acquisition ; car se ne puis avoir l'opinion que je suis propriétaire d'un héritage avant que de savoir qu'on en a fait pour moi l'acquisition.

And they asked: Is there anything, then, to establish that Her Majesty has since the execution of the deed become cognizant of it?

If by this question is meant whether there is any evidence that Her Majesty has personally become cognizant of the deed, I answer, no. Nor, in my opinion, is it necessary that there should be. If the law required that Her Majesty should personally be made cognizant of the execution of a deed so procured to be executed, vesting land in her, so likewise to establish the want of that *juste titre*, whereon to base prescription, it would be necessary to show that Her Majesty *personally* did not entertain that firm and undoubted belief that she

(1) Prescription No. 30.

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had become proprietor, which alone, as was so strongly urged by the petitioner's counsel, constitutes *bonne foi*, and as Her Majesty, as we know, personally knows nothing whatever about these transactions, the effect would be that the Crown could never stand for title upon prescription by ten years undisputed possession under a *juste titre*. But under this Act the Commissioners for Public Works must be held to represent Her Majesty. They are the persons who are authorized to contract for, purchase and acquire the lands, which, when so purchased and acquired, the Act declares, shall be vested in Her Majesty, and to put a rational construction upon the Act we must hold that the knowledge acquired by the Commissioners of the fact of the execution of the deed (of which fact we must conclude they were informed, when, upon the 23rd of June, 1855, in acceptance of the title so acquired, they paid the consideration-money into Court to be dealt with under the statute), is sufficient, within the meaning of the passage extracted from *Pothier*, to base prescription upon, and as there does not appear to me to be a tittle of evidence to cast a doubt upon the *bonne foi* of the Commissioners at that time, construing *bonne foi* as the petitioner's counsel contend it should be construed, namely, the entertaining a "firm and undoubted belief" in the goodness of the title so acquired, prescription by ten years possession under this title would make the title of the crown good, if there was no other to rest upon. It appears to be rather inconsistent for the petitioner's counsel to contend that this knowledge of the Commissioners as to the execution of the deed which led to the payment of the consideration money into Court under the provisions of the statute could not be relied upon as a base of prescription from that date, when they insisted so strongly upon the knowledge acquired by the Commissioners by notice to them in

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1853, and in April, 1855 for the purpose of establishing the absence of good faith in May, 1855. But it is said that ten year's prescription is insufficient, by reason of the absence, as is alleged, of *Serina* and *Sally Wright* and of the children of *Hull Wright*.

In answer to this objection, it is to be observed: 1st. That there is no replication in answer to the plea asserting title in the Crown by ten years' prescription, which asserts the absence of any of the parties to be affected by such prescription; the only answer to that plea is one denying it, and according to every principle of pleading prevailing under every system of jurisprudence, if there be no pleading raising an issue upon the subject, evidence of the absence of any of the parties which would be affected by prescription is inadmissible. But 2nd. As to *Hull Wright*, the evidence shows that he was not absent, for he was present when he entered his claim under the statute upon the proceedings being taken in Court for confirmation of the deed, and he continued to be present until his death, in April, 1857, and there was no interruption of the prescription so begun during the currency of the ten years upon behalf of any one claiming through or under him. So also as to *Serina;* she was also present when she entered her claim in Court upon the proceedings taken for confirmation of the deed, nor is there any evidence of her having been absent at any time until after the expiration of the ten years from the opening of the prescription in 1855, and as to *Sally Wright*, there is no evidence of her having been absent when the ten years' prescription began to run in 1855, nor of any interruption of such prescription upon her part. But 3rd. The absence of *Sally Wright*, if established, is, in my judgment, immaterial, for the reason, that in my opinion, it sufficiently appears that she executed the quit claim deed of February, 1853, and, moreover, twenty years had elapsed before the

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institution of proceedings by the petition of right in this case, so that upon the whole, as it appears to me, the title of the Crown to all the land in litigation is unimpeachable and the appeal should be dismissed with costs.

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*Jan'y 29.

*April 16.

L'UNION ST. JOSEPH DE MONTREAL..APPELLANTS;

AND

CHARLES LAPIERRE.....RESPONDENT.

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

Benefit society—Expulsion of member—Prior notice not necessary under By-laws—Mandamus.

L. was expelled from membership in *L. U. St. J.*, an incorporated benefit society, for being in default to pay six months' contributions. Art. 20 of the society's by-laws, sec. 5, provides that "When a member shall have neglected during six months to pay his contributions, or the entire amount of his entrance fee, the society may erase his name from the list of members, and he shall then no longer form part of the society; for that purpose, at every general and regular meeting, it is the duty of the Collector-Treasurers to make known the names of those who are indebted in six months contributions, or in a balance of their entrance fee, and then any one may move that such members be struck off from the list of members of the society."

L. thereupon brought suit under the shape of a petition, praying that a writ of *mandamus* should issue, enjoining the company to reinstate him in his rights and privileges as a member of the society. 1. On the ground that he had not been put *en demeure* in any way; and that no statement or notice had been given him of the amount of his indebtedness; 2. On the ground that many other members of the society were in arrear for similar

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

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periods, and that it was not competent for the society to make any distinction amongst those in arrears; 3. On the ground that no motion was made at any regular meeting.

The Court of Queen's Bench for *L. C.* (appeal side) held that *L.* should have had "prior notice" of the proceedings to be taken with the view to his expulsion.

Held: On appeal, that as *L.* did not raise by his pleadings the want of "prior notice," or make it a part of his case in the Court below, he could not do so in appeal.

Per *Taschereau* and *Gwynne*, J. J., a member of *that* society, who admits that he is in arrears of six months' contributions, is not entitled to "prior notice" before he can be expelled for non-payment of dues.

APPEAL from a judgment of the Court of Queen's Bench for *Lower Canada* (Appeal side), rendered at *Montreal*, 21st December, 1877.

This was a suit instituted under the shape of a petition for a peremptory *mandamus* and requête libellée, by the respondent, who alleged in his petition, among other things, that, having been duly admitted, he continued for many years to be a member of the defendant society, which is a body corporate established in the City of *Montreal*, whose object (as stated in the petition) was and is to aid those belonging thereto in case of sickness, and to secure similar assistance and other advantages to the widows and children of deceased members.

The petition further stated that the society was and is governed by a constitution and by-laws, and admitting that, on the 13th of January, 1877, the petitioner had neglected during more than six months to pay his contributions, and that it was then competent for the defendant society to strike his name from the list of members and to prevent him from any longer forming part of the said society, averred that to that end it was necessary for the society duly to require the member thus in arrear to pay the said arrears, and that at a general and regular meeting the collector-treasurers

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should make known the names of those who are indebted in six months' contributions, and then that some one should make motion that such members be struck from the list of members, and he referred to the by-laws of the society in support of this contention. The petitioner then alleged: That no request was ever made to him for the payment of his arrears either by the Treasurer, or by the Collector or his assistant. That no account was ever sent to him and that he has never known and does not know what is the amount due by him for the arrears. That no motion was made on or before the 13th January, 1877, by any member of the society defendant, at any general and regular meeting, with the object of striking from the list of members the names of those members which the collector-treasurers are obliged to make known as being indebted in six months' contributions or more, and that in reality no motion was adopted to that effect. That on and before the said 13th day of January, and even after, there was and there is still a great number of members who are in arrears for more than six months' contributions, and who are in the enjoyment of all the benefits and advantages of membership. That the defendant society has often consented to receive the payment of more than six months' arrears from its members. That the defendant had no right to erase the name of the petitioner from its list of members under the pretext that he owed more than six months' contributions, without erasing at the same time the names of all members who likewise owed more than six months' contributions. The petition further alleged that on the 23rd of April, 1877, the petitioner presented himself at a general and regular meeting of the society defendant held at the society's ordinary place of meeting, and that there and then the petitioner did offer, in presence of the president, the officers and members of the society

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assembled in regular meeting, in good current money, the sum of $20.00 to pay the arrears which he may have owed the defendant, *that he might be again received as a member of the said society*, which the defendant illegally and unjustly refused, and that ever since the said the 13th of January the defendant has refused to reinstate the plaintiff petitioner in his rights and privileges as a member of the said society, and that illegally and fraudulently and without cause or reason; wherefore the petitioner prayed that a writ of *mandamus* should issue, enjoining the defendant to reinstate the petitioner in his rights and privileges as a member of the said society.

To this requête libellée and to the writ of *mandamus* the defendant filed an *exception péremptoire*, wherein the defendant society says and alleges that it avails itself of the important admissions contained in the requête libellée, to wit, that the petitioner was indebted for more than six months and that he has been regularly expelled from the society.

That in fact the petitioner was well and duly expelled, according to the constitution and by-laws of the said society, conjointly with twelve other members in default like himself, by a resolution adopted unanimously at a meeting of the society held in the assembly hall on the 8th day of January, 1877.

That the said resolution of expulsion was in order and had been preceded by the reading of the names of the members in default whom the society desired to expel, —that the defendant is not obliged to collect at their domiciles the contributions of members in arrears, but that, on the contrary, the members are obliged to pay all their contributions, fines and other dues at the hall of the said society where it holds its meetings and where all its business is transacted, at the general, as well as at the weekly meetings.

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That the right of the defendant to expel its members in arrears is optional, and it is responsible therefor to no one.

That the defendant has a right to expel either all or any part of its members in arrears, and it considers of essential importance the power to expel when it chooses, and those whom it chooses, consulting merely the opportunity of circumstances and its own well understood interests, wherefore the defendant prayed, that the writ of *mandamus* be quashed, and that the requête libellée be dismissed.

For answer to this peremptory exception the petitioner replied, declaring that all the facts tending to contradict the allegations of the requête libellée are false and unfounded in fact, wherefore the plaintiff, persisting in the conclusions by him taken in his said requête, prayed that the peremptory exception should be dismissed.

The plaintiff filed the following articulations of facts to be proved by him, to which the defendant gives the respective answers following:

"*Articulation* 1.—Is it not true that before the month of January last, (1877) the plaintiff was a member of the society defendant? *Answer.*—Yes, but liable to be struck off.

"*Articulation* 2.—Is it not true that when the name of the defendant was erased from the list there were at the same time other members in arrears with the payment of their contributions, whose names remained on the said list? *Answer.*—Yes.

"*Articulation* 3.—Is it not true that in the month of January last, and at the time of the institution of this action, there were persons owing more than six months' contributions who are still in the enjoyment of the rights and privileges of members of the society defendant? *Answer.*—Yes, a number remain members,

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but the fact of being in arrears deprives them of some of the benefits.

"*Articulation* 4.—Is it not true that all the facts alleged in the said requête are true? *Answer.*—No."

Certain extracts from the constitution and by-laws of the society were produced in evidence and admitted, whereby it appeared that each candidate for admission to membership promised to be faithful to the by-laws of the society. That by article 5 of the by-laws the regular contribution of members was forty cents per month, payable each month; and by article 11 that it was the duty of the collector-treasurers to collect those dues during the meetings, and at each regular and general meeting to call over the names of members who were indebted in contributions for six full months or over * * * * * * ; and by article 22 that every member who should fail to attend any general and regular meeting should be liable to a fine of 5 cents without appeal, except in cases of sickness or absence from the city; and by article 20 sec. 5, that when a member should have neglected during six months to pay his contributions, the society might erase his name from the list of members, and he should then no longer form part of the society; that for this purpose it should be the duty of the collector-treasurers at every general and regular meeting to make known the names of those who are indebted in six months' contributions, and then that any one might move that such members be struck off from the list of members of the society; and further, by sec. 6 of the same article, that every member who should have compromised the honor, the dignity, or the interests, of the society, might be expelled therefrom; that a member should be held to have compromised the honor of the society when guilty of immoral conduct, and the corresponding secretary, having warned him in writing and by order

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of the society to reform his conduct, if he does not amend his ways in the space of the month he might be expelled on motion. And by article 10 of the constitution it was provided that every member forfeits his right to the benefits, and his other rights who does not fulfil the obligations required by the by-laws. And by article 7 of the constitution it was declared that the members should pay the monthly contribution as fixed by the by-laws.

There was also produced and filed as evidence in the cause an admission in writing signed by the attornies for the petitioner in the words following:

"The parties admit that the exhibits produced are true copies of the documents they purport to be, and that the name of the plaintiff was read at the meeting at which his name was erased before the motion was made for expulsion, as well as the names of the members mentioned in the resolution produced in the record."

This motion, extracted from the minutes of the general meeting of the 8th January, 1877, was also produced, and was as follows: "Moved by Mr. *Leclerc*, and seconded by Mr. *J. Bte. Massé*, that the following named gentlemen be struck from the list of members of the society on account of arrears, to wit:" (here follows the names of 13 members, including the petitioner).

Upon this record and evidence the learned Judge of the Superior Court rendered judgment in favor of the defendants, considering the exceptions of the defendants to be well founded in law, and he granted the conclusions thereof and dismissed the petition of the petitioner with costs.

Mr. *Carter*, Q. C., and Mr. *Mousseau*, Q. C., for the appellants:

In this case the respondent was expelled for the mere cause of non-payment of his monthly contributions. In his petition he admits he was in arrears for six months,

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and that it was competent for the appellants to strike his name from the list of members, and by the admission of facts which is of record admits that in accordance with the by-laws his name was read at the meeting where his name was erased, before the motion was made for expulsion. Nothing else was required by the constitution and by-laws of the society. Contributions are payable at the hall where the members meet at the monthly meetings, and as all members are bound to attend these meetings, every member must be presumed to be present, and know what is going on.

The only grounds of complaint, such as laid down in his petition, are three in number: 1st. No *mise en demeure*, or demand of payment. 2nd. Many other members of the society were equally in arrears, and the society had no right to discriminate amongst them; 3rd. No motion made to expel respondent. The Superior Court deemed these grounds insufficient, and on appeal to the Court of Queen's Bench, their decision was reversed, because respondent had been expelled without "prior notice." This was a new argument, it was not one of the grounds chosen *in limine*, before the Superior Court, and it would be a great injustice to allow it. And why? No evidence is allowed in appeal; if the point had been raised in the Superior Court, the appellant would have proved a usage, a *coutume* followed by unanimous consent, and prove that the mode of procedure to expel members in arrears was and has been the one adopted against *Lapierre*, and hundreds of members have, in fact, been struck off in the same manner.

Now we come to the merit of the contention that *prior notice* was necessary. Why should such a notice be necessary in the present case? *Lapierre* is not accused of misbehavior, of having compromised the honor or the dignity of the society. If such a charge

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had been preferred against him, notice would have been necessary, as provided and required by sub-section 6 of art. 20 of the by-laws.

Lapierre has been expelled for the mere cause of non-payment of his monthly contributions, burial dues and fines. In such cases, prior notice is not necessary.

This case is to be viewed as a matter of contract, and we contend that this by-law is equivalent to a notice. The case of *Ragget* v. *Musgrave* (1) is in point, and in this as in that case the rules provided for the manner of payment. When the date and the place of payment is determined, as in the present instance, the law prevailing in the province of *Quebec* requires no *mise en demeure*, no demand of payment, nor any notice whatever prior to the time of payment.

The rules and by-laws of this society fall under the provisions of the Civil Code of the province of *Quebec*. See Arts. 1056, 1131 and 1134.

The society is not and cannot be bound to pass a trial on a member on the mere question of non-payment of his dues. The question of *prior notice* does not apply. A member of a society such as the society appellant in default is never notified in advance that he may defend himself on a charge of non-payment, and there are English authorities clear on this point. See *Scratchley's* Practical Treatise on Building and Lands Societies (2); *Card* v. *Carr* (3).

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

The petition sufficiently alleges the want of notice. In one paragraph it is alleged that the respondent was illegally and fraudulently and without cause or reason refused by the appellants to be reinstated in the enjoyment of all rights and privileges belonging to members. According to all authorities, when it is desired to

(1) 2 C. & P. 556.

(2) P. 78 and case there cited.

(3) 1 C. B. N. S. 197.

deprive a member of his rights in a society, where there is a question of property, he is entitled to receive notice. This is unwittingly admitted by the appellants, who filed of record a paper, being the account intended to be sent to respondent, which account contained a notice. The motion for expulsion does not even contain any statement that the member was in arrears for six months, and that his name was erased because he was six months in arrears. It was the duty of the appellants to prove that *prior notice* had been given. I will refer the Court to *Angell and Ames* on Corporations (1); *King* v. *The Chancellor of the University of Cambridge* (2); *Rex.* v. *Mayor, &c. of Liverpool* (3); *Grant* on Corporations (4); *Brice* on *ultra vires* (5); *Field* on Corporations (6); *Bagg's* Case (7); *Mereweather* and *Stephens* on Municipal Corporations (8); *Schmitt* v. *Saint Franciscus Benevolent Society* (9).

The charter being silent as to conferring any power to inflict forfeiture operating *ipso facto* on the respondent, the appellants are governed by the common law which requires *prior notice.*

To say that the petitioner did not complain of want of notice is playing on words. He was taken by surprise, and thereby deprived of rights for himself, his widow and his children, to secure which he had paid contributions for twenty years. If it be sound law that such notice should have been given, it was sufficient for him to say that he had been illegally expelled.

As to the articles of the Civil Code relied on by the counsel for appellants, it is sufficient to say that the whole policy of our civil law has been that no lapse of

(1) S. 420.
(2) 3 Burr. 1647.
(3) 2 Burr. 723.
(4) Pp. 245, 246, 274.
(5) 2 Ed. 1877, p. 39.
(6) Secs. 64, 65, 504.
(7) 6 Coke's Rep. 174, 184, 185.
(8) 3 Vol. p. 1526.
(9) 24 How. Prt. Rep. N.Y. 216.

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time was fatal. By referring to art. 1069 of the Civil Code it will be found to be only applicable to commercial matters, and even this is new law. The only way the appellant could expel the respondent was according to law, and by law respondent was entitled to a notice of some kind.

Mr. *Carter*, Q. C., in reply:

When motion was made, it must be taken as having been made in conformity with the by-laws. The learned counsel also referred to *Littleton* v. *Blackburn* (1).

RITCHIE, C. J.:—

The only matter put forward which could have availed the plaintiff in this case was the want of notice of the proceedings to be taken with a view to the expulsion of the plaintiff from the society, and his expulsion in his absence without having such notice. This point was not raised in the suit by the pleadings, nor put forward in the Superior Court where the question should have been raised and tried, and so, in my opinion, is not now open on appeal to plaintiff, who made it no part of his original case.

FOURNIER, J. :—

L'Intimé, membre de la société de Secours Mutuel, appelante en cette cause, étant tombé en arrérages pour six mois de sa contribution mensuelle, a été, pour cette raison, expulsé de la dite société conformément à l'article 5 de ses règlements. Cet article est ainsi conçu :

(5) Whenever a member shall have neglected during six months to pay his contributions, or the entire amount of his entrance fee, the society may erase his name from the list of members, and he shall then no longer form part of the society : for that purpose, at every general and regular meeting it is the duty of the Collector-Treasurers to make known the names of those who are indebted in six months contributions, or in a balance of their entrance fee, and then any one

(1) 33 L. T. N. S. 614.

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may move that such members be struck off from the list of members of the society.

Après son expulsion, l'Intimé s'est adressé à la Cour Supérieure, district de Montréal, pour en obtenir un bref de *Mandamus* pour se faire réintégrer dans tous ses droits et priviléges comme membre de la dite société, se fondant 1o. sur ce qu'il n'a pas été *mis en demeure* de payer et qu'aucun état de ses arrérages ne lui a été préalablement fourni ; 2o. Que d'autres membres se trouvant dans le même cas que lui n'ont pas été expulsés, et que la société n'avait pas le droit de faire une telle distinction parmi ses membres ; 3o. Qu'il n'a pas été fait motion à cet effet à une assemblée générale.

L'Appelante a plaidé à la requête de l'Intimé par une dénégation générale et par une exception péremptoire dans laquelle elle allègue que l'Intimé a été expulsé conformément aux dispositions de l'article ci-dessus cité.

Après contestation liée, preuve et audition au mérite, la Cour Supérieure, par jugement en date du 19 juin 1877, a renvoyé la pétition pour insuffisance de ses allégations.

Ce jugement a été renversé en appel ; et l'appelante se plaint que c'est uniquement pour un motif que l'Intimé n'avait ni plaidé, ni invoqué en Cour de première instance, savoir : que lui, l'Intimé, n'avait reçu de la société aucun avis l'informant des procédés adoptés pour son expulsion, et qu'il avait en conséquence été privé de son droit de défense C'est à cette dernière question seule que se réduit la contestation entre les parties devant cette Cour. L'Intimé le déclare formellement dans son factum.

Avant de considérer la question de la nécessité d'un tel avis dans un cas comme celui dont il s'agit, il faut d'abord savoir si la question a été soulevée et mise directement en contestation (*in issue*) par des allégations suffisantes dans les plaidoyers des parties.

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On a vu plus haut quels sont les principaux moyens invoqués par l'Intimé pour attaquer la validité des procédés de son expulsion ; mais on ne trouve nulle part dans la procédure qu'il ait allégué le défaut d'avis de ces procédés pour les faire déclarer nuls.

Cette allégation était nécessaire pour soulever la question et mettre la défenderesse appelante en état, si elle le jugeait nécessaire, de se justifier en prouvant que de fait un avis avait été donné. La nécessité d'une semblable allégation est admise par l'intimé, qui prétend l'avoir faite d'une manière suffisante. Pour prouver cet avancé il nous réfère à deux endroits de sa pétition: 1o. à la ligne 31, page 3, de sa pétition où, après avoir admis le droit de la société de l'expulser pour défaut de paiement pendant six mois, il ajoute "but to that end "it was necessary for the said society duly to require "the members then in arrears to pay the said arrears, "&c." ; 2o. dans l'allégation qui précède ses conclusions, l'intimé en se plaignant du refus de l'appelante de le réhabiliter dans ses droits, ajoute que ce refus a été fait illégalement et frauduleusement et sans cause ni raison, "and that illegally and fraudulently and without cause or reason."

Le défaut d'avis ou de sommation d'avoir à se défendre contre une motion d'expulsion peut-il être considéré comme compris dans ces deux allégations ?

Dans la première allégation il se borne à dire que la société ne pouvait procéder à son expulsion à moins de l'avoir requis de payer ses arrérages. Cette demande de paiement est bien différente du défaut d'avis d'avoir à se défendre contre une proposition d'expulsion, et ne peut être considérée comme son équivalent. Je ne puis trouver là l'allégation du défaut d'avis qui a été le motif unique sur lequel la Cour du Banc de la Reine a basé son jugement.

Dans la dernière allégation les mots *illegally, fraudu-*

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lently, and without cause or reason, s'appliquent au refus de le réhabiliter dans ses droits comme membre, et ne sont certainement pas susceptibles d'être interprétés comme une allégation du défaut d'avis de la motion d'expulsion.

Il me paraît en conséquence clair que cette question n'a pas été mise en contestation par les plaidoieries, et qu'en conséquence l'intimé n'aurait pas dû obtenir gain de cause devant la Cour du Banc de la Reine.

La contestation ayant été, lors de l'argument, réduite à ce seul point, il devient inutile de s'occuper des autres moyens invoqués dans la pétition.

HENRY, J., concurred.

TASCHEREAU, J.:—

The appellant is a benevolent society in *Montreal*, of which *Lapierre*, the respondent, was a member. By one of the rules of the society, any member who neglects during six months to pay his contributions may be expelled from it, Under that rule *Lapierre* was expelled on the 8th January, 1877, for non-payment of his contributions. By a writ of *mandamus*, he demands that the society be ordered to reinstate him as one of its members. He alleges that it is true that he had been more than six months without paying his contribution, but that his expulsion was irregularly made and illegal: 1st, Because he was not put *en demeure* to pay. 2nd, Because many other members of the society in arrear as he was were not expelled as he was; and 3rd, Because no motion to expel him was made at any regular meeting, according to the rules of the society.

The second of these reasons is unfounded in law, and was, I believe, abandoned at the argument before us. A creditor may sue only one out of a hundred of his debtors, if he chooses; so could this society expel one of

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its members in default, and allow others in the same case to remain in its ranks.

The third of the reasons invoked by *Lapierre* against the legality of his expulsion was that his name was not called out as being in default at any of the regular meetings of the society, according to one of its rules, and that no regular motion was ever made to expel him, according to the said rules. This ground is unfounded in fact. The motion to expel him is proved to have been duly made and adopted, and he admits that his name was read at the meeting where his name was erased, before the motion was made.

I come now to the first ground of his *requête libellée*, that he was not asked for payment, or put *en demeure* before being expelled. He says:

> I admit that I had not paid my contribution for more than six months, but I was not called upon to pay, and could not be expelled from the society before being so called upon.

This contention, it seems to me, is entirely unsupported by the rules of the society.

Article 7 of its constitution says that

> The members pay a monthly contribution which is fixed by the by-laws.

Article 10, that

> Every member who does not fulfil the obligations required by the by-laws forfeits his rights to the benefits and *his other rights.*

Article 5th of the by-laws fixes the amount of the monthly contribution at 40 cents per month. Article 11 defines the duties of the treasurer and other affairs; it enacts that the treasurer shall receive from the collector-treasurers the money collected by them *at each meeting*, namely, at each general and regular meeting, held on the first Monday of every month. By same article the collector-treasurers are required to collect during the meeting the monies and contributions of the members. They must also at each regular general meet-

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ing call over the names of the members indebted for six months or more.

Article 20 provides that if a member neglects during six months to pay his contributions, it is lawful and optional for the society to strike his name off the list of members, for which purpose at each meeting the collectors are required to mention the names of those who are indebted for more than six months of contribution.

Article 22 enacts that every member who fails to attend any general and regular meeting is liable to a fine of five cents, except in the case of sickness or absence from the city.

Now, taking all these rules together, it seems to me that *Lapierre* cannot contend that the society had to request him personally to pay his contribution before expelling him. The reading of his name at a regular meeting, where he was bound to be, was the only *mise en demeure* that he could ask for.

The contributions of the members are payable at such meetings, since the rules say that it is at such meetings, and there only, that these contributions are to be collected. This reading of his name on the list of defaulters is the only demand of payment required by the contract he entered into with the society when he joined it. By the express terms of this contract, he has agreed to pay forty cents a month to the society itself at its regular meetings, and that, if he should allow six months to elapse without paying, all his rights as a member were to be forfeited; he has agreed that in such a case his name should be called out at one of the regular meetings, and that thereupon any member might immediately move his expulsion. All this has been done: he admits that he did not pay for more than six months, that his name was called out regularly, that his expulsion was therefore moved and decreed. What else could

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he ask for? Any demand of payment under our law may be made at the place where the debt is payable. *Lapierre's* debt was payable at the meeting, where demand of payment to him was made by calling out his name according to the rules. Everything seems to me perfectly regular.

Lapierre, at the argument, invoked, as another ground against the legality of his expulsion, the absence of prior notice. He urged that not only was a demand of payment necessary, but that the society should have notified him that on such a day a motion to expel him would be made. I do not think that, as the record stands, he can avail himself of this want of notice; this case must be taken as he has himself made it. There is not a word of this want of notice in his *requête libellée*, nor in any of the pleadings in the record. This precludes him from invoking it now. Being of that opinion, it is perhaps unnecessary for me to say what would have been the consequences of this want of prior notice if it had been pleaded. I may, however, say that I have not been able to find a single case under the French law where such a notice has been held necessary in case of expulsion for payment of contribution. These benevolent societies exist in large numbers in *France*. Under the words "Association de secours mutuel," in *Dalloz* Repertoire, the law which regulates them is clearly demonstrated, and cases are cited, but not a word of this prior notice in such a case is mentioned. The principle of our civil law which rules this case is, it seems to me, that if a party is *en demeure* to pay, he may be expelled without prior notice of the motion for his expulsion (1). According to the terms of his contract with the society, *Lapierre* was *en demeure* to pay, and no prior notice to him was required. And how could a notice be given to

(1) Art. 1067, 1131, 1134, C. C.

him? Art. 20, sub-sec. 5, of the by-laws says that when a member is six months in arrear he may be expelled: that for this purpose, at every general meeting, the names of the members so in default shall be read, and that then any one may move the expulsion. What notice does *Lapierre* now say he was entitled to? Surely not a notice that he had been six months without paying. Then can it be a notice that his name would be read as a defaulter at the regular meeting? That cannot be what he means; this calling of the defaulters is done in virtue of the by-laws, and must be done, in fact, at each meeting by the collector-treasurers, upon whom this duty is imperatively imposed. It must be the notice that a motion for expelling him would be made that he means. Well, any one of the members was at liberty to make that motion immediately after his, *Lapierre's*, name was called out as a defaulter. How could that member know before this that *Lapierre* was a defaulter and would be so called out, and, if so, how could he give him notice that immediately after such calling out of his name he would move to expel him? How could the officers of the society, or any one, know that such a motion would be made?

Lapierre has been, it seems to me, regularly expelled. I also notice that he had been over ten months without paying his monthly contribution of forty cents, so that he does not seem to have been harshly treated by the society.

The judgment of the Superior Court quashed his writ of *mandamus* and dismissed his demand. The Court of Queen's Bench reversed that judgment, and ordered the society to reinstate him as a member. The appeal before us is from this last judgment. I am of opinion to allow the appeal, and to confirm the judgment rendered by the Superior Court, with costs in the three courts against the respondent.

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GWYNNE, J.:—

From a perusal of the case, of the record and issues joined therein, of the evidence adduced in support thereof, and of the admissions made in the cause, it appears that the only points presented to the learned Judge of the Superior Court for his adjudication, were: 1st, Was it, or not, necessary that a demand should have been made upon the petitioner for payment of his arrears before a motion for erasing his name from the list of members should have been made or carried? And 2nd, Was it, or not, competent for the society to erase the names of the petitioner and the others comprised with him in the same motion, there being other members of the society equally in arrear, whose names were not erased?

True it is, that the petitioner had rested the claim assserted in his petition upon another ground also, namely, that no motion was in fact made by any member of the society, nor adopted at any regular or general meeting, with the object of striking from the list of members the names of those members who were six months in arrear; but the admissions made upon that point, and the motion itself, which was produced, displace this ground of complaint, and shew that the course indicated by the by-law in that behalf was strictly complied with, unless it was necessary, in order to make the motion effectual, that the names of all members in default for six months should be struck off, if any were.

In these societies, which are of the nature of mutual insurance societies, in which the contributions of the members are the premiums paid by them for the benefits insured, it is apparent that punctual payment of the contributions imposed upon each member by the by-laws is essential to the success of the society. Every person upon becoming a member enters into a contract

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to comply with all the articles of the by-laws and of the constitution of the society. Now, looking at the by-laws and constitution, we find, that in the case before us, the petitioner, upon becoming a member, contracted with the society to pay monthly the contributions established by the by-laws, which was a known determinate sum, and as it was provided by the by-laws that these contributions were to be collected by the proper officer at the general regular monthly meetings, which the petitioner was required to attend under a penalty of 5c. for every default, the fair construction of the contract is that the petitioner undertook to pay his contributions to the proper officer every month at the regular monthly meeting of the society. It is clear, then, that upon default by the petitioner in payment of his dues, an action for their recovery might have been maintained against him without proof of any special demand of the amount in arrear before action. Upon non-payment at the times and place agreed upon he became in complete default, but we further see, by reference to sec. 5 of article 20 of the by-laws incorporated into the petitioner's contract, that he in effect contracted with the society, that in case he should neglect to pay his contributions during six months, the society might erase his name from the list of members, upon a motion being made to that effect at any general regular meeting of the society, after the collector-treasurer should make known, as was his duty to do, the petitioner was indebted in six months' contributions; while by sec. 6 of the same article it was contracted between the petitioner and the society that upon any charge compromising the honor, the dignity or the interests of the society, he could only be expelled after a warning in writing should be served upon him by order of the society.

It is impossible to import into this contract the further condition, which is not expressed therein, that

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after the expiration of the six months during which th e petitioner was in arrear, and notwithstanding he may have been duly reported by the collector-treasurer as so in arrear, it was nevertheless necessary that a special demand should have been made upon him for payment of those arrears before a motion for erasing his name from the list of members could be entertained by the society.

In *Rex* vs. *Lyme Regis* (1), it was held, that where residence was a condition of the enjoyment of a corporate office, the corporator, in case of non-residence, might be removed, without any notice to come and reside being first given, for that he was bound to know the law under which he held office; the principle of that case appears to apply to this, for the petitioner was bound to know that by his contract he had promised to pay his contributions without any special demand at a particular time and place, and that if he should make default, and therein continue for six months, he might be erased from the list of members, upon a motion to that effect made by any member of the society.

In *Rex* vs. *Mayor of Axbridge* (2), upon shewing cause against a *mandamus* to restore a corporate officer, namely, the town clerk, who had been removed, sufficient cause for removal was shewn, the prosecuting counsel admitted there was sufficient cause of amotion, but objected that the town clerk had been removed without notice to appear and defend himself, and the Court, Lord *Mansfield* presiding, declared that they would not grant the writ to restore an officer, when it was acknowledged that the corporation had sufficient cause to remove him.

This case was followed in *Rex* vs. *The Mayor, &c., of London* (3), where the Court refused a *mandamus* to

(1) 1 Dougl. 158.

(2) 2 Cowp. 523.

(3) 2 Term R. 177.

restore a corporate officer who had been suspended from an office to which emoluments were attached, without notice, it appearing upon his own shewing that there was good ground for the suspension.

The plaintiff in his petition here expressly admits that he was in default for the full period of six months mentioned in the by-law, in payment of those contributions which were in the nature of premiums, agreed to be paid by him as the consideration of the benefits assured to him; that he had broken the contract in virtue of which alone he was to continue to be a member of the society in its most essential particular, and that by reason of such breach of contract it was competent for the society to strike his name off the list of members and to prevent him from any longer forming part of the society, provided only, as he contends, that a demand of payment of the arrears should be first made upon him. I do not see, as I have already said, that we should be justified in importing this proviso into the contract, and as to the other point, namely, that other persons who were also in arrear for six months, were not also struck off, no case has been cited in support of the contention that it was not competent for the society to erase the names of some, without at the same time erasing the names of all in like default, which is not clear, if it be the case, there were at that time others in like default whose names were not erased. The rule upon this point to be gathered from the cases is, that the Court never interferes between societies of this kind and their members, where the action taken by the society has been in good faith and in the exercise of their judgment for the benefit of the society, and not founded upon mere individual caprice; where the decision has been arrived at *bonâ fide* without any caprice or improper motive, and where the plain principles of

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justice do not appear to have been violated. *Osgood* v. *Nelson* (1), *Hopkinson* v. *Marquis of Exeter* (2).

In so far, therefore, as relates to the case as expressly set up on the record, the decision of the learned Judge of the Superior Court, before whom the case came in the first instance, appears to me to have been well founded, nor do I understand the learned Judges of the Court of Queen's Bench on its appeal side to reverse his judgment upon any of the special grounds upon which the petitioner, as it appears to me, rested his case, but upon this ground, namely, that in their judgment it was contrary to the principles of natural justice to erase the plaintiff's name, not because a prior demand for payment of the arrears was not first made upon him, but because he had not first been served with a notice that a resolution to erase his name would be proposed to the society at some meeting named in such notice. This judgment and the application of the maxim "*nemo rebus suis interdictus existemetur*" to this case are rested upon *Rex.* v. *Richardson* (3); *Rex.* v. *The Mayor &c., of Liverpool* (4); a passage in *Angell and Ames* on corporations, 3rd Ed. p. 413, citing a case of the *Commonweath* v. *Pensylvania Beneficial Society* (5); and *Regina* v. *Saddler's Co.* (6).

Now, *Rex.* v. *Richardson* was the case of the removal of a freeman of the Borough of *Ipswich* without sufficient cause, and *Rex.* v. *The Mayor &c., of Liverpool*, was the case of the removal of a corporator from a freehold office without sufficient cause by a court of the corporation not shewn to have been duly assembled. That portion of the corporation which assumed to dismiss the officer, not being assembled upon a charter day, or general day of meeting, it was among other things held that to enable a special meeting to assemble, it should

(1) L. 5 R. H. L. 649.
(2) L. Rep. 5 Eq. 68.
(3) 1 Burr. 517.
(4) 2 Burr. 723.
(5) 2 Serg. and Rawl. 141.
(6) 10 H. L. 404.

have been averred in the return to the *mandamus* that all the members of the court had been notified to attend.

Regina v, *Saddlers' Co.* was the case of a freeman of the company having been removed, upon a charge of fraud committed by him in procuring his admission, without notice of any proceeding to establish the charge against him. The remarks of the learned members of the respective courts through which the case passed to the House of Lords, as to the removal of the party complaining without notice, plainly apply to the nature of the charge of which in effect he was *condemned* unheard, but that they do not apply to cases where there is admitted, upon the proceedings taken for the purpose of obtaining redress, that there was sufficient cause of removal, is apparent from the reference made by Lord *Chelmsford* (1) to *Rex.* v. *Griffiths* (2), that it is idle to grant a *mandamus* to restore where the party could be removed again immediately. The appositeness of the above cases, relied upon in the judgment of the Court of Appeal, to the circumstances of the case before us, is not very apparent when we reflect that the plaintiff here in his petition admits that he was liable to have his name struck off for breach of his contract in its most essential particular, and that it is shewn in evidence that the action taken was taken at a general regular meeting of the society which it was the plaintiff's duty to attend, and that all the conditions concurred and proceedings were taken which he had contracted with the society should be sufficient.

As to the case in 2 *Serg. and Rawl.* 141, its report is very meagre; enough, however, does appear in it to weaken its authority as applicable to the case before us, even if it contained the expression of opinion entertained by a court whose judgments were binding upon us. For,

(1) Reported in B. R. in 6 Jur. N.S. 1,116, and in the Exchequer Chamber in 7 Jur. N. S. 145.

(2) 10 H. L. 472.

(3) 5 B. & Ald. 731.

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firstly, as to the necessity of notice of an intention to expel in the given case, that point does not appear to have been raised in the case, its determination was not at all necessary to support the judgment of the Court, which proceeded upon the ground that there was no expulsion. Morover, secondly, the contention of the party applying to the Court for relief was not only that no expulsion had in fact been effected, and that therefore he was still entitled to all the benefits of membership, but that in truth he was not liable to be expelled, for that the society was indebted to him for services as secretary in a larger sum than the amount of his arrears, so that in effect there was no sufficient cause to justify expulsion. And lastly, the judgment professes to proceed upon the terms of the charter, and it does not appear that each member of the society had contracted as the plaintiff here has, that upon his continuing in default for the specified period, and upon his being reported to the society at any general meeting as such defaulter, *any* member might then make a motion that his name should be struck off the list of members, and that upon such motion being carried the plaintiff's right of membership should cease, and he should in fact no longer be a member of the society. In the argument before us it was strongly urged by the learned counsel for the appellants, that the point upon which the judgment of the Court of Queen's Bench in appeal proceeded was not raised upon the record. This contention appears to be well founded. The learned counsel for the respondent combated it upon the ground that it was sufficiently raised by force of the words "without cause or reason" in the last paragraph of the plaintiff's petition, which alleges:

> That since the 13th of January last until this day the defendant has refused to reinstate the plaintiff petitioner in his rights and privileges as a member of the said corporation, *L'Union St. Joseph de Montréal*, and to put him into the enjoyment of all rights and

privileges belonging to such membership, and that illegally and fraudulently and without cause or reason.

Now, it is to be observed that what is here said to have been illegal and fraudulent, and without cause or reason, relates to certain action said to have been taken upon the 23rd of April, when the plaintiff, after three months' notice of his expulsion, applied to be reinstated, and has no reference to anything done or omitted at the time of expulsion in the preceding January. But, further, assuming the allegation in the last paragraph to have pointed in express terms to the removal in January, namely, that it was charged that the plaintiff's removal then was without cause or reason, that would have been insufficient to amount to an averment that the removal was illegal for want of a preceding notice of the intended motion. Default in payment of his contributions for the period of six months constituted the *cause and reason* of his removal. Notice of the intended expulsion, if necessary to have been given, was part of the proceeding necessary to effect the removal for the pre-existing cause, and cannot be said to be a *part of the cause*, but the general scope and frame of the petition clearly shews that its framer never had in his mind the idea that he was raising an issue upon the point of removal without notice being given of the intended motion. In the paragraph preceding the last, he alleges that three months after his expulsion, and after he had notice thereof, the petitioner applied at a general regular meeting of the society *to be received again as a member*, which application he says the defendant illegally and unjustly refused. The natural construction of the petition, read all together, is that the plaintiff's contention was that it was illegal and unjust to refuse to receive him again, because, although true it is he had committed such default as justified his removal, yet that it was not legal to remove him because,

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1st. Payment of the arrears had not been first demanded of him; 2nd. Because he had not been reported by the collector-treasurer as having been six months in default; 3rd. Because in fact, as he alleged, no motion to remove him had been made by any member of the society as required by the by-laws, and; 4th. Because the society had no legal right to remove him without at the same time removing all others in like default.

These are the points upon which he rests his case. Now, assuming the contention of the plaintiff upon these points to fail, I cannot see upon what principle of justice, after what the plaintiff, himself alleges took place upon the 23rd of April, which appears to be a full unequivocal confirmation of what took place in January, he could with any reason be heard to urge the want of notice of the intended motion in January. After a full consideration of the matter, upon the application of the plaintiff after three months further default, the society in effect confirms the action taken in January. After this action of the society upon the 23rd of April, I fail to see what *legal right* the plaintiff has to invoke the interference of the Court, (or what right the Court has) to impose upon the society the obligation against its will to receive from the plaintiff his overdue contributions so long in arrear. The society itself alone in the untramelled, *bonâ fide* exercise of its discretion, is the sole tribunal to decide whether it should, or not, waive the forfeiture of his rights, which the plaintiff's default has incurred. I see no principle upon which the Court can compel a society of this nature to waive the ground of forfeiture, and to accept now from the plaintiff payment of all arrears in condonation of his default; and if that cannot be done, it would be contrary to another principle which governs the Courts in cases of this kind, to order the name of the plaintiff to be placed again upon the list, for it would be still subject to removal for the old default, a point

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already conclusively decided upon the plaintiff's own application for a rehearing upon the 23rd of April.

Adopting the language of Mr. Justice *Blackburn* in *Reg.* v. *Saddler's Co.* (1), I think that in this case, relief ought to be granted or refused according to the legal right upon the Record, and I am of opinion that the plaintiff has not raised upon the Record the point upon which the judgment of the Court of Appeal is rested, and further that in view of the circumstances of this case, if it had been so raised, it would not have established a legal right in the plaintiff to be reinstated, or have justified the decree made in his favor, in the face of his own admission that he had committed such a default as justified his removal, and of the evidence, which shews that the removal took place precisely in the manner in which the plaintiff contracted it might take place, and of the admission contained in the plaintiff's petition, to the effect that, upon his application upon the 23rd of April, the society deliberately refused to waive the cause of forfeiture, and has substantially affirmed the action of the society in January.

The judgment of the Court of Appeal must therefore be reversed, and that of the Superior Court be reinstated.

Appeal allowed with costs.

Solicitors for appellants: *Mousseau, Chapleau & Archambault.*

Solicitors for respondents: *Doutre, Doutre & Robidoux.*

(1) 10 H. L. 404.

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*June 2.
*Dec. 12.

JAMES CLARK,.....APPELLANT;

AND

THE SCOTTISH IMPERIAL INSURANCE COMPANY,.....RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

Fire Insurance.—Advances made to build a vessel.—Insurable interest.

C. made advances to *B.* upon a vessel, then in course of construction, upon the faith of a verbal agreement with *B.*, that after the vessel should be launched, she should be placed in his hands for sale, and that out of the proceeds the advances so made should be paid. When vessel was well advanced *C.* disclosed the facts and nature of his interest to the agent of the respondent's company, and the company issued a policy of insurance against loss by fire to *C.* in the sum of $3,000. The vessel was still unfinished, and in *B's* possession when she was burned.

Held,—Reversing the judgment of the Court below, that *C's* interest, relating, as it did, to a specific chattel, was an equitable interest which was insurable, and therefore *C.* was entitled to recover.

APPEAL from a judgment of the Supreme Court of *New Brunswick* (1) making absolute a rule *nisi* to set aside a verdict, and enter a non-suit.

The action was on a policy of insurance against fire.

A special case agreed upon by the parties for the purpose of the appeal states that:

"The *Scottish Imperial Insurance Company* now is, and in and prior and subsequent to the year 1874, was a corporation established and legally authorized

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

(1) 2 Pugs. & Bur. 240.

under the laws of the Dominion of *Canada* to issue policies of fire insurance in the Dominion of *Canada*.

"The said company in said year had an office in the city of *Saint John*, in the Province of *New Brunswick*, and *W. Colebrook Perley* was its lawful Agent, and as such had power to act for said company.

"On or about the tenth day of August, 1874, the said company issued a policy of insurance against loss by fire to the plaintiff, in the sum of $3,000, 'on a schooner in course of construction by *John Bishop* in his ship-building yard at *Hopewell, Albert Co., N. B.*, $3,000 insurance valid, launched or not launched, with liberty to complete, fit out and load cargo, the liability under this policy to cease when any marine policy exists covering said schooner,' for the period of six months, and the premium of said insurance was duly paid. The policy was put in evidence on the trial, but was subsequently burnt, and all other papers used or put in evidence at the said trial have since been burnt.

* * * *

"That by consent of both parties a verdict was taken for the plaintiff for the sum of $3,318, being the amount plaintiff claimed to be interested in such vessel, with interest, with leave to the said defendants to move the Supreme Court of *New Brunswick* for leave to enter a non-suit, should the said Court be of opinion that the plaintiff had no insurable interest.

"That the said Supreme Court subsequently granted a rule *nisi*, calling on the plaintiff to show cause why a non-suit should not be entered, and after argument and time having been taken to consider, the judgment of the Court was delivered by *Allen*, C. J., (the other Judges concurring in such judgment, but giving no reasons therefor.)

"The said rule was made absolute, as follows:

"In the Supreme Court,

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" Trinity Term, 41 *Victoria*,

James Clark v. *The Scottish Imperial Insurance Comp'y.*

" Upon reading the rule granted in this cause, and on hearing Mr. *Thomson* against the said rule, and Mr. *Weldon* in support thereof, and the Court having taken time to consider, doth now order that the said rule be made absolute, and a non-suit granted.

" By the Court,

(Signed) W. CARMAN.

From this rule plaintiff appealed.

Clark, the plaintiff, who carried on business in *Saint John*, describes, in his evidence, his connection with the builder, who resided in *Hopewell*, and through him, with the vessel, and what took place between himself and the agent on effecting the insurance and after the loss had taken place. He says :—

" In 1872 I commenced supplying *Bishop* on this vessel. In this year he commenced getting timber out. The arrangement was that I was to supply him to build this vessel, and hold the vessel as security for my advances. I was to dispose of the vessel in shares, or the whole, as I saw proper, and when the vessel was disposed of, what was remaining after I got my pay was to go to *Bishop*. That was the arrangement. In pursuance of that arrangement, I made advances to him, to over $2,000. At the time I made application for insurance, Mr. *Perley* was agent. I went to effect insurance in August, 1874."

Mr. *Armstrong*, who went with plaintiff to agent to effect the insurance, says : " *Perley* was away. I told his young man *Clark* wanted to make application for insurance. I got blank from *Clark* and filled it up. *Clark* signed it and left it there. I cannot state what was on the paper. I can only state what took place at the time. I am satisfied it was an application for insurance on a vessel which was building by *Bishop*, and

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that it stated plaintiff had been advancing on her, and the insurance was to cover advances."

Plaintiff then says: "I signed a paper—the one spoken of by Mr. *Armstrong*. The paper was not given back to me. After *Perley* returned home, I thought it best to see him as he was the agent. I saw him, and I said: 'Mr. *Perley*, I have made application for insurance on a vessel that was building by one *John Bishop*, in *Hopewell, A. C.*' Says I: 'Mr. *Perley*, I want you distinctly to understand that the vessel is not building for me directly, but I hold her as collateral security. She is in my hands and for sale, to dispose of any way I see fit to getting money out of her.' He said he had seen the application, but he said Mr. *Armstrong* had made a mistake in figuring up the premium—he had charged me some $2 or $3 too much. He took the paper—I suppose it was the same paper I had signed before—and altered the figures, and it reduced it down to some $31, it had been $33. He said that it was proper I should have insurance on a vessel where I had been making such large advances, it would be foolish if I didn't. I didn't sign any paper except the one which I signed when Mr. *Armstrong* was with me. I said: 'Mr. *Perley*, I have made application for $3,000. I haven't advanced that yet, but I have advanced something over $2,000, but it would take $3,000, and more, probably, to put her off.' *Perley* said if I advanced more I could further insure, but that I couldn't get more than my advances if I insured ever so much. I told him I was aware of it. I got the policy; this is it. The young man who was in the office brought this round to me. The young man's name is *Wade*."

Plaintiff then says he went on making advances. Vessel was destroyed 3rd or 4th October, 1874. First intimation he got of the fire was by letter from *Bishop*, which he showed to *Perley* the same day he got it.

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"Vessel was burnt to ashes on Saturday night. I can give no information how fire originated." He says: "Mr. *Perley* read this letter. He said: '*Clark*, its a bad job—but you're a fortunate man that you insured. Now you see the necessity of having proper insurance when you're making advances.' I said: 'Mr. *Perley*, what steps am I to take? I'm not much acquainted with insurance business' He said: 'its my duty, as agent, to go and see where vessel was burnt.' I directed him how to go there. He told me afterwards that he had been up. After he returned, I went in, and he smiled and said: 'It was the cleanest burn I ever saw, and there was nothing left but a pile of iron—didn't look if there had ever been much there.' I made out my claim—it amounted to $2,960, or thereabouts. Young Mr. *Charles Clark* kept my books. Goods would be sent generally to *Bishop* in his son's vessel, and save freight; sometimes by other vessels. I had transactions with *Bishop* before of a similar kind. I knew it took him a long time to build a vessel. I told him I would charge him interest, which he agreed to, and I made up an interest account. Bishop had built three or four vessels before this, under advances from me, under same terms. I would always hold them. Sometimes I bought an interest in them—half or three-quarters. I signed a letter addressed to Mr. *Perley*, and delivered it at his office to his young man."

On cross-examination, he proved the correctness of advance account. He says: "*Bishop* has dealt with me fourteen or fifteen years. He got all kinds of advances. I always held the vessel. I would sell the vessel or get a mortgage on her. When vessels came down they were registered in the name of *Bishop*. Before selling I would ask *Bishop* what vessel would be worth, as a guide for me to sell. I never saw this vessel. Used to sell the vessels at from $16 to $18 a

ton, hull and spars. They were iron fastened. When I commenced to supply this vessel former vessel was off. I had security on her. Former vessel was built by *Bishop* for his son. It was in the fall of 1872 I commenced on this. Former vessel I charged advances to son. When she came down and was registered, I got mortgage on her. His son gave the mortgage. Former vessel was the 'Minnie.' On this vessel I supplied iron, oakum, spikes, etc."

Re-examined—Had been in the habit of making these agreements with ship-builders. Always held on to the vessel. Sold her or got a mortgage on her. There was no written agreement. Question—"Did you make the advances on the faith of this agreement?" Mr. *Weldon* objects. "Admitted, subject to Mr. *Weldon's* objection. Answer—I did. I would not make them without."

Bishop, the builder, speaks as to the correctness of plaintiff's account as amounting "to pretty near $3,000." He then describes the state the vessel was in; that he considered the vessel at the time of loss worth near $5,000, and that he had no insurance on her, and lost everything he had in her; and, as to his agreement with plaintiff, he says: "*Clark* managed principally all my business in *Saint John*. I never sold any of the vessels. Don't think *Clark* sold any. I allowed him the privilege of doing so. We would talk the price over. *Clark* would either take a share in vessel, or take a mortgage on her when she came down for his advances. If he took a share, he would credit me with price of share, account of advances. I don't think I ever gave a mortgage to him. I built four vessels. This was the fourth. He was part owner of three vessels. In fall of 1873, after Christmas, I had the vessel pretty nearly half in frame—about one-third framed. Laid keel in August, 1873. Worked on her all winter. At time of

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fire I considered vessel about half done—more than that, for I had timber there to finish her. Don't think that we came to an arrangement as to price at which *Clark* should sell her. Think about $18 was spoken of, and I thought I should get $20. I bought part of her keel from *Uriah Bennett*, and I built on to it. I laid it before I got any timber in my yard, and it was two months after I laid the keel before I made the arrangements with *Clark*. It was Christmas, 1872, she was one-third timbered. We were two winters and two summers building her. In 1873 we had her all timbered out and top sides on and clamps in. In summer, 1874, we finished her at as far as she was when she was burnt. We finished laying decks, covering boards, waterways, etc."

Re-examined.—"Think plaintiff commenced advancing in 1872—in July. I wanted to build a vessel, and I wanted plaintiff to supply her, and I told him that he should have the vessel as security for what he supplied me with. That I would put in all I could myself. I said I could not tell him how much I could put in. That was about all that passed. He was to sell her, or make any bargain he could with her, and then to pay me the balance of what was paid him."

The defendant called no witnesses.

The question to be determined on this appeal was whether plaintiff had an insurable interest.

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

In this case the nature and extent of the appellant's interest in the subject matter of this insurance were fully and fairly disclosed to the respondent company, which, through its agent, admitted the interest to be an insurable one. The Court below decided that the appellant had not an insurable interest in the property. The appellant contends that it was only necessary to

have an equitable interest, in other words such an interest as a Court of Equity will recognize and protect. The Chief Justice of the Court below says there never was any written agreement with regard to the advances, but an oral or written declaration may be as effectual as the most formal instrument.

The promise of the appellant's advance, and the advances made in pursuance of it, and on the faith of *Bishop's* agreement to place the vessel after being launched in his hands, in order that he might sell her, and pay himself, did create a valid lien in equity on the the vessel; and therefore he had an insurable interest. See *Lucena* v. *Craufurd* (1); *Ex parte Houghton* (2); *Ex parte Yallop* (3); *Gurnell* v. *Gardiner* (4); *Riccard* v. *Prichard* (5).

An equitable assignment is thus defined by Sir *John Leach*, V. C., in *Watson* v. *The Duke of Wellington* (6):

"In order to constitute an equitable assignment there must be an engagement to pay out of a particular fund."

In *Field* v. *Megaw* (7), *Montague Smith*, J., says: "If the plaintiff had agreed that the fund should be held specifically for *Weld*, the agreement might have been enforced by a bill in equity."

Non-existing property to be acquired at a future time, although perhaps not assignable at law, is clearly so in equity. *Brown* v. *Tanner* (8); *Wilson* v. *Wilson* (9).

It was assumed that the appellant claimed that there had been a sale, but that such a sale was void under the statute of frauds.

The contract was not for the sale of the vessel, but for the making of advances to build a vessel, on the agree-

(1) 2 B. & P. 269.
(2) 17 Ves. 253.
(3) 15 Ves. 67.
(4) 9 Jur. N. S. 1220.
(5) 1 K. & J. 277-279.
(6) 1 R. & M. 602.
(7) L. R. 4 C. P. at p. 664.
(8) L. R. 3 Ch. App. 597.
(9) L. R. 14 Eq. 32.

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ment that the vessel was to be the fund out of which the appellant was to be paid, and for the purpose of making such fund available, the vessel was to be placed in his hands for sale, after she should be launched.

Neither was there anything in the contract, which necessarily prevented its being carried out within a year. How does the statute of frauds apply to such a contract?

The case of *Stockdale* v. *Dunlop* (1), relied on by the respondent and the Court below, has no bearing on the present case. Moreover, the decision of *Leroux* v. *Brown* (2) virtually overrules that decision; and what right have the company to set up the statute of frauds. It does not affect a contract so as to make it void. It only declares that you cannot enforce it, but that is only between vendor and vendee, and not a third party.

It was also stated that there was no mutuality.

The appellant contends the agreement was mutual. It was an agreement by *Clark* to make such advances to *Bishop* as might be necessary to complete the vessel, and as *Bishop* might require, in consideration of which *Bishop* agreed that *Clark* should have a lien on the vessel, sell her, and pay himself out of the proceeds. Why is such agreement not mutual? The effect of it, moreover, was to suspend any right of the appellant to sue *Bishop* for the advances, at all events, until the fund out of which the advances were to be paid (the vessel) failed or was exhausted. Could *Clark* have sued *Bishop* for the advances at any time while the vessel was in the course of construction and before launching? It is submitted that he could not.

The Court seems to have been under the impression that to pass an interest in property not in esse requires, even in equity, an agreement possessing peculiar requisites not necessary in contracts relating to

(1) 6 M. & W. 224. (2) 12 C. B. 801.

property actually in existence, and that such requisites are wanting here.

This view of the law, however, is wholly at variance with the authorities cited above, and with Lord *Westbury's* judgment in *Holroyd* v. *Marshall* (1). The learned Chief Justice says: "There was no such agreement as would pass property not in esse at the time it was made, or create any lien upon it, without a transmutation of possession; there was no obligation on the part of the plaintiff to make any specific amount of advances, and, therefore, the agreement, if such it might be called, was entirely wanting in mutuality. There was not even such a contract as could be enforced either at law or in equity."

Under the evidence it is by no means clear that the property was not in esse when the agreement between *Clark* and *Bishop* was made. It would seem, in fact, that the vessel had been some time in course of construction before *Clark* was asked to advance upon her.

In any case the appellant had clearly such an insurable interest as was decided to be sufficient by *Lawrence*, J., in *Lucena* v. *Craufurd*, "To be interested in the possession of a thing is to be so circumstanced with respect to it as to have *benefit from its existence, prejudice from its destruction.*" *Davies* v. *The Home Ins. Co.* (2).

Mr. *Weldon* Q. C., (Mr. *Haliburton*, with him), for respondent.

There is no dispute as to the facts of the case.

We contend appellant had not an equitable interest which a Court of Equity could enforce. The policy states that the insurance is "*on a schooner*;" the peculiar interest of the insured is not inserted.

(1) 10 H. L. 209.
(2) 24 U. C. Q. B. 364 and in appeal 3 Grant Err. & App. 269.

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The party here insures a vessel; the question is, if company paid, would they have a right of subrogation. There is a broad distinction between the cases cited and the present one. The article was not in existence when the agreement was passed; it was an article to be manufactured, and this was not a contract of which a Court of Equity would decree a specific performance, at all events, while the vessel was in an incomplete state and unfinished. There was no contract that could be enforced. In its inception it lacked mutuality. *Clark* was under no obligation to continue his advances. There was nothing in that agreement which could prevent *Bishop* from disposing of the vessel to a *bona fide* purchaser, for until vessel was complete appellant had only an inchoate right in an article to be manufactured. That is the distinction between this case and *Holroyd* v. *Marshall*, and others cited.

The right to insure cannot be only "an expectation of possession on the part of the plaintiff, founded on a mere promise of *Bishop*," as held in the case of *Stockdale* v. *Dunlop* (1).

A Court of Equity would even compel the party to give a mortgage for that part, but in this case respondent submits the Court could not compel *Bishop* to give a mortgage.

A right to insure must be of such a nature as to constitute an interest which the law will recognize and enforce. In this case the appellant chose to trust *Bishop*, and he has only a mere *moral* title which will not sustain an insurance.

The learned counsel referred to *Angell* on Insurance, sec. 69; *Seagrave* v. *Union Marine Insurance Co.* (2); *Anderson* v. *Morice* (3); *Folsom* v. *Merchants' Mut. Mar. Ins. Co.* (4).

(1) 6 M. & W. 224.
(2) L. R. 1 C. P. 305 and 310.
(3) L. R. 10 C. P. 58; S. C., L. R. 4 Ex. 609.
(4) 38 Maine 418.

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

RITCHIE, C. J., after referring to the evidence given above, proceeded as follows:

The defendants, by their first plea, claimed that the plaintiff had no insurable interest in the vessel, and it was, as the learned Chief Justice in the Court below says, upon this plea, upon which issue was joined, that the case turned. A verdict was taken for the plaintiff by consent for $3,318, with leave to move to enter a non-suit, and with power to the Court to draw inferences of fact. The Court was of opinion that the evidence showed no insurable interest whatever in the plaintiff, and made a rule absolute for a non-suit.

There is no contradictory evidence in this case, nor is it disputed, that there was a verbal agreement and understanding between *Bishop* and *Clark*, that if *Clark* would make the necessary advances to *Bishop* to enable him to build this vessel, he, *Clark*, would be in a position to look to the vessel when completed as security for his pay—in other words, that the advances were to be made on the security of the vessel, and that the advances were made on the faith of this agreement.

It is quite true, as suggested by the learned Chief Justice, that there was not any such agreement as would pass the property in this unfinished vessel, or any such transmutation of possession as would create a lien upon it in the legal technical sense of that word; but this by no means determines the question in controversy, nor does the fact put forward by the learned Chief Justice, assuming such to be the case, that "there was no obligation on the part of the plaintiff to make any specific amount of advances," in my opinion affect the case.

The contract of insurance being a contract of indemnity, it is abundantly clear that the plaintiff must establish some interest in the subject-matter insured.

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The questions we have to determine are, what constitutes such an insurable interest? And did the verbal agreement and the advances made on the strength of it, confer on *Clark* an insurable interest in the vessel while in course of construction?

As to the first, it is easily answered, negatively, that an insurable interest is not confined to a strict legal right of property; and, affirmatively, that any interest which would be recognized by a Court of Law or Equity is an insurable interest, or, as Mr. *Bunyon* thus sums up the question (1), "that any legal or equitable estate or right which may be prejudicially affected, or any responsibility which may be brought into operation by a fire will confer an insurable interest." There must therefore be a valid subsisting contract, susceptible of being enforced between the parties themselves, in order to constitute an insurable interest, or right of action against the insurer, not a mere expectancy or probable interest, however well founded. Was there, then, in this case such an existing contract between *Clark* and *Bishop*, in respect to this vessel in course of construction, as conferred on *Clark* an interest in it binding in law or equity, which a Court of Law or Equity would recognize and enforce, and which interest was prejudicially affected by the fire?

Though, as put by the Chief Justice, there may have been no obligation on the plaintiff's part to make any specific amount of advances, and though a Court of Equity will not decree performance of a mere agreement to advance money, I take it to be a well established principle, that where money has been advanced on an agreement that it should be secured on or paid out of a certain fund, or out of the proceeds of property to be sold for that purpose, a Court of Equity would, as between the parties to such an agreement, prevent the borrowers

(1) Bunyon on Fire Ins. p. 8.

or debtors from appropriating such property or fund to another purpose; therefore, as *Clark* actually made the advances, and so on his part fully performed his side of the agreement, a clear mutuality was established, and an agreement subsisted which *Bishop* was bound to perform; he received the benefit of the agreement and should not be permitted to repudiate the burthen; and that agreement, in my opinion, was a specific appropriation of the specific property to the discharge of these particular advances; an engagement (distinct from the legal estate or actual possession), to pay out of this particular property, sufficient to bind the property in equity and clothe it with an equity in favor of the plaintiff, and which gave to *Clark* a privilege or claim on such property, an equitable lien in the nature of an equitable assignment for the advances made, and by means of which the builder was enabled to proceed with its construction. Had the fire not occurred, and had the vessel been completed, as the agreement contemplated, and had *Bishop* attempted to divert the vessel to other purposes to the detriment of plaintiff's claim, I think a Court of Equity would, at plaintiff's instance, have interposed and compelled *Bishop* to act in good faith and carry out his side of the agreement, either by granting a formal mortgage on her in *Clark's* name, or by ordering a sale, or by placing her in *Clark's* hands to be sold, and the proceeds applied, as far as necessary, to the liquidation of *Clark's* advances; in other words, that a Court of Equity would recognize an equitable security on the property for the advances, and would enforce an appropriation of the property for their re-imbursement; for it would be the grossest fraud for one party to refuse to perform after performance by the other, and the ground of the doctrine of part performance is fraud.

In *Fry* on Specific Performance (1), it is said:

(1) Sec. 388, Ed. 1858.

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The principle upon which Courts of Equity exercise their jurisdiction in decreeing specific performance of a parol argeement accompanied by part performance is the fraud and injustice which would result from allowing one party to refuse to perform his part after performance by the other upon the faith of the contract (1).

That this agreement, though by parol, and the advances made under it, created an equitable charge on this property and gave *Clark* an equitable interest therein, principle and numerous authorities clearly establish, and it is, in my opinion, equally clear that if such equitable interest existed it was an insurable interest.

In *Rodick* v. *Gandell* (2), Lord *Truro* says:

I believe I have adverted to all the cases cited which can be considered as having any bearing upon the present case, and the extent of the principle to be deduced from them is, that an agreement between a debtor and creditor that the debt owing shall be paid out of a specific fund coming to the debtor, or an order given by a debtor to his creditor upon a person owing money or holding funds belonging to the giver of the order, directing such person to pay such funds to the creditor, will create a valid equitable charge upon such fund; in other words, will operate as an equitable assignment of the debts or fund to which the order refers.

In *Gurnell* v. *Gardiner* the head note is as follows (3):

Parol authority by a debtor to a creditor to go and take certain goods and sell them and pay himself a particular debt out the proceeds.

Held, to amount to the creation of an equitable lien upon such goods, and as such to be valid as against a claim by the personal representative of the debtor after his death

The Vice-Chancellor says:

In this case everything was by parol; the words are clear; and that, coupled with the conduct of the intestate, amounts to the creation of a valid equitable lien. It seems to me to be impossible to resist the plaintiff's claim on the ground that this was not a valid equitable assignment in writing. I find no law which says that a valid

(1) Per Sir Wm. Grant in *Buckmaster* v. *Harrop*, 7 Ves. 346; per Lord Cottenham in *Mundy* v. *Jolliffe*, 5 My. & Cr. 177.

(2) 1 De G. McN. & G. 777.

(3) 9 L. T. N. S. 367.

equitable lien cannot be created by parol, and the conclusion, if these premises be just, is inevitable, that where all things are by parol, and associated together for the purpose of giving an authority, where all is one transaction, and the power and the purpose are coupled together by the same evidence, they operate to confer a valid right which this Court is bound to enforce.

In *Malcolm* v. *Scott* (1), the Vice Chancellor says:

The of case *Burn* v. *Carvalho* was relied on as an authority in the plaintiff's favor. In that case the creditors requested the debtor to order *Rego*, the holder of property of the debtor, immediately to hand over to the creditors' agent such property as *Rego* might have belonging to the debtor, equivalent in value to the amount of certain bills; in answer to which request the debtor promised that he would write to *Rego* and direct him to hand over to the creditors' agent property of the debtor to cover the amount of the bills which might not eventually be paid. Lord *Cottenham* describes this as the result of the state of facts before him, he says: "The question, is whether such promise and agreement would not give a lien in equity?" and he decides that the letters containing the requests and the promise amounted to an equitable assignment of the funds in the hands of *Rego*. That was a promise to pay out of a particular fund in answer to an application for payment out of that very fund. I do not conceive that Lord *Cottenham* meant to decide anything more in that case, than that, when you make out the agreement to give the lien the form of the transaction is not material.

Previously to this, the Vice-Chancellor said:

I accede to the plaintiff's argument that where there is, as in this case there clearly is, a good consideration for the lien, it is immaterial what may be the form of the transaction. It is only necessary that the transaction should be evidence of an agreement for a lien; the real nature of the transaction, and not the mere form of it, must, I apprehend, be regarded: *Bill* v. *Cureton* (2), which case I followed in *Hughes* v. *Stubbs* (3).

The loss the parties in the present case sustained by the fire was this, that by reason of the destruction of the property, they were prevented from even "perfecting" their equitable title by lawfully clothing it with the possession of the property.

(1) 3 Hare 52.
(2) 2 My. & K. 511.
(3) 1 Hare 476.

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This was, as was said by the Vice-Chancellor in *Langton* v. *Horton* (1):

> The first and the substantial question in this cause is, whether the future cargo of the *Foxhound*—that which was the future cargo at the time of the assignment—passed either at law or in equity, by the assignment, from *Birnie* to the plaintiffs. I lay out of view all question as to the operation of the instrument at law, and look at the case only as a question in equity.
>
> Is it true, then, that a subject to be acquired after the date of a contract cannot, in equity, be claimed by a purchaser for value under that contract? It is impossible to doubt, for some purposes at least that, by contract, an interest in a thing not in existence at the time of the contract may, in equity, become the property of a purchaser for value. The course to be taken by such purchaser to perfect his title I do not now advert to, but cases recognizing the general proposition are of common occurrence. A tenant, for example, contracts that particular things, which shall be on the property when the term of his occupation expires, shall be the property of the lessor at a certain price, or at a price to be determined in a certain manner. This, in fact, is a contract to sell property not then belonging to the vendor, and a Court of Equity will enforce such contracts, where they are founded on valuable consideration, and justice requires that the contract should be specifically performed. The same doctrine is applied in important cases of contracts relating to mines, where the lessee has agreed to leave engines and machinery not annexed to the freehold, which shall be on the property at the expiration of the lease, to be paid for at a valuation. The contract applies in terms to implements which shall be there at the time specified, and here neither construction nor decision has confined it to those articles which were on the property at the time the lease was granted. But it is not necessary that I should refer to such cases as these, for Lord *Eldon*, in the case of the ship *Warre* (2) and in *Curtis* v. *Auber* (3), has decided all that is necessary to dispose of the present argument. Admitting that those cases are not specifically and in terms like the principal case, they are not of the less authority for the present purpose; for they remove the difficulty which has been raised in argument, and decide that non-existing property may be the subject of valid assignment. I will suppose the case of the owner of a ship, which is going out in ballast, proposing to borrow of another party a sum of £5,000 to pay the crew and furnish an

(1) 1 Hare 555. (2) 8 Price 269, n.
(3) 1 J. & W. 526.

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outfit; and agreeing that, in consideration of the loan, the homeward cargo should be consigned to the party advancing the money. It cannot reasonably be denied, in the face of the authorities I have just referred to, that a Court of Equity, upon a contract so framed, would hold that the party advancing the money was, as against the owner, entitled to claim the homeward cargo. And if a party may contract for the consignment of a homeward cargo, I cannot see why he may not contract with the owner of a ship engaged in the South Sea fisheries, that the fruit of the voyage—the whales taken or the oil obtained—shall be his security for the amount of his advances; I cannot, without going in opposition to many authorities which have been cited, throw any doubt upon the point, that *Birnie*, the contracting party, would be bound by the assignment to the plaintiffs.

* * * * * * * * *

In the course of the argument I suggested the case of the purchaser of an estate, who having paid his purchase-money, prevailed on the occupying tenant to give him possession, and I enquired whether equity, affecting the validity of the contract, would say that possession was unlawful, and would permit the vendor who had received the money to turn the purchaser out of possession. This question may be tried by that test, for though this is not in the form of a purchase, it is yet a transaction in respect of which a price was paid, for the price of the security was the money they advanced. It appears to me that whether *McG.* acted or not under the authority of *B.*, the plaintiff had, on the 9th of January, perfected their equitable title by lawfully clothing it with the possession of the property.

In *Ebsworth* v. *The Alliance Marine Insurance Co.* (1) there was no difference of opinion as to the right of plaintiffs to recover their own actual advances, but two of the judges thought they were neither the legal owners of the cotton, nor in equity trustees as to the surplus for the consignors.

Bovill, C. J., says (2):

The bill of exchange, being drawn by the shippers and accepted by the plaintiffs against the consignment, that consignment immediately became an equitable security to the plaintiffs for the amount of their acceptance; and they would have been entitled in equity to

(1) L. R. 8 C. P. 596.

(2) Ibid. p. 607.

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have the cotton appropriated for their re-imbursement: *Exparte Barber* (1); *Exparte Mackey* (2); and see also the recent case before the Lords Justices of *Exparte Smart* (3); and *Bank of Ireland* v. *Perry* (4).

* * * * * * * * *

In the judgment of *Chambre*, J., whose views were ultimately adopted by the House of Lords, he says (5): "I am not disposed to question the authorities in general; on the contrary, there appears to me to have been great propriety in establishing the contract of insurance, wherever the interest declared upon was, in the common understanding of mankind, a real interest in or arising out of the thing insured, or so connected with it as to depend on the safety of the thing insured and the risk insured against, without much regard to technical distinctions respecting property, still, however, excluding mere speculation or expectation and interests created no otherwise than by gaming (6)."

Brett, J., says:—

The first point is, thus raised whether plaintiffs had any insurable interest. I think they had: because they had an existing contract with regard to the cotton by virtue of which they had an expectancy of benefit and advantage arising out of or depending on the safe arrival of the cotton (7).

In *Hoare* v. *Dresser* (8), The Lord Chancellor (Lord *Chelmsford*) says:

If this question had arisen at law, the case of *Wait* v. *Baker* (9) would have appeared to me a decisive authority that no property passed in these cargoes to *Dresser*, so as to enable him to maintain an action for them. But the question in equity is not whether the property in the cargoes actually passed to *Dresser*, so as to give him a legal right, but whether there was not a contract for timber, which, though general at first, was, by the subsequent transactions between the parties, rendered specific, so as to enable *Dresser* to assert an equitable title to it? I entertain no doubt that, although at the time of the acceptance of the bill of exchange for £500 no timber had been specifically appropriated as the cargoes to be sent to *Dresser*, yet that when the "Verene" and "Christiana" were laden with timber ex-

(1) 3 M. D. & D. 174.
(2) 2 M. D. & D. 136.
(3) L. R. 8 Ch. 220.
(4) L. R. 7 Ex. 14.
(5) 3 B. & P. at p. 104.
(6) Ibid. p. 619
(7) Ibid. p. 637.
(8) 7 H. L. 311.
(9) 2 Exch. Rep. 1.

pressly for the purpose of satisfying the contracts which had been entered into on account of *Norrbom* for the supply of the exact quantities shipped for *Bristol* and for *London*, *Dresser* had an equitable title to the property in these cargoes which he could enforce against *Norrbom*, or against any other person claiming from *Norrbom* with no better title than he possessed.

Lord *Cranworth* (1) says:

At law there must be a positive appropriation to give a legal title: that was established in *Wait* v. *Baker*. So that, however unjustly a party may be acting who says I shall send you from abroad some timber by a particular ship, if in truth he sends it so as to make it the legal property of another, that legal property must prevail. The difference between law and equity I take to be this: that if there has been an engagement to appropriate a particular cargo, or an engagement to satisfy a contract out of a particular thing, such as to appropriate a part of a larger cargo, in either of those cases equity will interfere, in the one case, to decree what in truth is a specific performance, or something very like a specific performance, of the contract to appropriate a particular cargo; and, in the other, to give the puchaser a lien upon the larger cargo in order to enable him to satisfy himself of the smaller demand.

In the *United States* of *America* the same principles are enunciated.

In *Hancox* v. *Fishing Insurance Co.* (2), *Story*, J., says:

If in the present case the vessel had been successful in her outward voyage, and upon the homeward voyage had been lost with her catchings and other proceeds on board, it would be difficult to resist the claim of the plaintiff to a recovery for a total loss. He would have had a lien on the shares of the seamen in those proceeds, or some interest in the nature of a lien. It seems perfectly clear that a person having a lien, or an interest in the nature of a lien, on the property outward has an insurable interest, and it will make no difference in such a case that he might still have a right to pursue his debtor personally for the debt on account of which the lien attached. There are many authorities in the books to this effect.

And citing, among others, *Wolf* v. *Horncastle* (3).

(1) Ibid p. 317.

(2) 3 Sumner's Reports, 139.

(3) 1 B. & P. 316.

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And Chancellor *Kent*, in speaking of *Lucena* v. *Crauford* (1), says:

> The decision was that commissions to become due to public agents and all reasonable expectations of profits were insurable interests. The interest need not be a property in the subject insured. It is sufficient if a loss of the subject would bring upon the insured a pecuniary loss or intercept a profit. Interest does not necessarily imply a right to or property in the subject insured. It may consist in having some relation to or concern in the subject of the insurance, and which relation or concern may be so affected by the peril as to produce damage. Where a person is so circumstanced he is interested in the safety of the thing, for he receives a benefit from its existence and a prejudice from its destruction, and that interest is, in the view of the English law, a lawful subject of insurance.

In this case nothing like misrepresentation or fraud is alleged by the assured. The nature of the property and the appellant's interests were in the most full and frank manner disclosed to the assurers, and with such knowledge the interest was by them recognized as insurable, the premium accepted and risk undertaken, and their action now in repudiating their liability after a loss, the fairness of which is not questioned, presents their conduct before the Court in anything but a favorable light, and it is a satisfaction to know that the law will not aid them in depriving the plaintiff of what is not only his legal but his just due.

This appeal must be allowed with costs, and the rule absolute to enter a non-suit discharged.

STRONG, J., delivered a written judgment, in favor of allowing the appeal, which the Reporter has been unable to obtain (2).

FOURNIER, J., concurred.

HENRY, J.:—

I entirely concur in the judgment delivered. The doctrine, that under the circumstances of this case an

(1) 3 Kent's Com. sec. 276.

(2) This judgment will be found at page 706.

equitable lien existed, is so firmly established and unequivocally recognized by so many authorities that it cannot now be questioned.

The circumstances are such as we find in many of the cases reported, including those cited in the judgments just delivered.

It is equally well settled that a party has a right to insure property over which he has an equitable lien; and if a party goes to an insurance company, and offers to have such an interest insured and they take the risk, the contract is valid. The judgment of the Court below seems to have been founded altogether on a misapprehension of the law applicable to equitable liens. In the view taken on this point by the Court below I entirely disagree. Neither the actual or constructive possession of the property is necessary to be in the insurer, either at the time of issue of the policy or when the loss insured against takes place. It is sufficient if he have an equitable lien on the specific chattel property covered by the policy. The appellant had in this case such a lien on the vessel in question which then was covered by the policy, and I think, therefore, the appeal should be allowed and judgment entered in his favor with costs.

TASCHEREAU, J., concurred.

GWYNNE, J.:—

The question arising in this case may be determined wholly upon the authority of *Holroyd* v. *Marshall* (1). Lord *Westbury* there lays it down as an elementary principle long settled in Courts of Equity, that in equity it is not necessary for the alienation of property that there should be any formal deed of conveyance, that a contract for valuable consideration, by which it

(1) 10 H. L. 191, & 9 Jur. N. S. 213.

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is agreed to make a present transfer of property, passes at once the beneficial interest, provided the contract be such as a Court of Equity will decree a specific performance of.

Now, applying the principles here laid down to the present case, there can be no doubt, that immediately upon the first advance being made by the plaintiff under the contract with *Bishop*, the beneficial interest in the vessel then on the stocks was, in equity, transferred from *Bishop* to the plaintiff by way of security to the latter for his advances, and such interest increased in value from day to day as the vessel progressed, and became a security to the plaintiff for all his advances from time to time, as they were made. That interest was one which, relating as it did to a specific chattel, was such that a Court of Equity would have secured the benefit of it to the plaintiff by specific performance, or by injunction restraining *Bishop* from dealing with the vessel otherwise than in accordance with his contract with the plaintiff. This is a proposition which, at the present day, cannot admit of a doubt, and as an equitable interest is sufficient to create an insurable interest, the plaintiff at the time of the insurance being effected, and at the time of the loss, had an insurable interest in the subject of the insurance under the circumstances as established by the evidence. Between this case and *Stockdale* v. *Dunlop* (1), upon the authority of which the Court below rest their judgment, there is no parallel; there the agreement was to sell *oil to arrive*. It was proved that the expression *oil to arrive* was a mercantile term, and that if the oil should not arrive by the vessel, the purchaser had no right to it; until arrival, in effect, the contract did not profess to transfer any interest to the purchaser, and as the vessel did not arrive with the oil, but was lost on the voyage, the in-

(1) 6 M. & W. 224.

tending purchaser had not, either at the time of the insurance being effected, or at the time of the loss, any beneficial interest in the property insured; he had only an expectation that the event, the happening of which was a condition precedent to the accrual of his interest in the property, would happen, namely, the arrival of the ship with the oil; until then there was, as *Parke*, B., says, no contract which could be enforced. Between that case and the present it is apparent that there is no parallel.

Appeal allowed with costs.

Solicitor for appellant—*J. R. Armstrong.*

Solicitor for respondents—*C. W. Weldon.*

THE CITIZENS' INSURANCE CO.....APPELLANTS;

AND

WILLIAM PARSONS.....RESPONDENT.

THE QUEEN INSURANCE CO.....APPELLANTS;

AND

WILLIAM PARSONS.....RESPONDENT.

THE WESTERN ASSURANCE CO.....APPELLANTS;

AND

ELLEN JOHNSTON.....RESPONDENT.

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*Nov. 17, 18.
1880
*April 9.
June 21.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Insurance—Jurisdiction of Local Legislature over subject matter of Insurance—British North America Act, 1867, *secs.* 91 and 92—*Statutory conditions—R. S. O., ch.* 162—*What conditions applicable when statutory conditions not printed on the policy.*

The Citizens' Insurance Company, a Canadian Company, incorporated by an Act of the parliament of *Canada*, since the passing

*PRESENT:—Ritchie, C. J., and Fournier, Henry, Taschereau and Gwynne, J.J. Strong, J., was present when *The Citizens' Insurance Co.* v. *Parsons* and *The Queen Insurance Co.* v. *Parsons* were argued, but not when *The Western Insurance Co.* v. *Johnston* was argued, nor when judgment was delivered in the three cases.

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of *R. S. O.*, ch. 162, issued in favor of *P.*, a policy against fire which had not endorsed upon it the statutory conditions (*R. S. O.*, ch. 162,) but had conditions of its own, which were not printed as variations in the mode indicated by the Act.

The Queen Insurance Company, an English Company carrying on business under an Imperial Act, issued in favor of *P.*, after the passing of *R. S. O.*, ch. 162, an interim receipt for insurance against fire subject to the conditions of the Company.

The Western Assurance Company, a Canadian Company, incorporated by the parliament of *Canada* before Confederation, issued a policy of insurance against fire in favor of *J.*, the conditions of the policy, which were different from those contained in *R. S. O.*, ch. 162, not being added in the manner required by the statute.

The three companies were authorized to do Fire Insurance business throughout *Canada* by virtue of a license granted to them by the Minister of Finance under the Acts of the Dominion of *Canada* relating to Fire Insurance Companies.

The properties insured by these companies were all situated within the province of *Ontario*, and being subsequently destroyed by fire, actions were brought against the companies.

The Supreme Court of *Canada*, after hearing the arguments in the three cases, delivered but one judgment, and it was—

Held,—That "The Fire Insurance Policy Act," *R. S. O.*, ch. 162, was not *ultra vires* and is applicable to Insurance Companies (whether foreign or incorporated by the Dominion) licensed to carry on insurance business throughout *Canada*, and taking risks on property situate within the province of *Ontario*.

2. That the legislation in question, prescribing conditions incidental to insurance contracts passed in *Ontario* relating to property situate in *Ontario*, was not a regulation of Trade and Commerce within the meaning of these words in sub-sec. 2, sec. 91, *B. N. A. Act*.

3. That an insurer in *Ontario*, who has not complied with the law in question and has not printed on his policy or contract of insurance the statutory conditions in the manner indicated in the statute, cannot set up *against* the insured his own conditions or the statutory conditions, the insured alone, in such a case, is entitled to avail himself of any statutory condition.

[*Taschereau* and *Gwynne*, J. J., dissenting.]

Per *Taschereau* and *Gwynne*, J. J.:—That the power to legislate upon the subject-matter of insurance is vested *exclusively* in

the Dominion parliament by virtue of its power to pass laws for the regulation of Trade and Commerce under the 91st sec. of the *B. N. A. Act.*

APPEALS from judgments of the Court of Appeal for *Ontario*, which maintained three actions brought by the respondents upon policies of insurance against the appellants.

In the case of *Parsons* v. *The Citizens' Insurance Company*, the action was brought upon a policy of insurance, dated the 4th of May, 1877, issued by the defendants, who are a corporation incorporated by Act of the Dominion of *Canada*, insuring a building of the plaintiff in the town of *Orangeville*, *Ontario*, in the sum of $2,500. The building was destroyed by fire on the 3rd of August, 1877. The action was tried by *Patterson*, J. A., with a jury at the *Guelph* Assizes in the spring of 1878. The jury answered certain questions put to them by the judge (not material to the appeal), who thereupon entered a verdict for the plaintiff for $2,575. It was proved that at the time of the issuing of the policy by the defendants, the plaintiff had another policy for $1,000 on the building in the *Western Assurance Company*, which was not disclosed to the defendants. This it was submitted was a clear breach of the Company's conditions printed on the policy, and also of the eighth condition of the "Fire Insurance Policy Act," Revised Statutes of *Ontario*, ch. 162. The company's conditions were printed on the policy, but not in coloured ink as directed by that Act, nor were the statutory conditions printed on the policy. The judge reserved all questions of law for the court *in banc*. A rule was taken out to enter a non-suit pursuant to leave reserved or for a new trial, which was afterwards discharged. The defendants then appealed to the Court of Appeal for *Ontario*. The defendants were incorporated by the late province of *Canada*, 19 and 20 *Vic.*, ch. 124, (1856), and by 27 and

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28 *Vic.*, ch. 98 (1864) their powers were enlarged, and by Dominion statute 39 *Vic.*, ch. 55 (1876), these Acts were amended and their name changed to its present name.

The policy of insurance on plaintiff's building, occupied as a general hardware store, was issued to the plaintiff after the passing of the provincial Act of *Ontario*, 39 *Vic.*, ch. 24, and did not contain the conditions made necessary by that statute. The Court of Queen's Bench held in accordance with a previous decision of that court, in *Ulrich* v. *The National Insurance Company* (1), "that insurance companies incorporated by the Dominion of *Canada* are, as regards insurance effected by them in the province of *Ontario*, bound by the provincial statute, subject to all the consequences of non-compliance with its provisions;" and also in accordance with another previous decision of that court, in *Frey* v. *The Mutual Fire Insurance Co. of the County of Wellington* (2): "That a policy of insurance issued after the passing of the Act, but not in compliance with its provisions, is to be deemed *as against the assurer* as a policy without conditions." From this decision, the defendants appealed to the Court of Appeal for *Ontario*.

The reasons of appeal were to the following effect:

1. That the Policy sued upon is not to be deemed, as against the assured or otherwise, to be a policy without any conditions; that it was clearly not the intention of either party, plaintiff or defendants, to enter into an absolute unconditional contract of Insurance; that the said policy must be treated either as subject to the conditions therein endorsed, or as subject to the statutory conditions, in which case defendants were entitled to succeed upon the issue joined upon the pleas alleging that respondent had effected

(1) 42 U. C. Q. B. 141. (2) 43 U. C. Q. B. 102.

other or prior insurances on the same property, without having notified the company of such insurance, and having had the same endorsed on the policy, or otherwise acknowledged by the company. The defendants refer to *Ulrich* v. *The National Insurance Company* (1); *Frey* v. *The Mutual Fire Insurance Company of the County of Wellington* (2).

2. That the Revised Statutes of *Ontario*, ch. 162, "An Act to secure uniform conditions in Policies of Fire insurance," is *ultra vires* of the legislative assembly of the province of *Ontario*, so far as regards the defendants, a company incorporated by the parliament of the Dominion of *Canada*, and that it is inoperative therefore to affect the said policy or the conditions thereon endorsed.

The principal reasons against the appeal were:

"1. The plaintiff contends that the defendants, having wholly omitted the statutory conditions from their said policy, and having adopted a variation thereof, or a new condition instead thereof, without complying with the requirement of the Fire Insurance Policy Act, cannot set up the statutory conditions which they have not printed in their policy, or the variations or new conditions not in accordance with the Act. The condition relied upon is therefore not legal or binding on the plaintiff.

"2. The plaintiff submits that the Revised Statute of *Ontario*, ch. 162, is not *ultra vires* of the legislature of the province of *Ontario* as regards the defendants."

The Court of Appeal held the plaintiff's contention well founded and dismissed the appeal with costs. *Spragge*, C., in delivering judgment said: "I incline

(1) 42 U.C.Q.B. 141. (2) 43 U.C.Q.B. 102.

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to agree, contrary, I confess, to my first impression, that the policy in this case must be regarded as a policy without any express condition."

In *Parsons* v. *The Queen Insurance Company*:

This action was brought upon an interim receipt alleged to have been issued by an agent of the defendants, on the 3rd August, 1877, insuring against loss by fire to the extent of $2,000, a general stock of hardware paints, oils, varnishes, window glass, stoves, tinware, castings, hollow-ware, plated and fancy goods, lamps, lamp glasses, and general house furnishing goods.

The interim receipt was as follows:—

"Fire Department. Interim Protection Note.

QUEEN FIRE AND LIFE INSURANCE COMPANY,

Chief Office, Queen Insurance Buildings, *Liverpool*, No. 33.

Canada Head Office, 191 St. James St., *Montreal*. The Queen Insurance Co., *Orangeville* Agency, 3rd Aug., 1877.

"Mr. *William Parsons*, having this day proposed to effect on insurance against fire, subject to all the usual terms and conditions of this Company, for $2,000, on the following property, in the town of *Orangeville*, for twelve months, namely: on general stock of hardware, paints, oils, varnishes, window glass, stoves, tinware, castings, hollow-ware, plated fancy goods, lamps, lamp glasses and general house-furnishing goods, and having also paid the sum of forty dollars as the premium on the same, it is hereby held assured under these conditions until the policy is delivered, or notice given that the proposal is declined by the Company, when this interim note will be thereby cancelled and of no effect.

"(Signed), A. M. KIRKLAND,
"*Agent to the Company.*

"N. B.—The deposit will be returned, less the pro-

portion for the period, on application to the agent signing this note, in the event of the proposal being declined by the company. If accepted, a policy will be prepared and delivered within thirty days. If a holder does not receive a policy during the specified time he should apply to the head office in *Montreal*."

The case was tried at the Spring Assizes, 1878, at *Guelph*, before *Macdonald*, Judge of the County Court of the County of *Wellington*, sitting at the request of Mr. Justice *Patterson*.

The only question submitted by His Honor to the jury was whether there were more than 25 lbs. of gunpowder on the premises containing the property assured at the time of the fire.

The jury found in favour of the plaintiff; and a verdict was thereupon entered for $2,070, the learned Judge holding the defendants' conditions not to be part of the contract.

In Easter term, 41 *Victoria*, a rule nisi was granted by the Court of Queen's Bench, calling upon the plaintiff to shew cause why the verdict should not be set aside, and a new trial granted, for mis-direction of the learned judge, there being further insurances on the property insured; a greater quantity of gunpowder was contained in the premises containing the insured goods than permitted by, and contrary to, the terms of the defendants' contract with the plaintiff; and the proof of loss required by the contract was not filed in due time, and which said mis-direction was in telling the jury there was no question for them except the quantity of gunpowder on the premises.

The Court of Queen's Bench, not being able to discover any ground either upon the law or evidence for setting aside the verdict, discharged the rule.

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Defendants appealed from this judgment to the Court of Appeal for *Ontario*.

The reasons of appeal raising the points in this case different from those in *Parsons* v. *The Citizens' Insurance Company* were:

"4. The *Ontario* Revised Statute, ch. 162, does not apply to this contract, because this action is brought upon an interim receipt, and no policy of insurance had been entered into or was in force between the appellants and the respondent. The conditions to be taken as part of the contract are the appellants' ordinary conditions; and it being admitted by the respondent that he had more than 10 pounds of gunpowder on the premises containing the subject insured, at the time of the fire, the appellants are entitled to succeed on the 8th plea, and a verdict should have been entered in their favor thereon.

"5. The *Ontario* Act cannot affect the contract of an English Company doing business under an Imperial Charter, as is the case of the present appellants (1).

The Court of Appeal dismissed the appeal, with costs.

In the case of *Johnston* v. *The Western Assurance Company*, the action was also brought upon a policy of insurance against fire. The only point raised on this appeal different from those raised in *Parsons* v. *The Citizens' Insurance Company* was that the Act 39 *Vic.*, ch. 24, *Ont.*, was *ultra vires*, because it was not within the power of the provincial legislature to legislate regarding an Insurance Company incorporated before Confederation by a charter granted to it by the parliament of the old province of *Canada*, and since amended by the Dominion parliament.

In the case of *Parsons* v. *The Citizens' Insurance Company*, Mr. *Robinson*, Q. C., and Mr. *Bethune* were

(1) 7 & 8 Vic. (Imp. Act), ch. 110.

heard for appellants, and Mr. *Dalton McCarthy*, Q. C., for respondent.

In the case of *Parsons* v. *The Queen Insurance Company*, Mr. *Robinson*, Q. C., (and Mr. *J. T. Small* with him) appeared on behalf of the appellants, and Mr. *Dalton McCarthy*, Q. C., on behalf of the respondent.

In the case of *Johnston* v. *The Western Assurance Co.*, Mr. *Bethune* was heard for appellants, Mr. *Mowat*, Q.C., Attorney General of *Ontario*, was heard on the question of the jurisdiction of the provincial legislature, and Mr. *Dalton McCarthy*, Q. C., for respondent.

The arguments of Counsel and the authorities relied upon were as follows :—

For appellants :

The *Ontario* legislature had no power to deal with the general law of insurance; the power to pass such enactments was within the legislative authority of the Dominion parliament, under sec. 91, sub-sec. 3, *B. N. A. Act*, "The regulation of trade and commerce."

Insurance is a trade or business which may be and is in some of its branches carried on by individuals, and such persons are deemed to be traders in consequence of their following such trade or business. The hundreds of millions of insurances now effected, the usage of insurance which obtains, and the importance, or rather necessity of insurance to the conduct of other branches of trade, business and commerce, (in which insurance is now treated as part of the cost of merchandise, besides being a means of credit) all bring it within the definition of trade or commerce; and it has been so declared and recognized by the parliament of *Canada*, in the numerous private acts authorizing companies to carry on the trade or business, in the public acts controlling the business and providing for its being conducted under license, and in the Insolvent Act of 1875, which provides that it shall apply amongst

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others to * * * "trading companies" * * "except incorporated insurance companies," and in the Act of 1878, applying to insurance companies the provisions of the Insolvent Act.

The *British North America Act* expressly reserves for the Dominion exclusively certain matters, and all matters, in fact, not especially named and assigned by section 92 to the province: *L'Union St. Jacques* v. *Belisle* (1); *Dow* v. *Clarke* (2); *Attorney General* v. *Queen's Insurance Company* (3); *Hansard* (4).

The Dominion powers are exclusive, from their nature, without any express prohibition of the exercise of the same powers by the provincial legislatures.

The words "property and civil rights" used in the ninety-second section *British North America Act* when granting their respective powers to the provincial legislatures, are evidently used in that Act with a much more restricted meaning than in the provincial Act 32 *Geo. III.*, Con. Stat. *U. C.*, ch. 9.; for the *British North America Act* divides into numerous sub-divisions the powers which were held to pass under these words in the Act of 32 *Geo. III.* See *Anderson* v. *Todd* (5).

Upon the view taken in the court below of the powers of the legislature of *Ontario*, it would be competent for that legislature to enact regulations, in effect, prohibitory of their business, as lawfully authorized by the Canadian parliament, a consideration fatal to that view.

The decision in *Paul* v. *Virginia* (6), so much relied on by the Court of Appeal, is not an authority here, and the appellants submit that the reasoning is not applicable to this case.

(1) L. R. 6 P. C. 31, 36.
(2) Ibid. 272.
(3) L. R. 3, App. Cases 1090.
(4) 3rd series, vol. clxxxv. p. 566.
(5) 2 U. C. Q. B. 32.
(6) 8 Wallace 168.

The relative positions of the parliament of the Dominion of *Canada* and the legislatures of the various provinces are so entirely different from those of Congress and the legislature of the several States that no analogy can safely be drawn from a decision of the *United States* courts. The powers vested in Congress to "regulate commerce with foreign and *among* the several States" is a very different thing from the general powers to legislate with respect to "trade and commerce," which words are used without limitation or restriction in the *British North America Act*, thus giving to the parliament of the Dominion exclusive jurisdiction over all matters of trade and commerce, domestic as well as foreign, not only *among* the provinces, but in them. The difference alluded to is plainly shewn by the language of the Supreme Court, at p. 183: "Such contracts are not *inter*-state transactions, though the parties may be domiciled in different states." * * * "They do not constitute a part of the commerce *between* States any more than a contract for the purchase and sale of goods in *Virginia* by a citizen in *New York*, whilst in *Virginia*, would constitute a portion of such commerce." See also *Severn* v. *The Queen* (1).

The counsel for appellants in the case of *Parsons* v. *The Queen Insurance Company* contended further, that the *Ontario* statute was *ultra vires* of the legislature with respect to an English Company doing business under an Imperial charter, as is the case of the present appellants. Imp. Stat. 7 & 8 *Vic.*, ch. 110 (*Chitty's* Stat. vol. I, 649), and "The Company's Act," 1862 (*Chitty's* Stat. vol. I, 725.) The *British North America Act* was not intended to abrogate or diminish the powers already granted to English corporations doing business in *Canada*, under Imperial Acts. *Smiles* v. *Belford* (2); *Rutledge* v. *Low* (3).

(1) 2 Can. Sup. Ct. R. 104. (2) 1 Ont. App. R. 436.
(3) L. R. 3 H. L. 100.

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That the statute did not apply to a case in which a policy had not been actually delivered. The directions contained therein, with respect to printing, show that it never was intended to apply to the contract entered into by an interim receipt, such as is known to the public and insurers. The ordinary statutory conditions printed on such a document would be practically illegible from the smallness of the type necessarily employed. And, moreover, the language of the statute is explicit, the word "policy" alone being employed. As regards the temporary insurance by means of an interim receipt, the parties are at liberty to make such conditions as they may choose. *McQueen* v. *Phœnix Mutual Insurance Company* (1).

In any event the appellants are entitled to the benefit of the conditions against further insurance, whether their own conditions or the statutory makes no difference, as both are practically the same. *Geraldi* v. *The Provincial Insurance Company* (2).

In the case of *Parsons* v. *The Citizens' Insurance Company of Canada*, the counsel relied also on the fact that appellants company were incorporated by the late province of *Canada* and authorized to make *contracts* of insurance throughout the late province of *Canada*, and also on the fact that the respondent had effected a further insurance, which was contrary to the statutory conditions as well as to the appellants' ordinary conditions.

In the case of *Johnston* v. *The Western Assurance Company*, it was also contended that the appellants, having been incorporated by the parliament of the old province of *Canada*, and their charter having since been varied and amended by the Dominion parliament—the Company in fact being a creature of the parliament of *Canada*—the legislature of the province of *Ontario* cannot curtail or limit or put any restriction on the power of

(1) 29 U. C. C. P. 511, 521. (2) 29 U. C. C. P. 321.

the Company to do business in any province of *Canada*. It never was intended, under the *British North America Act*, that the provincial legislature should alter, vary or restrict corporate powers already possessed by companies doing business at the time of the passing of the Act.

For respondents :

The first question involves the constitutionality of the Act of *Ontario*, 39 *Vic.*, ch. 24, respecting uniform conditions on policies of Insurance. This Act is constitutional and within the powers of the *Ontario* legislature : *B. N. A. Act*, sections 91, and 92, subsecs. 11, 13 and 16 ; *Billington* v. *Provincial Insurance Company* (1) ; *Dear* v. *The Western Insurance Company* (2) ; *Ulrich* v. *The National Insurance Company* (3) ; *Parsons* v. *Citizens' Insurance Company* (4) ; *Frey* v. *The Mutual Fire Insurance Company of the County of Wellington* (5) ; *Parsons* v. *The Queen's Insurance Company* (6).

The making of a policy of Insurance is not a transaction of commerce within sec. 91 (sub-sec. 2) of the *B.N.A. Act*, but is a contract of indemnity. *Paul* v. *Virginia* (7) ; *Nathan* v. *Louisiana* (8). The matter in question here comes within sub-secs. 11, 13 and 16, or one of them, of sec. 92 *B. N. A. Act*. Sub-sec. 2 of sec. 91, giving power to the parliament of *Canada* to regulate trade and commerce, refers to general legislation applicable to the Dominion, and does not withdraw from the provinces the right to legislate respecting private property and contracts within the province.

Contracts of insurance are matters relating to property

(1) 24 Grant 299.
(2) 41 U. C. Q. B. 553.
(3) 42 U. C. Q. B. 141 ; S. C., in Appeal, 4 Ont. App. R. 84.
(4) 43 U. C. Q. B. 261 ; S.C., in Appeal, 4 Ont. App. R. 96.
(5) 43 U. C. Q. B. 102.
(6) 43 U. C. Q. B. 271 ; S. C., in Appeal, 4 Ont. App. R. 103.
(7) 8 Wallace 168.
(8) 8 Howard 73.

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and civil rights within sec. 92 (sub-sec. 13), *B. N. A. Act*, and are matters of a merely local or private nature in the province within sub-sec. 16, sec. 92.

These contracts are peculiarly local in their nature, inasmuch as they relate exclusively to the protection and security of property within the province. They are as clearly within the power of the local legislature as the many other classes of contracts admittedly within such power, and in respect of which the legislature of *Ontario* has always legislated without question as to its power to do so; such as the forms and solemnities of the instruments of title and conveyance of property; statutes requiring certain promises to be in writing; statutes of limitations by which titles and contracts are extinguished; statutes relating to married women and their dealings with such property; these and all other statutes of a similar character, are binding upon all persons and corporations, both foreign and domestic, contracting in *Ontario*.

So far as relates to the interpretation of the *B. N. A. Act*, that Act must be interpreted in the light of the established principles of public law. By that law, as held both in *England* and *America*, contracts are local matters; as to their nature, validity and obligation, they are governed by the law of the place where made and where they are to be executed. They are treated as matters of domestic legislation. See *Story* on Con. of *U.S.* (1); 2 *Kent's* Com. (2); *Robinson* and *Bland* (3); *Wheaton* Int. Law (4); *Westlake* Private Int. Law (5).

The appellants are a private corporation. It is merely a company of private persons with corporate powers; the business is carried on solely for the private benefit

(1) Sec's 279, 280, 364, 541 and cases referred to in the text.
(2) 3 Edn. sec. 37, pp. 393, 394, sec. 39, pp. 457, 459.
(3) 2 Burr. 1079.
(4) Eng. Ed. 1878, p. 194, sec's. 145, 146.
(5) Art. 208, 208, pp. 195, 196.

and profit of the individuals composing it; it has no connection with government; it is not an instrument of Government created for its own purposes, such as national banks in the *U.S.*

There is no analogy here to the case of a province taking national property, or salaries paid by government, or other acts, the effect of which might impede or hamper the operations of Government. See *Story* on Con. of *U. S.* (1).

There is no express provision in any of the statutes relating to the appellants company exempting them from the jurisdiction of *Ontario* to regulate insurance contracts and prescribe their forms and conditions, and such exemption cannot be implied: *Pomeroy* Con. Law 380; and the above principle applies even in the *U.S.*, the constitution of which contains a provision that "no State shall pass any law impairing the obligation of contracts," to which no similar enactment is found in the *B. N. A. Act.* The provincial legislatures are not in any accurate sense subordinate to the parliament of *Canada:* Each body is independent and supreme within the limits of its own jurisdiction: so that even if contracts are considered a kind of commerce, they are still governed by sec. 92, the powers in which should be read as exceptions to those conferred upon parliament by sec. 91, *B. N. A. Act: Severn* v. *The Queen* (2); *Re Slavin and Orillia* (3); *Reg.* v. *Boardman* (4); *Reg.* v. *Longee* (5); *L'Union St. Jacques de Montreal* v. *Belisle* (6).

If the local legislature has jurisdiction respecting the subject-matter of insurance contracts at all, it has the most full and ample jurisdiction—*plenum imperium* —it has sovereign power within its own limits. This principle requires that the legislature of a province

(1) Secs. 1262, *et seq.*
(2) 2 Can. Sup. Ct. R. 110.
(3) 36 U. C. Q. B. 172.
(4) 30 U. C. Q. B. 553.
(5) 10 C. L. J. N. S. 135.
(6) L. R. 6 P. C. 35.

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has power to prescribe or limit the conditions of insurance contracts made within the province, respecting property situate within its limits, whether such contracts are made by citizens of the province or provincial corporations, or by foreigners or foreign corporations. The provincial legislature has power to incorporate insurance companies; these are bound by local laws, but the argument of the appellants would enable the foreign corporation to claim immunity from provincial laws while enjoying the protection of these laws; to be "a law unto itself," while reaping the benefit of local business; thus, giving it a position more favourable than its local rival: a most curious and startling anomaly, and, it is submitted, contrary to all principle and authority.

The fact that certain powers have been assumed by parliament hitherto prove little, for the provinces have not power to disallow these Acts, and can only look to the courts for defence against the encroachments of the Federal power, whereas Acts passed by the local legislatures might be disallowed by the Dominion parliament. As to the contention of the appellants that the *Ontario* Act in question does not extend to them, there is nothing in the Act shewing or implying that the appellants are exempt from its provisions; and the authorities quoted above, and the reasons already given, shew that the Act extends to all policies of insurance made within the province, respecting property within the province.

Next, as to the construction of the statute in question —39 *Vic.*, ch. 24, *Ont.* The object of the Act was to protect the insured, not to benefit the insurer. The stand point of the legislature was this: the ends of justice were often defeated, and the insured defrauded by the multitude of conditions, many of them obscure and unfair. The intention was to confine the insurers

to fair and reasonable conditions by placing them under legislative or judicial control; and this object was to be attained as follows: As to certain specified conditions the legislature decided a *priori* that they are fair and reasonable and authorize the insurer to use them if he choses, these are called the statutory conditions, and he is directed to print them on the policy; further or different conditions may be used, provided they are printed in the manner directed, and provided they are fair and reasonable in the opinion of the proper tribunal upon the trial of any case. So far the object is to *limit the insurer to fair conditions*, but not to ordain that these conditions are to be part of every insurance contract. But still further in pursuance of the object of the Act to protect the insured, who, in many cases, would know nothing of the statute, the insurer is required to print the conditions on the policy if he desires the benefit of them, and to prevent him benefiting by his own omission it is ordained that, *as to him*, these conditions shall apply, whether printed or not. Notwithstanding the words of section 1 as to printing the conditions, the appellants contend that they may print them on the policy or omit them at their option, and that the effect is the same in either case: it is submitted such a construction is untenable, and that the true construction is that the conditions are not binding on the insured unless printed in compliance with the Act.

As to the construction of sec. 2: The legislature is there dealing with *variations*, it there assumes that the statutory conditions are printed as directed, because otherwise there could be no variation; then the statutory conditions being on the policy, and the variations not being made in the manner directed, it is provided that, *as against the insurer*, the variations are void and the policy subject to the statutory conditions only.

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By the above construction of the Act, both sections are made to harmonize and to effectuate the legislative intent, and this construction has been adopted by the various courts in *Ontario*. *Ulrich* v. *The National Insurance Company* (1); *Dear* v. *The Western* (2); *Parsons* v. *The Citizens Insurance Company* (3); *Parsons* v. *The Queen's Insurance Company* (4); *Frey* v. *The Wellington Mutual* (5).

The question as to the constitutionality of the *Ontario* statute 39 *Vic.*, ch. 24, having been raised in each case, the following judgments were delivered applicable to the three appeals.

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There never, probably, was an Act, the validity of which was questioned, that came before a Court so strongly supported by judicial and legislative authority as this Act. It was legislation suggested as necessary by the Court of Queen's Bench of *Ontario*, in the case of *Smith* v. *Commercial Union Insurance Co.* (6).

The legislature of *Ontario*, adopting the suggestion, passed, 38 *Vic.*, ch. 65, authorizing the issue of a commission to three or more persons holding judicial office in the province, and by section 2, enacted in these words, that:

> A commission is to be issued by the Lieutenant-Governor, addressed to three or more persons holding judicial office in this province, for the purpose of determining what conditions of a fire insurance policy are just and reasonable conditions, and the commissioners may take evidence, and are to hear such parties interested as they shall think necessary; and a copy of the conditions settled, approved of and signed by the Commissioners, or a majority of them, shall be

(1) 42 U. C. Q. B. 141.
(2) 41 U. C. Q. B. 553.
(3) 43 U. C. Q. B., 261; S. C. 4 Ont. App. R. 96.
(4) 43 U. C. Q. B. 271; S. C. 4 Ont. App. R. 103.
(5) 43 U. C. Q. B. 102.
(6) 33 U. C. Q. B. 69.

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deposited in the office of the Provincial Secretary; and in case, after the Lieutenant-Governor, by proclamation published in the *Ontario Gazette*, assent to the said conditions, any policy is entered into or renewed, containing or including any conditions other than or different from the conditions so previously approved of and deposited; and if the said conditions, so not contained or included, is held by the Court or Judge before whom a question relating thereto is tried, not to be just and reasonable, such conditions shall be null and void.

This Act was not disallowed, and a commission by the Government of *Ontario* was duly issued in accordance therewith to learned judges, who reported what they deemed just and reasonable conditions, whereupon the *Ontario* legislature passed the 39 *Vic.*, ch. 24: "An Act to secure uniform conditions in Policies of Fire Insurance," which is the Act now questioned, and which, after reciting that under the provisions of the Act, 38 *Vic.*, ch. 65., the Lieutenant-Governor issued a commission to consider and report what conditions are just and reasonable conditions to be inserted in fire insurance policies, on real or personal property in this province (*Ontario*), and, after reciting that a majority of the Commission had settled and approved of the conditions set forth in the schedule of the Act, and that it was advisable that the same should be expressly adopted by the legislature as the statutory conditions to be contained in the policies of fire insurance entered into, or in force in this province, the first sections enact:—

1. The conditions set forth in the schedule to this Act shall, as against the insurers, be deemed to be part of every policy of fire insurance hereinafter entered into or renewed, or otherwise in force in *Ontario*, with respect to any property therein, and shall be printed on every policy with the heading "Statutory Conditions;" and if a company (or other insurer) desire to vary the said conditions, or to omit any of them, or to add new conditions, there shall be added, in conspicuous type, and in ink of different color, words to the following effect: "Variations in conditions."

This policy is issued on the above statutory conditions, with the following variations and conditions:—These variations (or as the

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case may be) are, by virtue of the *Ontario* statute in that behalf, in force so far as, by the Court or Judge before whom a question is tried relating thereto, they shall be held to be just and reasonable to be exacted by the Company.

2. Unless the same is distinctly indicated and set forth in the manner or to the effect aforesaid, no such variation, addition or omission shall be legal and binding on the insured, and no question shall be considered as to whether any such variation, addition or omission is, under the circumstances, just and reasonable, and, on the contrary, the policy shall, as against the insurers, be subject to the statutory conditions only, unless variations, additions or omissions, are distinctly indicated and set forth in the manner or to the effect aforesaid.

This Act was never disallowed, but has since its passage been acted on; and the *Ontario* reports show that questions as to its construction have been before the Courts of *Ontario*, without its validity having been impugned by either Bench or Bar, and, when the point was raised, its validity was affirmed by the unanimous opinion of the Court, to whom the question was first submitted; it was so held and acquiesced in in two cases unappealed from, and, when again raised in the present cases, the Court of Queen's Bench unanimously reaffirmed its former decision, and, on appeal, the Appeal Court of *Ontario* unanimously affirmed that decision. But this is not all; we have the Dominion parliament recognizing, by expressed statutory terms, the right of the local legislature to incorporate insurance companies and deal with insurance matter.

So far back as the 31 *Vic.*, ch. 48 (1868), when the intention of the parliament of *Great Britain*, in enacting the *British North America Act*, must have been fresh in the minds of the leading men who first sat in the Dominion parliament, and who had taken the most prominent part in discussing and agreeing on the terms of Confederation and the provisions of the *British North America Act*, and who, we historically know, watched its passage through the parliament of *Great Britain*, we

find the Dominion parliament in that year (1868) passing "An Act respecting Insurance Companies," and in that Act, by section 4, thus clearly affirming the right of the local legislature to incorporate insurance companies, after fixing the amount to be deposited by Life, Fire, Inland Marine, Guarantee or Accident Insurance Companies, certain companies are excepted in these words :—

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Except only in the case of companies incorporated before the passing of this Act by Act of the parliament of *Canada*, or of the legislature of any of the late provinces of *Canada*, or *Lower Canada* or *Upper Canada*, or of *Nova Scotia* or *New Brunswick*, or which may have been or may *hereafter be incorporated* by the parliament of *Canada*, *or by the legislature of any province of the Dominion, and carrying on the business of Life or Fire Insurance.*

And, as if to place this beyond all doubt, and to show that companies, which might be so incorporated by the local legislature, were local incorporations and its business should be confined within the province incorporating them, we find it enacted in section 25 :—

That the provisions of this Act as to deposit and issue of license shall not apply to any insurance company incorporated by any Act of the legislature of the late province of Canada, or incorporated, *or to be incorporated, under any Act of any one of the provinces of Ontario, Quebec, Nova Scotia, or New Brunswick,* so long as it shall not carry on business in the Dominion *beyond the limits of that province* by the legislature or government of which it was incorporated, but it shall be lawful for any *such company to avail itself* of the provisions of this Act.

Could words or provisions in recognition and affirmance of the powers of the local legislatures be stronger? And in 38 *Vic.*, ch. 20 (1875), "An Act to amend and consolidate the several Acts respecting insurance, in so far as regards Fire and Inland Marine business," we find, by section 2, a distinct recognition of companies incorporated under any Act of the legislature of any province of the Dominion of *Canada :*

Section 2.—This Act shall apply only to companies *heretofore* incorporated by any Act of the legislature of the late province of

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Canada, or by any Act of the legislature of any of the provinces of Canada, and which, upon the day of the passing of this Act, were also licensed, under Act of the parliament of *Canada*, to transact business of insurance in *Canada, and also to any Company heretofore or which may hereafter be incorporated by Act of parliament of Canada*, and to any foreign insurance company *as hereinbefore defined*; and it shall not be lawful for the Minister of Finance to license any other company than those in this section above mentioned; and no other company than those above mentioned, shall do any business of fire or inland marine insurance throughout the Dominion of *Canada*; but nothing herein contained shall prevent any insurance company incorporated by, or under, any Act of the legislature of the late province of *Canada, or of any province of the Dominion of Canada*, from carrying on any business of insurance within the limits of the late province of *Canada or of such Province only*, according to the powers granted to such insurance company within such limits as aforesaid, without such license as hereinafter mentioned.

But the Dominion statutory recognition of the rights of the local legislation, strong as it is, does not rest here. As late as 1877, by the 40 *Vic.*, ch. 42, "An Act to amend and consolidate certain Acts respecting insurance," we find it thus enacted by section 28:

This Act shall not apply to any company *within the exclusive legislative control of any one of the provinces of Canada unless such company so desires, and it shall be lawful for any such company to avail itself of the provisions of this Act, and if it do so avail itself, such company shall have the power of transacting its business of insurance throughout Canada.*

So again, in the year 1878, the Dominion parliament distinctly recognized the incorporation by the *Ontario* legislature of the *Ontario Mutual Life Assurance Company, incorporated and carrying on business in the province of Ontario*, under the Act, ch. 17 of the statutes of said province, passed in the 32 *Vic.*, and incorporated the said company to enable it to carry on business of life assurance on the mutual principle, and doing all things appertaining thereto or connected therewith, *as well in the said province of Ontario as in the other provinces of the Dominion.*

We find, then, legislation in the direction carried out

by this Act recommended in a solemn judgment of the Queen's Bench of *Ontario*; we find the matter referred to a commission of Judges who reported to the Government of *Ontario* the conditions and provisions which, in their opinion, should be enacted by the legislature of that province, and form, as against the insured, the statutory conditions of a policy of insurance in force in *Ontario* with respect to any property therein, and the means necessary to be adopted by the insured if he desire to omit or vary any of such conditions. Here, then, we have the legislature of *Ontario* assuming the right to deal with insurance companies and insurance business, their legislative action not disallowed. We find this particular Act in several cases acted upon by the bar and bench of *Ontario* without its validity being questioned by either, and when at last questioned, we find its validity sustained by all courts and judges of original jurisdiction who have been called on to adjudicate on this point, and, finally, by the unanimous opinion of the Court of Appeal; and last, but not least, we have the express legislation of the parliament of *Canada*, expressly recognizing that the local legislatures have power to deal with matters of insurance.

I do not put forward these considerations as conclusive of the questions in this Court of Appeal, because, if we were clearly of opinion that under the *B. N. A. Act* the legislature of *Ontario* had not the power to pass the law, we would be bound to say so and to overrule the decisions of the courts below and disregard the legislation of the Dominion parliament, for, if not within the *B. N. A. Act*, neither the affirmance of the power by the local legislature nor the legislative recognition of it by the Dominion parliament could confer it. Still I am individually well pleased that I am enabled satisfactorily to arrive at a conclusion which relieves me from the necessity of overruling the Acts and decisions

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of so many learned Judges, and the legislative actions of the legislature of *Ontario* and the repeated statutory declarations of the parliament of *Canada*.

But this does not relieve me from the duty of showing immediately to the parties interested, and through them to the parliament of *Canada* and the legislatures of the provinces, by what process of reasoning I have arrived at that conclusion.

Is, then, such legislation as this with respect to the contract of insurance beyond the power of local legislation? I think at the outset I may affirm with confidence that the *B. N. A. Act* recognizes in the Dominion constitution and in the provincial constitutions a legislative sovereignty, if that is a proper expression to use, as independent and as exclusive in the one as in the other over the matters respectively confided to them, and the power of each must be equally respected by the other, or *ultra vires* legislation will necessarily be the result.

It is contended that the local legislature not only cannot incorporate a local insurance company, but cannot pass any Act in reference to insurance, inasmuch as it is contended such legislation belongs exclusively to the Dominion parliament, under the power given that parliament to legislate in relation to "the regulation of trade and commerce."

As to the incorporation of insurance companies, this point is not directly, though it is perhaps indirectly, involved in the questions raised in these cases. It may be remarked that, in the enumeration of the powers of parliament, the only express reference to the power of incorporation is under No. 15, "Incorporation of Banks," though it cannot be doubted that, under its general power of legislation, it has the power to incorporate companies with Dominion objects.

But it is said that insurance companies are trading

or commercial companies, and therefore within the terms "trade and commerce;" but we have matters connected with trade and commerce, such as navigation and shipping, banking incorporations, weights and measures, and insolvency, "and such classes of subjects as are expressly excepted in the enumeration of the classes of subjects by the Act assigned exclusively to the legislatures of the provinces," and these and the other enumerated "classes of subjects 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."

This shows inferentially that there may be matters of a local and private nature with which the local legislatures may deal, and which, but for the exclusive power conferred on the local legislatures, might be comprised under some of the general heads set forth in section 91, as belonging to the Dominion parliament. This is made very apparent in respect to navigation and shipping.

By section 91 the exclusive legislative authority of the parliament of *Canada* is declared to extend to all matters coming within the classes of subjects next thereinafter enumerated, of which "navigation and shipping" is one. When we turn to the enumeration of the exclusive powers of the provincial legislatures, we find "local works and undertakings, other than such as are of the following classes: (*a*) Lines of steamers and other ships, railways, canals, telegraphs and other works and undertakings" connecting the province with any other or others of the provinces, or extending beyond the limits of the province. (*b*) Lines of steamships between the provinces and any British or foreign country. (*c*) Such works, as although wholly situate within the province, are, before or after their

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execution, declared by the parliament of *Canada* to be for the general advantage of *Canada*, or for the advantage of two or more of the provinces"—and then follows the incorporation of companies with provincial objects.

Here, then, are matters immediately connected with navigation and shipping, trade and commerce.

If the power to legislate on navigation and shipping and trade and commerce, vested in the Dominion parliament, necessarily excluded from local legislatures all legislation in connection with the same matters, and that nothing in relation thereto could be held to come under local works and undertakings, or property or civil rights, or generally all matters of a merely local or private nature in the province, or the incorporation of companies with provincial objects, what possible necessity could there be for inserting the exception "other than such as are of the following classes as above" (*a*, *b*, *c*). On the contrary, does not this exception show beyond all doubt, by irresistible inference, that there are matters connected with navigation and shipping, and with trade and commerce, that the local legislatures may deal with, and not encroach on the general powers belonging to the Dominion parliament for the regulation of trade and commerce, and navigation and shipping, as well as railways, canals and telegraphs? Can it be successfully contended that this is not a clear intimation that the local legislatures were to have, and have, power to legislate in reference to lines of steamers and other ships, railways, canals, and other works and undertakings wholly within the province, subject, no doubt, to the general powers of parliament over shipping and trade and commerce, and the Dominion laws enacted under such powers, as, for instance, the 31st *Vic.*, ch. 65 (1868), "An Act respecting the inspection of steamboats, and for the greater safety of passengers by them," or the Act 36 *Vic.*, ch. 128, "An Act relating to shipping?"

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With reference to insurance companies, and the business of insurance in general, it is contended that insurance companies are trading companies, and therefore the business they transact is purely matter of trade and commerce, and therefore local legislatures cannot in any way legislate either in reference to insurance companies or insurance business.

As to such a company being a trading company, *Jessel*, M. R., in the case of *in re Griffith* (1), did not seem to think the question so abundantly clear as is supposed; he says:—

> I come now to the next point, which is, what is this company? Is it a trading or other public company? * * *
>
> So that we have it that it must be a public company, whether it is a trading or other company; therefore it seems immaterial to consider whether a particular company is or is not a trading company, and I am glad of it, because, though I think an insurance company might be called a trading company, many people might take the opposite view of the word "trade." I take the larger view, and think it would be called a trading company, but it is immaterial. If it is a public company at all, and not a trading company, it comes under the term "other public company (2)."

But in the view I take of this case, I am willing to assume that insurance companies may be considered trading companies, and yet that it by no means follows that the legislation complained of is beyond the powers of the local legislatures.

With reference to section 91, and the classes of subjects therein enumerated, Lord *Selborne*, in *L'Union St. Jacques de Montreal* and *Belisle* (3), says:

> Their Lordships observe that the scheme of enumeration in that section is to mention various categories of general subjects which may be dealt with by legislation. There is no indication in any in-

(1) L. R. 12 Ch. 655.

(2) See also *Paul* v. *Virginia*, 8 Wallace 168, where it was held that issuing a policy of insurance was not a transaction of trade and commerce.

(3) L. R. 6 P. C. 36.

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stance of anything being contemplated, except what may properly be described as general legislation.

It may be difficult to draw the exact line between the powers of the Dominion parliament to regulate trade and commerce and the powers of the local legislatures over "local works and undertakings," "property and civil rights in the province," and "generally all matters of a merely local or private nature in the province."

No one can dispute the general power of parliament to legislate as to "trade and commerce," and that where, over matters with which local legislatures have power to deal, local legislation conflicts with an Act passed by the Dominion parliament in the exercise of any of the general powers confided to it, the legislation of the local must yield to the supremacy of the Dominion parliament; in other words, that the provincial legislation in such a case must be subject to such regulations, for instance, as to trade and commerce of a commercial character, as the Dominion parliament may prescribe. I adhere to what I said in *Valin* v. *Langlois* (1), that the property and civil rights referred to, were not all property and all civil rights, but that the terms "property and civil rights" must necessarily be read in a restricted and limited sense, because many matters involving property and civil rights are expressly reserved to the Dominion parliament, and that the power of the local legislatures was to be subject to the general and special legislative powers of the Dominion parliament, and to what I there added: "But while the legislative rights of the local legislatures are in this sense subordinate to the right of the Dominion parliament, I think such latter right must be exercised, so far as may be, consistently with the right of the local legislatures; and, therefore, the Dominion parliament would only have

(1) 3 Can. Sup. Ct. R. at p. 15.

the right to interfere with property and civil rights in so far as such interference may be necessary for the purpose of legislating generally and effectually in relation to matters confided to the parliament of *Canada*."

I think the power of the Dominion parliament to regulate trade and commerce ought not to be held to be necessarily inconsistent with those of the local legislatures to regulate property and civil rights in respect to all matters of a merely local and private nature, such as matters connected with the enjoyment and preservation of property in the province, or matters of contract between parties in relation to their property or dealings, although the exercise by the local legislatures of such powers may be said remotely to affect matters connected with trade and commerce, unless, indeed, the laws of the provincial legislatures should conflict with those of the Dominion parliament passed for the general regulation of trade and commerce. I do not think the local legislatures are to be deprived of all power to deal with property and civil rights, because parliament, in the plenary exercise of its power to regulate trade and commerce, may possibly pass laws inconsistent with the exercise by the local legislatures of their powers—the exercise of the powers of the local legislatures being in such a case subject to such regulations as the Dominion may lawfully prescribe.

The Act now under consideration is not, in my opinion, a regulation of trade and commerce; it deals with the contract of fire insurance, as between the insurer and the insured. That contract is simply a contract of indemnity against loss or damage by fire, whereby one party, in consideration of an immediate fixed payment, undertakes to pay or make good to the other any loss or damage by fire, which may happen during a fixed period to specified property, not exceeding the sum named as the limit of insurance. In *Dalby*

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v. *The India & London Life Insurance Co.* (1), *Parke*, B., delivering the judgment of the court, says:

The contract commonly called "life insurance," when properly considered, is a mere contract to pay a certain sum of money upon the death of a person, in consideration of the due payment of a certain annuity for his life, the amount of the annuity being calculated, in the first instance, according to the probable duration of the life, and when once fixed is constant and invariable. This species of insurance in no way resembles a contract of indemnity.

How this, as between the parties to the contract, can be called a matter of trade and commerce, I must confess my inability to comprehend; but the process of reasoning, as I understand it, by which we are asked to say that fire insurance is a matter of trade and commerce, would make life assurance equally so.

In this same case, *Parke*, B., says:—

Policies of assurance against fire and against marine risks are both properly contracts of indemnity, the insurer engaging to make good, within certain limited amounts, the losses sustained by the assured in their buildings, ships and effects. Policies on maritime risks were afterwards used improperly, and made mere wagers on the happening of those perils. This practice was limited by the 19 *Geo.* 2 ch. 37, and put an end to in all except a few cases. But at common law, before this statute with respect to maritime risks, and the 14 *Geo.* 3 ch. 48, as to insurance on lives, it is perfectly clear that all contracts for wager policies, and wagers which were not contrary to the policy of the law, were legal contracts, and so it is stated by the Court in the case of *Causens* v. *Nantes* (2), to have been solemnly determined in *Lucena* v. *Craufurd* (3), without even a difference of opinion among all the Judges. To the like effect was the decision of the Court of Error in *Ireland*, before all the Judges except three, in the *British Insurance Co.* v. *Magee* (4), that the insurance was legal at common law (5).

I do not understand that by the Act now assailed

(1) 15 C. B. 364.
(2) 3 Taunt. 315.
(3) 2 B. & P. 324.
(4) C. & Al. 182.
(5) See also *The Edinburgh Life Assurance Co.* v. *The Solicitor of Inland Revenue, and The Scottish Widows' Fund and Life Assurance Co.* 12 Sc. L. Reporter, 275; and *Bank of India* v. *Wilson*, L. R. 3 Ex. Div. 108.

any supreme sovereign legislative power to regulate and control the business of insurance in *Ontario* is claimed. As I read the Act, it deals only with this contract of indemnity; it does not profess to deal with trade or commerce, or to make any regulation in reference thereto. In my opinion, this Act has no reference to trade and commerce in the sense in which these words are used in the *British North America Act*. It is simply an exercise of the power of the local legislature for the protection of property in *Ontario*, and the civil rights of the proprietors thereof in connection therewith, by securing a reasonable and just contract in favor of parties insuring property, real or personal, in *Ontario*, and deals therefore only with a matter of a local and private nature. The scope and object of the Act is to secure to parties insuring a just and reasonable contract, to prevent the exaction of unjust and unreasonable conditions, and to protect parties from being imposed upon by the insertion of conditions and stipulations in such a way as not to be brought to the immediate notice of the insured, or capable of being easily understood, or by the insertion of conditions calculated practically in many cases to deprive the parties paying the premiums of indemnity, though justly entitled to it, and, if the statutory conditions are omitted or varied, to compel the terms of the contract to be so plainly and prominently put on the contract that the attention of the assured may be called to them, and so that he may not be misled, judicial experience having proved that the rights of the insured, and legitimate indemnity in return for the money paid, demanded that the insured should be thus protected.

As the case of *Smith* v. *Commercial Union Insurance Company* (1) proves that the judicial tribunals found that legislative protection was required in *Ontario* against

(1) 33 U. C. Q. B. 69.

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unreasonable and unjust conditions imposed on the assured by the assurers; should experience show that over-insurance was of frequent occurrence, and led to fraudulent burning, whereby not only fraud was encouraged, but the neighbouring properties of innocent parties, wholly unconnected with the insurance, were jeopardized, can it be said that it would be *ultra vires* for the legislature of a province, with a view to stop such practises, to enact that in every case of over insurance, whether intentional or unintentional, the policy should be void, or to make any other provisions in reference to the contract of insurance as to value as would, in the opinion of the local legislature, prevent frauds and protect property? Could such legislation be held to be *ultra vires*, as being an interference with trade and commerce, because it dealt with the subject of insurance? Or for preventing frauds and perjuries, would it be *ultra vires* for the local legislature to enact that, as to all contracts of insurance entered into in *Ontario*, no insurance on any building or property in *Ontario* should be binding, or valid in law or equity, unless in writing? Or, take the first section of the 38 *Vic.*, ch. 45, can it be that the local legislature cannot make provision to provide against a failure of justice and right by enacting, as the first section of that Act did, that:

> Where, by reason of necessity, accident or mistake, the conditions of any contract of fire insurance on property in this province as to the proof to be given to the Insurance Company after the occurrence of a fire have not been strictly complied with; or where, after a statement or proof of loss has been given in good faith by or on behalf of the insured in pursuance of any proviso or condition of such contract, the Company, through its agent or otherwise, objects to the loss upon other grounds than imperfect compliance with such conditions, or does not, within a reasonable time after receiving such statement or proof, notify the insured in writing that such statement or proof is objected to, and what are the particulars in which the same is alleged to be defective, and so from time to time;

or where, from any other reason, the Court or Judge before whom a question relating to such insurance is tried or inquired into, considers it inequitable that the insurance should be deemed void or forfeited by reason of imperfect compliance with such conditions; no objection to the sufficiency of such statement or proof, or amended or supplemented statement or proof (as the case may be) shall, in any of such cases, be allowed as a discharge of the liability of the Company on such contract of insurance whenever entered into; but this section shall not apply where the fire has taken place before the passing of this Act.

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How can this be said to be an interference with the general regulation of trade and commerce? Yet it deals as effectually with the matter or contract of insurance in these particulars as this Act does in reference to the matters with which it deals. If the legislative power of the provincial legislatures is to be restricted and limited, as it is claimed it should be, and the doctrine contended for in this case, as I understand it, is carried to its legitimate logical conclusion, the idea of the power of the local legislature to deal with the local works and undertakings, property and civil rights, and matters of a merely local and private nature in the province is, I humbly think, to a very great extent, illusory.

I scarcely know how one could better illustrate the exercise of the power of the local legislatures to legislate with reference to property and civil rights, and matters of a merely local and private nature, than by a local Act of incorporation, whereby a right to hold or deal with real or personal property in a province is granted, and whereby the civil right to contract and sue and to be sued as an individual in reference thereto is also granted. If a legislature possesses this power, as a necessary sequence, it must have the right to limit and control the manner in which the property may be so dealt with, and as to the contracts in reference thereto, the terms and conditions on which they may be entered into, whether they may be verbal, or shall be in writ-

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ing, whether they shall contain conditions for the protection or security of one or other or both the parties, or that they may be free to deal as may be agreed on by the contracting parties without limit or restriction.

Inasmuch, then, as this Act relates to property in *Ontario*, and the subject-matter dealt with is therefore local, and as the contract between the parties is of a strictly private nature, and as the matters thus dealt with are therefore, in the words of the *British North America Act*, "of a merely local and private nature in the province," and as contracts are matters of civil rights and breaches thereof are civil wrongs, and as the property and civil rights in the province only are dealt with by the Act, and as "property and civil rights in the provinces" are in the enumeration of the "exclusive powers of provincial legislatures," I am of opinion that the legislature of *Ontario*, in dealing with these matters in the Act in question, did not exceed their legislative powers.

I am happy to say I can foresee, and I fear, no evil effects whatever, as has been suggested, as likely to result to the Dominion from this view of the case. On the contrary, I believe that while this decision "recognizes and sustains the legislative control of the Dominion parliament over all matters confided to its legislative jurisdiction, it, at the same time, preserves to the local legislatures those rights and powers conferred on them by the *B. N. A. Act*, and which a contrary decision would, in my opinion, in effect, substantially, or, to a very large extent, sweep away.

I carefully and advisedly abstain from expressing any opinion as to the validity or invalidity of any Act of the Dominion of *Canada*, or of the province of *Ontario*, save only as to the Act now immediately under consideration. It will be time enough to discuss and decide on the validity of other statutes, whether Do-

minion or provincial, when properly brought before us for judicial decision. To do so now, or to express any opinion as to the effect of this decision on other legislation not before us, and without argument or judicial investigation and consideration, would be, in my opinion, extra-judicial.

As to the construction which my brother *Gwynne* has put on section 3rd of the Act, in the case of *Giraldi* and *Provincial Insurance Company* (1), though the arguments used by him in that case, and in the judgment he is about to deliver, which he has kindly afforded me the opportunity of reading, and which I have most attentively considered, are very cogent and plausible, yet I have been unable to arrive at the same conclusion that he has. I think the history and phraseology of the Act shows it was passed for the protection and benefit of the insured, and "as against the insurer," that the insured may insure without conditions if he pleases, except those conditions which the law implies, but that in such a case, as against the insurer, the insured may claim the benefit of these conditions. But if the insurer wishes to avail himself of the statute and the statutory conditions, he must pursue the course pointed out by the statute; he cannot, in my opinion, disregard the requirements of the statute, and at the same time claim its benefits; and if he desires other conditions than the statutory conditions, he can only have them by varying the statutory conditions, or add to them in the manner pointed out by the statute. I can add nothing to what C. J. *Moss* and Judge *Burton* have said in their judgments on this point.

It is urged that the provisions of this statute do not apply to an insurance by what is called an interim receipt. When that contains an *agreement to insure*, it is, in my opinion, a policy within the meaning of the

(1) 29 U. C. C. P. 321.

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Act. A policy of insurance is a written instrument containing the contract. Whether it be contained in what is usually called an interim receipt, or a more formal document, it is equally the instrument containing the contract, and so the statutory definition of the term policy, in 33 and 34 *Vic.*, ch. 97 Imp., is:—"Every writing whereby any contract of insurance is made, or agreed to be made, is evidence."

As at present advised, I think the interim receipt should be treated as the policy. It would be an entire evasion of the statute if companies could insure by a document not in the usual form of a policy, and by calling it by another name impose their own conditions and escape from the provisions of the statute for the protection of the insured, but it is not necessary to discuss or finally decide this point, as in this case of *Parsons* v. *The Queen Insurance Company*, both the court of first instance and the Court of Appeal treated the case in the way most favorable for the defendants, and they have nothing to complain of.

As to the contention that the statute of *Ontario* can only apply to local companies and not to foreign companies, or companies incorporated by the Dominion of *Canada*, in my opinion any company, whether foreign, or incorporated by the Dominion legislature to carry on the business of fire insurance in any part of the Dominion of *Canada*, must do so subject always to the laws of the province in which the business is done, in the same way that a merchant carries on his trade or commerce within a province; but because he is a merchant or trader he is not exempt from an obligation to obey the laws of the province in which he carries on his business, if he enters into a contract within the province, and the law of the province prescribes the form of the contract under its power to legislate as to property and civil rights; neither corporations nor

traders can set themselves above that law and contract as they please independent of it. Suppose no statute of frauds was in force in a province, and the legislature enacted that no agreement for the sale of goods over $20 should be valid unless the contract of sale was evidenced by a writing signed by the parties, or in fact enacted a statute of frauds similar to the statute of *Charles*; or with reference to the statute of limitations, passed an Act limiting the validity of the contract as well as the remedy, or altered the existing limitations, and reduced or extended the time limited for bringing an action, could a corporation, merchants or traders, successfully claim to be exempt from the operation of such law on the ground that they interfered with trade and commerce, or that they were foreign corporations or foreigners engaged in trade, and therefore bound by no local laws?

If an insurance company is a trader, and the business it carries on is commercial, why should the local legislature, having legislative power over property and civil rights, and matters of a private and local character, not be enabled to say to such a company: "If you do business in the province of *Ontario*, and insure property situate here, we have legislative control over property and over the civil rights in the province, and will, under such power, for the protection of that property and the rights of the insured, define the conditions on which you shall deal with such property," it being possibly wholly unconnected with trade and commerce, as a private dwelling or farming establishment, and the person insured having possibly no connection with trade or commerce?

How can it be said that such property and such civil rights or contract shall be outside of all local legislation, and so outside of all local legislative protection? If the business of insurance is connected with trade and

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commerce, the legislation we are now considering does not attempt to prohibit the carrying on of the business of insurance, but having the property and the civil rights of the people of the province confided to them this legislation, in relation thereto, is simply the protection of such property and of such rights. In *Patteson* v. *Mills* (1), Lord *Lyndhurst* says:—

> And here another question arises—supposing the Act does not extend to *Scotland*, still it is said to be a bar to this action, because it is founded on a policy by an English company. The company is certainly an English one, but it is to be considered where the original contract was made. The policy was executed in *London*, but the action is not on the policy, but on the agreement; the original contract is made in *Scotland*, and if I, residing in *England*, send down my agent to *Scotland*, and he makes contracts for me there, it is the same as if I myself went there and made them.

In *Copin* v. *Adamson* (2), *Kelly*, C. B., cites the marginal note in *Bank of Australasia* v *Harding* (3), which he adopts as a correct proposition of law:

> The members resident in *England*, of a company formed for the purpose of carrying on business in a place out of *England*, are bound, in respect of the transactions of that company, by the law of the country in which the business is carried on.

I am, therefore, of opinion that this Act applies to all insurance companies that insure property in the Province of *Ontario*, whether local, dominion or foreign.

STRONG, J., who was present at the argument in the cases of *The Queen Insurance Company* v. *Parsons*, and *Citizens' Insurance Company* v. *Parsons*, did not deliver a formal judgment, but authorized the Chief Justice to state that he entirely agreed with the majority of the court in their conclusions, both as to the constitutionality of the *Ontario* statute, ch. 162 R. S., *Ont.*, and the construction to be put upon the provisions of that statute.

(1) 1 Dow & C. 362. (2) L. R. 9 Ex. 350.
(3) 9 C. B. 661.

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La principale question à décider est celle de la constitutionalité de l'acte d'*Ontario*, 39 *Vict.*, ch. 24, maintenant le ch. 162 des statuts revisés, pour assurer l'uniformité des conditions de police d'assurance. La constitutionalité est mise en question sur le principe que le pouvoir de législater au sujet des assurances appartient au parlement fédéral, comme conséquence de son pouvoir exclusif de réglementer le traffic et le commerce.

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Afin de s'assurer s'il y a conflit de pouvoirs, la première chose à faire est sans doute d'examiner la nature de la loi dont il s'agit. Comme l'indique son titre, elle a pour but d'assurer des conditions uniformes dans les polices d'assurance contre le feu.

La 2me section déclare que l'exécution imparfaite des conditions de l'assurance, quant à la preuve de l'incendie ne sera pas une raison suffisante pour annuler le contrat : 1o. lorsque par raison de nécessité, erreur ou accident, ces conditions n'ont pu être remplies ; 2o. lorsque après que cette preuve a été fournie conformément aux conditions du contrat, la compagnie fait objection pour d'autres motifs que le défaut d'accomplissement de ces conditions ; 3o. lorsqu'après avoir reçu cette preuve elle ne donne pas, dans un temps raisonnable, avis par écrit à l'assuré, des raisons pour lesquelles elle considère cette preuve défectueuse ; 4o. lorsque la cour ou le juge, pour aucune autre raison, considère qu'il serait injuste de déclarer l'assurance nulle pour cause d'exécution imparfaite de ces conditions.

La 3me déclare que les conditions mentionnées dans la cédule feront, contre l'assureur (*as against the insurer*), partie de toute police d'assurance contre le feu sur des propriétés situées dans la province d'*Ontario*. Ces con-

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ditions doivent de plus être imprimées sur la police d'assurance avec le titre "Statutory conditions."

La 4me section indique la manière de modifier les conditions et le mode à suivre pour leur impression.

La 5me section déclare qu'aucune variation de ces conditions ne sera obligatoire pour l'assuré, à moins qu'elle n'ait été faite conformément à la sec. 4; dans le cas contraire la police demeure, quant aux assureurs (*as against insurers*) soumise aux conditions imposées par le statut.

Par la sec. 6, il est déclaré que si d'autres conditions que celles voulues par le statut sont insérées dans une police—et que le juge ou la cour décide qu'elles ne sont ni justes ni raisonnables—elles sont dans ce cas déclarées nulles et sans effet.

La 7me donne un appel des causes jugées en vertu de cet acte.

Ce précis de la loi fait voir qu'elle se borne à établir des règles au sujet de la preuve à faire dans certains cas, ainsi qu'à déclarer quelles seront, dans la province d'*Ontario*, les conditions obligatoires de tout contrat d'assurance. Ces dispositions, entièrement de droit civil, ne comportent aucune prohibition du commerce de l'assureur, ni la nullité des polices qu'il émet. Les conditions imposées sont justes et raisonnables, et en réalité fort peu différentes de celles adoptées par la plupart des compagnies.

En quoi cette législation trouve-t-elle au pouvoir de réglementer le commerce et le trafic? Le sujet auquel elle s'applique, le contrat d'assurance, n'appartient-il pas au droit civil et ne fait-il pas partie de la juridiction attribuée aux provinces par le paragraphe 13 de la section 92 de l'Acte de l'Amérique Britannique du Nord au sujet de la propriété et des droits civils?

Sans doute que le contrat d'assurance est d'un usage immense dans le commerce, aussi bien que

par les non commerçants. Mais l'objet auquel s'applique un contrat n'en change pas la nature; quel que soit son objet le contrat d'assurance n'est toujours qu'un contrat d'indemnité, qui tient de la nature du cautionnement, et comme tel il appartient au droit civil. Le commerce ne fait-il pas aussi constamment usage des contrats de vente, d'échange, de louage, etc. ? S'en suit-il pour cela que la législation à leur sujet doit être considérée comme faisant partie de la réglementation du commerce ? S'il en était ainsi, si tout ce que peut atteindre le commerce devait, pour cette raison, faire partie du pouvoir exclusif du parlement fédéral, la plupart des pouvoirs des provinces se trouveraient ainsi anéantis, car le commerce dans son acception la plus étendue touche à tout,—c'est, dit une définition de ce mot par un auteur français, "cet "échange de produits et de services. C'est en dernière "analyse le fonds même de la société."

Il est clair que dans notre acte constitutionnel—le mot ne peut avoir une signification aussi étendue.

Pour déterminer la portée du paragraphe 2 de la sec. 91, on ne doit pas le considérer isolément; il faut au contraire le comparer avec l'ensemble des dispositions de l'acte constitutionnel, afin d'arriver à une conclusion qui soit conforme à son esprit, et de manière à donner effet à toutes ses dispositions. Le but du législateur en divisant les pouvoirs législatifs par les sec. 91 et 92 entre le gouvernement fédéral et les provinces était, autant que compatible avec le nouvel ordre de choses, de conserver à ces derniers, leur autonomie, sous le rapport des droits civils particuliers à chacune d'elles. On arriverait cependant à un résultat tout différent, si l'on donnait au paragraphe 2 la signification étendue que peut comporter son sens littéral. Mais il est évident que ce ne serait pas l'interpréter correctement, puisque les paragraphes suivants de la même section lui donnent un sens limité. En effet si c'eût été l'in-

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tention de donner à ces expressions "réglementaires du trafic et du commerce" une signification absolue; pourquoi la loi aurait-elle énuméré certains sujets de législation qui sont certainement compris dans le pouvoir de réglementer le commerce, comme *e.g.* la navigation et les bâtiments ou navires, les banques, les lettres de change et les billets promissoires, la faillite et la banqueroute—tous sujets qui sans cette énumération spéciale se trouveraient compris dans le pouvoir de réglementer le commerce. Il me semble que l'on doit conclure de là que si les expressions générales de ces paragraphes ne comprennent pas d'après l'acte lui-même tout ce qui fait certainement partie du commerce, elles doivent encore moins comprendre ce qui ne s'y rapporte qu'indirectement.

Dans la cause de *Severn* vs. *La Reine* (1) je me suis appuyé sur la définition donnée par le célèbre juge en chef *Marshall* des mots *regulations of commerce* dans la constitution des *Etats-Unis*. Elle est ainsi: "It is the „ power to regulate, that is the power to prescribe the rule „ by which commerce is to be governed. This power, like „ all others vested in congress, is complete in itself, may " be exercised to its utmost extent, and acknowledges no " limitations other than are prescribed by the constitu- " tion." Je crois encore à l'exactitude de cette définition. Pourvu qu'on la prenne en entier, elle peut s'appliquer à la question sous considération et nous aider à en trouver la solution. Il faut surtout ne pas perdre de vue les derniers mots "*and acknowledges no limitations other than are prescribed by the constitution.*" Cette restriction nous indique que c'est dans la constitution seulement que doit se trouver la limite du pouvoir de réglementer le commerce. Après avoir donné ce pouvoir au parlement fédéral, paragraphe 2, section 91, elle donne aux provinces la juridiction sur la propriété,

(1) 2 Can. Sup. Ct. R., at p. 121.

les droits civils et les affaires purement locales, etc., etc. Ces pouvoirs particuliers, exclusivement attribués aux provinces ne peuvent pas, d'après les termes mêmes de l'acte constitutionnel, être considérés comme pouvant tomber sous le pouvoir de réglementer le commerce. Réglementation du commerce et du trafic doit nécessairement signifier autre chose que législation sur la propriété et les droits civils, puisqu'ils sont des attributs exclusifs de chaque gouvernement. Dans l'exercice de sa juridiction, le parlement fédéral a sans doute le pouvoir de toucher incidemment à des matières qui sont de la juridiction des provinces,—mais ce pouvoir ne s'étend pas au-delà de ce qui est raisonnable et nécessaire à une législation pour les fins du commerce seulement. Le parlement fédéral ne pourrait donc sous ce prétexte de commerce contrôler entièrement un sujet qui est de la juridiction des provinces. Sa législation comme réglementation du commerce doit être complète, sans cependant anéantir la juridiction des provinces sur cette partie du sujet qui n'a pas été affectée par cette législation. S'il n'en était ainsi, chaque fois que le parlement fédéral, en exerçant son pouvoir au sujet de commerce, toucherait à la propriété et aux droits civils, il en résulterait que toute législation sur ce sujet lui serait attribuée et que le pouvoir législatif des provinces sur ces mêmes sujets cesserait d'exister. La décision du Conseil Privé dans la cause de l'*Union St. Jacques et Bellisle* (1), a adopté un principe dont l'application à cette cause nous permet de concilier l'exercice des pouvoirs respectifs du gouvernement fédéral et provincial. S'il n'était pas ainsi, qu'arriverait-il, par exemple, au sujet de la législation sur le mariage? Le gouvernement fédéral a juridiction sur le mariage et le divorce; la juridiction provinciale est limitée à la solennisation du mariage; ce dernier pouvoir est limité aux formalités extérieures du

(1) L. R. 6 P. C. 34.

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contrat de mariage. Mais les expressions générales " le mariage et le divorce " interprétées littéralement sont susceptibles d'une signification très étendue. Le gouvernement fédéral pourrait-il dans ce cas, sur le motif que la législation sur le mariage lui appartient, étendre sa juridiction jusqu'à en régler les conditions civiles, comme le douaire, la communauté de biens—et par là exclure la juridiction des provinces sur cette partie du droit civil ? N'est-il pas évident qu'il devait, au contraire, borner strictement sa législation aux conditions de capacité et d'incapacité de contracter mariage, ainsi qu'aux causes d'empêchements et autres conditions qui sont de la nature de ce contrat, sans intervenir avec les droits civils qui en résultent. Ces expressions générales du parag. 26, sec. 91 " Le mariage et le divorce " nous offre un autre exemple de l'emploi dans l'acte constitutionnel d'expressions qui doivent cependant avoir un sens limité par d'autres dispositions du même acte. N'en devrait-il pas être de même de l'exercice du pouvoir de réglementer le commerce ?

Afin de concilier l'exercice de ses pouvoirs je conclus que dans un cas comme celui dont il s'agit, la juridiction provinciale ne se trouve limitée par l'exercice de celle du pouvoir fédéral, qu'en ce qui est de la compétence de ce dernier,—et que la province peut encore exercer son pouvoir sur cette partie du sujet de sa juridiction dans tout ce qui ne se trouverait pas en conflit direct avec la législation fédérale sur un sujet de sa compétence,—cette interprétation me semble conforme à l'autorité suivante :—

A grant of power to regulate, necessarily excludes the action of all others who would perform the same operation on the same thing (1).

Existe-il une législation fédérale sur le même sujet; *same operation on the same thing* ? Il est bien vrai que

(1) Story on Stat. and Const. law, vol. 1, sec. 106.

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le parlement du *Canada* a passé plusieurs lois concernant les compagnies d'assurances avant et depuis celle dont il s'agit.

Sans vouloir entrer dans l'examen particulier de cette législation, sur laquelle je ne suis pas maintenant appelé à me prononcer, je crois cependant devoir faire allusion à quelques-unes de ses principales dispositions, afin de faire voir qu'il n'y a pas de conflit entre les lois fédérales et la loi d'*Ontario*.

La 40e *Vict.*, chap. 42, qui a amendé, consolidé et révoqué les lois antérieures dont la première est la 31e *Vict.*, ch. 48, adoptées par le parlement fédéral au sujet des assurances a établi des dispositions dont le but évident est de protéger le public contre des pertes qui pourraient être infligées par des compagnies irresponsables. Les compagnies auxquelles cet acte s'applique sont d'abord obligées de prendre une licence sans laquelle elles ne peuvent transiger aucune affaire, il leur faut ensuite faire un dépôt entre les mains du ministre des finances de $100,000 pour la sûreté des porteurs de polices d'assurances. Elles doivent aussi produire dans le département des finances, ainsi qu'aux greffes des Cours Supérieures, dans la juridiction desquelles elles transigent des affaires, une copie de leur acte d'incorporation, aussi, une procuration de la compagnie, en la forme prescrite, a son principal gérant ou agent en *Canada*, avec déclaration que la signification de tous brefs ou procédures contre elle pourra être faite au bureau de cet agent. Elles doivent fournir des statistiques complètes et détaillées sur leurs affaires, indiquer tout changement survenu dans l'agence principale, donner avis de l'obtention de la licence et aussi de la cessation des affaires. Des dispositions spéciales sont adoptées pour la liquidation des affaires dans le cas d'insolvabilité. Enfin, elles sont soumises à l'inspection et surveillance d'un inspecteur qui est revêtu

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de pouvoirs étendus pour faire exécuter toutes les dispositions de cet acte.

Ces dispositions, comme on le voit, ont pour but, non pas de régler le contrat d'assurance, mais uniquement de soumettre l'assureur dans l'exercice de son commerce comme tel à l'observation de règlements établis pour la protection du public. Ces lois n'imposent aucunes conditions comme devant faire partie obligatoirement du contrat.

Ainsi la loi fédérale ne touche nullement à la nature du contrat d'assurance, ni aux conditions qui devront en faire partie dont s'occupe exclusivement la loi d'*Ontario;* les deux législations découlant de deux sources différentes de pouvoir, la première du pouvoir de règlementer le commerce, et la seconde de celui de législater sur les droits civils et la propriété, ne peuvent-elles pas subsister toutes deux, si leurs dispositions ne sont ni contradictoires ni incompatibles? Je dois avouer que je ne trouve aucun conflit entre ces lois et que je ne vois aucun obstacle à leur exécution. Cette manière de voir est supportée par l'autorité suivante :

.....So if a State, in passing laws on subjects acknowledged to be within its control, and with a view to those subjects, shall adopt a measure of the same character with one which Congress may adopt, it does not derive its authority from the particular power which has been granted, but from others which remain with the State, and may be executed by the same means. All experience shows that the same measures, or measures scarcely distinguishable from each other, may flow from distinct powers; but this does not prove that the powers themselves are identical. Although the means used in their execution may sometimes approach each other so nearly as to be confounded, there are other situations in which they are sufficiently distinct to establish their individuality. (1)

Bien qu'il soit possible de concilier ainsi l'existence de ces deux législations, n'est-il pas évident cependant que la loi d'*Ontario*, portant exclusivement sur la preuve et la nature des conditions des contrats d'assurance

(1) Pomeroy Constitutional Law, p. 218.

faits dans cette province, cette loi est *intra vires* ? En effet l'émission d'une police d'assurance n'est pas *nécessairement* une transaction commerciale. Elle ne l'est certainement pas de la part de l'assuré, bien que d'après le code civil, elle le soit de la part de l'assureur. *Pardessus* s'exprime ainsi à ce sujet :

> Elles (les conventions d'assurances) ne sont par leur nature des actes de commerce au moins de la part de ceux qui se font assurer. Mais comme presque toujours de la part de ceux qui assurent, elles sont de véritables spéculations, c'est sous ce point de vue que nous les considérons comme actes de commerce, et que nous avons cru devoir en faire connaître les principes.

Dans le droit anglais, il en est de même ; l'assurance est une transaction commerciale, bien que le contrat d'assurance dont il fait un usage constant soit du droit civil.

L'acte constitutionnel ne dit nulle part que le droit commercial est de la juridiction de la Puissance. Il semble au contraire en lui en attribuant spécialement une certaine partie, comme la navigation, les banques, les lettres de change et les billets promissoires, la faillite, avoir laissé le surplus à la juridiction des provinces comme faisant partie des droits civils.

A ce point de vue la loi d'*Ontario* aurait sa source dans le pouvoir des provinces de législater sur les droits civils. C'est d'après ce principe que la cause de *Paul vs. Virginia* a été décidée (1). Une loi de l'Etat de *Virginie* avait déclaré que les compagnies d'assurance non incorporées en vertu des lois de cet état n'auraient pas le pouvoir de faire des affaires dans les limites de l'Etat, à moins d'avoir obtenu une licence à cet effet, et déposé une certaine somme pour la garantie des droits des assurés. Le demandeur prétendait que cette loi était inconstitutionnelle parce qu'elle était contraire au pouvoir du Congrès de réglementer le

(1) 8 Wallace 168.

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commerce. Le juge *Field* en prononçant le jugement de la cour s'exprime ainsi :

Issuing a policy of insurance is not a transaction of commerce. The policies are simple contracts of indemnity against loss by fire, entered into between the Corporation and the assured, for a consideration paid by the latter.

D'après cette autorité, c'est donc comme appartenant au droit civil que la législature d'*Ontario* avait droit d'adopter la loi en question. Mais il y a un autre argument que je considère comme très important dans le cas actuel, c'est comme on le verra ci-après la reconnaissance par le parlement fédéral du droit des provinces de législater à cet égard.

Bien que le paragraphe 11 de la section 92 donne aux provinces les pouvoirs d'incorporer des compagnies pour des objets *provinciaux*, on a cependant douté que les termes soient suffisants pour comprendre le pouvoir d'incorporer des compagnies d'assurances. Il me semble clair toutefois que les termes de ce paragraphe sont assez étendus pour comprendre les compagnies d'assurances. Si l'on objecte que l'objet d'une compagnie d'assurance n'est pas *provincial*, en ce sens qu'il n'a pas pour objet un intérêt concernant toute la province, c-à-d. un intérêt public, je répondrai que l'objet de la compagnie étant de faire des affaires dans toute la province c'est ce que les termes 'objets provinciaux' signifient, s'ils ont une signification quelconque. Ils n'en auraient certainement aucune, si on les interprétaient comme ne donnant que les pouvoirs d'incorporer des compagnies ayant un intérêt public provincial, une telle interprétation équivaudrait à dire que le gouvernement peut déléguer et faire remplir ses fonctions par des corporations, mais qu'il n'a pas le droit d'incorporer aucune compagnie pour des fins de commerce, d'industrie, etc. Il a sans doute ce pouvoir, pourvu que les compagnies ainsi créées bornent leurs opérations aux limites de la province.

Si elles veulent aller au-delà, elles tombent alors sous la loi fédérale à laquelle elles doivent se conformer et qui contient des dispositions spéciales pour ce cas.

Ce pouvoir d'incorporer des compagnies d'assurances exercé par la législature d'*Ontario* a été reconnu par la loi fédérale comme appartenant aux législatures provinciales.

La sec. 28 de 40 *Vict.*, ch. 42, s'exprime ainsi à cet égard :

This Act shall not apply to any company within the exclusive legislative control of anyone of the provinces of Canada, unless such company so desires; and it shall be lawful for any such company to avail itself of the provisions of this Act, and if it do so avail itself, such company shall then have the power of transacting its business of insurance throughout *Canada*.

La première section de cet acte applique les lois de faillite aux compagnies d'assurances incorporées par le parlement du *Canada*, ainsi qu'à celles incorporées avant ou après la Confédération, par la législature d'aucune province constituant actuellement le *Canada*.

On trouve encore dans la sec. 30 du même acte une autre reconnaissance du pouvoir législatif des provinces au sujet des assurances. Des doutes s'étant élevés au sujet de certaines dispositions de l'acte d'*Ontario* concernant les assurances mutuelles, cette section de l'acte fédéral déclare que telles dispositions seulement qui peuvent être dans les limites de la juridiction du parlement fédéral sont révoquées. Il y a dans cette section, non-seulement la reconnaissance formelle des pouvoirs de la province, mais il y a de plus la déclaration si importante que l'acte n'est révoqué que dans sa partie seulement où il y a conflit de pouvoirs. C'est une admission formelle que le sujet, en ce qui concerne son côté commercial, est de la compétence du parlement fédéral, tandis que pour ce qui concerne le droit civil, comme la nature et les conditions du contrat d'assurance,

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il reste sous le contrôle de la législation provinciale. C'est aussi en même temps une confirmation de l'opinion exprimée plus haut sur les restrictions que le gouvernement fédéral et le gouvernement provincial doivent s'imposer dans l'exercice de leurs pouvoirs respectifs, afin de ne pas en dépasser les limites.

Il est vrai que l'exercice d'un pouvoir ne saurait être dans la plupart des cas une raison suffisante pour établir son existence légale. Mais dans un cas comme celui dont il s'agit, où il y a de fortes raisons pour qu'il soit exercé d'une manière limitée comme il l'a été par la 40e *Vict.*, ch. 42, en reconnaissant le droit des provinces qui paraît également bien fondé, on doit en conclure que l'accord des deux législations pour se tenir dans leurs limites respectives, est une grande présomption qu'elles n'ont exercé que les pouvoirs leur appartenant. Les plus importants départements publics, comme la justice, les finances, ont adopté depuis plusieurs années cette manière de voir en faisant exécuter les dispositions des diverses lois fédérales au sujet des assurances. Cette interprétation ne saurait sans doute prévaloir contre une interprétation judiciaire, mais en l'absence de celle-ci, l'interprétation administrative ne peut manquer d'avoir une grande importance. *Story* la met au second rang et en parle en ces termes:—

> And, after all, the most unexceptional source of collateral interpretation is from the practical exposition of the Government itself in its various departments upon particular questions discussed, and settled upon their own single merits. Those approach the nearest in their own nature to judicial expositions; and have the same general recommendation, that belongs to the latter (1).

Cette interprétation administrative a eu lieu depuis plusieurs années—les droits de licences ont été perçus, les statistiques exigées ont été fournies, sans qu'il se soit élevé aucune prétention au contraire, de la part des

(1) Story Const. of the U. S. 1st Vol., p. 290, No. 408.

provinces ; de même que le pouvoir exercé par la loi d'*Ontario* n'a pas été mis en contestation par le gouvernement fédéral qui aurait pu désavouer cette loi s'il l'eût considéré comme *ultra vires*. Lorsque les deux gouvernements sont d'accord sur ce sujet, et qu'ils font disparaître par des lois les doutes qui pouvaient exister, n'y aurait-il pas témérité à substituer une autre interprétation que la leur. S'il y a doute sur la question il me semble réglé par l'interprétation législative et les tribunaux n'ont qu'à s'y conformer.

Ainsi, à part des raisons que j'ai données plus haut au soutien de la loi d'*Ontario*, il y a donc encore à son appui l'interprétation administrative et l'interprétation législative. Si je ne parle pas de l'interprétation judiciaire des cours d'*Ontario*, c'est parce qu'elle est mise en question par le présent appel, mais elle n'en a pas moins la plus haute valeur par l'unanimité d'opinions des honorables juges qui ont été appelés à se prononcer sur cette question, supportée comme elle l'est par la décision de la Cour Suprême des *Etats-Unis* dans la cause ci-dessus citée de *Paul* vs. *Virginia*.

Indépendemment de la question de constitutionalité, l'appelante prétend aussi qu'étant une compagnie incorporée par le parlement d'*Angleterre* elle se trouve par cela même soustraite à l'opération de la loi en question.

Quelle que soit l'origine des corporations, soit qu'elles doivent leur existence au parlement de la Puissance, aux législatures provinciales, ou à un pouvoir étranger, elles n'en sont pas moins, dans un cas comme dans l'autre, soumises pour l'exercice de leurs franchises aux conditions que peut leur imposer la loi du pays dans lequel elles les exercent. Ces corporations ne sont en réalité que des associations commerciales ne différant principalement des sociétés commerciales ordinaires que par la limite apportée à la responsabilité de ceux qui les composent. La loi fédérale citée plus haute, sec.

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lre, les met au même rang que les sociétés de particuliers faisant des affaires d'assurances. Elles ne peuvent pas plus que les autres sociétés se prétendre exemptes de se conformer aux lois. Nos grandes maisons de commerce, qui ont des comptoirs dans presque toutes les provinces de la Puissance et dans un grand nombre de pays étrangers, ont-elles jamais prétendu faire fléchir les lois des divers pays où elles font leur commerce, devant les conditions qu'elles ont pu faire au siège principal de leurs affaires. Quelque inconvénient qui puisse en résulter, ne sont-elles pas obligées dans tous leurs contrats, de se conformer aux lois de chaque pays où elles font des affaires. Il serait sans doute plus simple et plus commode pour les compagnies d'assurance d'avoir le pouvoir souverain de fixer elles-mêmes leurs conditions et de les imposer dans tous les pays où elles pourraient établir des bureaux. Mais ne serait-ce pas les mettre au-dessus de la loi ? Loin de leur reconnaître un pareil privilége, les autorités et de nombreuses décisions judiciaires sont d'accord sur le principe contraire. Cette question a été aussi décidée dans la cause déjà citée de *Paul* vs. *Virginia*, où le juge *Field* s'exprime ainsi à ce sujet :

> The recognition of its existence (Corporation) even by the other States, and the enforcement of its contracts made therein, depend greatly upon the comity of those States, a comity which is never extended when the existence of the Corporation or the exercise of its powers is prejudicial to their interests, or repugnant to their policy. They may exclude the foreign corporations entirely, they may restrict its business to particular localities, or they may exact such security for the performance of its contracts with their citizens as in their judgment will best promote the public interests.

Il est à peine nécessaire de citer des autorités à ce sujet, car il s'agit de l'application d'une règle réglementaire, *locus regit actum*. Je citerai cependant la suivante parce qu'elle contient l'opinion de l'auteur du "Traité du droit de la nature et des gens :

"Lorsque la police est applicable à des navires armés et équipés en *France* quoique étrangers, les dispositions de la loi française doivent être suivies. La Cour de Cassation a eu l'occasion d'examiner cette question et l'a résolue dans ce sens. *Merlin* qui rapporte cet arrêt l'approuve (1)."

"Sur cette question," disait M. *Daniels*, organe du ministère public, "rien n'est plus constant que le principe invoqué par les demandeurs et développé par *Puffendorf*, dans son traité du *Droit de la nature et des gens :* Quiconque passe un contrat dans les terres d'un souverain, se soumet aux lois du pays et devient en quelque manière sujet passager de cet état."

La compagnie appelante prétend en outre que ses conditions étant en substance les mêmes que celles du statut, elle doit en avoir le bénéfice, bien qu'elle ne se soit pas conformée aux conditions qu'il impose à cet égard—ce qui se réduit à dire que pour avoir éludé la loi, elle doit en avoir le même bénéfice que si elle l'avait respectée. Il me paraît clair que lorsqu'une compagnie ne fait pas imprimer les conditions du statut en la manière prescrite par la sec. 4, la sec. 3 veut qu'alors les conditions soient censées faire partie de la police contre l'assureur (*as against the insurer*) laissant l'assuré libre d'en prendre ou non avantage, l'assurance n'étant alors sujette à aucune autre condition que celles qui résultent suivant la loi de la nature du contrat d'assurance. Je n'entends pas discuter ici cette question qui l'a déjà été si souvent dans les tribunaux d'*Ontario*, et sur laquelle une grande majorité des juges se sont prononcés pour cette interprétation. Je me bornerai à exprimer mon entière et complète adhésion à l'opinion exprimée à ce sujet par l'honorable juge en chef *Moss*.

Pour ces raisons, je suis d'opinion que ces appels doivent être renvoyés avec dépens.

(1) Alauzet, vol. 1, No. 194, p. 361.

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[TRANSLATED.]

FOURNIER, J.:—

The principal question to be decided in this case is whether the *Ontario* Act, 39 *Vic.*, ch. 24, now ch. 162 of the Revised Statutes of *Ontario*, "An Act to secure uniform conditions in policies of fire insurance," is *ultra vires* of the *Ontario* legislature. Its constitutionality is questioned on the ground that the power of legislating in reference to the subject matter of insurance belongs to the federal parliament, as the necessary sequence of its exclusive power to regulate trade and commerce.

In order to ascertain whether there is a conflict of powers, the first step, no doubt, is to examine the character of the law in question. As may be seen from its title, the object of the Act is to secure uniform conditions in policies of fire insurance. The second section enacts that if the conditions of the contract of insurance have not been strictly complied with, it shall not be a sufficient reason to annul the contract, first, where by reason of necessity, accident or mistake, the conditions have not been complied with; secondly, where, after proof of loss has been given in accordance with the conditions of the contract, the company objects to the loss upon other grounds than for imperfect compliance with such conditions; thirdly, where, after having received this proof, the company does not notify, in writing to the assured, within a reasonable time, the reason for which the company considers the proof defective; fourthly, when the court or judge for any other reason considers it inequitable that the insurance should be deemed void by reason of imperfect compliance with such conditions. The third section declares that the conditions set forth in the schedule to the Act shall, *as against the insurers*, be deemed to be

part of every policy of fire insurance, with respect to any property situate in the province of *Ontario*. These conditions must also be printed on the policy of insurance, with the heading "Statutory Conditions." The fourth section indicates the manner in which the conditions may be varied or omitted, or new conditions added, by being printed in a particular way. The fifth section declares that the variations shall not be binding on the assured unless they have been made in conformity with the fourth section. If the contrary is done, the policy shall, as against the assurers, be subject to the statutory conditions only. By the sixth section, it is declared that if any other conditions than the statutory conditions are inserted in the policy, and that the judge of the court declares that they are not just and reasonable, that such conditions shall be null and void. The seventh section allows an appeal from any decision given under the Act.

This synopsis of the law shows that it was not intended to do more than to establish the proof to be given in certain cases, and to declare what shall be in the province of *Ontario* the conditions upon which all contracts of insurance should be subjected to in accordance with the law. These provisions, entirely relating to civil law, do not, in any way, prohibit the commerce of the assurers, neither do they declare that the policies which they insure are null and void. They are just and reasonable conditions, and, in fact, are almost similar to the conditions adopted by the majority of insurance companies. How then can it be said that this legislation in any wise refers to the power of regulating trade and commerce? The subject matter to which it is applicable is the contract of insurance, and does not that belong to the civil law, and does it not come under the jurisdiction assigned to the provin-

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ces by paragraph nineteen of section 92 of the *British North America Act*, "Property and Civil Rights"?

No doubt the contract of insurance is extensively availed of in commerce as well as by non-traders, but the object of a contract does not change its character; whatever may be its object, the contract of insurance is nevertheless a contract of indemnity, which is similar to a contract of guarantee, and, as such, belongs to the civil law. In commerce, contracts of sale, of exchange and bail are constantly employed and executed. Does it follow that any legislation in reference thereto must be considered as being a regulation of commerce? If this be so, if everything which has reference to commerce could for this reason come under the exclusive control of the Federal power, the greater portion of the powers of the provinces would thus become of no avail, for commerce in its most comprehensive meaning extends to everything. It is, as defined by a French author, "Cet échange de produits et de service. C'est en dernière analyse le fonds même de la société."

It is evident that this word cannot have in our constitutional Act such an extensive meaning.

In order to determine the meaning of these words in the second paragraph of section 91, they should not be read alone, but, on the contrary, they should be taken in connection with the whole of the provisions of the Constitutional Act, in order to arrive at a conclusion conformable to the spirit of the Act and to give effect to all its provisions. The object of the law-giver, in dividing the legislative powers between the Federal power and the provincial legislatures, was, as far as it was possible in the new order of things, to conserve to the latter their autonomy in so far as the civil law peculiar to each province was concerned. We would, however, arrive at a very different conclusion if we held that the words in paragraph two had the comprehensive meaning

that they have literally. But it is evident that it would not be interpreting them correctly, as in the following paragraph of the same section their meaning is limited. If it had been the intention to give to this expression, "Regulation of trade and commerce," such an absolute meaning, why should certain subjects of legislation which certainly come under the power of regulating trade and commerce have been enumerated in the statute, such as navigation, ships and steamers, banks, bills of exchange, promissory notes, insolvency and bankruptcy; all subjects which, without this special enumeration, would be comprised within the power of regulating trade and commerce. The proper conclusion to draw, it seems to me, is that if the general expression in this paragraph did not comprise, according to the Act itself, all that certainly forms part of commerce, it certainly should not comprise a subject-matter which is only indirectly connected with commerce.

In the case of *Severn* v. *The Queen*, (1) I relied on the definition given by *Marshall*, C. J., of the words, "Regulation of Commerce," (which are in the Constitution of the *United States*,) as follows: "That is the power to regulate, that is to prescribe, the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself; may be exercised to its utmost extent, and acknowledges no limitations other than those which are prescribed by the constitution." I still adhere to the correctness of this definition. If we take it in its entirety, it is applicable to the question now under consideration, and will help us to solve it. We must, above all, not lose sight of the last words, "and acknowledges no limitations other than those which are prescribed by the constitution." This restriction indicates that it is in the constitution alone that the limitations of the power to regulate com-

(1) 2 Can. Sup. C. R. at p. 121.

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merce will be found. After giving this power to the Federal parliament by paragraph 2, section 91, the statute gives to the provinces legislative control over property, civil rights, and matters of a merely local and private nature. This special power, exclusively assigned to the provinces, cannot by the terms of the constitution itself be considered as coming under the power of regulating commerce. The regulation of trade and commerce must necessarily mean something else than legislation on property and civil rights, subjects which belong exclusively to the local legislature. In excrcising its power, the Federal parliament, no doubt, has the right to incidentally entertain these matters which are under the jurisdiction of the provinces, but this power cannot extend any further than to what is just and reasonable and necessary in order to legislate for commercial purposes only. The Federal parliament could not, therefore, under the pretence of legislating on commerce, entirely control a subject matter which comes under the jurisdiction of the provinces. Any legislation having reference to the regulation of commerce must be complete, but it need not necessarily destroy the jurisdiction of the provinces over that part of the subject matter which is not affected by such legislation.

If this was not the case, whenever the federal power, in exercise of its authority over commerce, should legislate in such a manner as to indirectly affect property and civil rights, it would follow that all legislation over the subject matter would belong exclusively to the Federal parliament, and the legislative power of the provinces over the same matter would cease to exist. The decision of the Privy Council, in the case of *L'Union St. Jacques* v. *Belisle* (1), has enunciated a principle which, applied to this case,

(1) L. R. 6 P. C. 36.

enables us to reconcile the exercise of their respective powers by the Federal parliament and provincial legislatures. If this construction is not the proper one, what would be the consequence of legislation on the subject of marriage? The Federal Government has jurisdiction over marriage and divorce; the jurisdiction of the provinces is limited to the solemnization of marriage, which means the formalities required previous to marriage. Now the general expression, "marriage and divorce," literally interpreted, is susceptible of a very extensive meaning. Could the Federal parliament, in such a case, on the ground that the legislation over marriage is assigned to it, extend its jurisdiction so as to regulate the civil conditions of the contract, such as dower, community of goods, and thus exclude the jurisdiction of the provinces over that portion of the civil law? On the contrary, is it not evident that the Federal parliament should confine its legislation strictly to the conditions which have reference to the capacity or incapacity of contracting marriage, and to reasons for prohibition, and to other conditions relating to the character of that contract, without interfering with the civil rights appertaining thereto. This general expression, in paragraph 26, section 91, "Marriage and Divorce," gives us another example of the use made in the Constitutional Act of expressions, which must have a limited meaning by the other provisions of the same Act. Cannot the same process of reasoning apply in construing the power of regulating trade and commerce?

In order to reconcile the exercise of these powers, I have arrived at the conclusion, in a case such as the one now under consideration, that the provincial jurisdiction is only limited by the exercise by the Federal parliament of its power, in so far as the latter is competent to exercise it, and that the province can still exercise

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its power over that portion of the subject-matter over which it has jurisdiction, provided the provincial legislation does not directly conflict with the federal legislation. This interpretation seems to be supported by the following authority: "A grant of power to regulate necessarily excludes the action of all others who would perform the same operation on the same thing" (1). The question, therefore, is, is there any federal legislation on the same subject, *same operation on the same thing?* It is quite true that the parliament of *Canada* has passed several statutes relating to insurance companies, prior and subsequent to the law now under consideration. Without wishing to enter into a minute examination of this legislation, upon which I am not at present called upon to decide, I will, however, refer to some of its principal provisions, in order to show that there is no conflict between the federal laws and the statute passed by the legislature of *Ontario*. The statute 40 *Vic.*, ch. 42, which amends, consolidates and repeals the previous legislation (the first Act being 31 *Vic.*, ch. 48) passed by the Federal parliament, in reference to the subject-matter of insurance, enacts several provisions, the object of which is clearly to protect the public against any loss which might result from companies being irresponsible. The companies to which this legislation applies are first obliged to take out a license, without which they cannot transact any business; they must afterwards deposit in the hands of the Minister of Finance the sum of $100,000 as security for the holders of their policies of insurance. They must also file in the Department of Finance, and also in the offices of the Superior Courts having jurisdiction where they transact business, a copy of their charter of incorporation, as well as a power of attorney, in the form prescribed on the part

(1) Story Stat. & Const Law, 1st Vol. s. 1,037.

of the company, to its principal manager, with a declaration that the service of any writ or proceeding against the company can be made at the office of such agent or manager. They must as well furnish complete and detailed statistics of their business, and notify any change with respect to their head office, give notice that they have obtained a license, and also notify when they cease to do business. Special provisions are enacted, with a view of winding up such companies in case of their insolvency. Lastly, they are subject to the inspection and supervision of an inspector, who is given sufficient authority for the carrying out of the provisions of the Act.

These provisions it is clear, have nothing whatever to do with respect to the contract of insurance, but are only for the purpose of subjecting the insurer in the exercise of his trade as such, to certain regulations established for the protection of the public. This legislation does not impose any conditions which necessarily form part of the contract.

We find, therefore, that the federal legislation does not in anywise affect the nature of the contract of insurance, nor the conditions forming part of such contract, and that the legislation of *Ontario*, now under consideration, deals exclusively with that subject,—both legislations deriving their respective powers from different sources, the first from the power of regulating trade and commerce, and the other from their power of legislating over civil rights and property. Why, if the provisions of these laws are neither conflicting nor antagonistic to one another, can we not hold that both are constitutional? I must confess that I see between them no conflict, and I see no obstacle to their being carried into operation. This view of the case is supported by the following authority (1):

(1) Pomeroy on Constitutional Law, 218

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So, if a State, in passing laws on subjects acknowledged to be within its control, and with a view to those subjects, shall adopt a measure of the same character, with one which Congress may adopt, it does not derive its authority from the particular power which has been granted, but from the other which remains with the State, and may be executed by the same means. All experience shows that the same measures, or measures scarcely distinguishable from each other, may flow from distinct powers; but this does not prove that the powers themselves are identical. Although the means used in their execution may sometimes approach each other so nearly as to be confounded, there are other situations in which they are sufficiently distinct to establish their individuality.

Although it is possible to thus reconcile these legislations, is it not evident, however, that the Act passed by the legislature of *Ontario*, relating exclusively to the proof to be made in case of loss, and to the nature of the conditions of contracts of insurance effected in the province of *Ontario*, is *intra vires?* for the issuing of a policy of insurance is not necessarily a commercial transaction; it is certainly not one on the part of the assured, although, by the Civil Code of the province of *Quebec*, it is a commercial transaction on the part of the assurer. *Pardessus*, Droit Commercial, says:

> Elles (les conventions d'assurance) ne sont pas par leur nature des actes de commerce de la part de ceux qui se font assurer. Mais comme presque toujours de la part de ceux qui assurent, elles sont de véritables spéculations, c'est sous ce point de vue que nous les considérons comme actes de commerce et que nous avons cru devoir en faire connaître les principes.

It is the same in *England*; insurance is a commercial transaction, although the contract of insurance itself forms part of the civil law. In our constitutional Act I cannot find anywhere that commercial law is under the jurisdiction of the Dominion; it seems to me, on the contrary, that the Act, by assigning specifically to the Dominion legislative control over a part of the commercial law, such as any law on navigation, banking, bills

of exchange, promissory notes and insolvency, has left the residue to the jurisdiction of the several provinces as coming under the head "civil law." In this view of the case, the Act now under consideration would derive its authority from the power of the provinces to legislate on civil rights. It is on this principle that the case of *Paul* v. *Virginia* (1) was decided. A law passed by the State of *Virginia* enacted that insurance companies, not having been incorporated under the laws of the state, could not transact any business within the limits of the state without previously taking out a license and depositing a certain sum as security for the rights of the assured. The plaintiff contended that the law was unconstitutional, because it was contrary to the power of Congress to regulate trade and commerce. Mr. Justice *Field*, who delivered the judgment of the court, makes use of the following language :—

> Issuing a policy of insurance is not a transaction of commerce. The policies are simply contracts of indemnity against loss by fire, entered into between the corporation and the assured for a consideration paid by the latter.

According to this decision, the legislature of *Ontario* had power to pass the law in question as being a part of civil law.

But there is also another argument which I consider conclusive; it is, as will be seen hereafter, the recognition by the Federal parliament of the right of the local legislatures to legislate on this subject. Although, by paragraph 11 of section 92, power is given to the provinces to incorporate companies for *provincial objects*, it has, however, been contended that these words are not sufficient to comprise the power to incorporate insurance companies. It seems to me, however, that the terms are sufficiently comprehensive to include insurance companies. If it is objected that the object of an

(1) 8 Wallace 168.

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insurance company is not *provincial* in the sense that its object has not an interest for the whole province, that is to say, a public interest, I answer by saying that the object is to transact business throughout the province. This must be the interpretation to be given to these words, if they are to have any signification whatever. They certainly would have no meaning whatever, if they were interpreted as giving the power only of incorporating companies having a public provincial interest. Such an interpretation would be equivalent to saying that the Government could delegate its functions to corporations, and have them exercised by them, and that they have no power to incorporate companies for the purpose of commerce, industry, trade, &c., &c. They certainly have, in my opinion, that power, provided the companies thus incorporated limit their operations within the limits of such province. If they desire to go outside of the province, they come under the provisions of the federal law, to which they must conform, and which contains special provisions for such event.

This power of incorporating companies, exercised by the legislature of *Ontario*, has been recognized by federal legislation, as belonging to provincial legislatures. Sec. 28 of 40 *Vic.*, c. 42, enacts:—

> This Act shall not apply to any company within the exclusive control of any one of the provinces of *Canada*, unless such company so desires, and it shall be lawful for any such company to avail itself of the provisions of this Act, and if it do so avail itself, such company shall have the power of transacting its business of insurance throughout *Canada*.

The first section of this Act makes the laws respecting insolvency applicable to insurance companies incorporated by the parliament of *Canada*, as well as to those incorporated prior to and after Confederation, by the legislature of any province now constituting *Canada*. We also find in the 30th section of the same Act another

recognition of the power of the provinces to legislate on the subject of insurance. Doubts having been raised as to the validity of a certain *Ontario* statute relating to mutual insurance companies, this section of the Federal Act declares that only such provisions as are within the jurisdiction of the Federal parliament are repealed. In this section there is not only the formal recognition of this power in the province, but there is also this important declaration, that the Act repeals only that part of its provisions involving a conflict of power. It is a formal admission that this subject-matter, when treated in its commercial aspect, is within the control of the Federal parliament, whilst, when regarded as relating to civil rights, such as involve the form and nature of the conditions of insurance, it remains under the control of the provincial legislature. This also confirms the opinion above stated, as to the restrictions which the Federal and provincial governments must impose upon themselves in the exercise of their respective powers, in order to keep within the limits of their jurisdiction. It is true that the exercise of a power would not be a sufficient reason, in many cases, for declaring that it legally exists, but in a case such as the one now under consideration, where there are cogent reasons for exercising this power in a limited manner, as it has been by 40 *Vic.*, ch. 42, recognizing the power of the provinces, which seems equally well founded, we may fairly presume that the accord of both legislatures to keep themselves within the limit of their respective powers, was for the purpose of exercising such powers as properly belonged to them respectively. The most important public departments, such as the Department of Justice, and the Department of Finance, have for some years past adopted this view of the law, by seeing that the requirements of the several federal laws relating to

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insurance were strictly complied with. Such an interpretation could not prevail, no doubt, against a judicial decision, but, in the absence of the latter, the interpretation given by the departments must have great weight. *Story* thus speaks of the value of the same (1):

> And, after all, the most unexceptional source of collateral interpretation is from the practical exposition of the Government itself, and its various departments, upon particular questions discussed and settled upon their own single merits. These approach the nearest in their own nature to judicial exposition, and have the same general recommendation that belongs to the latter.

This departmental interpretation has been acted upon for several years; the license fees have been collected, statistics have been furnished without any contention on the part of the provinces, and the power exercised in virtue of the law of *Ontario* was not contested by the Federal Government, who had the authority to disallow the Act had they considered it *ultra vires*. When both Governments are in accord, and in order to dispel any doubts specially legislate, would it not be unwise to substitute another interpretation than theirs? If there is any doubt on the matter, it seems to me to have been settled by legislative interpretation, and all the tribunals have to do is to conform themselves thereto. Thus, besides the reasons I have given above in favor of the law of *Ontario*, there is also in its favor administrative interpretation and legislative interpretation. If I do not add judicial exposition of the *Ontario* Courts, it is because their decisions are being appealed from; but it is, nevertheless, of the greatest weight, as it has been the unanimous opinion of all the judges who have been called upon to pronounce upon this question. In addition to this we have this decision supported by the Supreme Court of the *United States* in the case of *Paul* v. *Virginia*. Besides the

(1) *Story*—Constitution of the United States, Vol. I., No. 408.

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question raised as to the constitutionality of the Act, the company (appellant) contends that, because it has been incorporated by the parliament of *Great Britain*, it is not subject to the provisions of the Act now under consideration. Whatever may be the origin of the corporation, whether they owe their existence to the parliament of the Dominion or to the provincial legislatures, or to a foreign power, they are nevertheless in the one case as the other, subject, in order to exercise their franchise, to the conditions which may be imposed upon them by the laws of the country where they desire to exercise such franchise. These corporations are in reality only commercial associations, which only differ from ordinary commercial partnerships as to the limited liability of the members thereof. The federal statute which I have cited, by the first section, treats them as ordinary associations of individuals transacting insurance business. These corporations cannot, any more than other associations, set themselves above the law, to which they are obliged to conform. Our large commercial houses, which have branch houses in the different provinces of the Dominion as well as in foreign countries, have never for a moment pretended that they could set themselves above the laws of the provinces or countries in which they carry on business, and claim that they should be subject only to the laws in force at their principal place of business. Whatever may be the inconvenience, are they not obliged in all their contracts to conform themselves to the laws of the country where they carry on business? It would, no doubt, be much simpler and more advantageous for insurance companies, to have the power of determining themselves their conditions and to impose them in all countries where they would open offices. Would this not be putting them above the law? Far from recognizing that they have such privileges, numerous

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authorities and judicial decisions agree to the contrary. This point has already been decided in the case of *Paul* v. *Virginia*, already cited, in which Mr. Justice *Field* says:

> A recognition of its existence (corporation) even by the other States, and the enforcement of its contracts made therein, depend greatly on the comity of those States, a comity which is never extended when the existence of the corporation or the exercise of its power is prejudicial to their intent or repugnant to their interest. They may exclude this foreign corporation, they may restrict its business to particular localities, or they may exact security for the performance of its contracts with their citizens, as in their judgment will best promote the public interest.

It is hardly necessary to cite authorities on this point, as it is only the application of the elementary rule "*locus regit actum.*" I will cite, however, the following, as it contains the opinion of the author of the "Traité du droit de la nature et des gens":

> Lorsque la police est applicable à des navires armés et equipés en France quoique étrangers les disposition de la loi française doivent être suivies. La cour de Cassation a eu occasion d'examiner cette question et l'a résolue dans ce sens. Merlin qui rapporte cet arrêt l'approuve.
>
> "Sur cette question," disait Mr. *Daniels*, organe du ministère public, "rien n'est plus constant que le principe invoqué par les demandeurs et developpé par *Puffendorf:* Quiconque passe un contrat dans les terres d'un souverain, se soumet au loi du pays et devient en quelque manière, sujet passager de cet état (1)."

The company (appellant) also contends that their conditions being in substance similar to the statutory conditions, they may avail themselves of the statutory conditions, and yet not comply with the requirements imposed by the statute; that is to say, in my opinion, because they have evaded the law, they should have the same right as though they had complied with it. It seems to me clear that when a company does not have the statutory conditions printed, as prescribed by sec. 4, the third section provides that they may form part

(1) Alauzet, Vol. 1, No. 194, p. 361.

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of the policy "as against the insurers," leaving it optional to the insured to take advantage of them or not, the insurance then being subject to such conditions as result from the law bearing on the subject of contract of insurance. I do not presume here to discuss this point, as it has been so often before the Courts of *Ontario*, and as the large majority of the judges have given their opinion in favor of this construction of the Act. It is sufficient for me to say that I entirely concur with the opinion expressed by the learned C. J. *Moss* on this point, in the cases now before us.

For these reasons I am of opinion that these appeals should be dismissed with costs.

HENRY, J. :—

Several important questions were raised and argued in this case, not the least of which was that as to the constitutionality of the Act of *Ontario*, which provides for conditions in policies for fire insurance such as that which is now contested by the appellants. I have considered that subject, and have arrived at the conclusion that the Act is *intra vires*. It is contended that, inasmuch "as the regulation of trade and commerce," by the 91st section of the *British North America Act*, is specifically given to the parliament of *Canada*, there is no power in a local legislature to regulate by enactment the rights of insurers and those they insure against loss or damage by fire. It is also contended that, if it be not so, the local legislature might, by the imposition of conditions and restrictions, frustrate the object of a company chartered, or incorporated by, or under, an Imperial Act, as is the case with the appellant's company, or by or under an Act of the parliament of *Canada*. The contention may or may not be well founded, but local legislation has not yet reached that point, and besides, the settlement either

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way cannot, I think, affect the main question. If it ever does, it will be time enough to deal with that position when it arises. If the power to regulate the matters in question be with the local legislature, it is not easy to find the authority to question, control, or limit the exercise of it.

We must construe the words of sec. 91, which I have quoted, *by the whole Act*, and the several important objects in view, and be governed by what is intended by it. The *regulation* of trade and commerce is a very comprehensive, but, at the same time, a very indefinite and vague term, and, if construed in its comprehensive meaning, would include a great variety of subjects which we find specifically added in the list of subjects given to the parliament of *Canada*, such, for example, as "beacons, buoys, lighthouses," "navigation and shipping," "Quarantine and establishment of marine hospitals," "Currency and coinage," "Banking, incorporation of banks, and the issue of paper money," "Bills of exchange and promissory notes," "Interest," "Legal tender," "Bankruptcy and insolvency," and others. From this it may be fairly assumed the term was used in some generic, but, at the same time, qualified sense, and not intended to apply to the regulation of trade and commerce in regard to all subjects that may be found to contribute to the one or the other. The operations of manufacturers, the hiring of their operatives, the providing and erection of machinery, procuring the raw materials used by them, with the necessary contracts and agreements and expenditure of labor employed, and the interests of all parties engaged, from the owner of the soil through all the train of persons engaged in producing and supplying lumber, iron or other materials for manufacturing purposes, may all be said to be intimately connected with trade and commerce, and be included in the gen-

eral term used, and if they were not shown by the whole Act and its objects to be excepted, we might possibly conclude them to have been intentionally included. The matters just referred to all tend to contribute to and create trade and commerce; but a Fire Insurance Company may operate, as they do in some cases, only in respect of agricultural buildings, which but very remotely have any effect on the trade and commerce of the country. If organized for local operation, we find, by number eleven of the list of subjects given to the local legislatures, the charters are to be granted by them. "The incorporation of companies with provincial objects" are the words used. But apart from these considerations, "Property and civil rights in the province" being within the power of the local legislatures, we must determine the extent to which, if any, the power to deal with them is necessarily restrained, and what limitation of them the British parliament intended to provide in reference to the exercise of it, by giving to parliament "The regulation of trade and commerce."

As I have before said, we must construe the whole Act together, and so as to give effect, if possible, to every part of it, and reconcile and ascertain what seeming contradictions the British Act contains.

From the pecular distribution of the legislative powers, and the mode adopted, it was a difficult undertaking to legislate so as to prevent difficulties arising, but they are to be properly resolved only by keeping prominently in view the leading objects intended to be provided for. Looking only at number 26 in the list contained in section 91, and finding the words "Marriage and Divorce," we would at once conclude that those words included everything with respect to those subjects; but in number 12 of section 92 we find "The solemnization of Marriage in the province" is expressly given to the

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local legislatures. No doubt can be entertained that, considering *both* provisions, notwithstanding any other provision of the Act, the intention was to give the power to regulate the solemnization of marriage to the local legislatures. I admit that the two cases are not exactly alike, but still it shows no one part of the Act should be alone looked at.

The incorporation of fire insurance companies with provincial objects being given to the local legislatures, they can, as to them, prescribe conditions and terms for the conduct of the business, and regulate the rights of the companies and those dealing with them. With the power to deal with the whole subject of property, real and personal, and civil rights, and the right to prescribe and regulate as just stated, in respect of the incorporation of companies with provincial objects, it would be unreasonable to conclude they were intended to have no power to apply the same, or similar conditions, to the dealings of other companies chartered outside. It would be, I think, improper to conclude that the Imperial Parliament, in the use of the words "the regulation of trade and commerce," in the peculiar connection in which we find them, could have intended them to apply, not only to the *regulation* of trade and commerce, as generally understood, but to all trading and commercial contracts, so as to limit the operation of the provision giving specifically the subject of property and civil rights to the local legislatures.

If once decided that contracts for fire insurance are necessarily beyond the powers of the local legislatures, where can a line be drawn to save to them the power to legislate touching the wages and contracts connected with manufactories, mercantile transactions, or others, or in respect to liens on personal estate, in the shape of stocks of goods, or to mercantile shops or warehouses.

The words of a statute, unless the context shows

otherwise, or they have a technical meaning, are to be construed according to their well understood and accustomed meaning. "Trade" means the act or business of exchanging commodities by barter, or the business of buying and selling for money—commerce—traffic—barter; it means the giving of one article for another for money or money's worth. "Commerce" is only another term for the same thing. Neither of the terms includes the rules of law by which parties engaged in trade or commerce are bound to each other, but when their *regulation* is given to a legislative body, it must be assumed the intention was that control in some respects was to be exercised, but to what extent, we must judge in this case by taking the whole Act into consideration. I have no doubt that the Dominion parliament has power to enact general regulations in regard to trade and commerce, but not to interfere with the powers of the local legislatures in the matter of local contracts, amongst which is properly included policies of insurance against loss by fire on property in the same province.

"To regulate" trade may remotely affect some of the conditions and terms under which articles are produced, but not necessarily so; and the regulation of it may consist only in rules governing the disposition or sale of goods, or may include conditions under which goods are manufactured, by which they become liable to duty. The term or expression "Regulation of trade and commerce" cannot, under the Imperial Act, be construed to extend to and include contracts for the erection, purchase, or renting of warehouses, manufactories, or shops used for trading or commercial purposes.

In some of the cases I have put, trade and commerce would be regulated. In the others they might be affected, but only incidentally, by the laws regulating

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contracts; nor is it, I think, at all necessary under the Act, that they should be construed to regulate contracts. This view is in accordance with the decision of the Supreme Court of the *United States*, in *Paul* v. *Virginia* (1), cited in this case by the learned Chief Justice of *Ontario*, and which, in the absence of English authorities, I feel at liberty to adopt.

I was of the majority of this Court who decided against the constitutionality of the Act of *Ontario* under which the case of *Severn* and *The Queen* came before us; but that case was essentially different from this, as will appear by a comparison of my reasons in the two cases.

Having disposed of the first, and, in several respects, the most important point, I will briefly consider what conditions attached to the insurance by the terms of the interim receipt, upon which the action in this case was brought.

The legislature having enacted that all policies should be subject to certain prescribed conditions, which were required to be printed on them (except where variations were appended in the manner prescribed), a question is raised how such legislation affects insurances created by the usual interim receipts, which provide that the conditions of the particular company, which differ from the statutory ones, shall be applicable. The legislature has virtually said that unless the prescribed conditions are printed as directed on the policy, there shall be, in fact, none in the interest or for the benefit of the company; but, although not so printed, they may be invoked by and for the insured, and "*shall, as against the insurers,* be deemed to be part of every policy of fire insurance."

The statute thus plainly negatives the right of the insurers to invoke the conditions unless printed on the

(1) 8 Wallace 168.

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policy as it requires. Whether in the case of an insurance by an interim receipt referring to conditions different from the statutory ones, by which the insurers are shown to ignore the enactment altogether, they can set up any condition at variance with the statutory ones, or invoke the latter, is a question that, in my view of the meaning of the statutes, should be resolved against them.

They are not justified in inserting in a policy any condition at variance with the statutory ones, and any such, for that reason, could not be a defence, and, being in that position, they cannot invoke the latter, for they are only to be deemed to be part of the policy, as *against* them, and not in their favor. If, therefore, that is the result, it has arisen because they have ignored the statutory provisions which they were bound by, and in departing from which they must be held to have, by their own act, become amenable to the consequences.

I entirely concur in the observations made by the learned Chief Justice of *Ontario*, in the second paragraph of his judgment in this case, and think it is the duty of courts to enforce obedience to the laws, and not to give the benefit of a provision to parties who, by their overt and deliberate acts, have violated it. After the enactment, companies should have changed their interim receipts, and made the reference in them to the statutory conditions, or to them with the variations and additions, as they might desire; but to make reference to conditions in opposition to the statute, is what they were clearly not justified in doing.

The amendment in the declaration as to the allegation of the time for making the claim was virtually made by the Court of Queen's Bench and sanctioned by the Court of Appeal, so that the declaration may be considered in that respect as in conformity with the statut-

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ory condition; and the proof was given as therein provided.

On a careful examination of the evidence I have arrived at this conclusion:—

Although the statutory conditions could not be invoked by the appellants, the first of them—providing for the avoiding of the policy in case of misrepresentation or omissions to communicate circumstances material to be known to the company—is supplied by the law otherwise, and is applicable to the question of other existing insurances not notified. The pleas alleging the other insurances in the "*Canada* Farmer's Insurance Company" and the "*Canada* Fire and Marine Insurance Company" are not proved, for it is clearly shown that the policies of those two companies were on goods different from those covered by the interim receipt herein.

Although in the view I take of the law, it is not necessary for me to refer to the matter of the gunpowder, I may say that I agree with the ruling that the verdict of the jury should settle the point as to the quantity of it. It was the only one in regard to which there was conflicting evidence and which became necessary to be found by the jury. I think the evidence abundantly warranted that finding, and that under it the appellant is shown not to have a greater quantity than he was justified in having by the statutory condition relating thereto, if it were applicable. I am of the opiuion there is nothing in any of the other pleas which requires special notice. I think the respondent is entitled to recover the amount claimed, and that the judgments appealed from should be confirmed and the appeal dismissed with costs.

Since this judgment was prepared in December last, I heard very attentively the argument of other cases on the constitutionality of two Acts—one of the

Dominion parliament, the other of the Act under consideration in this case; but have heard nothing to induce me to change my views, but, on the contrary, much to sustain them.

Since judgments were delivered in the *Queen* v. *the City of Fredericton*, I lighted upon a judgment of the Privy Council, which sustains the views I therein enunciated as well as those in my present judgment.

In *Ingram* v. *Drinkwater* (1), it was held, as by the head note, that although the words of the statute—

> Were large enough to include a rent charge in lieu of tithes, they would not necessarily do so if it appeared from the general wording of the Act that it was not intended to apply to incorporeal rights.

The doctrine, as laid down by the Court, is thus stated:—

> It is clear that, under the 6th section of the Act of 1860, the rate can only be laid on property legally liable to be included in the valuation under the 2nd section, and the only words in that section, or throughout the Act, which the respondent relies upon to make the amount paid to the vicar rateable, are the words "real estate," which, doubtless, are large enough to comprehend it, if intended to do so, but which have not necessarily that effect unless so intended; and looking to the collocation of those words in the different sections, as well as to the whole frame and general wording of the Act, their Lordships are of opinion that the rating powers were not intended to include or apply to the amounts payable to the appellant, and others similarly circumstanced.

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This is an action on a policy of insurance made after the passing of the Act of the legislature of *Ontario*, 39 *Vic.*, ch. 24, and the policy did not contain the conditions as required by that Act.

The same questions are raised here as in the case of the *Queen Insurance Company* v. *Parsons*, decided this term: first, as to the constitutionality of the Act, and, secondly, as to the consequence of a company ignoring the Act, and inserting conditions different from those

(1) 32 L. T. N. S. 746.

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prescribed by it. I have given, in my judgment in that case, my views on both subjects, and, in accordance with those views, I have now only to say that, in my opinion, the Act in question was not *ultra vires*, and that, as the appellants inserted conditions in the policy contrary to its provisions, they cannot set them up as any answer to the respondent's action.

The insertion of the conditions in the manner and substance adopted being virtually prohibited by the statute, no effect can be given to them in favor of the insurers. They cannot invoke the aid or benefit of the statutory conditions, because they did not obey the statute by inserting them. They undertook to make a contract in terms forbidden by the statute, and must take the consequences of a refusal of the Courts to ratify their attempt to evade the statutory provisions. Such conditions being prohibited, neither party is bound by them. Had it not been so, the respondent could have bound himself by any conditions agreed upon. But the legislature having, for, I have no doubt, wise objects, interposed and provided the only means of escape from the statutory conditions, which is by the insertion of them in full, and appending, in a prescribed manner, variations or additions, the conditions otherwise made are void in every respect. The legal course not having been pursued, we can substitute nothing in its stead. Such is the result, so far as I am able to determine and declare it. In so declaring it, I must not be understood as declaring that the policy is threfore free of all conditions, for the general principles applicable to all contracts still remain. My decision and remarks are only intended to apply to peculiar conditions, added to the ordinary implied ones, by insurance companies in their policies.

The appellants contend that, as their company was incorporated by the Dominion parliament, they cannot

be reached or affected by a local Act. That contention has been well answered in the judgments appealed from. If, as I have considered, the local legislature had the right to regulate fire insurance contracts, in common with others, it matters little where the mere corporate existence is created. By the comity of nations and countries, companies chartered in one country are acknowledged in others, but, at the same time, foreign companies must carry on their affairs and business, and be guided and governed by the local laws of all countries in which such affairs and business are carried on.

The issues tendered by the only pleas brought to our notice become, for the reasons given, immaterial, and are therefore no answer to the action of the respondent. Those pleas are founded, according to my views, on illegal conditions in the policy, and the breach of them cannot, therefore, be alleged as a ground of defence.

I think the appeal should be dismissed, and the previous judgments affirmed, with costs.

TASCHEREAU, J. :—

I do not concur in the judgment of the Court in these cases, and I proceed to state the grounds upon which I dissent.

The Citizens' Insurance Company of *Canada*, known in the first instance under an Act of the late province of *Canada* (19 and 20 *Vic.*, ch. 124, 1856), as the *Canada* Marine Insurance Company, later under 27 and 28 *Vic.*, ch. 98, 1864, as the Citizens' Insurance and Investment Company, and now, under its present name, by an Act of the Dominion parliament, 39 *Vic.*, ch. 55, (1876) has obtained from the Federal authority, by this last statute, the right to make and effect contracts of insurance upon such conditions, and under such modifications and restrictions, as might be bargained or agreed upon by and between the company and the persons contracting with them for such insurances.

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By chapter 162 of its revised statutes, the *Ontario* legislature has virtually revoked this power which this company held from the federal authority, and repealed the enactment of the Dominion Act under which the said company held this power, for a law repugnant to another, as entirely repeals that other as if express terms of repeal were used. It has said to this company: "The Federal authority has given you the right to make such contracts as you pleased, but we revoke that grant, we repeal *pro tanto* the Dominion statute under which you hold it, and hereafter you shall not contract except under the conditions we impose upon you."

Had the *Ontario* legislature, under the *British North America Act*, the power to do so? or, to put the question in another shape: Had the Dominion parliament the right to pass the 39 *Vic.*, ch. 55, under which the company (appellant) claims the right to issue its policies under such conditions as they please? For it must be admitted that, under the *British North America Act*, there can be no concurrent jurisdiction in the matter between the Federal and the local legislative authorities, and that if the Dominion parliament had the power to so authorize the said company to issue its policies under such conditions as it pleased, and to enact the said 39 *Vic.*, ch. 55, the local legislature had not the power to revoke this authorization or to repeal the said Act. It would be a strange state of things indeed if the local legislatures could repeal an Act passed by the Dominion parliament. They cannot do it either expressly or impliedly. They cannot by their legislation render nugatory the enactments of the Federal legislative power on subjects left under the control of the said Federal legislative power by the *British North America Act*.

Are these statutes, the Federal Act creating the

company (appellant) and the *Ontario* Act imposing conditions on its policies of insurance, regulations of trade and commerce? If they are, it follows that the Federal Act is constitutional and the *Ontario* Act unconstitutional. I am of opinion that both of these statutes are regulations on commercial corporations and commercial operations, and the words "regulation of trade and commerce" in sec. 91 of the *British North America Act*, mean "all regulations on all the branches of trade and commerce." Indeed, a contrary interpretation would be against the very letter of the Act. We cannot, it seems to me, find restrictions and limitations where the words used by the law-giver are so clear and general. That companies doing the business of insurance are commercial companies, and that their operations are of a commercial nature, admits of no doubt in my opinion. In one of the provinces (*Quebec*) a special article of its civil code (2,470) distinctly says so, and in that same province, so far back as 1835, long before the civil code, the Court of Queen's Bench, in *Montreal*, composed of *Vallière*, *Rolland* and *Day*, J.J, in a case of *Smith* v *Irvine* (1), held that the insuring against fire by an insurance company is a commercial transaction.

So it is held to be in *France*:

Cette enterprise, supposant l'existence d'un établissement et de bureaux ouverts a quiconque voudra se faire assurer, et un ensemble d'opérations faites dans l'espoir des bénéfices qui doivent en resulter présente tous les caractères d'une spéculation et constitute une véritable enterprise commerciale.

Les Compagnies d'assurance à prime font évidemment des actes de commerce en souscrivant des polices d'assurance, puisqu'elles font profession de vendre la garantie à laquelle elles s'obligent, et qu'elles ne contractent qu'en vue de profit qu'elles espérent retirer de leurs operations (2).

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(1) 1 Rev. Leg. 47.

(2) Boudousquié, Traité de l'assurance No. 70.

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L'assurance à prime contre l'incendie étant de la même nature que l'assurance maritime est reputée acte de commerce. Dalloz avait d'abord émis un sentiment contraire qu'aprés nouvel examen il a cru devoir abandonner (1).

In *Prussia*, *Belgium*, *Portugal*, *Spain*, *Holland* and *Wurtemburg*, whose codes I have been able to refer to, the contract of insurance against fire is also held to be a commercial contract. Why should it be considered otherwise in *England*, the emporium of trade and commerce, where the amount of business done by these fire companies is so large? Not a single authority has been cited at the Bar tending to show that there they are not considered as commercial companies, or that their operations are not considered as commercial operations, and I have not been able to find any. On the contrary, if I open *Homan's Cyclopædia of Commerce*, or *MacGregor's Commercial Statistics*, or *McCulloch's Commercial Dictionary*, I find these companies and their contracts treated of as falling under the commercial operations and the commercial law of *England*. In *Stephen's* Commentaries (2), an insurer is spoken of as a party "carrying on" a general *trade* or "business of insurance."

In *Levis' Manual of Mercantile Law* (3), Joint Stock Companies are said to be under the Commercial Law of *England*, and at paragraph 230, of the same book, I find a chapter on these insurance companies as falling within the Mercantile Law. So in *Smith's* Mercantile Law, and in *Chitty's* Commercial and General Lawyer. And Lord *Mansfield*, in *Carter* v. *Bohem* (4), says that "Insurance is a contract upon speculation." I also remark

(1) Ibid. No. 384. See Dalloz, Actes de Commerce, No. 216, where the decisions cited shew that the jurisprudence of the Courts is in the same sense. See also Pardessus, Droit Commercial, No. 588; Dalloz Diction. *vo.* Assurance Terrestre, Nos. 19, 20 and 22.

(2) Vol. 2, page 127.

(3) Paragraph 30.

(4) 3 Burr. 1,905.

that this case was tried before a special jury of *merchants*, yet it was not a case of maritime insurance.

I really cannot see on what grounds, under the English Law, a Fire Insurance Company can be said to be a non-commercial corporation. It is commercial, it seems to me, for the same reasons that make it so in *France* and the rest of *Europe*, that is to say, because it is a company doing the business of speculation on risks and hazards, because it trades on its contracts of indemnity, because it does the business of selling that indemnity. It is as commercial as the contract of maritime insurance, the character of which admits of no doubt (1), and in which, as in the contract of fire insurance, there is nothing but a contract of indemnity (2). And is not maritime insurance a commercial contract, whether it is a pleasure yacht, a man-of-war, a ship engaged in a scientific expedition, or a merchant vessel that is insured? Then if so, how can it be contended that fire insurance is a commercial contract only when it is made on goods and merchandize, and not commercial when made, say, on a building? As in maritime insurance, it is not from the nature of the thing insured that the transaction derives its character, but from the fact that the insurer does the business, speculation or trade of insurance; so, for instance, with the contract of sale, which is not commercial of its essence, but becomes commercial, not from the nature of the article sold, but because the seller does a business of selling that article. What is trade? Trade is an occupation, employment or business carried on for gain or profit. Now, do these Fire Insurance Companies carry on a business for gain or profit? To ask the question is to answer it. They are trading corporations,

(1) Stephen's Com. 2 Vol. p. 128.
(2) *Dalby* v. *India and London Life Insurance Co.*, 15 C. B. 365.

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and trading corporations are commercial corporations (1). In the *United States*, as in *England*, this seems uncontroverted. In *Angell & Ames* on Corporations, insurance companies are classified among commercial corporations. In *Parson's* Mercantile Law and *Bryant & Stratton's* Commercial Law, fire insurance is treated of as forming part of the commercial law. In the Civil Code of *Louisiana*, the contract of insurance was entirely left out, to form part of the Code of Commerce, which it was then intended to promulgate.

But great stress is laid by the respondent on the decision of the Supreme Court of the *United States* in *Paul* v. *Virginia* (2), where *Field*, J., said that issuing a policy of insurance is not a transaction of commerce. Well, I may first remark that this case is not binding on this Court; then, a reference to the report shows that this is simply an *obiter dictum* of Mr. Justice *Field*, and that the gist of the decision in that case is merely, that insurance business done by a *New York* Company, in the State of *Virginia*, does not fall within the meaning of the clause of the constitution, which declares that Congress shall have power to regulate commerce with foreign nations, and among the several States. Mr. Justice *Field* himself, in *Pensacola Telegraph Co.* v. *Western Telegraph Co.* (3), explained what he said in *Paul* v. *Virginia* as follows:—

> In other words, the Court held that the power of Congress to regulate commerce was not affected by the fact that such commerce was carried on by corporations, but that a contract of insurance made by a corporation of one State upon property in another State was not a transaction of inter-state commerce. It would have been outside of the case for the Court to have expressed an opinion as to the power of Congress to authorize a foreign corporation to do business in a State upon the assumption that issuing a policy of insurance was a commercial transaction.

(1) 1 Holmes 30. (2) 8 Wallace 168.
(3) 96 U. S. 2.

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So that this case of *Paul* v. *Virginia*, it seems to me, has no application whatever here. The relative positions of the parliament of the Dominion of *Canada*, and the legislatures of the various provinces, are so entirely different from those of Congress and the legislatures of the several States, that all decisions from the *United States* Supreme Court, though certainly always entitled to great consideration, must be referred to here with great caution. There the right to regulate commerce *in* the State is given to the State, not to the Federal power. Here, as said by Mr. Justice *Strong*, in *Severn* v. *The Queen* (3) : "That the regulation of trade and commerce *in the provinces*, domestic and internal, as well as foreign and external, is by the *British North America Act* conferred upon the parliament of the Dominion, calls for no demonstration, for the language of the Act is explicit." I might also remark that, whilst in the *United States* constitution, the word "commerce" only is used ; ours has the words "*trade and commerce*." Some law dictionaries give the word "trade" as meaning "internal commerce," whilst the word commerce would refer to foreign intercourse. But this appears to be a fanciful distinction, not recognized either in common parlance or in legal language. In either one or the other, the expressions : "the trade with the *West Indies*, with the *United States* * * * the foreign trade," &c., are of every day use, and therefore, in the interpretation of the Imperial Act, we cannot hold, it seems to me, that the word "trade" has been added to the word "commerce" simply to mean "internal commerce." Leaving it out of the Act, the internal commerce of the Dominion would remain as it is—under the control of the federal power. Every word of the Act must have its due force and appropriate meaning, and the Imperial parliament, which, no doubt, whilst creat-

(3) 2 Can. Sup. Ct. R. 104.

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ing a federal union among its North American possessions, had before its eyes the constitution of the *United States*, must have intended by adding this word "trade" to the word "commerce" to give to our federal authority supreme power, not only over the commerce, internal as well as external, but also over the trade of the whole Dominion, internal as well as external. Of course we are not called upon to give a general definition of this word "trade" as used in the Act. In the interpretation of the constitution, general definitions are to be avoided. In this case, all that is necessary to determine is, whether the word embraces insurance companies and their contracts, and, in my opinion, it does.

To revert to the case of *Paul* v. *Virginia*, the *obiter dictum* of Mr. Justice *Field*, "that issuing a policy of insurance is not a transaction of commerce," seems to me nothing but a truism. In the same sense, as I have remarked before, it may be said that making a contract of sale is not a transaction of commerce. It is the fact of a person or corporation making a business of selling and buying, or of issuing policies of insurance, which gives to the contract of sale, or the contract of insurance, and the seller or insurer, a commercial character. It is in accordance with this principle that the Civil Code of *Lower Canada*, art. 2,470, to which I have already referred, says that *fire insurances are not by their nature commercial, but that they are so when made for a premium by persons carrying on the business of insurers.*

So it is with the telegraphing business; for example, sending a message by telegraph is not a transaction of commerce, yet, telegraph companies inter-States, and the right to regulate them, are held in the *United States* to be under the federal power as a part of commerce, and this, though a very large proportion of the telegraphic mes-

sages have nothing to do with commerce at all (1). With us, on the same principle, telegraph business would also be exclusively under federal control, if the *British North America Act* did not expressly vest in the local legislatures, the control over local and provincial lines as long as the Federal parliament does not declare them to be for the general advantage of *Canada*.

Against the decision of *Paul* v. *Virginia*, in the *United States*, a decision in our own Courts can be cited. I refer to *Attorney General* v. *The Queen Insurance Co.* (2), in which Mr. Justice *Torrance* in the Superior Court at *Montreal*, and the five judges of the Court of Appeal, unanimously held, that a license tax on *policies* of insurance was a regulation of trade and commerce, and, as such, under the *British North America Act*, *ultra vires* of the provincial legislatures. This decision seems to me in point. The case was carried to the Privy Council, and the judgment of the *Quebec* Courts was confirmed without hearing the respondents. However, the Privy Council disposed of it without deciding whether the provincial License Act on insurance policies was a matter falling within the words "regulation of trade and commerce" of the *British North America Act*. It may, nevertheless, be remarked, that their Lordships in their judgment, after saying that the price of a license to a trader is usually ascertained by the amount of his trade, add, referring to the license imposed by the *Quebec* legislature on insurance policies, "this is not a payment depending in that sense on the amount of trade previously done by the trader," calling insurance business a "trade" and insurance companies "traders." The report of this case in the *Jurist* is very

(1) *Western Union Telegraph Co.* v. *Atlantic and Pacific Telegraph Co.* 5 Nev. 102; *Pensacola Telegraph Co.* v. *Western Union Telegraph Co.* 96 U. S. 1.

(2) 21 L. C. J. 77; 22 L. C. J. 307.

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incomplete. I have referred to the *case* containing the note of all the Judges in the *Quebec* Courts at length, as filed before the Privy Council. The judgment of the Privy Council is to be found in L. R. 3 App. Cases 1090.

I will now refer to the statutes in which the legislative authority of the Dominion has exercised its jurisdiction over Insurance companies, or expressed, in its legislation, an opinion on the questions here raised, remarking, at first, that where the commencement of a practice was almost coeval with the constitution, there is great reason to suppose that it was in conformity to the sentiments of those by whom the true intent of the constitution was best known: *Houston* vs. *Moore* (1); *Ogden* vs. *Saunders* (2); *Martin* vs. *Hunter* (3).

Since Confederation, in many instances our statutes have expressly or impliedly recognized insurance companies as trading companies. In the Insolvency Act of 1875 (38 *Vic.*, ch. 16, sec. 1,) it is enacted that the Act applies to traders and to trading companies, *except Insurance Companies.* Now, it is an admitted rule of interpretation that the exception of a particular thing from general words, proves, that in the opinion of the law-giver, the thing excepted would be within the general words, had the exception not been made. So that the opinion of the Federal parliament must have been, when making the said exception in the said statute, that insurance companies are trading corporations. I see, moreover, that in 32 and 33 *Vic.*, ch. 12, sec. 3; 32 and 33 *Vic.*, ch. 13, sec. 3: and 40 *Vic.*, ch. 43, sec. 3, the Dominion parliament has enacted that these statutes should apply to any purposes or objects to which the legislative authority of the parliament of *Canada* extends, *except insurance.* That is

(1) 5 Wheaton 1. (2) 12 Wheaton 213.
(3) 1 Wheaton 304.

saying clearly that the legislative authority of the said parliament extends to insurance. Indeed, the Dominion parliament has given no uncertain sound on the question. Within the very first year of the Confederation (31 *Vic.*, ch. 93,) it exercised the power of legislation on the subject, and it has done so ever since, in no less than twenty-five statutes passed thereon at various periods, as follows:—

1868,	31	*Vic.*,	ch.	93.
1869,	32 & 33	*Vic.*,	ch.	67, 70.
1870,	33	*Vic.*,	ch.	58.
1871,	34	"	"	53, 55, 56.
1872,	35	"	"	98, 99, 102, 104, 105.
1873,	36	"	"	99.
1874,	37	"	"	49, 86, 89, 94, 95.
1875,	38	"	"	81, 83, 84.
1876,	39	"	"	53, 54 & 55.
1879,	42	"	"	66.

To these may be added the six license acts on Insurance Companies:—31 *Vic.*, ch. 48; 34 *Vic.*, ch. 9; 37 *Vic.*, ch. 48; 38 *Vic.*, ch. 20; 38 *Vic.*, ch. 21; 40 *Vic.*, ch. 42, in which the Dominion parliament has also exercised the right to legislate on insurance and insurance companies, and to enact regulations on their trade and business, making at least (not including those of the last session) thirty-one statutes of the Federal parliament (and I have no doubt I have not counted them all), which, if the respondent's contention should prevail, would fall to the ground as unconstitutional.

The consequence of the nullity of these statutes must be, amongst a great many others, that all the amendments made by the Dominion parliament to the charters of the insurance companies existing before confederation, all the charters granted to insurance companies by the said parliament, are null and void; that all

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their policies of insurance are so many pieces of blank paper; that their shareholders are relieved from all liability whatsoever for the unpaid portions of their shares; that all actions pending, in which any of these companies are parties, must fall to the ground. And, as to the license acts, if they are illegal, of course these companies are not obliged to submit to them; they are, moreover, not only free from the operation of these acts for the future, but the Dominion Government is obliged to refund to them all that they have paid into the treasury under the said acts, and to remit the many hundred thousands of dollars which they have deposited with the Government. Indeed, it is impossible to foresee the grave and stupendous consequence of the nullity of the Dominion legislation on these companies, and the complications which would necessarily arise therefrom.

In fact, the Citizens' Insurance Company itself, the appellant in this case, does not exist if the Federal parliament has not the power of legislating on insurance companies and creating them.

And if the Federal parliament had not the power to create the company (appellant) to give it existence, the judgment itself, that the respondent has obtained, is against a non-existing body, and, as such, must fall to the ground. He, in fact, then, has never been insured; he is the bearer of a mere shadow of a policy.

The respondent is thus driven to admit that the Federal parliament has the right to create and incorporate insurance companies. But then, if parliament has this right, it can only be because these companies fall under the federal control in virtue of the words "regulation of trade and commerce," in s. 91 of the *British North America Act.* "The power to incorporate or create a corporation is not a distinct sovereign power or end of government, but only the means of

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carrying its other powers into effect," per *Marshall*, C. J., in *McCulloch* v. *Maryland* (1); and upon this principle, it is to be presumed the framers of the *British North America Act* have not deemed it necessary to grant in express terms to the Federal parliament the power to incorporate railroad, shipping, telegraph or any other companies for the Dominion. Yet it cannot be questioned that it has such power. In the enumeration of the powers of the provincial legislatures, it has been deemed necessary, it is true, to include in express terms the incorporation of companies for provincial objects, but that was undoubtedly because the power of creating a corporation appertains to sovereignty, and as such would not impliedly vest in the provincial legislatures, which clearly, by the Act, have none but the powers expressly given to them, whilst the Federal parliament has all the other powers. And if the Federal parliament has the power to create insurance companies, it has the power to regulate them, that is to say to prescribe the rules under which they can carry on their trade, by which their trade is to be governed. The respondent contends, that, assuming these companies can be created by the Federal parliament, their contracts, their policies fall under provincial control, and that the provincial legislatures alone have the power to regulate these contracts and these policies. But are not these contracts, these policies, the trade and commerce of these companies? and is it not the regulation of trade and commerce itself that the *British North America Act* vests, in express terms, in the federal authority? Is this not contending against the very words of the Act, that the federal authority can create or incorporate traders, but that it cannot regulate their trade? If such was the case, the provincial legislatures would have a power

(1) 4 Wheaton, 316, 411.

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totally incompatible with the supremacy which the 91st section of the *British North America Act* gives in such clear terms, to the Federal parliament, over all the matters left under its control. Either the Federal parliament has no control at all over insurance companies, or it has it supreme, entire and exclusive. If it has it, it has necessarily the power to regulate them and to impose upon their contracts all the conditions or restrictions it may think advisable; it has the power, for instance, to enact a statute imposing upon the companies it has created the very conditions contained in the *Ontario* Fire Insurance Policy Act. And, if it has that power, the *Ontario* legislature has not got it. A contrary interpretation would be giving to one Government the power to create, and to the other the power to destroy; and to use the words of *Marshall*, C. J. (*loc cit.*), "A power to create implies a power to preserve; a power to destroy, if wielded by a different hand, is hostile to and incompatible with this power, to create and preserve, and where this repugnancy exists, that authority which is supreme must control, not yield to that over which it is supreme."

I really fail to apprehend upon what ground the respondent, and the *Ontario* courts with him, whilst admitting the power of the Federal parliament to incorporate insurance companies, can sustain the contention that the contract of insurance itself falls under provincial control, simply because it is a *contract* or a *personal contract* governed by the local laws, and falling within the words "civil rights," of the 92nd section of the *British North America Act*. Certainly a personal contract is governed by the local laws; no one denies this; but the question to be determined here is, which is the local law, the law in *Ontario* on the subject? Is it the Dominion or the provincial law? The respondent would seem to treat the Dominion laws as foreign laws. He

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forgets that before the laws enacted by the federal authority within the scope of its powers, the provincial lines disappear; that for these laws we have a *quasi* legislative union; that these laws are the local laws of the whole Dominion, of each and every province thereof; that the Dominion, as to such laws, is but one country, having but one legislative power, so that a contract made under these laws in *Ontario*, or any one of the provinces, is to be considered, territorially or with respect to locality, as a contract in the Dominion, and, as such, governed by the Dominion laws, and not as a contract locally in the province, governed by the provincial laws. This is why the contracts to convey passengers and goods on the railways under Dominion control, for instance, the contract made by the sender of a message with a telegraph company, the contracts of a sale of bank stocks, are all and every one of them when made anywhere in the Dominion, regulated by the federal authority. And the power of the federal authority to so regulate them has never been doubted; yet are they not all local transactions and personal contracts? Undoubtedly so; but these railway companies, these telegraph companies, these banking companies, being under the federal control, their contracts are necessarily under the same control, absolutely and exclusively. It would be impossible for them to carry on their business, if each province could impose upon them and their contracts different conditions and restrictions. A Dominion charter would be absolutely useless to them if the constitution granted to each province the right to regulate their business. For the same reasons, the Federal parliament, for instance, in the general railway Act of 1879, section 9, has enacted, as it had done in 1868, by the repealed railway Act, that tenants in tail or for life, *grevés de substitutions*, guardians, curators, executors, and all trustees whatsoever,

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may contract and sell their lands to the company. This is certainly an enactment on property and civil rights, yet I have never heard it doubted, during the twelve years that it has been on the statute book, that it is perfectly constitutional. Indeed, without it, the enactments of the Federal parliament might be in some instances entirely defeated and set at nought. In the *United States* the federal power has in the same manner exercised its jurisdiction over civil rights and contracts. It having been settled, for instance, by judicial construction, that navigation was under federal control, Congress has enacted laws regulating the form and nature of the contract of hiring the ships' crews (1). It has altered the obligations imposed by the common law on the contracts made by ship-owners as common carriers, and though the validity of this enactment has never been directly decided upon by the Supreme Court, it has been brought before that tribunal in such a way that their silence was equivalent to a positive and formal judgment in favor of its validity, as demonstrated in *Pomeroy's* Constitutional Law (2).

This court has, in various cases, held that the Federal parliament, on the matters left under its control by section 91 of the *British North America Act*, must have a free and unfettered exercise of its powers, notwithstanding that, by doing so, some of the powers left under provincial control by section 92 of the Act, might be interfered with. And this doctrine has been approved of by the Privy Council as directly as possible in the case of *Cushing* v. *Dupuy*, decided a few weeks ago, April 15th, 1880 (3). In that case it was contended by the appellant that the provisions of the Dominion Insolvency Act were *ultra vires*, because they interfered with property and civil rights, as well as

(1) Pomeroy's Constitutional Law, par. 381.

(2) Par 384.

(3) 3. Leg. News 171.

with the procedure in civil matters, all of which are assigned exclusively to the provincial legislatures by the *British North America Act.* But that contention was disapproved of by their lordships in the following terms:—"The answer to these objections is obvious. It would be impossible to advance a step in the construction of a scheme for the administration of insolvent estates, without interfering with and modifying some of the ordinary rights of property and other civil rights, nor without providing some mode of special procedure for the vesting, realization and distribution of the estate and the settlement of the liabilities of the insolvent. Procedure must necessarily form an essential part of any law dealing with insolvency. It is, therefore, to be presumed; indeed, it is a necessary implication, that the Imperial statute, in assigning to the Dominion parliament the subjects of bankruptcy and insolvency, intended to confer on it legislative power to interfere with property, civil rights and procedure within the provinces, so far as a general law relating to those subjects might affect them." (That is to say, I take it, so far as a general law relating to bankruptcy and insolvency might affect property and civil rights or procedure.) And their lordships held that consequently the Dominion parliament had, in bankruptcy and insolvency, rightly exercised the power to revoke, alter or amend a certain article of the *Quebec* Code of Civil Procedure.

In the course of his very able argument before us, in one of these cases in favor of the constitutionality of this Fire Insurance Policy Act, the learned Attorney-General for *Ontario* enunciated the proposition that the federal authority may have the power to incorporate insurance companies, but that, if it has it, it is only in virtue of its general power under section 91 of the *British North America Act*, to make laws for the peace,

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order and good government of *Canada*, and that this power must be limited to the creation of these companies, and does not extend to the regulation of their business and contracts over which the provincial authority alone, as he contends, has jurisdiction as matters falling within the words "property and civil rights" of the 92nd section. I have already said why, in my opinion, the powers to create and regulate cannot be in such a manner divided. I will only here add, that this proposition of the learned Attorney-General seems to me entirely opposed to the very words of the section 91, in which it is enacted in very clear terms that this general power of the federal authority to make laws for the peace, order and good government of the Dominion, cannot be exercised *in relation to any of the matters coming within the class of subjects exclusively assigned by the Act to the provincial authority*. Now, the statutes creating and incorporating insurance companies, and enabling them, as bodies corporate, to make contracts of insurance, are clearly in relation to the subject of insurance, so that, if the Federal parliament has the right to incorporate these companies, as it seems to me clear it has, and as the respondent and the *Ontario* Courts are forced to admit, insurance cannot be deemed to come within the classes of subjects put under provincial control by the words "property and civil rights," of the 92nd section of the *British North America Act*. The Federal parliament cannot extend its own jurisdiction by a territorial extension of its laws, and legislate on subjects constitutionally provincial, by enacting them for the whole Dominion, as a provincial legislature cannot extend its jurisdiction over matters constitutionally federal, by a territorial limitation of its laws, and legislate on matters left to the federal power, by enacting them for the province only, as for instance, incorporate a bank for the province. The

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British North America Act is not susceptible of a different construction without eliminating from section 91 thereof the controlling enactment that the general power of the central parliament to make laws for the peace, order and good government of the whole Dominion, *does not extend to the subjects left to the provincial legislative power*, and *that, notwithstanding anything in the Act*, the authority of the central parliament over the matters enumerated, as left under its control, *is exclusive*, as also without eliminating from section 92 of the Act, the enactment that the provincial legislatures have *exclusive* power over the matters therein enumerated. And this cannot be done. It would be declaring that neither one or the other has exclusive powers, whilst it is clearly intended by the Act that the powers of both should be exclusive. And upon this principle, I presume, for the reasons are not given at length, and it was before I came to this Court, a bill to incorporate the Christian Brothers as a Dominion body, which was referred to the judges of this Court by the Senate in 1876, was reported by them to be unconstitutional, and *ultra vires* of the Federal parliament (1). This bill purported to incorporate a company of teachers for the Dominion, and consequently as such, infringed on the powers of the provincial legislatures, in which is vested by section 93 of the *British North America Act*, the exclusive control over education; and the learned judges, by declaring it unconstitutional, recognized the principle that for a matter constitutionally provincial, the Federal parliament has not the power to incorporate a company for the Dominion. And that this is so, seems to me clear; but then it is as clear upon the same principle that the Federal parliament could not incorporate insurance companies, nor legislate in any manner whatsoever on their trade and business, if in-

(1) Journal of Senate, 1876, pp. 155, 206.

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surance was a matter constitutionally provincial, that is to say, left under provincial control by the *British North America Act.*

I say then to the respondent: "If legislation on insurance is left to the provincial legislatures by the *British North America Act*, the Federal parliament had not the power to create the Citizens' Insurance Company, and then you were never insured. If, on the contrary, the power of legislation over insurance is left to the federal authority, then this power is supreme and exclusive: the federal authority alone can regulate this trade in all its details, and the *Ontario* statute, which purports to do so, is *ultra vires* and unconstitutional. In either case, the judgment rendered in your favor in the Courts below must be reversed and the appeal allowed. (It is admitted that, if the *Ontario* statute is *ultra vires*, the appeal is to be allowed.)

However, I feel it my duty not to avoid deciding the main question raised in this case, and I hold for the reasons hereinbefore given, that the Federal parliament has the right to incorporate insurance companies and to regulate them and their trade and business: that this right is exclusive, and that consequently the *Ontario* Legislature has exceeded its powers in enacting the Fire Insurance Policy Act. It cannot be, according to both the letter and the spirit of the *British North America Act*, that one Government could have the right to incorporate these companies, and another Government the right to regulate them and their trade and business. It cannot be that the provincial legislatures could thus have it in their power to retard and impede, burden and impair, obstruct, and even defeat the enactments of the federal authority.

The laws promulgated for the Dominion by the Federal parliament under the provisions of the Imperial

Act, must have their full sway from the Atlantic to the Pacific, unrestrained by any other legislative body, free from provincial control, without hindrance from provincial legislation. On the application of this rule rest entirely for our country the safe-guards against clashing legislation; against concurrent jurisdiction; against interfering powers; against the repugnancy between the right in one government to pull down what there is an acknowledged right in another to build up; against the incompatibility of the right in one government to destroy what it is the right in another to preserve (1). The Court of Appeal of *Ontario* goes so far as to say that an insurance company, created and authorized by the Dominion of *Canada* to do business throughout the whole Dominion, can be excluded from making contracts in the Province of *Ontario* by the provincial legislature; and there is no doubt that it is so, if the provincial legislatures have, as held by the *Ontario* Courts, the power to regulate the insurance trade. But this, in my opinion, demonstrates conclusively that the provincial legislatures have not, and cannot have such a power of regulation.

If the *Ontario* legislature can exclude an insurance company from the province of *Ontario*, it must be conceded that all the other provincial legislatures have the same right in their respective provinces. So that, according to this theory, if all the provincial legislatures should exercise this right, a company created and authorized by the Federal parliament to do business *all through the Dominion*, could not then do business *anywhere in the Dominion*.

But, may I ask here again, what would then be the use of a Dominion charter? Clearly none whatever. Has the Imperial parliament granted to the federal authority a power so entirely useless and unsusceptible of any prac-

(1) *McCulloch* v. *Maryland*, 4 Wheaton 316.

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tical effect? The Constitutional Act does not, as I read it, bear an interpretation inevitably leading to such anomalous consequences; the powers of the federal authority cannot, to such an extent, be dependent upon the consent and good-will of the provincial authorities.

It is of the very essence of supremacy to remove all obstacles to its action within its own sphere, and so to modify every power vested in subordinate governments so as to exempt its own operations from their influence, and it cannot be that the framers of our constitution, who determined to give to the central power of this Dominion the supremacy and strength which, in the hour of trial, were found to be so much wanting in the federal power of the *United States*, have thus given to a province, or to all the provinces uniting in a common legislation, the power to annihilate, either directly or indirectly, the corporation which the central power is authorized by the Act to create; that they have thus rendered inevitable in this Dominion, that conflict of powers under which a federation must always, sooner or later, crumble and break down.

In re The Western Insurance Company, appellant, and *Johnston*, respondent, the appeal must also, in my opinion, be allowed, for the reasons I have given in the *Citizens'* v. *Parsons.*

The *Western* exists in virtue of an Act of the late province of *Canada;* but if insurance is a trade, the Acts on the subject passed before Confederation can now be repealed, altered or amended, by the Federal parliament only, under section 129 of the *British North America Act.*

In the *Queen Insurance Company* v. *Parsons* also, the appeal must, in my opinion, be allowed. The Company appellant, in this case, being a foreign Company, is on a slightly different footing than the *Citizens'* and the *Western.* Yet, if upon the grounds I have stated, insurance

companies and their trade and business fall under the regulations and control of the Federal parliament, there are no reasons why foreign insurance companies should be held to be under provincial control.

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It is admitted (and my remarks here apply as well to the other two companies, which are also under license of the Federal Government) that this company, the Queen Insurance Company, has obtained from the Federal Government a license, that is to say, a permit to do business all through the Dominion, under 38 *Vic.*, ch. 20, and 40 *Vic.*, ch. 42 Now a license is a regulation, or rather, it is a permit to carry on a trade under certain regulations enacted *by the licenser* (1).

These regulations the federal authority has made. To obtain its license, this company had to deposit $50,000 with the Receiver General of the Dominion (2); it had to file with the Dominion Government certain documents, and perform certain formalities enumerated in sections 10 and following ones of the said Act. Any business done before this deposit was made and these formalities fulfilled, would have brought on the person doing such business a penalty of $1,000 or an imprisonment for six months.

This company, moreover, is taxed by the Federal Government, sec. 23, sub-sec. 5. All these enactments are regulations on its trade and business. Having complied with them all, it could reasonably expect to have acquired some right, some privileges. "But that is not so," say the respondent and the *Ontario* courts to the appellant, "or, at the most, if it is so, it is only as long as the provincial legislatures will suffer the permits and enactments of the Dominion authority. And when they please, instead of doing your business all through the Dominion of *Canada*, as the federal authority has

(1) *Calder* v. *Kirby*, 5 Gray's Rep. 597.

(2) Sec. 6, 38 Vic., ch. 42.

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given you the right to do, you will be excluded from *Canada* altogether, either in express terms or indirectly, by these legislatures imposing upon you, under their power to regulate your contracts, such onerous conditions that you will be forced to withdraw." Such is, according to the respondent, the relative position of the federal power towards the provincial power, under the *British North America Act.* I venture to think that our constitution is not the solemn mockery that this interpretation, if it prevails, would make it to be. Insurance business is a trade, and to the federal authority belongs the "*exclusive*" power of regulation of that trade "*in each and every province*" in the Dominion, and this is so, (enacts section 91 of the Constitutional Act), *notwithstanding* that this power might interfere with the rights conceded to the provincial legislatures by section 92. This power to regulate excludes necessarily the action of all others that would perform the same operation on the same thing, and to the Federal parliament alone must belong the right to impose upon the company appellant and its policies, the conditions and restrictions which this *Ontario* Fire Insurance Policy Act purports to impose, or any conditions or restrictions whatsoever.

These companies cannot be controlled and governed by as many different regulations as there are provinces in the Dominion. It is by the comity of the Dominion that they are admitted here, and under the Dominion laws and power that they remain. One of the great benefits of confederation would be lost if the rules on trade and commerce were not uniform all through the Dominion; if the provincial legislatures had, as contended by the respondent, the power to tamper with the grants and privileges conferred by the federal authority on the trading and commercial bodies authorized to do business in this country.

I have not lost sight of certain enactments of the Federal parliament, in which it seems to be admitted that the provincial legislatures have the right to incorporate insurance companies. But the Federal parliament cannot amend the *British North America Act*, nor give, either expressly or impliedly, to the local legislatures, a power which the Imperial Act does not give them. This is clear, and has always been held in this court to be the law. I have also not failed, as it was my duty to do, to give due consideration to the fact that the respondent appears to have in his favor the weight and authority of the opinions of the learned judges of the province of *Ontario*, though I may here remark that the judges of the Court of Queen's Bench, in one of these cases, *Western Assurance Co.* v. *Johnston*, distinctly stated that they did not express their individual opinions on this constitutional question, but yielded to the judgments already given.

GWYNNE, J.:—

Upon the point as to the construction of the Act, assuming it to be not *ultra vires* of the provincial legislature, I retain the opinion expressed by me in *Geraldi* v. *The Provincial Insurance Company* (1), that the true construction of the Act is that the statutory conditions set out in the schedule to the Act, whether omitted altogether, with or without others being substituted in their place, or whether some be omitted and others retained and new ones added, shall alone be regarded as being part of the policy, unless the conditions and variations, whether of *omission*, substitution or addition, shall be printed on the policy in the manner prescribed by the Act, the object being, that, to secure uniformity, no departure from the statutory conditions shall be

(1) 29 U. C. C. P. 321.

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recognized, unless the variations shall be endorsed in the manner prescribed in the Act.

The words of the statute are, to my mind, free from ambiguity, namely: "The conditions set forth in the schedule to this Act shall, as against the insurers, be *deemed* to be part of every policy of fire insurance hereafter entered into, or renewed, or otherwise in force in *Ontario*, with respect to any property therein."

The words "shall be deemed," &c., &c., here used, plainly point to the case of the conditions not being stated to be part of the policy, in which case there would be no necessity for saying they "shall be deemed to be," &c., &c. Then, the next branch of the sentence is purely *directory*, and not a condition precedent to the prior branch of the sentence acquiring force; it is coupled to the prior branch by the copulative "and," "and shall be printed on every such policy with the heading 'Statutory Conditions;'" the sentence still continues copulatively, "and if a company or other insurer desire to vary the said conditions, or to omit any of them, or to add new conditions, there shall be added, in conspicuous type and ink of different color, words to the following effect:" Variations from conditions," &c., &c., &c.

These statutory conditions, it is to be observed, are framed for the express purpose of protecting the insurers. Out of twenty-one conditions in the original Act, there is but one which can be said to be framed for the purpose of protecting the insured against the insurers, namely, the 20th.

These conditions, as the Act recites, were framed by a Judicial Commission appointed by the Government of the province of *Ontario*, for the express purpose of framing such conditions as would be just and reasonable to be inserted in all fire policies on real or personal property in the province, and, being so framed, the Act

further recites that "it is advisable that these conditions should be expressly adopted by the legislature as the *Statutory Conditions* to be contained in policies of insurance against fire entered into and in force in the province." The very term here used, "the statutory conditions, &c., &c., seems to show the intent to be that they shall operate by force of the *statute* to be part of a contract without the necessity of their being embodied in the contract, for, if embodied in the contract, they become conditions acquiring force from the contract and agreement of the parties, *and not from the statute*. The contract of fire insurance being one requiring the utmost good faith upon the part of the insured, and these conditions being adopted as being just and reasonable and for the express purpose of protecting insurers, and securing to them that good faith which ought to exist in every contract of insurance, the above recital seems to amount to a legislative declaration, that the presence of these conditions is necessary in order to make contracts of fire insurance to be just and reasonable.

To effect the purpose, namely, that these conditions, so necessary to making contracts of insurance reasonable, shall be part of every contract of fire insurance and no others, unless, as prescribed in the Act, the Act is passed. It would be singular, indeed, if we should find an Act, which has been passed for the purpose of making all contracts of insurance just and reasonable contracts, to be so framed and expressed in its enacting clauses as to force from a court of justice the construction, that unless these conditions are endorsed on the policy in a particular form and under a particular heading, and although conditions of a like import are agreed upon between the parties, and are endorsed upon the policy as part of the contract, nevertheless the contract, stripped of the element essential to make it just and rea-

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sonable, shall be held to be free from all conditions, and may, as such, be enforced by the party who has violated the conditions to which he agreed, as if the opposite party had subscribed a contract without conditions, so compelling a defendant to pay a sum of money, contrary to the express agreement of both parties to the contract, against all reason and justice.

To hold that an insurer shall not be entitled to avail himself of a condition endorsed upon the policy, and agreed to by the other contracting party as an essential element in the contract, and which, in substance, is identical with one of the statutory conditions, or to call in aid the statutory conditions to the like effect, unless the statutory conditions, in the precise words, form and heading given in the statute, are endorsed upon the policy, seems to me to be a mockery of justice. To enact that a contract, in order to be valid and binding and capable of being enforced in a court of justice, must be in a prescribed form, is an exercise of legislative authority with which we are familiar; but an enactment that a contract (to which the parties themselves have expressly agreed) shall not operate according to the terms of their agreement, but shall operate in violation of those express terms, in the interest of the party who alone has violated them, so as to enable him to recover from the other party a sum of money under circumstances in the event of the occuring of which it was an express term of his contract that he should have no claim whatever, or, in other words, although he could not recover under the terms of the contract, which he produces as the one he made, he may, in defiance of such terms, recover as under a totally different contract, which, as a matter of fact, never was made, is such an unprecedented and wanton assertion of arbitrary power, and is so contrary to all our ideas of justice and of the principles which should govern legislative bodies in

their interference with contracts, that the language used by the legislature, upon which such a construction is sought to be put, should be expressed in such unmistakeable, clear and unequivocal terms as to leave open no possible way of escape to the court of justice, which should be called upon to put such a construction upon it.

The courts below have held that the construction which appears to me to be the true one cannot be so, and that the other construction above suggested is—not because the language of the Act *clearly expresses in terms* such to be the intent of the legislature, but because in the judgment of those courts, no force can otherwise be given to the words "as against the insurers," but, as it seems to me, the courts below, in putting the construction which they do upon these words, have overlooked the fact that, in order to do so, they have altered the whole frame of the sentence in which they occur, so as to express the very opposite of what the sentence does literally express.

The sentence is—"the conditions set forth in the schedule to this Act shall, as against the insurers, be deemed to be part of every policy of insurance," &c., &c., &c. The Act does not say that as against the insurers the single condition numbered twenty, which is the only one so framed as to operate to the prejudice of the insurers, shall be deemed to be part of every policy, &c., and that the others, (twenty in number) which are framed for the purpose of operating in their favour, shall not be, but that (at whatever may be the time and place contemplated by the Act when, as is therein directed, the adjudication shall take place, namely, that the conditions shall be deemed to be part of every policy, &c., &c.), *all the conditions alike* shall *be deemed*, that is to say, *adjudicated*, to be part of every policy, &c. Now, when can this time and place be,

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unless upon the occasion of an action being brought in Court by the insured against the insurers? Then alone can adjudication take place, and such adjudication is to be, that the conditions set forth in the schedule, that is to say, *all* the conditions, &c., shall be deemed to be part of every policy, &c.; but the construction put by the Courts below upon this language is that "the conditions set forth in the schedule to this Act shall, as against the insurers, be deemed to be *no* part of any policy of insurance hereinafter entered into, or renewed, or otherwise in force in *Ontario* with respect to any property therein, unless the same shall all be printed on such policy, under the heading *Statutory Conditions*, and in default of their being so printed, though the assured accepted the policy upon an express contract that it should be held by him subject to certain conditions to be fulfilled by him, he shall, notwithstanding that he has violated all those conditions, be absolved therefrom, and also from the conditions which, because of their being just and reasonable, the Act recites that it was deemed advisable to make them, by legislative authority, part of every policy, and shall recover as upon a contract known to have been never entered into, namely, a contract free from all conditions, except the occurring of loss by fire."

It was suggested, in argument before us, that the intention of the legislature was to impose this consequence as a punishment upon insurance companies in case they should issue policies with conditions, albeit in substance, identical with the statutory conditions, in any other form or mode of expression than that mentioned in the schedule to the Act, and, by this infliction of punishment, to compel the companies to adopt the prescribed form. We are not warranted, in my opinion, in attributing to a legislative body a purpose so futile and so vindictive. The

construction that the statutory conditions, unless there shall be variations agreed upon, shall be deemed to be part of every policy, &c., secures, in the most effectual manner possible, the recited object of the legislature in passing the Act equally as if the conditions should be endorsed under the heading "Statutory Conditions," and as such construction would render disobedience innocuous and practically immaterial, the offence would be, in effect, removed, and, with it, all occasion for the punishment removed also.

But, it is said, if the conditions are to be deemed to be part of every policy, although, in fact, not endorsed, they, from their nature, cannot operate as against the insurer. Grant that they cannot, in the sense in which the Courts below have construed the Act, and it may be difficult to understand how conditions, whose express object and purpose is to protect the insurers against certain acts and defaults of the insured, and for that purpose are pronounced by the Act to be just and reasonable to be adopted as part of every contract of fire insurance, should be used to the prejudice of the persons for whose protection they are introduced; but, to my mind, all this only shews that the intent of the legislature in using the words was not that which is imputed to it by the Courts, for the Act expressly says that it is *against* the insurers that the conditions shall be *deemed* to be, that is, adjudged, to be part of every policy, &c., and a difficulty, if there be any, in giving effect to those words would never justify the construction put upon them by the Courts below, which, in my judgment, is not only forced, unnecessary and contrary to the spirit of the Act, but contrary to its letter also, and one to support which a total remodelling of the sentence is necessary, while a sufficiently reasonable sense can be put upon the words by the construction which appears to me to

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be the true one, a construction which in the most effectual manner attains the object which the preamble of the Act declares the Legislature had in view in passing the Act, namely, that of securing that these just and reasonable conditions, so necessary to the existence of every just contract of insurance, shall be adjudged to be part of every policy of fire insurance, and to be the sole conditions affecting every policy, unless variations therefrom shall be printed on the policy in the precise manner pointed out in the Act; such a construction relieves the courts from the position of doing a plain injustice which the other construction causes. To prevent the adoption of the construction put upon the Act by the Courts below, it is sufficient, in my opinion, to say that there is not an expression in the Act which indicates, in the remotest degree, the intention of the legislature to have been to commit the injustice of enabling an insured person, while violating the express conditions to which he had agreed to subject himself, to recover against the insurers as upon a contract which was never entered into. I am unable to bring my mind to concur in the adoption of a construction which declares that a man who contracts that he shall have no right to recover in case of loss, if he shall keep upon the insured premises any nitroglycerine or more than 10 lbs. of gunpowder, may nevertheless (unless that contract be put into a particular form) recover for his loss, notwithstanding that he has kept one hundred weight of each upon the insured premises, and that these explosive materials caused the fire which occasioned his loss.

By reference to the case as reported (1), it appears, although it does not appear in the very imperfectly printed case in appeal brought before us, that the defendants, in their 5th and 6th pleas, set up, in bar of the plaintiff's recovery, the violation by the plaintiff of

(1) 43 U. C. Q. B. 261.

certain conditions endorsed upon the policy of like import with some of the "Statutory Conditions," but which were not printed in the form mentioned in the schedule to the Act. They also, in their 7th plea, pleaded the violation by the plaintiff of one of the statutory conditions, namely, further insurance without notice. The plaintiff himself proved a clear violation, although, perhaps, a negligent violation of that condition, the effect of which was to cause the property to be over insured. The court rejected all those pleas, holding the policy containing conditions to which the plaintiff had assented, to be not only absolved from those conditions, but also from the statutory conditions, and the contract to be free from all conditions. Under these circumstances, it appears to me to be impossible to sustain a verdict rendered in favour of the plaintiff, and that a new trial must needs be granted, if it were not that it is clear the plaintiff has violated the statutory conditions set out in the 7th plea, and as no verdict in his favour could upon that plea be sustained, but would have to be set aside *ex debito justitiæ*, a new trial would be unnecessary, and a non-suit should be entered.

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Upon the question as to the construction of the contract involved in the interim receipt sued upon, assuming the Fire Insurance Policy Act of 1876 not to be *ultra vires* of the provincial legislature, I am of opinion that the Act does not affect an insurance made through the medium of an interim receipt pending an application for a policy. The difference between an interim receipt and a completed policy is well known, and must be deemed to have been so to the legislature, and when they framed an Act having express reference to a policy, and to that only, we must conclude that they did so designedly, and did not intend to include under that term an interim receipt. We have no right to extend

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the Act beyond what it has clearly expressed; moreover, it is impossible to construe the Act as applying to interim receipts, since by so doing we should utterly destroy the most essential characteristic and property of such a receipt, namely, the property of being liable to immediate cancellation upon the company declining to hold the risk and to issue a policy, which the 18th statutory condition, if those conditions applied, would no longer permit to be done; and the effect would be that a condition which, when applied to a perfected policy, is introduced there for the protection of and in the interest of the insurers, would operate to their injury when applied to an interim receipt.

Although an action may now, under the Administration of Justice Act, be brought at law upon an interim receipt, whereas formerly it only could be brought in equity, still the principle upon which the action was sustained remains the same, namely, that the contract involved in such a receipt was one which a Court of Equity would enforce the specific performance of, by decreeing the issue of a policy in accordance with the terms of the agreement contained in the interim receipt, and it was argued in the court below that since the passing of the Fire Insurance Policy Act, a Court of Equity would not decree a policy to issue in pursuance of this receipt other than one which should be subject to the statutory conditions only, and that, therefore, such a policy must be taken to be the one referred to in the receipt under the expression, "subject to all the usual terms and conditions of this Company;" but, as the Act authorises variations to be made in the statutory conditions, provided only that they shall be just and reasonable, even though it might be that, up to the time of the issuing of the interim receipt, the defendants had not had policies printed with the conditions endorsed in the form pointed out in the schedule to the

Act, no court proceeding upon principles of equity could prevent the defendants from adopting, albeit at the eleventh hour, those conditions, with such variations, as should be reasonable, before they should issue a policy in pursuance of the receipt. To a bill in equity framed upon this receipt, the defendants could, as it seems to me, effectually resist a claim made by the plaintiff to have one subject to the statutory conditions only, without variations; the most favorable decree they could upon any principle of justice be entitled to, would be, as it appears to me, subject to the statutory conditions with such variations, being reasonable, as the defendants should desire to insert of like import with those which their former form of policy contained and put into the shape indicated in the statute; no Court of Equity could deprive them of the right given them by the statute of making reasonable variations in the statutory conditions, and compel them to issue a policy with the statutory conditions alone without such variations. The case would have to be regarded, as it appears to me, precisely as if the receipt had been given the day after the passing of the Act, and before the defendants could have adopted a new form of policy in compliance with the terms of the Act, in which case, it seems to be clear beyond all doubt, that no Court of Equity could compel the defendants to issue a policy subject to the statutory conditions only, unless they happened to be identical with the conditions upon the form of policy theretofore in use by the defendants.

If then the statute does not, as I am of opinion that it does not, import the statutory conditions into interim receipts, then these receipts must be construed as they would have been if the Fire Policy Act had not passed, and the defendants can neither at law nor in equity be held liable upon any other terms than those they agreed to, that is, to insure the plaintiff subject to the con-

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ditions contained in the policies which have been and are in use by them, and the plaintiff is in this position, that he cannot sue upon the receipt unless he is willing to regard the policy agreed to be issued under it as one containing the conditions which have ordinarily been in use with the defendants, or, which seems to me to be much the same thing, a policy with the statutory conditions, with such variations as would be effected by such of the conditions upon the policies which have been in ordinary use with the defendants, as would be good and valid under the statute if endorsed as variations in the form prescribed in the statute. The former is what the plaintiff did, for, to pleas setting up in bar the violation by the plaintiff of some of the conditions endorsed on the form of policy ordinarily in use by the defendants, he joined issue in fact, which issues, when brought down for trial, except such only as could have been raised treating the statutory conditions as the only ones to which the insurance was subject, the Court refused to entertain.

The defendants, by the policies in ordinary use with them, guarded themselves from all liability for loss in case the insured should keep more than 10 lbs. of gunpowder upon the premises insured. I do not think it could be held that this would not be a reasonable variation from the statutory condition which allows 25 lbs., if endorsed upon a policy in the manner prescribed in the Act. The Court allowed an enquiry as to whether the insured kept more than the 25 lbs., but would allow none as to whether he kept more than 10 lbs., and in short the case was tried as if a policy had been in fact executed by the defendants subject to the statutory conditions only, without any variations. In this, as it appears to me, for the reasons above given, the Court erred, and there should therefore be a new trial ordered, and the appeal should be allowed with costs.

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But it is contended that the Act under consideration is *ultra vires* of the provincial legislature of *Ontario*, which passed it, as interfering with the regulation of a branch of trade and commerce—control over which is by the 2nd item of sec. 91 of *B. N. A. Act*, vested exclusively in the Dominion parliament.

The question thus raised is, undoubtedly, one of a very grave character, for, as became developed in the argument of the several cases now before us, wherein the point is raised, one of which, namely, the *Western Assurance Co.* v. *Johnston*, was argued by the Attorney-General, who is also the Premier of the province of *Ontario*, in support of the constitutionality of the Act, the question before us is not one merely affecting the particular Act in question, but our judgment in this case, although the Dominion parliament is not represented, and has not been heard in the matter, will logically affect some thirty acts of the Dominion parliament, whose constitutionality has not heretofore been questioned, and which must be *ultra vires* of the parliament, if the Act now before us be *intra vires* of the provincial legislature, and, on the contrary, if this Act be *ultra vires* of the provincial legislature, a number of Acts passed by the legislature of the province of *Ontario* must be equally so. It is clear that the subject-matter of the Act in question is not one over which jurisdiction is by the *B. N. A. Act* given concurrently to the provincial legislatures and to the parliament. If it were, no doubt the Act would be valid "*as long and so far only as* it is not repugnant to any Act of the parliament of *Canada*." The subject not being one over which concurrent jurisdiction is given to the provincial legislatures and to the parliament, must be placed exclusively either under the one or the other. The question, therefore, is determinable by the rule which I adopted in the *City of Fredericton* v. *The Queen* (1),

(1) 3 Can. Sup. Ct. R., 505.

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as appearing to me to furnish an unerring guide in determining whether any given subject of legislation is within the jurisdiction of the provincial legislatures, or of the parliament, namely: "All subjects of whatever nature, not exclusively assigned to the local legislatures, are placed under the supreme control of the Dominion parliament, and no matter is exclusively assigned to the local legislatures unless it be within one of the subjects expressly enumerated in sec. 92, *and at the same time* does not involve any interference with any of the subjects enumerated in sec. 91."

The contention in support of the claim that the Act is within the jurisdiction of the local legislature, is that the subject matter of the Act comes within item 13 of sec. 92 of the *B. N. A. Act*, namely, "Property and Civil Rights in the province."

I have already in the *City of Fredericton* v. *The Queen* expressed my opinion that the plain meaning of the closing sentence of sec. 91 is that (notwithstanding anything in the Act), any matter coming within any of the subjects enumerated in the 91st section, shall not be deemed to come within the class of subjects enumerated in the 92nd section, however much they may appear to do so. Jurisdiction, therefore, over "Property and Civil Rights in the province" is not vested absolutely, but only qualifiedly, in the local legislatures.

In so far as jurisdiction over "Property and Civil Rights," in every province may be deemed necessary for the perfect exercise of the exclusive jurisdiction given to the Dominion parliament over the several subjects enumerated in sec. 91, it is vested in the parliament, and what is vested in the local legislatures by item 13 of sec. 92, is only jurisdiction over so much of property and civil rights as may remain, after deducting so much of jurisdiction over those subjects as may

be deemed necessary for securing to the parliament exclusive control over every one of the subjects enumerated in sec. 91, the residuum, in fact, not so absorbed by the jurisdiction conferred on the parliament.

The only question, therefore, before us substantially is: Are or are not joint stock companies, which are incorporated for the purpose of carrying on the business of Fire Insurance, Traders? and is the business which they carry on a trade?

If this question must be answered in the affirmative, the Act under consideration must be *ultra vires* of the provincial legislature, as much as was the Act which in *Severn* v. *The Queen* (1) was pronounced so to be, and as the Act under the consideration in the *City of Fredericton* v. *The Queen* would have been if passed by a local legislature; indeed, it seems to me to be difficult to conceive what greater assertion of jurisdiction to regulate trade and commerce there could be, than is involved in the assumption and exercise of the right to prescribe by Act of the legislature in what manner only, by what form of contract only, by what persons only, and subject to what conditions only, particular trades, or a particular trade, may be carried on, and to prohibit their being carried on otherwise than is prescribed by the Act. If this may be done in one trade, obviously it may be done in every trade, and so all trades must be subject to the will of the legislature having jurisdiction so to legislate as to whether it shall be carried on at all or not. As to the Act under consideration, if it be open to the construction put upon it by the courts below, it seems to me to be impossible to conceive any stronger instance of the assertion of supreme sovereign legislative power to regulate and control the trade of fire insurance and of fire insurance companies, if the business of those com-

(1) 2 Can. Sup. Ct. R. 70.

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panies be a trade. Now, among all the items enumerated in sec. 92, it is observable that not one of them in terms indicates the slightest intention of conferring upon the local legislatures the power to interfere in any matter relating to trade or commerce, or in any matter which in any manner affects any commercial business of any kind, unless it be item No. 10, whereby the local legislatures are empowered exclusively to make laws in relation to "local works and undertakings" subject to this qualification, namely, "other than such as are of the following classes:"

"1. Lines of steam or other ships, railways, canals, telegraphs, and other works and undertakings connecting the provinces, or extending beyond the limits of the province;

"2. Lines of steamships between the province and any British or foreign country; and

"3. Such works as, although wholly situate within the province, are, before or after their execution, declared by the parliament of *Canada* to be for the general advantage of *Canada*, or for the advantage of two or more of the provinces."

All these excepted subjects are, by item 29 of sec 91, placed under the exclusive legislative authority of the parliament of *Canada*, and so, by the closing paragraph of section 91, are, in effect, pronounced not to be local or provincial works or undertakings,—works and undertakings within each province other than those excepted, are all, therefore, which can come within the description of "local works and undertakings" comprehended in item 10.

It is to be observed also that when power to incorporate companies is given, no mention is made of trading companies. The power is expressly limited by item No. 11, sec. 92, to "the incorporation of companies *with provincial objects*." None of the learned counsel who

contended for the validity of the statute under consideration, ventured to define the term "provincial objects;" they rather preferred to submit at large, that the item intended to confer power to incorporate companies for all purposes of trade, and, in fact, all purposes whether of trade or otherwise, provided only the corporate powers should be expressly prescribed by the Act to be exercised within the province.

It is, perhaps, easier to say what the term does not comprehend than to define it precisely. I venture to suggest, however, that such local works and undertakings as are by item 10 placed under the local legislatures may properly be termed local or provincial objects. So may the subjects enumerated in item No. 7, viz.: "The establishment, maintenance and management of hospitals, asylums, charities and eleemosynary institutions in and for the province, other than marine hospitals;" and so likewise the item specified in sec. 93, namely, "Education;" and beyond these I cannot say that I see any other; but when we regard the whole scope and object of the *B. N. A. Act* and bear in mind that the scheme of constitutional government, which it was designed to create, was to vest in the Dominion parliament, consisting of Her Majesty (herself the supreme executive authority) as one member, and a Senate and House of Commons as the other members of the legislative body, the supreme sovereign jurisdiction to legislate upon all subjects whatsoever, excepting only certain specific matters *particularly* enumerated, purely of a local, domestic and private nature, which were assigned to the provinces; and, when we find that for greater certainty (to expel doubt as it were) the exclusive legislative jurisdiction of parliament is declared to extend to all matters coming within the regulation of trade and commerce, words which (in perfect character with the general supreme jurisdiction, intended to be

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conferred upon the parliament, excepting only the *particularly* excepted subjects,) are comprehensive enough to include and must be construed to include every trade and everything relating to every trade, and to all branches of commerce and to the persons by whom, and to the manner in which the same, in every branch thereof, may be carried on: we can, I think, with great confidence, assert that no jurisdiction to *incorporate any Trading Company* or to *restrain or control any Trading Company* in the way it should carry on its trade, is given to the local legislatures, unless it be in respect of companies for the construction, maintenance and management of such works, as by item No. 10 are placed under the control of the local legislatures under the designation "local works and undertakings." From the frame of item No. 11, it is plain that what was intended by annexing the qualification "with provincial objects," was not the power of incorporating companies for all purposes, but a limited power, for inasmuch as, wholly irrespective of these words, the local legislatures could give no powers beyond their province, to companies incorporated by them, these words, "with provincial objects" were superfluous, and have no sense unless they be read as words of limitation, having a restrictive operation; it would have been sufficient to have said simply, "the incorporation of companies;" but "for greater certainty," a principle which pervades the Act, I have no doubt these words "with provincial objects" were introduced to confine the power to those purposes which are specially placed under the control of the local legislatures in express terms—so as to leave nothing to be implied or inferred. My brother *Taschereau* has, however, so forcibly dealt with this subject, that I shall discuss it no further, but shall proceed to the enquiry: "Are or are not joint stock companies which are incorporated for the purpose of carry-

ing on the business of fire insurance, traders? and is the business so carried on by them a trade?"

It was admitted as beyond all question that the business of marine insurance is a trade, and that all companies carrying on that business are traders, and are in all matters subjected to the exclusive jurisdiction of the Dominion parliament; but marine insurance policies invariably contain, and from the time of their first introduction did contain, provision for indemnity against loss by fire; and all text books upon the subject of insurance are careful to impress the doctrine that *Fire* insurance is but the offspring of marine insurance, that nothing was more natural, or more reasonably to have been expected, than the conversion of the security which had long afforded protection against injury to ships, occasioned by fire, to the purpose of yielding protection to property on land; that it was the calamitous fire in *London* in 1667, which hastened the application of this provision in marine policies to the protection of property by land; and that, as *Magens* says, there were few merchants in *London* in 1755 who were not insured, as well for their protection, as for the greater credit, both at home and abroad, which they enjoyed in their commercial transactions, from its being known that the great capitals lying in their houses and warehouses are thus secured from the flames; that the utility, both in a public and a private point of view, as an incentive to industry and enterprise, and the promotion and advancement of trade, is as great in contracts of fire insurance as in those of marine insurance, and indeed greater, by so much as the amount secured by contracts of insurance against fire largely exceeds that secured by those against marine risks; that contracts of fire insurance are governed by the same general principles as marine policies, and that the solution of any question that may arise upon an insurance against

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fire, will be found by a careful application of the doctrine of marine insurance; and that the law most reasonably presumed originally that persons who entered into contracts respecting fire insurance were acquainted with, and *had in their contemplation, the custom of merchants and legal rules affecting marine insurance, and intended that those new contracts should be construed and controlled by the same means.* No reason therefore exists for regarding the business of marine insurance to be a trade and a branch of commerce, and that of fire insurance not to be. The only difference in fact between them is, that policies against fire are almost invariably effected by companies formed for the express purpose of carrying on the business, so forming mercantile partnerships, having within themselves the desirable requisites of security, wealth and numbers, which afford them the means of defraying heavy losses, while marine insurance risks are usually taken by individuals.

That the Imperial Parliament had no doubt as to fire insurance companies being traders, and their business a trade, appears from the Joint Stock Companies Act, 7 and 8 *Vic.*, ch. 110, and the Companies Act of 1862, by the former of which every assurance company or association, whether for the purpose of insurance on lives, or against any contingency involving the duration of life, or against the risk of loss or damage *by fire*, or by storm, or by other casualty, or against the risk of loss or damage to ships at sea, or on voyage, or to their cargoes, or for granting or purchasing annuities on lives, are all alike brought under the Act, and are obliged to be registered under the Board of Trade; and by the latter of which all were alike obliged to furnish half-yearly to the Board of Trade a full statement of the liabilities and assets of the companies, and by which also the *commercial* privilege of limited liability was

extended to them. Neither do the members of the Mercantile Law Commission appointed in 1853, nor the legal and mercantile gentlemen to whom questions were submitted by that commission, appear to have had any doubt upon the point.

That commission was appointed to enquire and report how far the *mercantile law* in the different parts of the United Kingdom might be advantageously assimilated, and also whether any and what alterations and amendments should be made in the law of partnership, as regards the question of limited and unlimited responsibility of partners. The commissioners, in their first report, reported against any alterations being made in the mercantile law, which the majority approved of as it stood. Mr. Baron *Bramwell*, who was a commissioner, and in the minority, expressed his opinion, which accompanied the report, in favor of a change, wherein, among other things, he says:

No doubt we are not called upon to consider the general law of partnership, but it is important to refer to its condition, to ascertain how far the proposed change would be a change—how far a novelty to the public, and what present mischief it might prevent.

Now the law does at this present moment permit partnerships with limited liability; *many insurance companies*, though unchartered, are carried on on that principle, and I conceive *all other trades* or businesses theoretically may be so conducted.

Mr. *Slater*, who was also on the commission and in the minority, in an opinion of his, which also accompanied the report, says:

Under certain restrictions and regulations, *joint stock companies* for banking, not being banks of issues, *insurance companies* and companies of a decided public character, possessing a large subscribed capital, might be permitted to conduct their business upon a principle of limited liability, *because their establishment would be advantageous* to the *trading and commercial interests of the country*.

Among the questions submitted by the commission to leading legal and mercantile gentlemen, throughout the United Kingdom and the United States of *America*, was the following:—

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Would you make the limited responsibility of partners applicable to private or ordinary partnerships, as well as to joint stock companies? Would not this unduly interfere with the free competition of industry on the part of individual traders or small partnerships with unlimited liability? Would you apply it to partnerships for banking or insurance?

To this question Mr. *James Andrew Anderson*, then late manager of the Union Bank of *Scotland*, answered:

Banking and insurance companies are those of all others which, in my opinion, ought to enjoy no exemption from unlimited responsibility, not only on account of the magnitude, but of the multitude, of their dealings; *there are now fewer branches of business, which seems less to require the stimulus of limited liability than banking and insurance.*

Mr. *James Stewart*, barrister-at-law, answered:

I apprehend that a limited liability is already applied to partnerships for insurance, as in the policies of all the companies with which I am acquainted, the claim of the assured is limited to the capital stock of the company.

Mr. *William Valentine*, President of, and selected by, the Chamber of Commerce, *Belfast*, answered:

I would make limited responsibility applicable to private partnerships, as well as to public companies generally; *but, as banking and insurance partnerships have dealings with the general public* in districts remote from the localities in which they are established, and it being difficult to obtain correct information in such remote districts as to the extent of the capital and conditions of their liabilities, I would continue the unlimited responsibilities of such companies.

Mr. *Donala McLaren*, merchant, selected by the Chamber of Commerce, *Leith*, to answer the questions, answered:

As regards *insurance companies*, I believe that many of the companies in this country, by a special clause in their policies, limit their liability to the capital stock of the company, and in the city of *Hamburg* there are a great number of companies who have for a long period carried on extensive business, *both in marine and also in fire insurance*, the liability of each shareholder being limited to the amount of his subscription, and the system has been found most satisfactory to the shareholders as well as the public.

Mr. *John Slagg*, merchant, selected by the Chamber of Commerce, *Manchester*, answered as follows:

I do not think there should be any change in the present law, (that is the mercantile law), unless it be that all existing companies, such as "*railway and insurance companies*," should be brought into the same position *as other* "*mercantile firms.*"

And, finally, the author of the "Wealth of Nations," one hundred years ago, in his world accepted work, in book 5, ch. 1, under the title "of the public works and institutions which are necessary *for facilitating particular branches of commerce*," says:

The only trades which it seems possible for a joint stock company to carry on successfully without any exclusive privilege, are those of which all the operations are capable of being reduced to what is called a routine, or to such a uniformity or method as admits of little or no variation. Of this kind are:—1st. The banking trade; 2nd. The trade of insurance from fire, and from sea risk, and capture in the time of war; 3rd. The making and maintaining a navigable cut or canal; and 4th. The similar trade of bringing water for the supply of a great city.

The value, of the risk, *either from fire* or from loss by sea or capture, though it cannot perhaps be calculated very exactly, admits, however, of such gross estimation, as renders it in some degree reducable to strict rule and method; *the trade of insurance, therefore*, may be carried on by a joint stock company without any exclusive privilege.

When we regard the magnitude of the business of fire insurance, in which alone, in 1860, a sum exceeding one thousand one hundred and thirteen millions of pounds sterling was at risk in *Great Britain*, the annual premiums in respect of which amounted to nearly six millions sterling, a sum five times as great as that derived from marine insurance risks; and when we observe by the report of the Superintendent of Insurance appointed by the authority of the Dominion parliament, that there were in 1869:—

5 Canadian Fire Insurance Companies, having at risk in the Dominion of *Canada*	$ 59,340,916.00
And 12 British Companies, having at risk	115,222,003.00

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And 2 American Companies, having at risk.....	$ 13,796,890.00
Amounting in all to.....	$188,359,809.00
Which, in 1877, had increased to 13 Canadian Companies, having at risk..	$217,745,048.00
12 British Companies, having at risk....	184,304,318.00
3 American Companies, " "	18,293,315.00
Amounting in all to	$420,342,681.00

And when we consider that, but for the business of fire insurance, the trade and commerce of the world could never have attained the magnitude and success and exalted position which they have attained, we may well say, in my judgment, that the trade of fire insurance is, *par excellence*, the trade of trades, without which all other trades would have dwindled and decayed.

Against the position supported by the above vast concurrence of opinion, with the reason of the thing, we have been referred to some observations reported to have been made by Mr. Justice *Field*, in the Supreme Court of the *United States*, in *Paul* v. *Virginia* (1); but Mr. Justice *Field* himself explains, in the *Pensacola Telegraph Co.* v. *Western Telegraph Co.* (2), that all that was decided or intended to be decided in *Paul* v. *Virginia* was:—

> That the power of Congress to regulate commerce was not affected by the fact that such commerce was carried on by corporations, but that a contract of insurance, made by a corporation of one state upon property in another state, was not a transaction of *inter-state* commerce.

The parliament of Old *Canada*, which comprised the territory now constituting the Provinces of *Quebec* and *Ontario*, when applying to the Imperial parliament for the passage of the *B. N. A. Act*, was not ignorant that by the Civil Code of *Lower Canada*, which was enacted into law by an Act of the parliament of Old *Canada*,

(1) 8 Wallace 168. (2) 6 Otto, or 96 U. S. Rep. 21.

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the contract of fire insurance, when made for a premium by persons carrying on the business of insurers, is a commercial contract. It was therefore upon the same basis as marine insurance, which, by the same article of the Code, 2,470, is declared to be always a commercial contract, and this is given not as new, but as old law. Now, it is impossible to conceive that the *B. N. A Act* contemplated dealing with the same subject as a branch of trade and commerce in one province of the Dominion, and in another as not—in one as subject to the Dominion parliament, in another to the local legislature. I have shewn that in *England* fire insurance has always been regarded to be a trade equally as *marine* insurance, and to have emanated from the latter, and to be governed by the same principles and the same mercantile law as governed marine insurance. There can, therefore, in my judgment, be no doubt that in the contemplation of the *B. N. A. Act*, all insurance, whether of lives, or of real or personal property, and whether against risk by fire on land or on sea, or by storm on land or sea, or by any other casualty, must be equally regarded as branches of trade and commerce, and must all alike be under the jurisdiction of the Dominion parliament. There can, I think, be no doubt that the object of the *B. N. A. Act*, in placing "*all matters coming within*" the term "*regulation of trade and commerce*," under the exclusive control of the Dominion parliament, was to secure a perfect uniformity in all the provinces of the Dominion, as *to all matters whatsoever* affecting all trades, as an essential condition to the prosperous carrying on of trade, and to prevent all possible interference or intermeddling with any trade, which diverse local views entertained in the different provinces of the Dominion might be disposed to attempt, if the subject was placed under local jurisdiction, whether by prescribing a particular form of contract and prohibiting

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any other being used, or by prescribing a particular mode of execution of the contract, or by assuming to dictate in any other manner as to the manner in which, or the terms subject to which trading companies or other persons engaged in any particular trade, should be permitted to carry on such trade. The inconvenience which would attend the carrying on fire insurance business may well be conceived to be highly injurious to the interests of persons engaged in that trade, if they should be restrained from entering into contracts in the terms in which persons desirous of having their property insured may be willing to contract with them, and should be compelled to give up business, unless they should adopt a particular form of contract, executed in a particular manner, and subject to particular conditions, totally different in each province; and if they should be subjected to different penalties, forfeitures and consequences, in each, if the forms prescribed in each should not be followed; so, likewise, how inconvenient it would be if companies empowered, as many are, to carry on marine as well as fire insurance, should, as to one contract, be subject to the Dominion parliament, and, as to the other, to a local legislature. Now, that the Act under consideration, which assumes to prohibit all fire insurance companies, whether composed of foreigners or of British subjects, and whether incorporated by foreign states, or by the Imperial Parliament, from carrying on their trade in the manner authorized by their respective charters of incorporation, and from entering into such contracts as persons willing to deal with them may agree upon, or from entering into any contract in the way of their trade, subject to any other conditions, or in any other form than prescribed by the statute, and that in default of adopting the prescribed form, the parties contracting with them, although violating all the conditions upon

which alone the companies entered into the contracts, shall recover against the companies, notwithstanding that, in the contracts in fact entered into, they had consented that, in the event which had happened, the companies should incur no liability—that such an Act is one which assumes to regulate and control, and in a very marked manner, to interfere with the trade of fire insurance, does not, in my judgment, admit of a doubt. Such an Act may safely, with greater propriety, be said to regulate the trade of fire insurance, and so to relate to a matter coming within the term "regulation of trade and commerce," than the 4th and 17th sections of the Statute of Frauds. That the 17th section of that statute effects a regulation of trade and commerce, will not, I presume, be doubted; and the Imperial Parliament has furnished us with proof that, in the estimation of that power, to which the *B. N. A. Act* owes its existence, the 4th section does the same, for by the 19th and 20th *Vic.*, ch. 97, intituled "An Act to amend the laws of *England* and *Ireland affecting trade and commerce*;" after reciting that—

> Whereas inconvenience is felt by persons engaged in trade by reason of the laws of *England* and *Ireland* being, in some particulars, different from those of *Scotland* in matters of common occurrence in the course of such trade, and with a view to remedy such inconvenience, it is expedient to amend the laws of *England* and *Ireland* as hereinafter mentioned;

It was enacted among other things:—

> Sec. 3. That no special promise to be made by any person after the passing of this Act to answer to the debt, default or miscarriage of another person, being in writing and signed by the person to be charged therewith, or some other person by him thereunto lawfully authorized, shall be deemed invalid to support an action, suit or other proceeding to charge the person by whom such promise shall have been made, by reason only that the consideration for such promise does not appear in writing or by necessary inference from a written document;

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and by the 16th section, the title given to the Act in citing it is: "The Mercantile Law Amendment Act of 1856."

Now, if this amendment of the 4th section of the Statute of Frauds so affects trade and commerce as to find its proper place in a "Mercantile Law Amendment Act," can there be a doubt that the *Ontario* Fire Insurance Act of 1876, assuming, as it does, to prescribe the only manner in which, and the terms upon which, the trade of fire insurance may be carried on in *Ontario*, is an Act which assumes to introduce a new regulation of trade and commerce into the mercantile law of *Ontario*, and so usurps the jurisdiction of the Dominion parliament, in which, for the purpose of preserving uniformity in matters of trade throughout all the provinces of the Dominion, the exclusive power to enact all laws in any manner affecting trade and commerce, is vested.

The mischief of this legislation lies deeper than appears upon the surface. The germ of that mischief appears in the judgments of some of the learned judges of the Court of Appeal in *Ontario*, and was more fully developed in the argument of the Attorney-General of *Ontario*, in his argument before us in *Johnston* v. *Western Assurance Co.*; the logical result of which, if well-founded, would be, in my judgment, to undermine the fabric which the *B. N. A. Act* designed to erect.

In the *Citizens' Assurance Company*, appellants, v. *Parsons*, respondent, one of the learned judges of the Court of Appeal in *Ontario* makes use of the following language: "The Parliament of the Dominion has no power to authorize a Company;" that is, a 'Fire Insurance Company,' of its creation, "to make contracts in *Ontario*, except such as the legislature of that province may choose to sanction;" they, that is the legislature of the province, "*may*, if they think proper, *exclude such corporation from entering into contracts of*

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Insurance here altogether, or they may exact any security which they may deem reasonable for the performance of its contracts."

"The artificial being created by the charter is authorized to make such contracts as come within its designated purposes; but the legislature granting the charter can give no privileges to be exercised within any of the provinces, except with their assent and recognition, and it follows, as a matter course, *that these may be granted upon such terms and conditions as the provinces think fit to impose.*

"Within these respective limits, each legislature is supreme and free from any control by the other. The Dominion parliament has no more authority to regulate contracts of this nature," that is to say, contracts of Fire Insurance, "within any of the provinces, than has the legislature of the province to attempt to regulate promissory notes or bills of exchange. *The terms upon which insurance business is to be carried on within the province is a matter coming exclusively within the powers of the local legislatures*, and any legislation on the subject by the Dominion would be *ultra vires*. The local legislature has the exclusive discretion as to the conditions under which it," that is, the business of insurance, "shall be carried on within the confines of this province."

If this be law, it must be admitted that the imputation charged against the Dominion parliament—that they have encroached upon the jurisdiction of the local legislatures—is well founded; in fact, it may be admitted that in every session of the parliament's existence it has passed Acts which, if the above be law, would have to be pronounced to be *ultra vires*, to the extent of invalidating from 30 to 40 Acts. If the local legislature had jurisdiction to pass the Act under consideration, it is obvious that it has the like jurisdiction over all

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other trades, so that what is asserted on behalf of the local legislatures is the *exclusive right to legislate in such a manner as to regulate and control all trades*, and to exclude, "*if they think proper*," *all persons and corporations, as well foreign as domestic, from carrying on their respective trades within the province of Ontario.* Now I freely admit that the local legislatures have the right so to legislate, if they have the power to pass the Act under consideration, but I add that they have only the like power in each case; that they have no more power or jurisdiction to pass the one species of Act than the other; that they have no more power or jurisdiction to pass an Act to regulate or control the terms under which a trade may be carried on, than they have to prohibit it altogether from being carried on within the limits of the province. The former power is indeed but the exercise of, and is comprehended in, the latter, for an Act to control and regulate a trade is, in effect, to prohibit the carrying on of the trade *at all, otherwise* than upon and subject to the prescribed regulations; but the right to exclude, for example, foreign traders, be they corporations or individuals, from carrying on their trade in a country, can only be asserted in virtue of, and as incident to, Supreme National Sovereignty. An Act of exclusion, equally with an Act to control and regulate the manner in which a trade shall be carried on, can only be vindicated upon the principles governing what is called the *Comity of Nations*, the administration of which belongs exclusively to *Supreme National Sovereignty*. Now the provinces of the Dominion of *Canada*, by the wise precaution of the founders of our constitution, are not invested with any attribute of National Sovereignty. The framers of our constitution, having before their eyes the experience of the *United States of America*, have taken care that the *B. N. A. Act* should leave no doubt upon the subject.

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Within this Dominion the right of exercise of National Sovereignty is vested solely in Her Majesty, the Supreme Sovereign Head of the State, and in the Parliament of which Her Majesty is an integral part; these powers are, within this Dominion, the sole administrators and guardians of the *Comity of Nations*. To prevent all possibility of the local legislatures creating any difficulties embarrassing to the Dominion Government, by presuming to interfere in any matter affecting trade and commerce, and by so doing violating, it might be, the Comity of Nations, all matters coming within those subjects are placed under the exclusive jurisdiction of the Dominion parliament; that the Act in question does usurp the jurisdiction of the Dominion parliament, I must say I entertain no doubt. The logical result of a contrary decision would afford just grounds to despair of the stability of the Dominion. The object of the *B. N. A. Act* was to lay in the Dominion Constitution the foundations of a nation, and not to give to provinces carved out of, and subordinated to, the Dominion, anything of the nature of a national or *quasi* national existence.

True it may be, that the Acts of the local legislatures affecting the particularly enumerated subjects placed by the *B. N. A. Act* under their exclusive control, if not disallowed by the Dominion Government, are supreme in the sense that they cannot be called in question in any court, but this supremacy is attributable solely to the authority of the *B. N. A. Act*, which has placed those subjects under the exclusive control of the local legislatures, and is not, in any respect, enjoyed as an incident to national sovereignty.

To enjoy the supremacy so conferred by the *B. N. A. Act*, these local legislatures must be careful to confine the assumption of exercise of the powers so conferred upon them, to the particular subjects expressly placed

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under their jurisdiction, and not to encroach upon subjects which, being of national importance, are for that reason placed under the exclusive control of the parliament.

How the species of legislation which appears upon the statute books, upon the subject of insurance and insurance companies, came to be recognized (by which it would seem as if the parliament and the legislatures had been attempting to make among themselves a partition of jurisdiction, for which the *B. N. A. Act* gives no warrant whatever), I confess appears to me to be very strange, for it surely cannot admit of a doubt that *no act* of the Dominion parliament can give to the local legislatures jurisdiction over any subject which, by the *B. N. A. Act*, is placed exclusively under the control of parliament, and as the parliament cannot by Act or acquiescence transfer to the local legislatures any subject placed by the *B. N. A. Act* under the exclusive control of parliament, so neither can it take from the local legislatures any subject placed by the same authority under *their* exclusive control. There is nothing in the *B. N. A. Act* to justify the conclusion that the subject of insurance is placed under the concurrent jurisdiction of the local legislatures, and of the parliament; if it were, the latter could itself apply the necessary remedy by an Act controlling the legislature of the former. The subject then, not being one of concurrent jurisdiction, must be under the *exclusive control*, either of the parliament or of local legislatures; there can be no partition of the jurisdiction.

It is impossible to estimate the embarrassments which will be occasioned by the species of legislation which has been adopted, if not promptly checked and corrected. The only way of correcting the evil is to determine by an irreversible judicial decision to which authority the exclusive jurisdiction belongs, namely,

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whether to the parliament or to the local legislatures. In my judgment, it belongs, without doubt, to the parliament.

The arrival, by the majority of this court, at a contrary conclusion, will, I fear, justly expose their judgment to the imputation that it will be impossible, as I confess I think it will be impossible, to reconcile that judgment with the principle upon which *Severn* v. the *Queen*, and the *City of Fredericton* v. the *Queen*, have been decided; and that it will have the effect of unsettling, rather than of settling, the law upon a most grave constitutional question.

Appeals dismissed with costs.

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*Feb'y. 24.
*May 9.

GEORGE A. CHAPMAN.....APPELLANT;

AND

CHARLES LARIN.....RESPONDENT.

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

Contract, terms of delivery—Reasonable time—Damages—Arts. 1067, 1073, 1544, *C. C. L. C.*

On the 7th May, 1874, the appellant sold to the respondent five hundred tons of hay. The writing, which was signed by the appellant alone, is in following terms: "Sold to *G. A. C.* five hundred tons of timothy hay of best quality, at the price of $21 per ton f. o. b. propellers in canal, *Montreal*, at such times and in such quantities as the said *G. A. C.* shall order. The said hay to be perfectly sound and dry when delivered on board, and weight tested if required. The same to be paid for on delivery of each lot by order or draft on self, at

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

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Bank of Montreal, the same to be consigned to order of Dominion Bank, *Toronto*."

In execution of this contract, the appellant delivered one hundred and forty-seven tons and thirty-three pounds of hay, after which the respondent refused to receive any more.

The appellant having several times notified the respondent, both verbally and in writing, by formal protest on the 28th of July, 1874, requested him to take delivery of the remaining 354 tons of hay.

On the 11th of November following, the appellant brought an action of damages for breach of contract, by which he claimed $3,417.77, to wit, $2,471 difference between the actual value of the hay at the date of the protest and the contract price, and $943.77 for extra expenses which the appellant incurred, owing to the refusal of the respondent to fulfil his contract.

Held,—That such a contract was to be executed within a reasonable time, and that, from the evidence of the usages of trade, the delivery, under the circumstances, was to be made before the new crop of hay, and that the respondent, being in default to receive the hay when required, was bound to pay the damages which the appellant had sustained, to wit, the difference at the place of delivery between the value when the acceptance was refused, and the contract and other necessary expenses, the amount of which, being a matter of evidence, is properly within the province of the court below to determine (1).

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

Action of damages for breach of the following contract:

"May 7th, 1874.

"Sold to *G. A. Chapman*, five hundred tons of timothy hay of best quality, at the price of twenty-one dollars per ton, f. o. b. propellers in canal, *Montreal*, at such times and in such places as the said *G. A. Chapman* shall order. The said hay to be perfectly sound and dry when delivered on board, and weight tested if required. The same to be paid for on delivery of each lot, by order or

(1) C. C. L. C., Arts. 1,067, 1,544, 1,073.

draft on self at Bank of Montreal, and same to be consigned to order of Dominion Bank, *Toronto*.

"C. LARIN."

The respondent alleged by his declaration, that on the 7th May, 1874, he sold to appellant 500 tons of timothy hay, at the rate of $21 per ton; which was to be delivered f. o. b.(which he interprets to mean, "taken from on board") propellers in the *Lachine* Canal at *Montreal*, at such time and in such quantity as the appellant should order, to be paid for on delivery of each lot; the whole in accordance with the terms of a written agreement prepared by appellant and signed by respondent.

The respondent further alleged, that at the date of that contract, hay was increasing in value; and that the hay in question was bought by appellant on speculation. That it was then and there understood and agreed between the parties, that the delivery of the hay would be ordered, and the hay paid for, within a reasonable delay, and before the new crops. And that by the terms of the agreement, the nature of the contract, the *pourparlers* which took place at the time of the said contract, and the custom of trade, the execution of said contract on the part of both parties was to take place within a reasonable delay, and before the depreciation in the price of hay, which would necessarily take place after the new crops.

That accordingly the respondent, a few days after the date of the contract, delivered to appellant 146 tons of the said hay, for which appellant paid respondent according to the agreement.

That since the delivery of the said quantity, appellant had neglected and refused to order any more hay, or to receive the balance of the quantity mentioned in the agreement; although the respondent had, at different times, tendered the said hay to the appellant; and always declared himself ready, and was ready to

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deliver it; and had in fact the said hay, at different times after the notification to appellant, and more particularly in the months of July and August then last, ready to be delivered in the *Lachine* Canal, as agreed

That about the 30th July then last, the respondent notified, and protested in writing, appellant, that he had the balance of 354 tons of hay ready for delivery; that it had been stored ready for that purpose; that he was obliged to remove it for storage to other places, which would entail expense and trouble; and that he would hold appellant liable for all loss, damage and expenses which would be incurred with the hay, on account of appellant not receiving the same. And he protested against keeping the hay any longer; of which so called protest he produces a copy.

But that appellant still neglected and refused to order and receive the remainder of the hay, and to pay respondent the value of the hay at the contract price, viz., $7,266.

That since that period hay had only averaged from $12 to $14 per ton, and the respondent had had the balance of the hay resold at an average of $14 per ton. That he had to incur extra expense for the cartage, storage, weighing and selling of the hay, and thereby had sustained damage to the extent of $3,414.77; that is, $943.77 for expenses in labor, cartage, storage, weighing and selling the hay, and $2,471, difference between the actual value at $14 a ton, and the price at which it was sold.

That appellant had often notified respondent that he would not receive the balance of the hay.

Wherefore he prayed for a condemnation against the appellant for the above two sums, amounting together to $3,414.77.

The appellant pleaded the general issue, and there-

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upon the parties proceeded to evidence, which is reviewed in the judgments.

The Superior Court, Mr. Justice *Rainville* presiding, rendered judgment, maintaining the respondent's action to the extent of $2,970.87; being the difference between $14 per ton, and the price agreed upon; and $500, for expenses; but this judgment was reversed by the Court of Review, and the action was unanimously dismissed with costs. Thereupon the respondent appealed to the Court of Queen's Bench: and the judgment of the Court of Review was reversed and the judgment of Mr. Justice *Rainville*, sitting in the Superior Court, was confirmed in its material points.

Mr. *Kennedy* for appellant:—

The contract is within that class of cases where the consideration for the promise is contingent; that is, it consists in the doing of something by the promisor which he need not do unless he chooses. The appellant need not order unless he chose, and until the order is given no binding contract was made: *Great Northern R. W. Co.* v. *Withan* (1); *Burton* v. *Great Northern R. W. Co.* (2); *Benjamin* on Sales (3).

The respondent had the right before the appellant ordered to notify the appellant, that unless he ordered within a reasonable time he would rescind the contract.

The contract must be construed so as to give the literal meaning to every sentence; and although the word *sold* is used in the beginning of the contract, its use is consistent with the fact of it being a conditional sale, that is contingent on the appellant's order. To construe it otherwise would have the effect of eliminating the words, "at such times and in such quantities as the said *G. A. Chapman* shall order," for a contract without these words would imply a delivery within

(1) L. R. 9 C. P. 16. (2) L. R. 9 Exch. 507.

(3) P. 55.

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a reasonable time: *Ellis* v. *Thompson* (1), *Leak* on Contracts (2).

No parol evidence can be given to alter or vary a written contract; and importing into the contract in question that delivery is to be within a reasonable time is an alteration and variation, as the contract states that the delivery shall be as the appellant "shall order," thereby negativing the implied time of delivery: Civil Code, article 1234; *Leak* on Contracts (3), *Greenleaf* on Evidence (4).

When the contract itself is plain, no usage or custom can be proved to vary the terms of delivery. Here the contract is plain that the time of delivery should be at the option of the appellant; *Taylor* on Evidence (5), *Greenleaf* on Evidence (6); *Lewis* v. *Marshal* (7), particularly the remarks of *Tindal*, C. J., at p. 745: *Bowes* v. *Shand* (8), and the remarks of Lord *Hatherley*, at p. 473: "If the contract bears a plain natural sense and meaning, nothing should make us deviate from that plain natural sense and meaning but the strongest evidence, not the opinion of this or that witness, but of a custom of the trade or business which forms the subject matter of the contract." And of Lord *Gordon*, at p. 486: "We must construe the contract itself according to its reasonable and literal sense; and again: "the safest rule in all these cases is to allow the parties who were interested in making the contract to explain themselves."

No particular custom as to this trade was proved, the witnesses themselves not agreeing, and the evidence being simply an opinion; and no evidence was given of any case where this custom was followed. As to evidence necessary to establish a custom, see *Willans* v.

(1) 3 M. & W. 445.
(2) P. 836.
(3) P. 176.
(4) Vol. 1 p. 321 and p. 328.
(5) Sec. 1058.
(6) 1st vol. p. 344, p. 347 and note at p. 350.
(7) 7 M. & G. 744.
(8) L. R. 2 App. Cases 455.

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Ayers (1), *Bowes* v. *Shand* (2), *Taylor* on Evidence (3), *Addison* on Contracts (4).

The fact of the contract being in favour of the appellant, and pressing hard on the respondent, is no reason why its literal meaning should not govern. The Court cannot supervene to relieve a person from an improvident contract: *Addison* on Contracts, (5); *Cheale* v. *Kennard* (6).

By the evidence it appears that the appellant drew the contract as it is to avoid the probable want of storage that might occur, and that did occur. That it was owing to the respondent's acts that the appellants had not room to store the hay, for it appears first that the steamship *York* brought up 88 tons of damaged hay on the 21st May, 1874. After this appellant received on account of the contract, 147 tons of good hay, and on the 6th June, the respondent's agent brought to the appellant, and got him to store for him 191 tons, on the open end of a wharf, by covering same with tarpaulins, requesting him at the same time to sell this 191 tons first, and this hay was not sold until October, 1874.

The appellant therefore contends that if the evidence can be looked at to construe the contract, it shews that the intention of the parties was, that the hay should be received in such quantities as would enable the appellant to store it, and the respondent, by his own act, rendered it impossible to have the contract carried out according to the intention expressed when it was made.

Mr. *David* for respondent:

The appellant contends, that the hay having to be delivered *at such times and in such quantities as the said G. A. Chapman shall order*, the execution of the contract was merely facultative on his part; so that, according

(1) L. R. 3 App. Cases 133.
(2) L. R. 2 App. Cases 455.
(3) Sec. 1076, also sec. 1078.
(4) P. 166 7th ed.
(5) P. 12, 7th ed.
(6) 3 DeG. & J. 27.

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to that pretention, it was in his power to hold continually and always the respondent bound by the contract without being so himself. The appellant at any day, at any time of the year, might order the respondent to deliver to him one ton or one hundred tons of hay and the respondent ought to be ready to deliver them. It might also please him to sleep upon his contract a year and the respondent should have remained under the obligation of keeping in a safe place, always ready to be delivered, the balance of the hay.

The contract was signed on the 7th day of May, eleven or twelve weeks before the crop of the new hay. At that time hay had gone up in *Montreal* to the extraordinary price of $21 to $22 per ton; in *Toronto* it was selling at $34 and $40 per ton. The time was good for speculation. The appellant, who is a merchant, goes to *Montreal*, or names a representative there, and buys the hay in this case mentioned.

It is evident that both parties had the intention of executing the contract in a reasonable time: the respondent to get the price of sale, the appellant to realize a benefit the soonest possible, and with more certainty before the new hay.

The learned counsel referred to arts. 1013, 1014 and 1016, 1067, 1544, 1073, C. C. L C.

Mr. *Kennedy* in reply.

RITCHIE, C J.:—

The plaintiff complains in this case, that he sold to defendant 500 tons of hay under a contract, of which the following is a copy, signed by the plaintiff, (respondent) and affirmed and acted on by appellant. [His Lordship read the contract] That a few days after the date of that contract, plaintiff delivered to defendant 146 tons, for which defendant paid as per agreement; that since then defendant has neglected and refused to

order any more, or to receive the balance of the 500 tons, although plaintiff has offered and tendered to defendant, particularly on the 28th July, '74, the 354 tons; that defendant notified plaintiff that he would not receive the balance of the hay; that the hay having fallen in value, plaintiff re-sold balance, and claims the difference in price and expenses.

If the contract had been to supply defendant with whatever hay he might from time to time order at so much per ton, defendant would not be bound to give orders (1). But that is not this case. This was a contract for the sale of a specific quantity (500 tons) of hay, and though the delivery as to times and quantities was left to be fixed by the purchaser, this gave him no right to repudiate the contract in whole or in part, but he was bound to order delivery at reasonable times and in reasonable quantities, and if there was any well known usage of the trade in regard to the articles sold, in respect either to times for delivery or quantities to be delivered, it would be a criterion by which the question of reasonable times or quantities might be decided; in other words, if not conclusive, cogent evidence of what would be reasonable times and quantities. If the vendee unreasonably witheld his orders, the vendor discharged his duty by a tender or offer of performance, that is, of delivering at the place specified, at or after a reasonable time had elapsed, thereby giving the vendee an opportunity of accepting a complete performance. The buyer by this contract undertook to order the hay which he had purchased, and as no time was fixed at which he was to do this, the law implied he was to do it within a reasonable time under the

(1) See *Great Northern Ry. Co.* v. *Withan*, L. R. 9 C. P. 16; *Burton* v. *Great Northern Ry. Co*, L. R. 9 Exch. 507.

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circumstances, and the dictum of the court in *Ford* v. *Cotesworth* (1) bears directly on this case:

> Whenever a party to a contract undertakes to do some particular act, the performance of which depends entirely on himself, so that he may choose his own mode of fulfilling his undertaking, and the contract is silent as to time, the law implies a contract to do it within a reasonable time under the circumstances.

Leake (2) says:

> Where there is no time fixed by the contract, the law in general implies that the performance must be at a reasonable time, having regard to the nature and circumstances of the performance (3).

In *Ellis* v. *Thompson* (4) *Alderson*, B., says that:

> The correct mode of ascertaining what reasonable time is in such a case is by placing the Court and Jury in the same situation as the contracting parties themselves were in at the time they made the contract; that is to say, by placing before the jury all those circumstances which were known to both parties at the time the contract was made and under which the contract took place. By so doing you enable the Court and Jury to form a safer conclusion as to what is the reasonable time which the law implies and within which the contract is to be performed.

Leake on contracts (5):

> Under a written contract for the sale of goods appointing the time for payment, but silent as to the time for delivery; and, therefore, presumptively importing delivery within a reasonable time upon credit, evidence was held admissible of a usage in the trade, that the delivery should be made concurrently with the payment and could not be demanded before (6).

And I can discover nothing in the law of the Province of *Quebec* at variance with these principles, which, after all, are only the principles of common law and common justice. In this case the evidence shows, I think, conclusively that a reasonable time for giving an order or orders had elapsed on the 28th of July, when the time

(1) L. R. 4 Q. B. 133.
(2) P. 836.
(3) Co. Lit. 56, b.; see per Rolfe, B., in *Startup* v. *Macdonald*, 6 M. & G. 610.
(4) 3 M. & W. 445.
(5) P. 200.
(6) *Field* v. *Lelean*, 6 H. & N. 617, distinguishing or over-ruling *Spartali* v. *Benecke*, 10 C. B. 212.

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was about arriving for the crop of new hay to come into the market, and defendant, having then refused to order or receive the balance of the 500 tons, was, in my opinion, guilty of a breach of his contract, and rendered himself liable to pay to the plaintiff the difference between the then market value of the hay and the price agreed on. The measure of damage is the difference between the contract price and the market price, or value on the day fixed for the delivery, or in this case the day on which the hay was tendered to the vendee and should have been received by him, that being the time when the contract was broken, thus leaving plaintiff in the same situation as if defendant had fulfilled his contract. The vendor is not bound to re-sell, though he may, if he thinks proper so to do, and charge the vendee with the difference between the contract price and that realized at the sale, but it is requisite, in such a case, to show the property was sold for a fair price and within a reasonable time after the breach of the contract.

In this case the plaintiff appears to have used all reasonable efforts to dispose of this hay to the best advantage, and we can easily understand the difficulties he must have experienced in the face of a falling market and the competition of the new hay crop; and I cannot say that the amount the court below has allowed him for expenses necessary and incident to the disposal of so large a quantity of an article so bulky is not justified by the evidence.

STRONG, J., concurred.

FOURNIER, J. :—

L'action de l'intimé était en dommages pour inexécution de contrat et fondée sur l'écrit cité plus haut.

Après avoir accepté en exécution de ce contrat une certaine quantité de foin, l'appelant refusa d'en recevoir davantage, prétendant que par les termes de son con-

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trat il n'y a pas de temps fixé pour la livraison, et de plus qu'il avait la faculté de n'en ordonner que ce qu'il lui plairait d'accepter. Cette prétention est formulée en ces termes dans sa défense :

As to the first point, the Respondent contends that the contract, as contained in the memorandum already printed, was perfectly intelligible and clear in itself. No time was fixed by that contract, within which the Respondent was to be obliged to receive the hay. The memorandum states in express terms, that the hay is to be delivered free on board propellers at *Montreal*, at such times and in such quantities as the said *G. A. Chapman* shall order.

There is not the slightest limitation of the discretion of the Respondent, as to when he shall order, and what he will receive ; that is left entirely to him. It is the Appellant who takes the risk of the orders being given at times and for quantities inconvenient to him. The Respondent had the right of making these times and quantities to suit his convenience, in entire disregard of the wishes of the Appellant.

La Cour Supérieure a considéré le contrat comme prouvé et a condamné le défendeur (appelant) à payer à l'intimé une somme consistant dans la différence du prix du foin, suivant le prix courant, à l'époque où le défendeur a refusé de continuer l'exécution de son contrat, avec la différence du prix convenu par l'écrit ci-haut cité, plus une somme de $500, pour frais de transport, tonnage, pesage et vente du foin en question.

Ce jugement soumis à la Cour Supérieure, siégeant en révision, a été cassé pour deux raisons principales.

La première que l'on trouve énoncée dans ce jugement, c'est que dans le cas actuel, le demandeur (intimé) avant de pouvoir revendre le foin qui faisait l'objet du contrat intervenu entre les parties, aurait dû notifier le défendeur (appelant) de son droit de demander la rescision du contrat. Cette proposition est énoncée de la manière suivante :

Plaintiff does not even state in his declaration that he notified defendant of any *claim of rescision* of contract, before re-selling the hay referred to ; and that in fact plaintiff did not *notify*

defendant of any rescision of contract, or of any proposed re-sale of said hay.

La 2ème. C'est que dans le cas particulier dont il s'agit, la loi ne permettait pas au demandeur de vendre le foin en question à vente privée,—mais qu'au contraire elle l'obligeait à le faire vendre par encan public, dans une seule vente (*at one time*), après avis au défendeur ; la vente à l'encan étant la seule manière légale de déterminer le prix courant qui devait servir de base pour l'appréciation des dommages.

Ces deux propositions sont-elles fondées en droit ? Le demandeur était-il bien obligé, après avoir mis le défendeur en demeure d'accepter le foin, de demander la rescision du contrat avant de pouvoir réclamer ses dommages ? Le contrat ne se trouvait-il pas plutôt nul de plein droit par suite du refus du défendeur d'en continuer l'exécution ?

Il est à remarquer que la vente dont il s'agit est une vente au comptant, le prix convenu est stipulé payable à la livraison de chaque lot. Après mise en demeure suffisante, (et celle prouvée l'est certainement) le défendeur était tenu d'enlever le foin qui lui était offert ; sur son refus ou négligence de le faire et de payer le prix convenu, la vente se trouvait résolue de plein droit.

Dan la vente de choses mobilières, l'acheteur est tenu de les enlever au temps et au lieu où ils sont livrables. [Si le prix n'en a pas été payé, la résolution de la vente a lieu de plein droit en faveur du vendeur, sans qu'il soit besoin d'une poursuite, après l'expiration du terme convenu pour l'enlèvement, et s'il n'y a pas de stipulation à cet égard, après que l'acheteur a été mis en demeure en la manière portée au titre des Obligations ;] sans préjudice au droit du vendeur de réclamer les dommages et intérêts (1).

Pour faire l'application de cet article au cas actuel, il ne reste qu'à savoir si la mise en demeure a été suffisante et conforme à l'art. 1067. Indépendamment des lettres et télégrammes concernant la livraison du foin, il y a le protêt formel en date du 28 juillet 1874, décla-

(1) C. C. L. C. Art. 1544.

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rant que le demandeur est prêt à livrer la quantité de foin nécessaire pour parfaire le contrat, sommant le défendeur de l'accepter, avec de plus déclaration qu'il sera responsable de tous les dommages que son refus pourrait causer. Il est en preuve que le protêt est parvenu au défendeur. Le contrat en question étant par écrit, ce protêt conformément à l'article 1067 devait être par écrit. Ainsi le demandeur a rempli les formalités que la loi exigeait de lui pour mettre son adversaire en demeure. Le refus de celui-ci de se présenter pour accepter et payer le foin a eu l'effet, suivant l'article 1544, d'opérer de plein droit la résolution de la vente en question et de donner ouverture à la réclamation pour dommages. Rien dans la loi n'obligeait le demandeur à faire connaître son intention de faire résilier une vente que la loi déclarait résolue de plein droit, sans formalité quelconque. Pour ces raisons le premier motif donné par la Cour de Révision me paraît tout-à-fait erroné.

Il en est de même du 2ème qui contient l'énonciation d'un principe que l'on ne trouve nulle part. La loi n'a pas imposé l'obligation de faire, dans un cas comme celui dont il s'agit, une vente à l'encan pour servir de base à l'appréciation des dommages. A part de l'énonciation du principe général contenu dans l'article 1073 " que les dommages sont, en général, le montant de la perte subie et du gain dont on est privé," la loi laisse à la discrétion des tribunaux les moyens d'apprécier les dommages selon les circonstances. Elle ne leur prescrit point de règle absolue à ce sujet, et l'on ne trouve nulle part celle qui a été invoquée par la Cour de Révision. Au contraire, d'après les autorités, il est reconnu qu'il y a absence de règles positives, à part des principes généraux.

Duranton dit (1):

(1) Vol. 10 p. 464, No. 480.

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Il n'est pas de matière plus abstraite que celle relative aux dommages-intérêts ; aussi la loi n'a-t-elle pu tracer que des principes généraux, en s'en remettant à la sagesse des tribunaux pour leur application, selon les circonstances et les faits de la cause.

Fournier, J.

La Cour de Révision n'était certainement pas fondée en droit à déclarer qu'il y avait nécessité de faire une vente à l'encan.

Cette Cour n'a attaché aucune importance au principal moyen de défense de l'appelant, savoir, que le contrat ne contenant point un délai dans lequel il devait recevoir son exécution, était par cela même inexécutable, et qu'il n'avait en conséquence contracté aucun engagement. Elle semble au contraire, avoir répudié cette prétention et avoir été d'accord avec la Cour Supérieure et la Cour du Banc de la Reine, pour reconnaître que dans un cas semblable, "il y a tacitement un terme convenu, qui consiste dans le temps nécessaire pour son exécution" puisqu'elle prétend que le demandeur aurait dû demander la résiliation du contrat. C'est sans doute admettre qu'il a existé, et conséquemment, qu'il y avait un terme tacitement convenu qui devait être déterminé par les circonstances. Cette proposition de droit ne me paraît guère susceptible de doute. Elle a été traitée avec tant de développement par Sir *A. A. Dorion*, J. C., dans son opinion écrite sur cette cause, que je crois devoir me borner à exprimer mon concours dans la doctrine qu'il a si complètement établie par les nombreuses autorités qu'il a citées.

Si je n'entre pas dans la considération des questions de faits de la cause, c'est parce que j'adopte entièrement le jugement de la Cour du Banc de la Reine, qui, suivant moi, doit être confirmé et l'appel renvoyé avec dépens.

HENRY, J.:—

I concur in the view that the appeal in this case should be dismissed.

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The decision of the Court of Review I consider founded on incorrect statements of law. It is properly stated to have been a commercial case, and as such, on refusal of the appellant, he, if otherwise liable, is required by law to make good to the respondent such loss as may result from the non-acceptance of the hay in question; and the rule by which such loss is measured is the difference at the place of delivery between its value when the acceptance was refused, and the contract price. That difference may be shown in a variety of ways. The most usual one is by means of a sale by public auction at the place of delivery, but in the case of a perishable article, if not then in a place of safety, it might be removed for protection and a market to any convenient and reasonable distance. The sale was not by public auction, and it need not have been, but was conducted in a manner, I think, more for the interests of the appellant. It is not even pretended that the most, under the circumstances, was not realized for it, and for which the appellant has got the benefit. The difference in value sufficient to sustain the respondent's case, at the canal, and where it was sold, has been satisfactorily shown. The respondent is entitled also to be reimbursed his outlay for the expenses of removal and sale, including storage and insurance, for a reasonable time. There is no charge made for the latter, but for the other legitimate charges, for labour and cartage from the canal, storage, expenses of sale, weighing and loss of weight, the respondent is entitled to recover. He alleges his expenditure for those purposes amounted to $843.77, besides $120 for other carting not explained. The learned Judge who tried the cause allowed him $500 for those expenditures, which I think, under the evidence, reasonable.

The appellant contends, however, that he was not bound to take the hay when offered, and therefore not liable to damages for refusing it.

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The contract provides for the delivery "at such times and in such quantities as the defendant (appellant) should require," but contains no provision between what dates the appellant shall exercise that right. The agreement is for a sale of five hundred tons of hay at the rate of twenty-one dollars per ton, and provides for the place and manner of delivery, to be paid for on delivery of each lot. The contention of the appellant is, that as no time was prescribed for the delivery of the whole, that he could ask for the delivery at any time or times, or that in fact it depended on his option to decline altogether any part of the number of tons sold. When the parties to a contract omit to limit their respective liabilities under it as to time, the law wisely provides that they shall end at the end of a reasonable time corresponding to the nature of the several liabilities. The law in such cases enjoins each party to perform his contract within a reasonable time. The appellant, therefore, had that reasonable time to provide the necessary means to accept, according to the contract, the hay purchased. He was to provide propellers, on board of which at different times and various quantities, as he should order, he was to take delivery of the hay, and the respondent, getting reasonable notice, was bound to deliver the same at those different times and various quantities, but with this proviso, that his requisitions to the respondent were made within a reasonable time. It would be indeed a strange law that under such a contract one party should be bound to have the hay on hand for months or years, and should suffer natural deterioration and loss of weight, and perhaps after the expiration of a year be obliged possibly to supply wholly different hay, keep it on hand and then possibly be told the appellant was not even then ready to receive it, and if the law put no limit to the liability of the respond-

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ent, when would it end, unless his insolvency put him beyond the power of the appellant. But suppose the price of hay advanced greatly, and it became desirable for the appellant to obtain the delivery of the hay he must have made the necessary requisitions to the respondent for it, as the law puts it, within a reasonable time, otherwise he could recover no damages for the non-delivery. Each must act within a reasonable time, or no cause of action arises to him who is negligent because of his own laches. The true legal construction of the contract in question may be thus stated: The respondent bargains and sells to the appellant 500 tons of hay not immediately to be delivered, but the appellant virtually says to respondent: "You keep possession of the hay until I, within a reasonable time, advertise to you my desire that at such times and in such quantities as I may engage propellors to take it on board, when you shall deliver it free on board for me." We would have to say, under the circumstances, what that reasonable time should be, if the appellant had raised such an issue, but I do not think he has. The respondent, in his declaration, alleges that, by legal construction, the agreement was to be performed within a reasonable time, but the appellant does not, in his plea, take issue upon the question of reasonable time, or allege that at the time the respondent gave the notice of his readiness to deliver, which, however, under the contract, he was not bound to do, such reasonable time had not elapsed. His defence was not such, and therefore we need not have inquired into that question; and the mere *readiness* of the plaintiff to deliver and the question of damages, were all that regularly was in issue. If the respondent, in his declaration, had alleged generally his readiness to deliver *within a reasonable time*, and the failure or refusal of the appellant to ac-

cept, it would have been sufficient, and if denied, it would then depend on the evidence; but the declaration states the time when the protest or notice of readiness to deliver was given—on the 28th July, 1874. If necessary to decide the question of the reasonableness of the time, I should say it was, under the evidence, sufficient; but, notwithstanding that notice, up to the time of the commencement of this suit, on the 11th November following, the appellant made no requisition for delivery, and surely no one would contend that, at the latter date, reasonable time had not long before expired. The hay was sold on the 7th May, and the delivery commenced, as by the bills of lading, on the 1st of June following; nine shipments in all, six in June and three in May, up to the 29th, when they stopped, and after which, no requisition for any more appears to have been made. From the nature of the article, and from the correspondence and other evidence, the conclusion is irresistible, that both parties fully intended the whole delivery should take place before the new crop came in; and it is, I think, put beyond all doubt that the appellant clearly so understood it, for in his letter of the 14th of May (seven days after the date of the contract) he says: "I telegraphed you answer that I would write respecting your offer of three to four hundred tons of hay beyond the five hundred contracted for. But first, before setting price, I should wish to know the time of delivery of this second quantity, if purchased. If I bought, I should require to the end of June, to be shipped to my order, as I could make room for each cargo. It might not be till the end, but I should not wish to be crowded for the next two or three weeks to come till I get storage to receive it." The appellant, as that letter shows, contemplated taking the delivery of the additional 300 tons, by or before the last of June, so

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that he fully understood and intended the 500 tons previously purchased to be delivered, at the latest before the 23rd of June. I think that by the law and evidence the respondent is entitled to recover the amount stated in the judgment, and that the appeal should be dismissed with costs and the judgment of the Superior Court of first instance confirmed.

GWYNNE, J., concurred.

Appeal dismissed with costs.

Solicitors for appellant: *Abbott, Tait, Wotherspoon & Abbott.*

Solicitors for respondent: *Longpré & Dugas.*

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*June 16.

*Dec. 13.

THOMAS H. McKENZIE.....APPELLANT;

AND

ALFRED H. KITTRIDGE *et al*.....RESPONDENTS

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Corporation—Shareholder in public company, actions against by creditors of Co.—Registration of certificate—Con. Stat. C., ch. 63, secs. 33, 35.

In an action brought by *McK.* under the provisions of Con. Stats. Can., ch. 63, against *K. et al* as stockholders of a joint stock company incorporated under said act, to recover the amount of an unpaid judgment they had obtained against the company, the defendants *K. et al* pleaded *inter alia* that they had paid up their full shares and thereafter and before suit had obtained and registered a certificate to that effect.

Held: affirming the judgment of the Court of Common Pleas, that

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

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under sec. 33, 34 and 35, ch. 63 (1), as soon as a shareholder has paid up his full shares and has registered, altho' not until after the 30 days mentioned in sec. 35, a certificate to that effect, his liability to pay any debts of the company then existing or thereafter contracted ceases, excepting always debts to employees, as specially mentioned in sec. 36.

[*Ritchie*, C. J., and *Fournier*, J., dissenting.]

APPEAL from a judgment of the Court of Appeal for *Ontario* (2), affirming the judgment of the Court of Common Pleas (3), in favor of the respondents.

The action was originally brought in the Court

(1) Sec. 33.—"Any shareholder in a company may, at any time within a period of five years from the incorporation of the company, pay up his full shares in the company, and a certificate to that effect shall be made and registered, as prescribed in the twenty-fifth section of this Act, after which such shareholder shall not, except as hereinafter mentioned, be in any manner liable for, or charged with, the payment of any demand due by the company, beyond the amount of his share or shares in the capital stock of the company so paid as aforesaid."

Sec. 34.—"The stockholders of any company incorporated or continued under this Act, shall be jointly and severally liable for all debts and contracts made by the company, until the whole amount of the capital stock of the company, fixed and limited in manner aforesaid, has been paid in, and a certificate to that effect has been made and registered as prescribed in the next section of this Act, after which no stockholder of such company shall be in any manner whatsoever liable for or charged with the payment of any debt or demand due by the company, beyond the amount of his share or shares in the capital stock of the company so fixed and limited and paid in as aforesaid, save and except as hereinafter mentioned."

Sec. 35.—"Within thirty day after the payment of the last instalment in the capital stock of any such company, there shall be made and drawn up a certificate to that effect, which certificate shall be signed and sworn to by a majority of the trustees of the company, including the chairman or president, and shall be registered within the said thirty days in the registry office of the district or county wherein the business of the company is carried on; and the registrar of such district or county, or his deputy, shall administer such oath, and enter and register such certificate in the book to be kept by him for the purposes of this Act as hereinbefore mentioned."

(2) 27 U. C. C. P. 65.

(3) 24 U. C. C. P. 1.

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of Common Pleas. The plaintiff, having obtained a judgment against the *Strathroy* Woollen Manufacturing Company, a joint stock company incorporated under Cons. Stats. *C.*, ch. 63, for the sum of $12,744.21 and $66.75 costs, sought to recover that amount from the defendants under the provisions of said Cons. Stat. *C.*, ch. 63, the defendants being shareholders in the said company.

The defence was, that the defendants had paid up in full their shares of the stock and had registered a certificate to that effect. It was not alleged that the certificates were registered within thirty days after the shares had been paid up.

The principal question which arose on this appeal was, whether a shareholder of a joint stock company incorporated under Cons. Stat. *C.*, ch. 63, who had paid up his shares in full and registered a certificate to that effect, was freed from individual liability for the debts of the company, if the certificate was not registered within the thirty days mentioned in the 35th section?

Mr. *C. Robinson*, Q. C., and Mr. *T. Robertson*, Q. C., for appellant:

The defendants in this suit are and were stockholders in the said company at the time the debts set out in the declaration were contracted, and not having paid up their stock, or if having paid the same, not having registered a certificate of the payment, signed and sworn to as required by the 35th section of the Act, within thirty days after the payment of the last instalment, this action is brought to recover the amount of the said judgment against them under the provisions of the said Act.

Under the said Joint Stock Company's Act stockholders continue liable for all debts and contracts made by the company until the whole amount of the capital stock of the company, fixed and limited as by the said

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Act is provided, has been paid in; and to put an end to such liability, a certificate of such payment must, within thirty days after the payment, be made and drawn up; signed and sworn to by a majority of the trustees of the company, including the chairman or president, and registered, within the said thirty days, in the Registry Office of the district or county wherein the business of the company is carried on (1).

If the payment in full of his shares by any shareholder can exempt him from liability before the whole capital stock has been paid in, a certificate of such payment made, signed and sworn to as already mentioned, must be registered within thirty days after the payment (2).

The true construction of the said statute is, that such certificate must at all events be registered before the contracting by the company of the debt for which the shareholder is sought to be held liable; that, if registered within thirty days from the payment, such registration relates back to the time of such payment and exempts from liability from that time; but, if registered after the thirty days, it takes effect and forms an exemption only from the time of such registration. In this way, secs. 33 and 35 of the said statutes may be reconciled and given effect to; and this construction of the Act is in accordance with the opinion of the Court of Queen's Bench for *Ontario* in *McKenzie* v. *Dewan et al.* (3), in which the judgment of the Court of Common Pleas now appealed from, was followed *pro forma*, but dissented from.

The object of the statute in requiring registration was to give notice to those dealing with the company that the shareholders who had paid and registered their certificates were exempt, and thus to prevent credit being given on the faith of their liability, and this

(1) Sec. 34, Con. Stat. C., ch. 63. (2) Sec. 35, Con. Stat. C., ch. 63.
(3) 36 U. C. Q. B. 512.

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intention is defeated, and a door opened to fraud upon the creditors of the company, by exempting shareholders who have neglected to register their certificates of payment.

If a stockholder is desirous of putting an end to his liability, it is incumbent upon him to observe a strict compliance with the statute which enables him to limit his liability.

Acts of parliament which confer exemptions and privileges contrary to general common law rights, as a rule, should be strictly construed: *Maxwell* on statutes (1); *Kraemer* v. *Gless* (2); *Mitchell* v. *Weir* (3).

Mr. *W. R. Meredith*, Q. C., and Mr. *Osler*, Q. C., for respondents;—

By the provisions of the Consolidated Statutes of *Canada*, chapter 63, any stockholder in a company incorporated under that Act, notwithstanding that the whole capital stock of the company has not been paid in, may, within five years from the incorporation of the company, pay up in full his shares in the company, and upon a certificate of such payment being registered under the provisions of the said Act, he is by the effect of section 33 discharged from all liabilities of the company then existing or thereafter contracted.

By section 4 of the said act, upon compliance with the formalities mentioned in the three preceding sections, the person signing the declaration of incorporation and their successors are made a body corporate by the name mentioned therein.

By the provisions of the Interpretation Act, (Cons. Stats. of *Can.* ch. 5, sec. 6, sub-sec. 24), words making any number of persons a corporation or body politic and corporate exempt the individual members of the

(1) P. 264.
(2) 10 U. C. C. P. at p. 475, per Draper, C. J.
(3) 19 Grant 568.

corporation from personal liability for its debts, obligations or acts. Sections 33 and 34 of chapter 63 are therefore not to be construed as modifying common law obligations in favor of the stockholders, but rather as imposing upon them in certain events certain additional obligations to those to which they were liable *qua* stockholders.

Section 33 is to be read as if it were placed immediately after section 34; a reference to the acts consolidated and forming ch. 63 (13 and 14 *Vic.*, ch. 28, and 16 *Vic.*, ch. 172) makes this clear, and any other interpretation would render the provisions of section 33 insensible. The original acts may be referred to in the construction of the Consolidated Statutes.—*Whelan* v. *The Queen* (1).

The language used in sections 33 and 34 is as strong as possibly could be used to indicate the intention to discharge from existing liabilities. It is declared that the stockholders shall not be *in any manner whatsoever liable for or charged with the payment of any debt or demand due by the company*, and they point rather to a discharge from existing liabilities than an exemption from after contracted debts; probably because there was nothing in the act which imposed any personal obligation after either the stock was paid up in full and the certificate registered—as to the whole body of stockholders—or after payment of the shares of any stockholder and the registration of the certificate of such payment as to that particular stockholder. The language used in other sections of the act shows that, where it was intended to refer to any particular class of debts, plain and unmistakable languge was used. See sections 49, 50, 51 and 52.

The personal liability is, by the provisions of the act,

(1) 28 U. C. Q. B. 108, at page 117; Cons. Stat. *Can.*, ch. 19, sections 8, 9 and 10.

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to exist only *until* the shares are paid up and the certificate is registered, as prescribed in section 35, but the construction put upon section 34 by the Vice-Chancellors in the Court of Appeal, would require a meaning to be given to the word *until* which it does not properly bear, or the addition of another word, so that the section would in effect read *unless and until.*

The provisions as to the mode and time of registration are directory only. The effect of a different construction would be that in the case of a company, the whole of whose capital stock was paid in, the omission to register the certificate for one day beyond the thirty days would, under section 34, take away from the company for all time its character of a limited liability company, and render the company, in effect, an ordinary partnership. An opposite construction would make it necessary for every shareholder, at the peril of personal liability for all the debts, to ascertain when the last payment was made, and to see that the certificate was registered within thirty days thereafter.

It is said that to permit the certificate to be registered after the expiratin of thirty days, would be "to turn the statute into an engine of fraud;" but it is submitted that the opposite construction would afford greater facilities for fraud than that contended for by the respondents.

According to respondents contention, a person proposing to deal with the company, though he searched in the Registry Office and found no certificate registered, would know that if the stock had been paid it would be open to the stockholder at any time to register his certificate and discharge himself from any liability to the company, and would then take the precaution—not an unreasonable one in any case—of searching the record which the company is bound by section 23, under the penalty of the forefeiture of its charter, to keep, and

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he would then know exactly how much of the capital remained unpaid and what, in addition the assets of the company, was available as uncalled for capital for payment of debts.

It is also submitted that the act affords no justification for giving any different effect to the registration of the certificate on existing and after contracted debts as was held in the Court of Queen's Bench in *McKenzie* v. *Dewan* (1); *Queen* v. *Ingall* (2).

Section 33 does not require a registration of the certificate within thirty days from the last payment of the shares, or within any stated period of time; the words "made and registered as prescribed" relate to manner but not to the time of registration. *Hampton* v. *Holman* (1).

The true construction of the statute is, that the liability of the stockholders exists as to the body of them until the whole capital stock of the company is paid in and the certificate is registered, and as to a single stockholder until he pays up his shares and registers his certificate, and that upon this being done—at whatever period it may be done—the whole body of the stockholders in the one case are, and the particular stockholder in the other is, absolutely released and discharged from all liability to pay any debts of the company then existing or thereafter contracted, except those specially mentioned in section 36; that the duty imposed by section 35 is imposed, not upon the stockholders, but upon certain of the officers of the company, and that the omission by them to make and register the certificate within the time prescribed, while it renders them liable to make good any damage sustained by a person dealing with the company and damnified by the non-registration of the certificate, in no way

(1) 36 U. C. Q. B. 512. (2) L. R. 2 Q. B. Div. 199.
(3) L. R. 5 Ch. Div. 193.

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interferes with the operation or effect of the certificate when registered. *Queen* v. *Ingall* (1).

This construction, while it preserves the leading feature of the act—the creation of a company with a limited liability—adequately protects persons dealing with the company from loss by reason of the omission to register the certificate.

RITCHIE, C. J.:—

Mr. Justice *Patterson*, in his judgment in the Court of Appeal, says "the ground of appeal in this case reduces the question before us to much narrower limits than were occupied by the questions argued in the court below," and thus states the points in controversy in the court of appeal.

"The questions presented to us are:

"1. Whether, by paying up his shares and registering a certificate within thirty days, the shareholder is freed from an individual liability for debts already contracted, or only for those contracted after the payment?

"2. If registration of the certificate frees from liability of existing debts, will that be so if the certificate is not registered until after the thirty days?

"The Court of Common Pleas, in the decision now under review, has held that existing as well future debts are discharged by the registration of the certificate, even though not registered till after the thirty days. The Court of Queen's Bench has followed that decision, but Mr. Justice *Wilson*, in delivering the judgment in court, intimated a different opinion as to the true construction of the statute (2)."

In tracing the legislation on this subject we find the words in the 11th sec. of 13 and 14 *Vic.*, ch. 28, are as follows:

(1) Supra.

(2) *McKenzie et al* v. *Dewan et al*, 36 U. C. Q. B. 512.

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And be it enacted, that all the stockholders of any company that shall be incorporated under this act, shall be jointly and severally liable for all debts and contracts made by such company, until the whole amount of the capital stock of such company, fixed and limited in manner aforesaid, shall have been paid in *and a certificate to that effect shall have been made and registered as prescribed* in the next section of this act, after which no stockholder of such company shall be in any manner whatsoever liable for or charged with the payment of any debt or demand due by such company beyond the amount of his share or shares in the capital stock of such company so fixed and limited and paid in as aforesaid, save and except as hereinafter mentioned.

The words are "shall have been made and registered *as prescribed* in the next section of this act." The directions as to making and registering in the next section are: as to the making "that within thirty days after the payment, &c., there shall be made and drawn up a certificate, &c.," which certificate shall be signed and sworn to, &c.;" and as to the registering of the certificate, that it "shall be registered within the said thirty days in the registry office," &c., and the registrar is authorized to administer the oath and enter and register the certificate in a book, &c.," "after which no shareholder shall be liable for or charged with the payment, &c." But what does "after which" mean here? I think, unquestionably, after the certificate has been made and registered as prescribed or directed in the 12th section, that is, after all the directions given in the section have been followed. It seems to me that the time within which the certificate is to be made and registered is an element in the making and registering as much prescribed or directed in the next section as the drawing up, or signing, or swearing, or entering and registering. We have, I think, no right to eliminate from these directions the time within which the legislature has expressly enacted the certificate shall be made and registered. If the certificate can be made at any time and registered at any time, what force and effect is to

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be given to the words thirty days twice repeated in the section? I think we ought not to ignore the clear and explicit language of the legislature and reject a provision which it has thought expedient to enact, and which in its plain unambiguous phraseology involves no doubtful construction.

The 16 *Vic.*, ch. 172, extended the exemption, and sec. 2 provided that, notwithstanding the 13 and 14 *Vic.*, ch. 28, it should be lawful for any shareholder, at any time from and after the said incorporation, and within the period of five years therefrom, to pay up his full shares, to the effect whereof a certificate should be made and registered in the manner provided by the 13 and 14 *Vic.*, ch. 28, and which as to such shareholder should have the same force and effect *from the making thereof* as the making and registering of the certificate of the payment of the whole amount of the capital from "the making and registering of the certificate."

It is to be observed here that the liability by the 13 and 14 *Vic.*, ch. 28, is to continue "until" the capital stock is paid in and the certificate shall have been made and registered, "after which" no stockholder shall be liable; but by the 16 *Vic.*, ch. 172 sec. 2, while the certificate is to be made and registered as by the 13 and 14 *Vic.*, ch. 28, is provided, when so made and registered it is to have force and effect from the making thereof.

Does not this give great force to the view that time was considered by the legislature of the essence of this matter, otherwise a stockholder might pay up his stock and not register for twelve months after, and so give to such registration a retroactive operation from the making of the certificate, for there is nothing whatever in this last act to show that the exemption is to take effect at any other time than the making of the certificate.

This being the state of the law at the time of the con-

solidated statutes, by the consolidated statutes, ch. 63, sec. 33, a shareholder may within five years pay up his full shares "and a certificate to that effect shall be *made* and *registered* as prescribed in the 35th sec., "*after which*" such shareholder shall not be liable, &c. The 35th sec. is, as to the certificate and registering, a copy of the 12 sec. of the 13 and 14 *Vic.*, ch. 28.

The 34th sec. is a copy of the 11th sec. of the 13 and 14 *Vic.*, ch. 28, as to the liability of the stockholders until the whole amount of the capital stock is paid up and a certificate made and registered, &c., and this, it has been argued, is in conflict with and repugnant to the preceding 33rd section. But I think there is no substantial ground for any such contention.

This section (34) must be read as applying to those shareholders who have not availed themselves of the privileges granted under the preceding section 33, by paying up and obtaining a certificate to be made and registered as prescribed, &c. No doubt, the insertion of the clause as it stands, is very inartificial and presents at first sight an apparent contradiction, but the incongruity can properly be thus reconciled, which leaves the law as it was at the time of consolidation; and that it was the intention of the legislature that this should be the case, is evident from the 8th sec. of ch. 29 of the Cons. Stat., which enacts that the said consolidated laws shall not be held to operate as new laws, but shall be construed and have effect as a consolidation, and as declaratory of the laws as contained in the said acts and parts of acts so repealed, and for which the said consolidated statutes are substituted. The statute then expressly says that the stockholders shall be liable for all debts of the company *until* the whole amount of the capital stock has been paid in, *and* a certificate to that effect shall have been made and registered as prescribed, that is, I take it, as directed by section 12, reading the

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section *mutatis mutandis*, in other words, making the necessary changes and altering the terms to make the directions suit the circumstances; "*after which* no stockholder shall be liable," &c., that is to say, exemption from liability is granted to the stockholders, if they do a certain act, and if within thirty days after there shall be drawn up a certificate thereof, signed and attested in a certain way and registered within the said thirty days in a specified office. If these things are not done as prescribed, either in respect to the time, manner or place, how can a court be asked to say that doing similar acts, not within the time specified, or in another manner, or at a different place, shall have the same effect? The legislature had a perfect right arbitrarily to specify the terms and conditions on which such exemptions from liability should take place, and to say, that *until* such terms and conditions have been complied with, the liability of the stockholders should continue, and I know of no principle by which this or any other court would be warranted in relieving the stockholders from lability on any terms other than those expressly sanctioned by the legislature, or to say that their liability should cease *until* what the legislature required to be done was done.

With reference to the consequences of such a construction we have nothing to do. The legislature has chosen in its wisdom to make the discharge of stockholders from liability dependent on a compliance with certain statutory directions, and has used words of a plain and definite character, and we are, I think, bound to give effect to all the words so used, by construing them in their ordinary grammatical signification according to their nature and import.

Mr. *Dwarris* (1), says:

(1) On statutes, 748.

Wherever a statute imposes terms, and prescribes a thing to be done within a certain time, the lapse of even a day is fatal, even in a penal case, because no inferior court can admit of any terms, but such as directly and precisely satisfy the law (1).

And in *Regina* v. *Justices of Middlesex* (2), where it was held an appeal was too late, as not being "*within* six days after the cause of complaint," within the provisions of the 87th section of 4 *Geo.* 4, ch. 95, it was contended notice of appeal served on Monday was sufficient because the 6th day fell on a Sunday, and that the party had therefore the Monday on which to give his notice of appeal.

Williams, J., says:

The question which I have to determine arises upon the distinct language of the statute: and upon that language how can I say that this notice was given *within six* days? It was indeed conceded that it was not; but it was argued that Sunday ought not to be reckoned in the computation. No authority is cited in support of this argument, and in the absence of one, I think that the plain words of the act are not to be got rid of.

So in this case the defendant's right, to be relieved arises on the distinct language of the statute, and how can I say the certificate was made and drawn up within thirty days of the payment of the last instalment "until which" he was to continue liable, or registered within the said thirty days "from which" he was to be discharged. "The plain words of the act are not to be got rid of."

The liability of the stockholder is fixed by law, and the burthen is on him to get rid of that liability. If he seeks to do it through the instrumentality of this statute, he must, I think, bring himself within the terms of the statute, by shewing a full and complete compliance with its provisions; for it is that, and that alone, that relieves him from liability. If there is any defect which gives rise to a grievance, it

(1) *Atkins* v. *Banwell*, 3 East 91. (2) 2 Dowl. N. S. 719.

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was, as said by *Lawrence*, J., in *Rex* v. *Justices* of *Staffordshire* (1), "in the statute itself," and in which case Lord *Ellenborough*, C. J., said:

> Whatever hardships the parties grieved may labour under in this case, we can only follow the directions of the statute, which has expressly limited the appeal to be made to "the next quarter sessions after such order made or proceeding had," &c. Now it is attempted to substitute the words "after *notice of* such order made," in lieu of the words in the statute "after such order made;" but they are different things, and the legislature having made use of the latter words, we cannot say that the appeal may be made at the next quarter session *after notice* of the order. It is, however, a case of great grievance and hardship where the interests of the parties are thus invaded by an order made behind their backs; and may be a good ground to apply to parliament for a revision of the clause of appeal; but we cannot remedy the abuse.

It has been very strongly urged that a great hardship might arise, because the making out of the certificate and the signing and attesting is to be done, not by the stockholder, but by others who might neglect or refuse to act, though it is not alleged that any such difficulty existed in this case, nor indeed is any excuse alleged or suggested for not having procured and registered the certificate within the period provided. But with the question of hardship or no hardship we have nothing to do. If a party cannot bring himself within the statute, it may be his misfortune, or his fault, or it may be through the negligence or default of those who should draw up and attest the certificate and register the same; if they, or any of them fail in their duty in this respect, he may or may not have a means of compelling them to do their duty; or whether the general rule, that a person damnified by the failure to perform a statutory duty, is entitled to maintain an action, applies in such a case as this; or whether a party aggrieved may or may not have a remedy against the officers of the company for any injury or damage he may sustain or be

(1) 3 East 150.

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put to by reason of their misfeasance or nonfeasance, it is not necessary for us in this case to determine. Be this as it may, I do not think we are at liberty to say that in fixing thirty days after the payment as the period in which the certificate is to be made, and again expressly providing that the same shall be registered within the said thirty days, the legislature meant nothing, and did not intend that parties or courts should be bound thereby. I think we are bound to assume they were inserted with an object, and whether the reason for their insertion is obvious or not, it is a plain provision which the legislature have deemed necessary for the protection of creditors and the public, and with which all we as a court of justice have to do, is to enforce the period fixed in the statute within which the certificate is to be made and registered, and is, to use the language of Lord *Denman* in the *Queen* v. *Justices* of *Derbyshire* (1), "too distinct and express to admit of being varied by any gloss or construction."

I express no opinion as to the liability of shareholders who have not registered within, but have after, the prescribed time, for new engagements incurred after such a registration, as that question does not arise in this case; all that I desire to say is that in my opinion, if registration be not made till after the thirty days, there is at any rate no exemption so as to discharge defendants from personal liabilty for debts contracted before such registration.

I think the appeal should be allowed with costs.

STRONG, J., was opinion that the decision of the Court below was right and ought to be affirmed with costs.

FOURNIER, J.:—

Le Demandeur a obtenu, le 15 octobre 1873, devant

(1) 7 Q. B. at p. 199.

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Fournier, J.

la Cour de "Common Pleas" d'*Ontario*, jugement contre la *Strathroy Woollen Manufacturing Company*, incorporée en vertu du ch. 63, S. R. C., pour la somme de $12,744.21, montant de certains billets promissoires, et $66.75 ses frais.

Le capital de cette compagnie était de $75,000, divisé en sept cent cinquante parts ou actions de $100 chacune,—payable en 20 mois après le 1er octobre 1869, par versements de 10 p. c. tous les deux mois.

Aucun prélèvement de deniers n'ayant pu être fait au moyen de l'exécution émanée en vertu du jugement ci-dessus mentionné, le demandeur a intenté la présente action contre les défendeurs (intimés,) comme actionnaires dans cette compagnie pour se faire payer par eux du jugement obtenu contre la dite compagnie, alléguant qu'il avait commencé son action et obtenu jugement contre elle dans l'année après l'échéance de la dette—que les défendeurs et chacun d'eux en étaient actionnaires avant que la dite dette eût été contractée; que tout le capital n'avait pas été payé; qu'aucun certificat à cet effet n'avait été signé et assermenté par une majorité des directeurs—et n'avait pas été non plus enregistré au bureau d'enregistrement du comté où la compagnie faisait ses affaires. Que les défendeurs, (intimés) n'avaient pas payé le montant entier de leurs parts ni enregistré aucun certificat à cet effet, et qu'en conséquence le demandeur avait droit de réclamer contre eux le montant du jugement obtenu contre la dite compagnie.

Les défendeurs ont plaidé en réponse à cette demande que chacun d'eux avait payé le montant de ses actions et avait, conformément à la sec. 35 du statut cité plus haut, enregistré un certificat de ce paiement. Quelques-uns de ces certificats ont été enregistrés dans le mois d'octobre 1873, avant le commencement de la présente action; d'autres l'ont été dans le mois de mars 1874,

après la poursuite commencée; mais les défendeurs n'ont pas allégué dans leur défense que les enregistrements ont eu lieu dans les trente jours après le paiement du dernier versement de leurs parts. Il paraît par la déclaration du demandeur que la dette en question était due et exigible avant que les deux enregistrements aient été faits.

La défense est fondée sur les sections 33 et 35 du ch. 63 S. R. C. qui, avec la 34e sont les seules qui puissent affecter la solution de la question soulevée en cette cause. [L'Honorable Juge fait lecture des sus-dites sections] (1).

La question à décider est de savoir si pour obtenir le bénéfice de la section 33, l'actionnaire qui a payé complètement ses parts doit enregistrer un certificat dans les 30 jours du paiement du dernier versement tel que requis par la 35e sec. ci-dessus citée.

En référant à la sec. 11 de la 13e et 14e *Vict.*, ch. 28, ont voit qu'il est déclaré que les actionnaires sont responsables conjointement et solidairement de toutes dettes et contrats de la compagnie, jusqu'au paiement entier du capital souscrit et à l'enregistrement d'un certificat à cet effet tel qu'exigé par la sec. 12 du même acte. Ce n'était qu'après l'accomplissement de cette formalité qu'ils pouvaient être déchargés de toute responsabilité au-delà du montant de leurs parts.

Par la section 12, un certificat dans la forme qu'elle prescrit devait être enregistré dans les 30 jours après le paiement du dernier versement du capital. En vertu de cet acte un actionnaire qui avait payé toutes ses parts ne pouvait encore être déchargé de toute responsabilité qu'à deux conditions: la 1ère, que tous les autres actionnaires eûssent aussi complètement payé le montant de leurs parts; la 2me, qu'un certificat de ce paiement fût

(1) See page 369 note (1).

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enregistré, en la manière voulue, dans les 30 jours à compter du paiement du *dernier versement.*

Cette dernière condition qui rendait un actionnaire garant de la solvabilité de tous les autres ayant sans doute été trouvée trop onéreuse, et comme telle, nuisible à la formation de sociétés à responsabilité limitée, fut modifiée par la 16e *Vict.*, ch. 172, qui donna à un actionnaire plus de facilité pour limiter sa responsabilité au montant par lui souscrit. La 2me sec. de cet acte déclare :

Provided always and be it enacted, that notwithstanding any thing in the said first cited Act contained, it shall be lawful for any shareholder, at any time from or after the said incorporation, and within the period of five years therefrom to pay up in full his shares in the Company to the effect whereof a certificate shall be made and registered in the manner prescribed by the first cited Act (13 and 14 *Vic.*, ch. 28), and which as to such shareholder and his liability, in virtue of the said Act, shall have the same force and effect from the making thereof, as the making and registering of the certificate of the payment of the whole amount of the capital stock of such company.

L'effet de cette section est de donner à un seul actionnaire le droit de se libérer de toute responsabilité sans attendre l'époque du paiement du dernier versement complétant le paiement du capital entier. Ce privilége lui est accordé à la condition de se conformer, quant au certificat du paiement et à l'enregistrement, aux formalités exigées par la sec. 12 de la 13e et 14e *Vict.*, ch. 28.

Sous l'opération de ces deux actes le mode de libération par paiement et enregistrement qui ne pouvait, avant la 16e *Vict.*, être imployé que par la compagnie au bénéfice de tous les actionnaires, est rendu par ce dernier acte accessible à un seul actionnaire en remplissant les formalités prescrites par le premier acte. Leur accomplissement dans l'un et l'autre cas limite la responsabilité à compter de l'enregistrement fait dans les 30 jours du paiement.

A ne considérer que ces deux statuts, cette question n'est guère susceptible de difficulté. Malheureusement dans leur consolidation il a été fait quelques changements dans l'ordre des sections et dans leur rédaction, dont l'effet est de donner lieu à la présente difficulté. C'est ainsi que la sec. 34 correspondant à la 11e sec. du ch. 28, 13 et 14 *Vict.*, concernant les formalités à remplir pour faire obtenir à tous les actionnaires le privilége de la responsabilité limitée, vient après la 33e reproduisant les dispositions de la 2e sec. de la 16e *Vict.*, ch. 177, qui a pour la première fois conféré à un seul actionnaire le privilége de limiter sa responsabilité. Au point de vue de la logique comme dans l'ordre chronologique, il est évident que cette transposition est une erreur. On aurait dû conserver l'ordre suivi dans les deux statuts originaires et ne faire venir la 33e sec. qu'après les 34e et 35e. Si au moins dans cet ordre (que je crois fautif) on eût conservé dans la sec. 33e les expressions de la 2e sec. du ch. 172 déclarant que "le certificat obtenu par un seul actionnaire aurait la "même force et effet que la confection et l'enregistre-"ment du certificat du paiement du montant entier du "capital de telle compagnie," — mais au contraire la référence à la 35e, omet ces expressions qui, dans la 16e *Vict.*, qualifiait la référence faite à la sec. 12 de la 13e et 14e *Vict.*, de manière à ne laisser aucun doute sur la forme du certificat que devait faire enregistrer un actionnaire.

Maintenant, dans le ch. 63, les secs. 33 et 34 réfèrent purement et simplement, pour les formalités à suivre, à la 35e sec. qui est la 12e du ch. 28 de 13 et 14 *Vict.*, établissant les formalités en question. On a évidemment oublié que cette section a été originairement faite pour le cas où il s'agissait seulement de limiter la responsabilité de tous les actionnaires, et qu'il n'y était question que du certificat constatant le paiement du

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dernier versement du capital entier. Cette section ayant été conservée telle qu'elle était dans le premier acte, on prétend maintenant que la conséquence qui en résulte est qu'un actionnaire qui veut limiter sa responsabilité ne peut le faire qu'au moyen d'un certificat constatant le paiement du capital entier.

Il est évident que si l'on exige de l'actionnaire un semblable certificat, il se trouvera par là même, nécessairement privé du bénéfice qui lui est conféré par la 33e sec., de se libérer seul sans égard à l'action des autres actionnaires. Cette interprétation a l'effet de rendre cette section tout-à-fait inexécutable.

Avant d'en arriver à une telle conclusion je me demande s'il y a vraiment incompatibilité et contradiction entre les sec. 33 et 35 et en quoi elle consiste, et s'il n'est pas possible de leur donner effet sans qu'il soit nécessaire d'y ajouter ou retrancher quelque chose.

Pour rendre le sens de ces deux sections très clair et éviter toute difficulté, il eût sans doute été mieux d'ajouter dans la 35e sec. quelques expressions ayant rapport au cas d'un seul actionnaire qui veut se libérer. C'est sans doute une omission mais elle est peu importante. Elle peut se suppléer sans rien ajouter à la disposition. En consultant l'esprit de la loi, et en lisant ces deux sections, ainsi que l'on doit le faire, comme n'en faisant qu'une seule, il est clair que l'enregistrement dans les 30 jours du dernier versement du *capital entier*, doit dans le cas de la sec. 33, signifier le montant entier dû par l'actionnaire. Autrement cette référence n'aurait aucun sens.

A quelles conditions d'après cette section l'actionnaire peut-il obtenir le bénéfice de la responsabilité limitée? A deux seulement, 1o le paiement du montant entier de ses parts dans les cinq ans à dater de l'incorporation; 2o l'enregistrement d'un certificat à cet effet, fait et enregistré tel que prescrit par la 35e sec. La

référence à cette dernière sec. n'est que pour la forme du certificat et les formalités de l'enregistrement et non pour imposer d'autres conditions. Cette sec. 35, contient deux choses bien distinctes, la première est la condition à laquelle tous les actionnaires doivent se soumettre pour arriver à la responsabilité limitée, savoir: celle du paiement du capital entier; la deuxième est la formalité du certificat constatant ce paiement et son enregistrement. La condition de paiement étant déjà imposée à l'actionnaire par la 33e sec., la référence à la 35e sec. n'avait donc pas pour but de lui en imposer une autre, (celle du paiement par tous les actionnaires) qui eut été en contradiction manifeste avec la disposition de la sec. 33. La référence à la sec. 35 ne venant qu'après l'imposition de la condition de paiement, il me paraît clair qu'il n'y a que la partie de la 35e sec. concernant le certificat et son enregistrement qui doit être considérée comme incorporée dans la sec 33 et être lue comme en faisant partie. De cette manière, toute contradiction disparaît et les deux sections ainsi conciliées peuvent recevoir une exécution complète.

Il suit de là, suivant moi, que pour un seul actionnaire comme pour la compagnie l'obligation d'enregistrer est impérative et doit être exécutée dans la forme et dans le délai prescrit par la sec. 35. Le but du législateur en exigeant cet enregistrement était sans doute de donner à ceux qui contractaient avec une compagnie incorporée le moyen de s'assurer de sa solvabilité par les renseignements que l'enregistrement pouvait fournir, et se comporter en conséquence dans ses rapports d'affaires avec la compagnie. Supprimer la nécessité de cet enregistrement sous le prétexte d'incompatibilité entre les deux sections, c'est aller directement contre les termes formels de la loi qui n'exempte les actionnaires de la responsabilité solidaire qu'à certaines conditions, dont l'enregistrement dans un délai fixé est la principale.

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Si l'on reproche à l'interprétation qui concilie ces deux sections de sous-entendre quelque chose, on peut faire à celle qui les déclare inconciliables le reproche bien plus grave de supprimer des expressions formelles comme celles-ci, "l'enregistrement dans les 30 jours," pour arriver à une conclusion manifestement contraire à la lettre et à l'esprit de la loi.

Considérant que dans le ch. 63, de même que dans les deux statuts originaires, la disposition concernant l'enregistrement du certificat dans les trente jours est tout aussi nécessaire que celle du paiement pour obtenir le privilége de la responsabilité limitée, je me suis abstenu de faire aucun raisonnement et de citer des autorités pour démontrer que cette disposition n'est pas simplement directoire, mais impérative dans sa forme et d'après la nature du sujet. Ayant pris communication des notes de l'honorable Président de la cour, je concours pleinement dans les observations qu'il a faites à ce sujet.

En conséquence je suis d'avis que l'accomplissement de ces formalités est de rigueur....." Acts which con- "fer exceptional exemptions and privileges correlative- "ly trenching on general rights are subject to the same "principle of strict construction." "In general then it "seems that when a statute confers a privilege or a "power, the regulative provisions which it imposes on its "acquisition or exercise are essential and imperative (1)."

Pour ces raisons j'en viens à la conclusion que les défendeurs (intimés) ne peuvent avoir le bénéfice des secs. 33 et 35, à moins d'alléguer que l'enregistrement a été fait dans les 30 jours du paiement du dernier versement de leurs parts respectives.

HENRY, J.:

This is an appeal from the judgment of the Court of

(1) Maxwell, pp. 264, 334.

Appeal for *Ontario* on an appeal to that court from the Court of Common Pleas.

It is an action brought by the plaintiff to recover from the defendants, as stockholders in the *Strathroy Woollen Manufacturing Company* the amount of a judgment they obtained against the company. The plaintiff, after setting out the judgment in the declaration, avers that before the debts were contracted, not when the suit was commenced, the defendants were stockholders of the said company—that the whole amount of the capital stock had not been paid in, nor had a certificate to that effect been signed, sworn to, or registered as required—nor had the defendants paid up the full amount of their shares, nor made nor registered a certificate to that effect, as prescribed by the act referred to in the declaration. Some of the defendants, that is to say, *Alfred H. Kitridge, J. S. Smith, John W. Robson, Arthur Robson* and *Thomas Moyle*, pleaded in substance, that at the respective times when the debts were contracted, or any of them, or at any time afterwards up to the commencement of the suit they were not stockholders in the company, and the defendants *Alfred H. Kitridge, John W. Robson, Arthur Robson* and *Thomas Moyle*, pleaded in substance, that within the period of five years from the incorporation of the said company they paid up their full shares in the said company, and that thereafter, and before the commencement of this suit, to wit on the first day of October, one thousand eight hundred and seventy-three, a certificate to that effect was made and drawn up, signed and sworn to, and on the same day duly registered in *manner* prescribed by the statute in that behalf.

The plea of the other defendants is substantially the same as the last one in every respect, except that it alleges that the full payment of the several shares and the making and filing of the certificate took place *after*

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the commencement of the suit. To these pleas there were replications which were demurred to. The declaration was also demurred to. Notices were also given that objections would on the argument of the demurrers be made to the pleas as being bad in substance. The demurrers were argued and the Court of Common Pleas gave judgment for the plaintiff on the demurrer to the declaration, and for the defendants on the demurrers to the pleas and replications.

The plaintiff subsequently obtained an order on this judgment, by which he was allowed to strike out the second and subsequent counts of the declaration, and all the issues of fact joined in the cause, in order that final judgment might be entered herein on the issues in law, so as to enable the plaintiff to appeal against the judgment without trying the issues in fact, with leave to the plaintiff to sign judgment on the demurrers for the defendants on the issues of fact being struck out; and notice of intention to enter such judgment to be given to the defendants attornies. Such notice was given and the judgment formally entered.

From the judgment in demurrer to the pleas the plaintiff appealed, and the Court of Appeal being equally divided the former judgment prevailed, and it has come to this Court.

The plaintiff says there is error in the record and proceedings which the defendants deny.

The question for our decision is therefore wholly as to the sufficiency of the pleas.

The validity of the first plea does not seem to have been specially considered or adjudicated on by the Court of Appeal, but was by the Court of Common Pleas, and held good. We, therefore, in the interests of those pleading it have a right to consider it. In the peculiar position of the case, from the withdrawal of the issues in fact and the judgment for the defendants thereon,

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we must look at the question presented just as if no replications had been put in. If any one of the pleas is a good answer to the plaintiff's claim the general result must be in favor of the defendants pleading it, notwithstanding the other issues in law should be found against them.

Keeping in view the fact that the plaintiff's right to recover depends on the allegations set out in his declaration, that the defendants, before the debts were contracted, and before and at the commencement of the suit, were stockholders in the company, let us see if the plea sufficiently raises in reference thereto an important and material issue. The defendants, who pleaded it, therein say that they were not, at the respective times when the debts were contracted, or at any time from thence until or at the commencement of the suit, stockholders in the said company. This, to my mind, is a complete answer, though in general terms, to the plaintiff's most important allegation, and upon which his right to recover was based. The demurrer admits the truth of the plea, and if the parties were not stockholders in the company when the debts were contracted, and did not become such up to the commencement of the action, and if the declaration shows nothing else (as is the fact) to make them liable, they cannot be adjudged so. If at any time before the debts were contracted, the defendants in question had been stockholders in the company, and had illegally or irregularly transferred their shares, that might have been shown on the trial of the issues in fact raised by the declaration and pleas; or if the facts had been specially alleged in the declaration, then the plea would possibly be wanting in substance if it failed to negative the allegation of them. No such issue is however tendered, or any other but those which I have already concluded to have been sufficiently answered by the plea. There is nothing in the

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whole record, after the general denial that they were at any time stockholders, to found a decision in favor of the general allegation that they were so. It is, therefore, a good answer to the declaration, and consequently a good defence for those who filed it. Our judgment, therefore, as far as those defendants are concerned should be for them.

The objection to the plea is, not that it leaves any allegation unanswered, but that it tenders an immaterial issue, to wit, "whether the defendants in question were stockholders in the company at the time of the commencement of this suit." In taking that objection the substance of the plea is misstated. If it alleged nothing more than that, the objection would be good. It, however, also negatives all the material allegations in the declaration upon which the plaintiff's right to recover is based, including the one that the defendants were stockholders *before and at the several times when the debts were contracted;* thus, as I think, taking away the foundation upon which the plaintiff's claim wholly rests. I think, therefore, that, independently of any other issue before us, the appeal, as to those five defendants, should be dismissed.

The objections to the second and other pleas are: 1st. That they do not show that the stock was paid up within the time mentioned in the declaration of incorporation. On the argument of a demurrer to the pleas, we can only look at them and the declaration. Neither, in this case, refers to the declaration of incorporation, or sets it out, and we cannot say whether or not the stock was paid up *according to it.* That objection cannot therefore be sustained. 2nd. That it does not show that the certificate was filed within the time prescribed by law, which substantially means within thirty days as prescribed by section 35 of the act in question.

That objection necessitates two considerations: 1st.

Admitting that that section requires a stockholder who has paid up his full shares to register his certificate within thirty days, is the plea in that case a good one? Does it in fact sufficiently allege that fact? It states in substance that the full amount of the several shares was paid up, within the prescribed five years, and the certificate duly made and sworn to before the commencement of the suit, to wit, on the first day of October, 1873, and on that day duly registered "*in manner* prescribed by the statute in that behalf." Section 33 of the act in question is the "statute" referred to in connection with section 35, and provides that the certificate shall be made and registered as prescribed in section 35.

Section 35 provides that within thirty days after the payment of the last instalment of the capital stock of the company the certificate shall be made, drawn, sworn to and registered. The plea shows specially that the certificates in question were drawn up, signed and sworn to as section 35 prescribes, and generally that it was duly registered in the proper office *in manner* prescribed by the statute in that behalf. Is it, therefore, sufficient to allege such registry in that general way without the allegation that it was so registered within the thirty days? I think that on the trial of the issue raised on that point, the plaintiff might properly insist that the defence was not made out, if evidence showed the registry after the expiration of the thirty days. The plea referred to a public statute in general terms, but pointing explicitly to the requirements of section 35, not only as to the place but the manner of registry. Section 33 requires it to be registered "as prescribed in section 35." That section (33) imposed the obligation in those words, and the affirmative allegation of the plea is identical with that section. In substance it alleges performance of the requirements of that section.

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Certainty as to a common intent is all that is necessary. No misapprehension could result as to the meaning of the allegation. In *Beaver* v. *The Mayor, &c., of Manchester* (1), the declaration complained of injuries to real estate to which there was a plea:

> That the several acts, matters and things complained of were lawfully done by defendants under and by virtue of powers given to them by a certain Act of Parliament (setting out the year and title) Held that this general form of plea was good, and that it was not necessary to allege the particular acts upon which the defendants relied as bringing them within the statute.

On the authority of that case and the prevailing rules of pleading, I think the general allegation of compliance with the provisions of the statute sufficient, and that under an issue thereby tendered all necessary proof could have been required. It was, I think, just as necessary under that plea to prove the fact of registry within the prescribed thirty days, as if the fact of such registry had been specifically alleged.

I might rest my judgment here, but as views of a contrary nature have been taken as to the obligation of a stockholder to allege specially that the certificate was filed within the prescribed thirty days I will proceed to give my views briefly on that point.

It will be observed that in reference to the sufficiency of the allegation in the plea, I have assumed that the defence required such a statement and proof of it. Had, however, the plea, in my opinion, not fully covered the ground, I should have had to consider, as I now intend to do, what the obligation upon a stockholder was under the terms of section 33, so as to arrive at the point where he would be free from the debts or liabilities of the company. On a comparison of the three statutes (for by the provision of the Consolidated Statutes and by

(1) 8 El. & Bl. 44.

long established custom of the courts, we are to look at the two preceding ones,) I can come to but one conclusion, and that is the only one that by any possibility will not render useless the legislation by the Act of 16 *Vic.*, ch. 172, and re-enacted by the 33rd section of the Consolidated Act. No doubt was, or successfully could be, raised, that if the certificate were made and registered according to the 23rd section, and as prescribed in section 35 (whatever the latter may be,) it would bar all debts either present or future; for the provision on that point is quite clear.

I think the true construction of all the Acts shows two ways by which stockholders would be clear of all liability. The one under the provisions of sections 34 and 35, and the other under sections 33 and 35. Whenever the language admits of two constructions, according to one of which the enactment would be unjust, absurd, or mischievous, and according to the other it would be reasonable and wholesome, it is obvious that the latter must be adopted as that which the legislature intended (1). It is said that as the provision for the limiting of liability is a boon to stockholders and relieves them from personal liability, we should construe strictly against them any enactment as to the conditions required for exemption; such limitation being a relief to them from the common law obligations, that would otherwise press upon them as copartners or joint and several contractors. I must confess I do not see much in that argument. The legislature for the benefit and advancement of public interests, by a general incorporation Act, holds out certain inducements to parties to engage jointly in business transactions and undertakings; one of the greatest of which is immunity from the consequences of a failing partner-

(1) Per Lord Campbell in *R.* v. *Skeen*, 28 L. J. M. C. 98; per Keating, J., in *Boon* v. *Howard*, L. R. 9 C. P. 308.

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ship business; and the limit of the liability is that which attaches according to the amount of stock subscribed for or purchased. The statutes on this point should be construed differently from a special charter granted on the petition of the parties, where they may be said to use their own language in asking exceptional powers or privileges, and when doubt arises as to the construction of that language, the maxim ordinarily applicable to the interpretation of statutes, that *verba chartarum fortius accipiuntur contra proferentem*, or that words are to be understood most strongly against him who uses them, is justly applied (1). No common law liabilities are, therefore, in my opinion, incurred or intended to be by any one becoming a stockholder. No credit is given to the stockholders individually, but to the company. They, in no sense of the word, are debtors, but merely guarantors in a special way. They are only such guarantors or sureties to the extent from time to time of their unpaid stock. *Angel & Ames* in their treatise on corporations say (2):

> That one of the properties of a private aggregate corporation is the irresponsibility of its members for company debts, and that they are not liable beyond the amount invested in their subscription of stock.

That is the general principle. It has been well said, that the object of granting such charters is to shield its members from such personal responsibility; and it was, and is, deemed a matter of public policy so to grant them, to induce individuals to invest a portion of their means for the purposes of trade and public improvement who would abstain from so doing were not their liability thus limited. In joining one of those registered companies, then, no one assumes any common law obligations; and therefore I feel bound to construe the statutes in respect of them without that strict-

(1) Maxwell on statutes, 268. (2) P. 470.

ness which is right enough in cases of a different character and nature. Parties dealing with joint stock limited liability companies, while expecting profits therefrom, must take all the incident risks; they are presumed to judge of the solvency of their immediate debtors and the nature of the liability of their guarantors or sureties; and I know of no principle that calls upon me to put other than a reasonable and fair construction on the statutes through which parties seek to make shareholders pay for over again stock which they have paid for once, and the amount of which in many cases they have wholly lost. I feel bound, for these reasons, to construe the acts so as fairly and reasonably to give effect to the general intentions of the legislature.

By the Act 16 *Vic.*, ch. 172, which amends the Act 13th and 14th *Vic.*, ch. 28, five years are given for the payment in of the whole stock instead of two; and it provides that, notwithstanding anything in the last mentioned Act contained, it should be lawful for any shareholder, within five years, to pay up his full shares "to the effect whereof a certificate shall be made and registered in the manner provided by the said first cited Act, and which, to said shareholder and his liability in virtue of the said Act, shall have the same force and effect *from the making thereof* as the making and registering of the certificate of the payment of the whole amount of the capital of such company." In that case the certificate operates, not from the registry, but *from the making*. It is required that it (the certificate) "shall be made and registered *in the manner* provided by the first recited Act." Under this Act I think the "manner" referred to was not intended to include or limit the "time" for doing it. If so, the liability would cease *whenever it was done* at any time within the five years.

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If the requirement of the statute can be satisfied by the registry of the certificate *in the manner* specified, without regard to the limitation of thirty days, it seems the condition as to the *time* of registry is not necessarily included; and when to have made it plain it was only necessary (as is the usual course pursued in enactments) to have added the words "and within the time limited, &c.," we are the more justified in concluding such was not the intention of the legislature.

A difficulty, however, is said to arise in consequence of the difference in the language of the 33rd section of the consolidated statute. The words there used are that the certificate "shall be made and registered as *prescribed* in the 35th sec. of this Act, *after which* (not *upon* which) such shareholders shall not * * * * * be in any manner liable for or charged with the payment of any debt or demand due by the company, &c." By the later Act the liability continues until the *registration.* The difference in one respect, that is as to the time when the party would be discharged, has, however, no effect in this case, for *both* the making and registration took place before action.

Can the limitation of the "thirty days" in section 35 be applied to the registry of the certificate as mentioned in section 33? The words "as prescribed" in the thirty-third section, refer as well to the *registry* as to the *making* of the certificate, but the prescription of the "thirty days" in section 35 is "*after the payment of the last instalment in the capital stock of any such company.*" That is the only prescription *as to the time of the registry*, and being wholly inapplicable to the circumstances arising under the provision of section 33, how am I to say the legislature in making section 33 intended that as regards section 33 it should mean thirty days from the payment by one shareholder

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of the last instalment of his individual stock. We are not to legislate, but to give effect to the provisions of the statute and cannot, as I think, supply what is clearly deficient. The position and commercial status of the company, from the fact of one shareholder having fully paid up his stock and registered his certificate, is essentially different from what it would be if the whole stock were paid up; and the necessity for a registry, and thereby a publication of the fact, being so much more necessary in the latter event than in the former.

I cannot see my way clear to decide that the legislature intended the prescription of thirty days to apply to a case under section thirty-three. The last Act contains all the guards the legislature thought necessary for the protection of parties dealing with those companies, after the public had nine years acquaintance with the dealings under the previous joint stock companies Acts. It contains provisions for records of payments of stock, by which parties could inform themselves, before dealing as creditors with a company, as to the solvency of the company, and the amount of the guarantee by holders of unpaid stock; and their ability to pay up balances of unpaid stock to a more reliable extent than they could do, as a general rule, in regard to individual traders. If parties choose to deal with legal entities, without the proper inquiry open to them, it would be hardly right by a strict or strained construction of a statute to enforce payment from stockholders who have fully paid up all their stock. The principle that every one must be presumed to know the law in regard to the persons and matters they deal with is applicable to every one dealing with a chartered company, and so dealing are bound to see that they are reasonably safe. In this case the plaintiff must be held to have known before

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he gave the credit, that at any moment he was liable to lose the guarantee of any one or more stockholders by the payment in full of their shares and the registry of their certificates. A company composed of shareholders, some of whom are wealthy, and who are presumed to stand as sureties for the whole liabilities of the company, obtains a standing and credit it otherwise would not have, but outside parties should be held to know that the guarantee is but a contingent one, and that at any moment such sureties may by payment and registry cease to be such. Suppose the statute expressly prescribed the registry of the certificate within thirty days, as contended for in this case, outside parties are required to take notice that under the act a stockholder, even after the company had become hopelessly insolvent, might pay up the balance of his stock and by registering his certificate within thirty days afterwards, (all which might be done in a few hours,) get relieved from the payment of anything further. It cannot, therefore, be contended that the guarantee of the unpaid shares of any particular individual for anything beyond the amount due on them, is one of the main reliances of a party giving credit to a company. If, then, the whole of the individual stock be paid in the creditors get about all they could reasonably expect. It is claimed to be better in all such cases to rule against the stockholder on the ground that he has all the chances of gain, and should also bear the losses of the speculations of the company. To that, however, it is fairly answered that he became a guarantor merely, and that having paid up all he promised within the terms of his contract, no creditor should complain that he refuses to pay more. The only just way, then, is to ascertain the nature of the contract binding on all persons becoming parties to it, and by a reasonable construction of it give effect to what we must assume to have been under the law their

intentions and reasonable expectations. By the terms of the constating documents, in the case of the great majority of joint stock companies in *England* and other countries, shareholders are only liable to be made contributories to the extent of the balances due on shares, and payment alone is sufficient to discharge them from all further liability. To that extent they are strictly held, but here, where a party who never owned possibly over two or three hundred dollars worth of shares, is claimed to be retained as a guarantor for several thousand dollars, equity and common honesty require that before he is so declared liable, *the law plainly makes him so.* If it do not, I feel myself powerless to decree it.

The provision in regard to the registry of the certificate under section 34 was called for to enable the public to know, within a reasonable time, that all guarantees were at an end and that the only reliance of a creditor was on the fund so provided, if any balance of it remained. If of any service as a *notice*, it was but a very uncertain one in practice, as a small balance might remain due up to any time within five years. One day the absence of any certificate from the registry might induce the belief that a large amount of stock was due, and credit might thereupon be given to the company; and before liabilities ripened, the small balances might be paid up and the certificate registered, and with it, recourse upon the stockholders at an end. I have, however, just stated a possible but not a probable case. It is, nevertheless, one which the provision of the statute could not prevent. If registry of the certificate of the payment in of the whole capital stock was intended as a notice, it might have some result as to parties from whom the company sought credit, but the registry of the certificate of one shareholder would change, in few cases, the commercial standing or position of the company or lessen its claims for credit.

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Taking, then, every view of the legislation and the interests of all the parties in their several relations to each other, I do not feel justified in enforcing the claims of the appellant. It is to be regretted that innocent creditors should suffer, but it should be equally regretted that innocent stockholders should lose what they never received value for or agreed or expected to pay.

Some of the defendants set up a defence by alleging the payment in full of their shares within five years, and the registry of the certificates, not before, but after the commencement of the suit. If I am right as to the issues on the pleas generally then those in question are, in my opinion, good. By section 97, ch. 22, of the consolidated statutes of *Upper Canada* "any defence arising after the commencement of any action may be pleaded according to the fact without any formal commencement or conclusion, &c. (1)." The defence here arose after the commencement of the action, and if the plaintiff was satisfied with the truth and legal effect of the matters therein alleged he could have so said, and he would have, in that case, been entitled to his costs up to that time; but the rule is, I think, "if the plaintiff replies or demurs to the plea the defendant will be entitled to his costs if he succeeds" —excepting, however it may be, "the costs incurred prior to the plea." The objection that the plea is not "to the further maintenance of the suit" and is therefore bad, because it would be no defence as regards the costs incurred previous to right of defence arising from the registration, cannot be accepted as a valid one. The law makes it a good defence pleaded in that way; and I think the question of the previous costs depends on the action of the plaintiff subsequent to the plea. It cannot, in my judgment, affect the issues raised.

(1) See also *Todd* v. *Emly*, 9 M. & W. 606.

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On the whole case, after much reflection and research, I feel that my judgment should be for the respondents, and that the appeal should be dismissed with costs.

GWYNNE, J.:—

For the reasons given by the learned Chief Justice of the Court of Common Pleas in his judgment, and by Mr. Justice *Patterson* in the Court of Appeal, I am of opinion that the true construction of the acts which raise the question before us, is that put upon them by the judgment of the Court of Common Pleas.

I see nothing in the Acts which expresses the intention of the legislature to have been, that payment in full by a shareholder of all his stock should have effect, but of a greater or less degree, according as registration of the certificate of payment should take place within, or after, the expiration of, thirty days from the payment. If such had been the intention of the legislature, it should have been, and, no doubt, would have been so expressed; so that the question really is, as it is put by the demurrer, whether payment by a shareholder of his stock in full shall have any operation at all as a discharge of such shareholder from unlimited liability for all the debts of the company, unless he *obtains and registers a certificate of such payment within* 30 *days from payment.* We cannot, I think, put such a construction upon the statutes as that the obtaining and registering a certificate of payment in full by a shareholder upon the thirtieth day from payment, should discharge him from all liability beyond the amount so paid; and that the obtaining and registering such certificate upon the thirty-first day after such payment in full should have no operation whatever, but would leave him equally liable for all debts of the company as if he had not paid anything on his shares. The spirit of the statute is, in my opinion, as stated by the learned Chief Justice of

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the Common Pleas, in whose judgment, and in that of Mr. Justice *Patterson*, I entirely concur. We give, I think, full effect to the letter also, by holding that, as to a shareholder paying in full, registration of the certificate of payment within thirty days does not constitute an essential element to give to payment in full the operation of a discharge from all liability, excepting always the excepted demands.

Appeal dismissed with costs.

Solicitors for appellant: *Robertson & Robertson.*

Solicitor for all respondents except *Rumsey*: *W. R. Meredith.*

Solicitors for respondent *Rumsey*: *Osler, Wink* and *Gwynne.*

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*Oct. 29.

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*Feb'y. 3.

CHARLES H. B. FISHER.....APPELLANT;

AND

GEORGE R. ANDERSON, *et al*.....RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Will, construction of—Tenants in common or joint tenants.—Costs.

By will *J. H. A.* directed:—"Until the expiration of four years from the time of my decease, and until the division of my estate as hereinafter directed, my executors shall every year place to the credit of each of my children the sum of sixteen hundred dollars, and if any of my children shall have died, leaving issue, then a like sum to and among the issue of the child so dying, such sum of sixteen hundred dollars to be

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

paid by half yearly instalments to such of my children as shall be of age or be married; but if any advances shall have been made to any of them, and interest shall be due thereon, such interest to be deducted from the said sum of sixteen hundred dollars.

"As regards the division, appropriation, and ultimate disposition of my estate, it is my will that, subject to the payments of my just debts and legacies, bequests and annuities, I have heretofore given or may hereafter give, and to the expenses of the management of my estate, all the rest, residue and remainder of my estate, and the interest, increase and accumulation thereof, be distributed, settled, paid and disposed of, to and among my children who may be alive at the time of the division and appropriation into shares of my estate hereinafter directed, and the issue then living of such of my children as may be then dead, at the time and in the manner following, that is to say:

"That immediately, on the expiration of four years from my death, my executors, after making such provision as may be necessary for the payment of any debts and legacies that may be outstanding and unpaid, and of outstanding annuities, and of the expense of the management of my estate, shall divide all my remaining estate into as many just and equal shares as the number of my then surviving children and of my children who shall before them have died, having lawful issue then surviving, shall amount unto, and shall apportion and set off one such share to each of my said then surviving children, and one such share to the lawful issue of each of my then deceased children, whose lawful issue shall be then surviving, all the issue of each deceased child standing in the place of such deceased child.

"And it is my will, and I direct, that from henceforth a separate account shall be kept by my trustees of each share, and of the interest and profit thereof, and the payments made to or on account of or for the maintenance and education of each of my said children or issue, shall be charged against the share apportioned to such child or children, or wherein such issue shall be interested, so that all accumulations and profits that may arise shall enure to the increase of each several share on which such accumulation or profit shall accrue—it being my intention that after such division shall take place, the maintenance, education and support of each of my children while under the age of twenty-one years shall be drawn from the separate income of such child, and the maintenance and education of the children of any of my children who may have before them died, leaving issue, shall be drawn from

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the share or shares set apart for the issue of such deceased child or children.

"And that my children, and such issue of deceased children being of age, that is to say, of the age of twenty-one years, or when respectively they shall attain the age of twenty-one years, shall be severally entitled to receive for their own use the whole of the interests and profits of the share and proportion of my estate to which they may be respectively entitled."

On 26th May, 1864, *M. L. A.*, testator's daughter, married *C. H. F.*, appellant. Testator died 24th Dec., 1870. On 25th Aug., 1872, testator's daughter died, leaving three children: *H. A. F.*, *E. B. F.*, and *W. S. F.* On the 14th Sept., 1877, *H. A. F.*, the eldest son of appellant and *M. L. A.* died. Thereupon the appellant claimed that the three brothers took their mother's share under the will as tenants in common and, the property being personal property, *H. A. F.'s* share vested in the appellant, his father.

Held,—That the intention of the testator was that his estate should be divided, and that the children of testator's daughter took as tenants in common, and consequently on the death of the eldest son the whole right, title and interest in his share, vested in the appellant.

APPEAL from a judgment of the Supreme Court of *Nova Scotia* (sitting in Appeal in Equity), pronounced on the 22nd of April, 1879, dismissing an appeal of the present appellant against the decree or judgment of the Judge in Equity made therein.

The following case was entered into between the parties, and filed on the Equity side of the Supreme Court, under the practice in *Nova Scotia*, viz.:

"On or about the 24th day of December, A.D., 1870, the Honorable *John H. Anderson* departed this life, having first made his last will and testament, a true extract whereof is hereto annexed marked 'A.' At the time of his death he left several children him surviving, and amongst others *Mary Louisa*, then the wife of *Charles H. B. Fisher*, one of the parties hereto. The said *Charles H. B. Fisher* was married to the said *Mary Louisa Anderson* on the 26th day of May, A.D., 1864, and at the time of the death of the said *John H.*

Anderson, there were living of the issue of the said marriage the following persons, namely: *Henry Anderson*, born on the 31st day of August, A.D. 1866, *Edwin Bayard*, born on the 7th day of December, A.D. 1867, *Walter Stanley*, born on the 11th of September, A.D. 1869. The said *Mary Louisa* departed this life on the 25th day of August, A.D. 1872, leaving the said children her surviving. The said *Mary Louisa* died without having made a will, and without having exercised any right or power of appointment conferred upon her by the said will.

"On the 14th day of September, A.D., 1877, the said *Henry Anderson Fisher* departed this life, leaving his two brothers him surviving and who are still living.

"The said extract hereto annexed marked 'A' is the only portion of the will of the said *John H. Anderson* which in any way bears upon the question intended to be raised by this case, but either party shall be at liberty to produce and use at the argument hereof a copy of the entire will of the said *John H. Anderson*, providing the same is certified under the hand of the Registrar of the Court of Probate for the county of *Halifax*, and sealed with the seal of the said Probate Court.

"*George R. Anderson, John Starr* and *Andrew K. Mackinlay* are now the executors and trustees of said will.

"The said *Charles H. B. Fisher*, as the father of the said *Henry Anderson Fisher*, claims that upon the death of the said *Henry Anderson Fisher* his share in the estate of the said *John H. Anderson* became the property of him the said *Charles H. B. Fisher*, and did not go to the surviving brothers of said deceased child.

"The foregoing statement of facts has been agreed upon by the said *Charles H. B. Fisher* on his own behalf, and by the said *George R. Anderson, John Starr*

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and *Andrew K. Mackinlay*, as such executors and trustees as aforesaid, on behalf of their *cestui que trust* who are interested in said fund, and the opinion of this court is sought as to whether or not the share of said *Henry Anderson Fisher* upon his death vested in his father, the said *Charles H. B. Fisher*, as his heir or legal representative.

"Nothing herein contained shall be construed to deprive the party against whom the judgment of this court shall be given of the right of appeal from such decision."

The clauses of the will of the said *J. H. Anderson*, upon which the determination of this appeal depended, are set out in the head note.

The case was argued before Mr. Justice *J. W. Ritchie*, Judge in Equity for the Province of *Nova Scotia*, who gave judgment in favor of the defendants. The plaintiff appealed to the Supreme Court of *Nova Scotia* from that decision, and that Court dismissed the appeal with costs.

The question which arose on this appeal was whether, under the will of *John Anderson*, the children of the appellant by *Mary Louisa Anderson*, a daughter of the testator, took as joint tenants or tenants in common, the benefit which they derive?

Mr. *Gormully* for appellant:—

On the construction of the will, the children of Mrs. *Fisher* took as tenants in common.

There is very little dispute as to the law, the point is, does the will, as a fact, create a severance?

Now, where in a will property, whether real or personal, is given to two or more persons, any expression, which in the slightest degree imports a division among the objects of the gift, creates a tenancy in common. It has been held, for example, that a tenancy in common is created by the use of the words "to and

among," "respectively," "between or amongst," and "between them," and also by the use of the word "participate."

A court of equity leans in favor of a tenancy in common rather than a joint tenancy.

The Judge in Equity has founded his decision chiefly on the following clause of the will:

"That.....my executors..... ..... shall divide all my remaining estate into as many just and equal shares as the number of my then surviving children and of my children who shall before then have died, having lawful issue then surviving, shall amount unto, and shall apportion and set off one such share to each of my said surviving children, and one such share to the lawful issue of each of my then deceased children whose lawful issue shall be then surviving, all the issue of each deceased child standing in the place of such deceased child."

Perhaps if that clause stood alone the decision would be correct, but it is submitted that the learned Judge has not given sufficient weight to the other parts of the will.

The appellant relies on that portion of the will in which the grandchildren as well as the children of the testator are given several interests in the income thereby bequeathed to them, the words "to and among" being sufficient to create a tenancy in common. See *Richardson* v. *Richardson* (1), *Stilworthy* v. *Sancroft* (2).

The case of *Crooks* v. *De Vandes* (3), is relied upon by the respondents, but there the only words were "what remains to go to my grandsons," and Lord *Eldon* did not think there was anything in the context to control the natural meaning of these words.

This was a gift to a class, and those who take are

(1) 14 Sim. 526.
(2) 33 L. J. Ch. 708.
(3) 9 Ves. 200.

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those who are alive at the time of the distribution, and the moment they took, they took absolutely. The time for division had passed before the child died, and if the executors had followed the directions in the will the division would have taken place. The Court below did not discuss the period of division.

Mr. *Cockburn*, Q.C., for respondents:

In one of the cases referred to by the learned Judge in Equity, *Bridge* v. *Yates* (1), precisely the same words were used, and there it was held that two grandchildren, the issue of a deceased child of testator, took as between themselves as joint tenants, and not as tenants in common, the testator not having spoken of any division amongst them. The only division contemplated in this case is that of the grand division of the children when they attain the age of 21 years. There never was a subdivision of one share left to the issue of the children dead contemplated. It is altogether a question of construction, and I contend it was not the intention of the testator that the husband of his child should take anything under this will.

The learned counsel relied on the reasons given in the three concurring judgments appealed from and the following cases therein cited, viz.:

In *re Hodgson* (2), *McGregor* v. *McGregor* (3), *Leak* v. *McDowall* (4), *Crooke* v. *DeVandes* (5).

Mr. *Gormully* in reply.

RITCHIE, C. J.:—

This was an appeal from a judgment of the Supreme Court of *Nova Scotia*. The question raised is as to the construction of the will of *John Anderson*, viz: Whether the children of the appellant by *Mary Louisa Anderson*,

(1) 12 Sim. 645.
(2) 1 K. & J. 181.
(3) 1 DeG. F. & J. 63.
(4) 32 Beav. 28.
(5) 9 Ves. 206.

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a daughter of testator, took under his will as joint tenants or tenants in common.

On 26th May, 1864, *Mary Louisa Anderson* married the appellant. The testator died on 24th December 1870. On the 25th August, 1872, *Mary Louisa Fisher née Anderson* died, leaving three children, *Henry Anderson Fisher*, *Edwin Bayard Fisher*, *and Walter Stanley Fisher*.

On the 14th Sept., 1877, *Henry Anderson Fisher*, the eldest son of the appellant, and *Mary Louisa Anderson* died, and the appellant now claims that the three brothers took their mother's share under the said will as tenants in common and not as joint tenants, and the property being personal property vested in the appellant, his father. On the other side it is contended the brothers took as joint tenants, and that consequently the interest of *Henry Anderson Fisher* survived to his brothers.

Though unquestionably at the present day tenancies in common are favored rather than joint tenancies, it cannot be doubted, that where the words used create a joint tenancy and there is nothing to indicate a contrary intention, no words or circumstances which, either expressly or by implication, create a severance, that must be taken to be the real intent of the testator, but wherever slight words of severance are found, the court acts upon them, and this the more readily in cases where provision is being made for families, for courts of equity have always inclined to tenancies in common when a question arises upon a provision for children.

Cruise thus states Lord *Hardwicke's* views, as taken from *Stones* v. *Heurtly*, MSS. R. (1):

> Courts of law were anciently very favorable to joint tenancies to prevent the splitting of tenures and services, but since the abolition of tenures, even courts of law have been less favorable to them, but courts of equity always espouse tenancies in common as being a more suitable provision and prevents the descent of and right to the

(1) Greenleaf's Cruise's Dig. vol. 3, p. 415.

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estate depending on an accident, that of survivorship, and are still more inclined to them when the question arises upon provisions for children, whereby an equality is established among them. It was said on the one hand that the word "survivor" makes a joint tenancy, and on the other hand that the words "*equally to be divided*" should sever it and make a tenancy in common, and I am of opinion in this case these last words must prevail, for it could never be the testator's intent that, if any one of his younger children should die leaving children, such children should have nothing at all, but their mother's share should go to the surviving sisters. It was said the daughters might have severed the joint tenancy, but here they were under age, any one of them might have married and had children and died under age before any severance of the joint tenancy could be.

An observation peculiarly applicable to the present case, and Mr. *Jarman*, after citing a great number of cases, showing what expressions have been held to create a tenancy in common, says:

The preceding cases evince the anxiety of later judges to give effect to the slightest expressions affording an argument in favor of a tenancy in common, an anxiety which has been dictated by the conviction that this species of interest is better adapted to answer the exigencies of families than a joint tenancy, of which the best quality is that the right of survivorship may, at the pleasure of either of the co-owners, (if personally competent), be defeated by a severance of the tenancy (1).

In *Haws* v. *Haws* (2), Lord *Hardwicke* says:—

The general rules insisted on are true, for certainly joint tenants are not favored here, because they introduce inconvenient estates and do not so well provide for families, therefore this court leans against them, and so, I believe, do the courts of law now, though they favored them formerly, and the ground upon which they went was the multiplication of services under the old tenures, but the statute of 12 Car., 2 ch. 24, s. 1, has reduced the several sorts to socage tenure only.

Again, in *Rigden* v. *Vallier* (3), Lord *Hardwicke* says:

Here is a father making provision for all his children: suppose one of them had died and left children, if a joint tenancy, it must have gone from them and survived to the other sons and daughters of the grantor, which could never be his intention.

In *Taggart* v. *Taggart* (4), Lord *Redesdale* says:

(1) 2 Jarman, 3rd ed. 239.
(2) 3 Atkyns 524.
(3) 3 Atkyns 730.
(4) 1 Sch. & Lef. 88.

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Joint tenancy as a provision for the children of a marriage is an inconvenient mode of settlement, because during their minorities no use can be made of the portions for their advancement, as the joint tenancy cannot be severed.

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And Lord *Hatherley*, in *Robertson* v. *Fraser* (1), says:

I cannot doubt, having regard to the authorities respecting the effect of such words as "amongst" and "respectively," that anything which in the slighest degree indicates an intention to divide the property must be held to abrogate the idea of a joint tenancy and to create a tenancy in common.

From all which it may safely be affirmed that where words of joint tenancy are coupled with words amounting to a division, there will be a tenancy in common.

I think enough can be found in this will to indicate an intention of severance sufficient to justify the conclusion that a tenancy in common was created, that the share of the child of the testator *Mary Louisa* was on her death to be shared equally by her issue, that is by her children; for by the term "issue" as used in connection with that of "parent," and to take the share primarily intended for the parent, I think the testator clearly meant children, and the word must be so construed.

A critical examination of the terms of the will makes the intention of severance, I think, apparent. After vesting his property in trustees, giving directions as to the managing, selling and investing the estate, and after certain specific bequests, and after making provision for his wife, and also for the bringing up, maintenance and education of his children while under the age of 21 and unmarried, the testator provides for a division of his estate, on the expiration of four years from his death, but until the expiration of the four years, and until the division takes place, the executors are required, in these words, "every year to place to the credit of each of my children the sum of $1,600, and if any of my children shall have died, leaving issue, then

(1) L. R. 6 Ch. App. 699.

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the like sum *to and among the issue* of the child so dying."

This sum of $1,600 a year was unquestionably to the issue as tenants in common, because it is abundantly clear from numerous authorities that the terms "to and among" create a tenancy in common. Then provision is made as regards the "*division, appropriation* and *ultimate disposition* of my estate." These words indicate that the testator intended himself to *divide, appropriate* and *ultimately dispose* of the estate, and he proceeds to do so, subject to payment of debts, legacies, and expenses of management, in these words:

All the rest, residue and remainder of my estate, and the interest, increase and accumulation thereof, be distributed, settled, paid and disposed of *to and among* my children (who may be alive at the time of the division and appropriation into shares of my estate, hereinafter directed), and the issue then living of such of my children as may be then dead.

The words "to and among," I think, apply quite as much to the "issue" as to the "children," and quite as much as the words *share and share alike* were held to apply in *Hodges* v. *Grant* (1). In that case, the language as to the residue was:

Unto and among all the children of *James Grant* who shall be then living, and the issue of such of the children of the said *James Grant* as shall be then dead, having left issue living at the time of their respective deaths, equally to be divided between such children and issue share and share alike, but so that the issne of such children respectively, shall take only such share as their respective parents would, if living, have been entitled to.

It was contended that the children only took as tenants in common and the issue of deceased children as joint tenants. The Master of the Rolls says:

You cannot get over the words "equally to be divided between such children and issue share and share alike," for the words apply to the *issue* as much as to the *children*.

In delivering judgment he also said:

With regard to the residuary gift, I am of opinion that the issue of deceased children of *James Grant* are entitled to take as *tenants in common*.

(1) L. R. 4 Eq. 140.

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That is to say, I think, this clause should be read the words " who may be alive, &c." as matter of description, and as in a parenthesis " to and among my children and the issue then living of such of my children as may be then dead."

Then, as to the time and manner of this division, the testator provides that immediately on the expiration of four years from his death, his executors, after making provision for debts and legacies, and annuities outstanding, and the expense of the management of his estate, " shall divide all my remaining estate into as many *just and equal shares* as the number of my then surviving children, and of my children who shall before then have died leaving lawful issue then surviving, shall amount unto, and shall apportion and set off one such share to each of my said then surviving children, and one such share *to the lawful issue* of each of my then deceased children, whose lawful issue shall be then surviving, all the issue of each deceased child standing in the place of such deceased child." This, I take it, was to indicate that though the estate was to be divided, as previously provided, *to and among* his children and the issue then living of such of his children as might then be dead, such issue should only have divided among them what the parent would have had had she been living at the time of the division and appropriation, and was not intended to interfere with an equal division of such share among her issue, and this, I think, is indicated by the next section which provides for the keeping of a separate account by the trustees of each share, thus :

And it is my will, and I direct, that from henceforth a separate account shall be kept by my trustees of each share, and of the interest and profit thereof, and the payments made to or on account or for the maintenance and education of each of my said children or *issue,* shall be charged against the share apportioned to such child or *children,* or *wherein such issue shall be interested,* so that all accumulations and profits that may arise shall enure to the increase of each

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several share on which such accumulation or profit shall accrue, it being my intention that after such division shall take place, the maintenance, education and support of each of my children, while under the age of twenty-one years, shall be drawn from the separate income of such child, and the maintenance and education of the children of any of my children who may have before them died, leaving issue, shall be drawn from the share or shares set apart for the issue of such deceased child or children.

This separate account must have been intended to be kept, not only of each share apportioned to each child, but also of the share of each of the children of a deceased child, and this, I think, the following, as it were explanatory clause, makes very clear :—

And that my children, *and such issue of deceased children being of age*, that is to say, of the age of twenty-one years, or when respectively they shall attain the age of twenty-one years, *shall be severally* entitled to receive for their own use the whole of the interests and profits of the share and proportion of my estate to which they may be respectively entitled.

What would be the share and proportion of his estate to which they would be respectively entitled, if the testator did not contemplate an equal division of the mother's share *to and among* the issue or children of a deceased child? What can this mean but that the children of the testator were to have equal shares of the estate, and the children of a deceased child to have equal shares of the deceased parent's share, and that an account was to be kept against each child and against each of the issue or children of a deceased child, so that each should be maintained and educated out of his or her share, and not that the whole or an unequal portion should be expended on one to the detriment of the other or others; and unless such an account was kept, as well against the children severally of the deceased child as against the children living of the testator, how could the testator's clearly expressed intention be carried out, viz: that his children and such issue of

deceased children *being of age*, or when respectively they shall attain the age of twenty-one years, should be severally entitled to receive for their own use the whole of the interest and profits of the *share* and proportion of the estate to which they may be respectively entitled?

Unless shares were set apart and these separate accounts kept with each and all, both children and issue, what would they respectively be entitled to? No distinction whatever is made between the children and their issue, but, as in the case of the children so in the case of the issue, each of the children and each of the issue is to receive on coming of age the whole of the interests and profits of *the share* or proportion of his estate to which they may be respectively entitled. All this, I think, indicates that the testator intended that his children should enjoy his estate share and share alike, and that the issue, that is the children of a deceased child, should take their mother's share, share and share alike, and should receive each one his share together with all interest and profits accruing thereon on coming of age, and so brings this case directly within the rule enunciated by Lord *Hatherley* in *Robertson* v. *Fraser* (1) where he says:

> All the authorities go to this, that if there is to be a sharing, the shares must be equal; and division being once imported, the true interpretation must be a tenancy in common.

I, therefore, think that though there may be in one part of the will an expression, which, if it stood alone, would indicate a joint tenancy, the words used are so coupled with provisions and directions, so clearly pointing to a severance and equal division, and separate interests in each of his children, and in each of the children, or issue, of a child dying, for whom the testator was making provision, that the bequest must be treated

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as a bequest to such issue as tenants in common and not as joint tenants; in other words, the testator intended division; the whole scope of the will shows that the intent of the testator was that his estate should be divided, and by consequence that there should be no survivorship.

STRONG, J.:—

I am of opinion that the children of the testator's deceased daughter, Mrs. *Fisher*, take the interest bequeathed to them as tenants in common and not as joint tenants.

It is quite clear that Mrs. *Fisher*, having died before the period of division, the legacy to her never vested. The children do not therefore take under the provision of the will which disposed of the reversionary interest in their mother's share, by giving her a power of appointment to the extent of $10,000, and in default of appointment, and as to the residue of the share, gave the fund to her children and grand children absolutely by words which clearly imported a tenancy in common. I think that that disposition has no influence on the immediate gift to the children on which depends the question we have to determine. The children here take under the direct bequest to them, in the event of their mother's death before the arrival of the period of distribution. The testator directs his executors, at the expiration of four years after his death, to divide the residue of his estate into as many just and equal shares as the number of his then surviving children, and of his children who shall before then have died shall amount unto, and shall apportion and set off one such share to each of said surviving children, and one such share to the lawful issue of each of his then deceased children whose lawful issue shall be then surviving, all the issue of each deceased child standing in the place of such deceased child.

It is, I think, clear that there is nothing in this part of the will which indicates an intention that the issue of one of the testator's deceased children should take *inter se* as tenants in common, though, as between a class of such grand children and the testator's surviving sons and daughters, the directions as to apportionment, and other words imputing severance, are amply sufficient to shew that no survivorship was intended, but no such expressions apply to the grand children amongst themselves, who would therefore, if there was nothing more in the will explanatory of the gift, take as joint tenants.

Further, the gift to the children of a child deceased before the period of distribution of the annuity of $1,600 up to the expiration of the four years from the testator's death, does not, in my opinion, bear in any way on the point in dispute. It is clear that this annuity is given to grand-children as tenants in common, the words "to and among the issue of the child so dying," being conclusive in that respect, but the circumstance of the testator having given this temporary provision to his grand-children as tenants in common in no way leads to the inference that he intended them to take their share of the residue, which he bequeaths by a distinct gift, in the same manner. To proceed on such reasoning, would amount to holding that, if a testator gives distinct legacies to the same persons in one bequest, using words of severance, and not applying such words to the other, both legacies would vest in the legatees as tenants in common, a course of reasoning manifestly unsound. If authority is wanted for so plain a proposition, the case of *Crooke* v. *De Vandes* (1) shews that, in the much stronger case of the interest being given with words of severance not extending to

(1) 9 Ves. 197.

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the corpus, the *jus accrescendi*, nevertheless, applies to the latter.

Then the will contains this clause: "And that my children and such issue of deceased children being of age, that is to say of the age of twenty-one years, or when respectively they shall attain the age of twenty-one years, shall be severally entitled to receive for their own use the whole of the interests and profits of their share and proportion of my estate to which they may be respectively entitled." I find here expressions which are decisive to show that a tenancy in common, and not a joint tenancy, was contemplated by the testator.

In the first place, the issue of the testator's deceased children are declared to be "severally" entitled to be paid when they "respectively" attain twenty-one—stronger terms for inferring a tenancy in common than these words "severally" and "respectively" could not be suggested, and they must be conclusive, if I am right in considering, as I do, that by the words "interests and profits" of the share it is not intended to direct the payment, in the manner mentioned, to the issue of deceased children, merely of the accrued interest and profits, but of the whole corpus of these legacies. Supposing, however, that this direction has not reference to the payment of the capital, but is confined to the accretions, there remain still words referring to the original gift sufficient to explain the testator's intention to have been to create a tenancy in common; for the "interests and profits" which are to be paid "severally" to the issue as they "respectively" attain 21 are to be of the "share and proportion" of the estate to which they may be "respectively" entitled.

The testator must therefore in this last view be taken as furnishing an explanation of his intention in making the original gift; for if each grand-child was to take a "share and proportion," and the members of the class of

grand-children were to be "respectively" entitled to an interest in the testator's estate, all right of survivorship must be excluded. In *Robertson* v. *Fraser* (1), a much stronger case than this, Lord *Hatherly* determined that a legacy, which *per se* would have been taken in joint tenancy, was so explained by a codicil referring to the original bequest incidentally, and without any reference to the vesting or payment of the legacy, as to amount to tenancy in common, the word used, and which the Lord Chancellor fastened upon as indicating the intention, being one of much less force than the expression contained in the clause of this will which I have quoted.

I need scarcely say that there is no room for arguing that these words "severally" "respectively" "share and proportion" do not refer to the children issue of a testator's child, as well as to the testator's own children; for the direction for payment at 21 of course applies to the grand-children individually, who are therefore, by force of the expression just mentioned, declared to be each entitled to a share in that portion of the testator's estate which is allotted to the class to which they belong.

For these reasons I am compelled to differ from the Court below.

I do not see, however, that we can at present make any order upon this appeal, for we have not any order or decree of the Court below before us—the printed case being in this respect incomplete.

Further, as far as I can see, none of the surviving infant children of Mrs *Fisher* are parties to the record, and without their presence no order for payment to the appellant or declaration of the construction of the will could properly be made. The trustees, it is clear on

(1) L. R. 6 Ch. App. 696.

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authority, do not for the purpose of such a suit as this sufficiently represent infant beneficiaries.

In my judgment, the appeal ought to stand over until the order or decree is produced; and, if it then appears that none of the children are parties, the cause ought to be remitted to the Court below with a simple declaration that the suit is defective for want of parties—in which event no order should be made as to costs. If it appears that the children are defendants, then, I think, the construction of the will may be declared in conformity with the opinion I have before expressed, and in that event the costs of all parties should be paid out of the estate.

FOURNIER, J., concurred in allowing the appeal.

HENRY, J.:

I concur. I had at first some difficulty in arriving at the conclusion that the children of the testator's daughter, *M. L. Anderson*, took as tenants in common; but taking the whole will together I have arrived at the same conclusions as my brothers. There are sufficient words in this will to create a tenancy in common. First, he makes provision for his own children, but gives them only a limited control, for they were not even entitled to their share when they arrived at age. Then he directs that a separate account of each share belonging to the lawful issue of each of his then deceased children should be kept, and directs that payments made to, or account of, or for the maintenance and education of each of his said children or *issue*, shall be charged against the share apportioned to such child or children, or wherein such issue shall be interested, so that all accumulations and profits which may arise shall enure to the increase of each several share on which such accumulation or profit shall accrue, &c. I think from that, and for other reasons, we may assume that the estate

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was intended to go to the heirs as tenants in common, and therefore I have come to the conclusion that this appeal should be allowed.

GWYNNE, J.:

This a case which raises a question under the will of the late *John H. Anderson*, who died on the 24th Dec., 1870, and the question is, whether the children of testator's daughter, *Mary Louisa Anderson*, who derive a benefit under testator's will, take that benefit as joint tenants, or as tenants in common. The learned Judge in Equity in *Nova Scotia*, and a majority of the Supreme Court of that province, *Weatherbe*, J., dissenting, have held that they took as joint tenants, being of opinion that there is nothing in the will of the testator indicating an intention that they should take in severalty. With the greatest respect and deference for the learned judgments delivered in the courts below, the testator's will does appear to me sufficiently to indicate that intention, the assumed absence of which is made the basis of the judgment appealed from. The rule which governs the case is very emphatically expressed by Lord *Hatherly* in *Robertson* v. *Fraser* (1), namely, that:

> Any thing which in the slightest degree indicates an intention to divide the property must be held to abrogate the idea of joint tenancy and to create a tenancy in common; all the authorities go to this, that if there is to be a sharing the shares must be equal, and division being once imported, that the interpretation must be a tenancy in common.

By the clauses of the will, which raise the question, the testator directed that until the expiration of four years from the time of his decease, and until the division of his estate as thereinafter directed, his executors should every year place to the credit of each of his children the sum of $1,600, and if any of his children should have died leaving issue, *then a like sum to and among*

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the issue of the child so dying. Now, that the word "*issue*" in this last sentence is equivalent to "children" is clear upon the authority of *Sibley* v. *Perry* (1) and *Lanphier* v *Buck* (2). We have, then, in the case of one of testator's children dying leaving issue before the period appointed for the division of his estate, which is the event which has happened, a clear gift of $1,600 annually *to and among* the *children* of his child so dying, which upon the authority of all the cases constitutes a tenancy in common, and as this sum is to be placed to the credit of such children, it must be so done in equal parts in severalty.

Subject, then, to the payment of his debts, legacies and the payment of the expenses of the management of his estate, the testator, as regards the division, appropriation and *ultimate* disposition of his estate, directed all the rest, residue and remainder of his estate, and the interest, increase and accumulation thereof to be *distributed, settled, paid* and *disposed of*, to and among his children living at the time of such division and appropriation, and the issue then living of such of his children as might be then dead in manner following, that is to say: That immediately on the expiration of four years from his death, his executors (after making provision for payment of debts, legacies and the expenses of the management of his estate) should *divide* all his remaining estate into as many *just and equal* shares as the number of his then surviving children, and of his children who should have before then died leaving lawful issue them surviving, should amount unto, and should apportion and set off one such share to each of his then surviving children, and one such share to the lawful issue of each of his then deceased children whose lawful issue should be then surviving; all the issue of each deceased child standing in the place of

(1) 7 Ves. 522. (2) 2 Dr. & Sm. 492.

such deceased child. He then directs that a separate account of each of such shares shall be kept, and he declares the object he had in view in directing such separate accounts to be kept—thus: "And it is my will and I direct that from henceforth a separate account shall be kept by my trustees of each share and of the interest and profits thereof, and the payments made to, or on account of, or for *the maintenance and education of each* of my said children *or issue*, shall be charged against the share apportioned to such child or children, or wherein such issue shall be interested, so that *all* accumulations and profits which may arise shall enure to the increase of each several share on which such accumulation or profit shall accrue—it being my intention that after such division shall take place, the maintenance, education and support of each of my children, while under the age of 21 years, shall be drawn from the separate income of such child; and the maintenance and education of the children of any of my children who may have before then died, leaving issue, shall be drawn from the share or shares set apart for the issue of such deceased child or children, and that my children and such issue of deceased children being of age, that is to say of the age of 21 years, or when they *respectively* attain the age of 21 years, shall be *severally* entitled to receive for their own use, the whole of the interest and profits of *the share* and proportion of my estate to which they may be respectively entitled."

Now, the word "*issue*" in this paragraph being, upon the authorities already cited, and the whole context of the will, equivalent to "children of a deceased child," the paragraph commences with a direction that a separate account shall be kept of all payments made *to* or on account of, or for the maintenance and education of *each of the children* of a deceased child, and that the same should be charged against the share wherein the

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children of such deceased child shall be interested, *so that* all accumulations and profits that may arise shall enure to the increase of each several share on which such accumulation or profit shall accrue, and that the children of a deceased child, when *respectively* attaining the age of 21 years, shall *severally* receive for their own use the whole of the interests and profits of the share and proportion of testator's estate to which they were *respectively* entitled.

The bearing which this paragraph has upon the construction to be put upon the will depends, not upon the fact that it provides that the children of a deceased child shall receive, for their absolute use, the full and ultimate benefit conferred upon them by the testator's will, at different times, namely, when each arrives at 21 years of age, but upon this, that it provides that at that age *each* should receive the whole of the interests and profits of the *share* and *proportion* of the testator's estate *to which each* is entitled, in virtue of the interest which became vested at the expiration of four years from the testator's decease.

The account which was directed to be kept was the means provided by the will, and the sole means for arriving at the amount of such share or proportion of testator's estate which each would be so entitled to receive, and that amount would necessarily depend upon the amount which during minority had already been paid to, or on account of, or for the maintenance and education *of each*; for what was so expended for one could not be charged to the account of, or reduce the amount of the share of the others, or of either of them. The amount expended upon each could only be charged to the share or interest of that one for whom it was so expended.

Now, upon the death of *Mary Louisa Anderson*, wife of the appellant *Chas. H. B. Fisher*, her three children

became entitled as tenants in common to the legacy of $1,600 per annum until the *ultimate* division of testator's estate at the expiration of four years from his decease, when these same children being still living, the share to which their mother, if then living, would have been entitled, became vested in interest in them. The interest so vested in them was made subject to charges, of which an account was directed to be kept, of all payments made to, or an account of, or for the maintenence and education *of each*, which amounts would vary in the several cases according as more or less should be expended upon one than upon another during minority.

The account so to be kept, together with the accumulations upon the shares of each in the legacy of $1,600 per annum, would alone shew, and this is the mode which the will provides for shewing, the amount which each heir arriving at 21 could claim as his own property, already vested in him, but then only payable.

This account so directed to be kept, from the instant of the interest of the children of *Mary Louisa Anderson* vesting, and the charges directed to be entered in it of monies expended upon *each*, necessarily, as it appears to me, involves a severance of the interests of each, and that therefore, according to the rule laid down by Lord *Hatherly* in *Robertson* v. *Fraser* (1), the children of *Mary Louisa Anderson* took as tenants in common and not as joint tenants.

The result is that the appeal should be allowed.

Appeal allowed.

As to costs, the court ordered that the costs be paid by the respondents out of the general residue of the estate of the said *J. H. Anderson*, deceased, but if the said residue should have been distributed then the said costs should be contributed by the persons who should

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have received portions of the said residue ratably according to the amounts of the respective sums received by them.

Gwynne, J.

Solicitor for appellant: *N. H. Meagher.*

Solicitor for respondents: *J. Norman Ritchie.*

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*March 22.
*June 10.

CONTROVERTED ELECTION OF THE NORTH RIDING OF THE COUNTY OF ONTARIO.

GEORGE WHELER .....APPELLANT;

AND

WILLIAM HENRY GIBBS.....RESPONDENT.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR ONTARIO.

Bribery—Promise to pay legal expenses of a voter, who is a professional public speaker—The Dominion Elections Act, 1874, *sub-sec.* 3, *sec.* 92.

Appeal from a judgment of *Armour*, J., holding that appellant had employed and promised to pay the expenses of one *H.*, a voter, who was a lawyer and a professional public speaker, and therefore was guilty of bribery within the meaning of sub-sec. 3 of sec. 92 of *The Dominion Elections Act*, 1874 (1). The evidence as to agreement entered into between *H.* and appellant was contradictory, and is reviewed at length in the judgment. It was admitted, however, that *H.* addressed the meetings in the interest of the appellant, and during the time of the election made no demand for expenses, except on one occasion, when attending a

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

(1) For the sec. of the statute see p. 444.

meeting and finding himself without money he asked for and received the sum of $1.50 for the purpose of paying the livery bill of his horse.

Held: That the weight of evidence showed that the appellant only promised to pay *H's* travelling expenses, if it were legal to do so, and such promise was not a breach of sub-sec. 3 of sec. 92 of *The Dominion Elections Act*, 1874. (*Taschereau* and *Gwynne*, J. J., dissenting.)

Per *Fournier*, J.;—Candidates may legally employ and pay for the expenses and services of canvassers and speakers, provided the agreement be not a colorable one intended to evade the bribery clauses of the Act.

Per *Taschereau* and *Gwynne*, J. J.: Such a payment would be illegal.

APPEAL from the judgment of Hon. Mr. Justice *Armour*, of the Court of Queen's Bench for *Ontario*, the Judge trying the election petition under the Act of *Canada*, 37 *Vic.*, ch. 70.

The petition was filed by the respondent against the appellant under the *Dominion Controverted Elections Act*, 1874, in the matter of an election of a member of the House of Commons for the electoral district of the north riding of the county of *Ontario*, holden on the 10th and 17th of September, 1878, setting forth that the petitioner and *George Wheler* were candidates, and that the returning officer returned *George Wheler* as being duly elected, and that *Wheler* before, during and after the election was, by himself and his agents, guilty of corrupt practices within the meaning of that expression as defined by section 4 of the *Dominion Controverted Elections Act*, 1874, and the common law of parliament, whereby the election and return of *George Wheler* was null and void, whereupon petitioner prayed that it might be determined that *Wheler* was not duly elected or duly returned, and that the election was null and void.

To this respondent, *Wheler*, answered *inter alia* that he was not guilty of the charges in the petition set

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forth. This is the only issue material to the present inquiry.

The petition was tried before Mr. Justice *Armour*, who found that corrupt practices had been committed by the respondent *Wheler* and his agents at the said election.

The appellant only appeals from the judgment of the learned Judge as to charges Nos. 4 and 5, which allege that appellant had been personally guilty of bribery, and by notice, the appeal is in respect to corrupt practices so limited.

The charge involved in Nos. 4 and 5 is that appellant made a corrupt agreement to secure the vote and influence of one *Prosper A. Hurd.*

The evidence as to the agreement between the appellant and *Hurd* is contradictory.

Hurd's contention is that, appellant having had a conversation with one *McClelland* in reference to his supporting *Wheler*, he wrote a letter dated the 5th of August, 1878, to Mr. *McClelland*, as to the terms on which he would support *Wheler*, by attending meetings, speaking, canvassing and generally using his influence to secure *Wheler's* return; he then says that *Wheler* called on him, and, professing to be cognizant of the contents of this letter, entered into the agreement with him for his support, influence and services. The letter is as follows:—

Addressed to Mr. McClelland.

PORT PERRY, August 5th, 1878.

"DEAR FRIEND,—I have not written the letter spoken of the day you were here, but have thought best to allow this matter to remain a matter of confidence between you and myself at present, and I write this letter under the seal of secrecy between you and myself. As you have extended to me your confidence, I feel safe in saying what I please to you; and what-

ever may be the final result of this letter, I desire to keep good faith with you.

"I almost regret that I consented to talk about this matter, but as I have gone as far with you as I have, I propose in this letter to be frank and speak out to you my mind.

"Until after you left I did not fully consider the responsibility I had assumed, and more than that, I felt I was placing you in a false position, for if this should go back on you I would be compelled to bear the loss or cause you to bear it yourself. I have learned something by the past thirty years as to how men will act when victory is theirs and they are no longer in want of assistance. Now in this matter I am disposed to be plain and explicit.

"If I should assume the position required, I at once sacrifice a large business awarded to me by strong party men, who would withdraw it at once. It would necessitate my leaving my office and business for at least one month, and entail on me the most constant application to prepare for the platform, and tax my energies to the utmost.

"The first thing that requires to be done is to organize the whole riding by having a central committee in every township and village, and sub-committees in every school section, and to do that requires a personal canvass of the most thorough character. The leading men require to be seen all over the riding, not saying about the numerous meetings that are to be called and attended to in the riding during the contest. Then there are also local difficulties to encounter, and above all, the party requires to be raised up to the utmost enthusiasm if victory is to attend the effort.

"I know what the riding is, for I have gone through election contests here for the last thirty-five years, and I never, with the exception of one or two cases, lost the

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election of the candidate I supported; but I know how difficult it is to create an excitement under the present circumstances, the party having been so frequently beaten here that they look upon defeat as certain and do not half work. The truth is, that not one for *the party* here talk as if there was any prospect of success, and I would not enter upon this contest and be cleaned out by the other party for any sum that could be offered, and I would not touch the thing unless I felt sure of success; but I do not intend to injure my own business and give others the benefit of thirty years' study and hard work without some consideration. I do not feel there is much that divides the two political parties, for "*John A.*" will never in practice adopt protection. As to the second man, my choice would be the man in the riding, all other things being equal, but unless my services on the platform and in the contest are considered worth the estimate I put upon them, I shall remain mute as far as this riding is concerned.

"I have had liberal offers from two other ridings since you were here, but have so far declined them.

"*Now, as to what I shall expect.* I will enter upon the personal canvass any time after the twenty-fifth of this month, and continue in the contest till the matter is over, deliver two addresses a day, when required, anywhere in the county of *Ontario*, and give an article every week in some of the local papers touching the issues under discussion, if necessary; in fact, the public press requires as much attention as almost anything else in order to ensure success, for which services I shall expect my expenses to be paid liberally; and for my professional services on the platform and my contributions to the local press, I shall expect to be paid four hundred dollars, thusly: One hundred dollars on entering upon my duties, and the balance during the contest, and if the candidate I support comes out triumphant, I

shall expect to be paid six hundred dollars more within ten days after the election is over.

"In the first place, out of the four hundred dollars I shall save very little, if anything at all, for it will take all of that to secure the others.

"If those who are the most interested in the result consider it an object to comply with these terms, and will place you in a position so that you will be financially safe in promising them to me, I am satisfied to arrange with you alone; but if they consider the terms too steep, the matter can drop just where it is; for I would not be willing to assume the responsibility, suffer the loss to my business, and tax my brain for the next six weeks for anything less. Should I be unable to continue the fight through illness or other causes, the money advanced would be returned and no further demands made. I have suffered loss myself several times rather than ask a friend to carry out what he had agreed to when his endorser went back on him.

"Unless a man has been through a contest he knows nothing about it; and if any man expects to secure a seat in parliament without an effort at the present state of affairs, he will be mistaken. Now *Mac*, if you can satisfy yourself that the parties interested are willing to come to time, I will meet you at your own place the first of next week and definitely arrange matters. If they think they are paying too dear for the whistle, there is no harm done, and I will be at liberty to make other arrangements; but whatever is the result, I depend upon you as a man of *honor*. I shall mail this letter in *Toronto* while on my way to *Rochester*, and shall not return till Saturday. If you can write me Saturday to *Port Perry*, I will see it on Monday. If things are favorable, you can let me know what day I can see you at your place.

"Yours, &c.,

"P. A. HURD."

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Mr. *McClelland* says that he never replied to this letter or took any notice of it whatever, and never communicated its contents to *Wheler* or any body else, and *Wheler* swears that he never heard of the letter until after the election had taken place and protesting it was spoken of, and that he never entered into any such agreement with *Hurd*. *Hurd* says he had a copy of the letter, but did not show it to *Wheler*, but that he dealt with *Wheler* on the assumption that *Wheler* knew all about it, as one *Paxton* had so informed him.

Wheler's contention is that it having been communicated to him that *Hurd* was going to vote on account of the National Policy, of which he did not approve, against his (*Wheler's*) opponent, and it was proposed to him that *Hurd* should hold and address meetings in favor of *Wheler's* candidature, he (*Wheler*) paying *Hurd's* expenses, that, believing he would be successful, he was afraid of doing anything that might jeopardize the election; that being assured that he could legally pay *Hurd's* expenses without interfering in any way with the election, and *Hurd* assuring him that it was quite legal and proper for him to pay his (*Hurd's*) legal expenses, he agreed he would pay whatever was legal and proper toward *Hurd's* legal expenses, they being understood to be his travelling expenses; and that there was not a word said about paying him for speaking; and that this was the only agreement or arrangement he ever had with *Hurd*. He swears that from the beginning to the end he made every effort to secure a pure election as far as he was able to do it; that he was not aware whether it was legal to pay *Hurd* for his expenses as a speaker; that he gave *McClelland* no instructions, because he was not at all clear on that point, and he says "I told him I would do nothing, nor make any arrangements that would affect the election in any way;" that there was

no talk between him and *Hurd* about a third party to make an agreement between them; "there was nothing said about his expenses but his legitimate expenses and the printing."

He said:

"I know Mr. *Hurd*; he is a pretty prominent man in his profession in his part of the Riding.

"Q. A man who has in former years taken a pretty active part in elections? A. He has addressed meetings. I was nominated against Mr. *Paxton*; I did not run against him. Mr. *McClelland* spoke to me about Mr. *Hurd*, the first intimation I had of *Hurd's* supporting me; he and others from *Port Perry* stated that they believed Mr. *Hurd* was going to support me in this election. Mr. *McClelland* stated that he had seen Mr. *Hurd*, and that Mr. *Hurd* was going to oppose Mr. *Gibbs*—that he would not under any circumstances support Mr. *Gibbs*; that he was opposed to the National Policy; and that he might be got to support me. I think *McClelland* said he met him at some public gathering; that was told me at *Uxbridge* about the latter end of July or the beginning of August. I had heard before that from several parties in *Port Perry* that Mr. *Hurd's* support could probably be obtained; I think Mr. *Mark Currie* was one.

"Q. Who else? A. Mr. *William Jones*, and I think Mr. *Edward Munday*. I do not recollect positively whether there were any more. These parties told me he intended to support the Reform candidate, no matter who was before the Convention. * * *

"Q. Did he (*McClelland*) come to see you about election matters at *Uxbridge*? A. No; I think not.

"Q. What did he come about? A. He informed me that he was gathering samples of barley for Mr. *Matthews*, of *Toronto*. I had not any samples of

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barley. I do not know that he came to see me. I met him in the hotel, talking about the *South Ontario* election and the *North Ontario* election—about elections generally; and he wished to see me particularly about meeting Mr. *Glen* in *Whitby* within the next week or two, with the object of getting the Hon. Messrs. *Mackenzie* and *Cartwright* to address meetings, one in *North Ontario* and one in *South Ontario*. He stated that he had met Mr. *Hurd* sometime previous to that, and he thought it likely Mr. *Hurd* would support me, from what he said. He stated that he was opposed to Mr. *Gibbs* anyway, and was opposed to the National Policy.

"Q. In consequence of that, did you ask Mr. *McClelland* to do anything? A. Nothing. He stated that he had spoken to Mr. *Hurd*, and he said he could do Mr. *Wheler* some good, and that Mr. *Hurd* stated that he had not decided what course he would take, but that if he addressed meetings he would have to be paid his expenses. I replied that I was not prepared to give any answer; that I was not aware whether the law would allow me to pay any expenses; that I was looking for information on that point; and that until I got that information I would not give any answer whatever. I understood that Mr. *Hurd* would require his expenses paid; I did not understand he had sent a statement to me to that effect. I did not ask Mr. *McClelland* to do anything whatever. I cannot say whether Mr. *McClelland* left *Uxbridge* for the purpose of going to *Port Perry*; I do not know where he was going; he said he was going on gathering more samples; he did not tell me where he was going; he remained in *Uxbridge* all night. I did not ask him to go and see Mr. *Hurd*, nor make him any such request, because I was not exactly favorable to receiving Mr. *Hurd*. I know Mr. *Robson*.

I have never conversed with him on this subject that I know of. I remember meeting him in *Port Perry* some time since the election.

"Q. Did you tell Mr. *Robson*, at an interview, that Mr. *McClelland* came to your place and promised you to go over to *Port Perry* and make an arrangement with Mr. *Hurd*? A. I did not.

"Q. And that *McClelland* said to you *Hurd* would want money, or that some arrangement would have to be made with *Hurd* about money. Is it true that you told Mr. *Robson* that? A. It is not true.

"Q. Nothing of that kind? A. Nothing of that kind. I cannot say when I next said anything about this matter. I do not recollect hearing anything more particularly about it. I never heard from Mr. *McClelland* again about it. I never saw him again on that subject till the day of Mr. *Glen's* trial in *Whitby*. I never got a letter from Mr. *McClelland* on the subject or wrote him one.

"Q. Did Mr. *McClelland* send you any communication on the subject that he got from Mr. *Hurd*? A. Never. I did not hear of *McClelland* having got any letter from Mr. *Hurd* till about the time of this protest. I heard then for the first time about this letter. I never heard from Mr. *Paxton* about Mr. *Hurd*.

"Q. After you saw Mr. *McClelland*, did you ever hear of any further negotiations with Mr. *Hurd* by any other person? A. No; none except the conversation I had with Mr. *Hurd* myself. I had an interview with Mr. *Hurd*; I cannot tell exactly when it was; to the best of my recollection it was on the 10th of August. I saw him in his own office at *Port Perry* I called on him to solicit his vote; I did solicit it.

"Q. Did you want him to work for you? A. Well, he said he was not decided what he was going to do.

"Q. Did you want him to work for you? A. I do

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not know that I did. I asked his support, and then he stated that he had not exactly decided what course he would take; would not do so for a week. He was going the *States*; I think he said he would be away a week or two, and after he came back he would decide what he would do. He asked me my views. He said it depended much on my views of the National Policy—if I was in accord with him. He wanted me to give him my opinion on certain points. I did so, and he said, "Well, we are nearly in accord;" and he said, "I am determind not to support Mr. *Gibbs* after what he has done." I asked him then, "Will you give me your support?" He said he would not decide then. He said he had some business matter to arrange before he would give any body to understand what he would do; he had some business to arrange with Conservative parties; I think he said parties who would give him trouble after he announced himself. He stated that he was going over to the *States* for some information respecting protection, and if he decided to take any action in the matter, he would require his personal expenses to be defrayed by me if he addressed meetings. He asked me what I would require him to do. I said, if he took hold of the matter it would be to address meetings only. I told him I would want him to address meetings if my Reform friends decided to engage him to do it or to accept him. Nothing more was said about terms—nothing about amount. He asked me whether I would want him to hold meetings generally throughout the Riding or in any locality. He said, "If I do take hold of the matter, I propose to hold a meeting at *Port Perry* in the first place, or at *Uxbridge Village*;" and he said, "I wish to take control of the meeting." He would not allow anybody to address the meeting but himself; and that he would take up about two or three hours, and not refer to Mr. *Gibbs* or anybody else. He

said he would not allow Mr. *Gibbs* or myself to address the meeting; and then he wanted his speech to be revised and printed in fly form, and five or six thousand distributed through the Riding, and he wanted to know if I would go to that expense. I said if he went on and addressed the meeting, and my friends considered his speech was worth it, we would consider whether it would be worth while going to that expense. There was nothing more said about expenses at that time. He stated it was quite correct and proper, and legal, for me to pay his legal expenses. I stated if it was, and if our people decided to accept him as speaker for us, I would pay whatever was legal and proper towards his legal expenses; that was not to cover his trip to the States; it was understood to be his travelling expenses. There was not a word said about paying him for speaking. Then we parted without any definite understanding. That interview lasted about twenty minutes; it took place in his office about six or seven o'clock in the evening; Saturday, I believe. Mr. *Foreman* came in, I suppose about five or ten minutes before we closed. I do not know whether he heard any part of our conversation; he was present at the latter part of our conversation. *Foreman* is a supporter of mine. I do not think *McClelland's* name was mentioned; it might have been mentioned.

"Q. Do you rember asking him whether he had seen *McClelland*? A. No. I think perhaps he asked me whether I had seen *McClelland*. He did not tell me he had written to *McClelland*. I did not tell him I had come to close up the matter with him.

"Q. Had you any other interview about this matter? A. No.

"Q. Never had any interview at which it was arranged that his expenses should be paid? A. No, never. The first thing I heard of him after that was that he wrote me that he had advertised a

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meeting at Port Perry; that my friends had advised him to do so. I received the letter produced in *Uxbridge* (dated 20th August, 1878.) At our interview I told him I was prepared to pay his ligitimate expenses for addressing meetings, if the party accepted him. I do not recollect when I next saw him. The first intimation I got that the meeting was called was that it was advertised in the Port Perry *Standard*. I do not recollect when I next saw him. I do not think I met him again until the meeting at *Scott*, in the Town Hall. That was my meeting and Mr. *Gibbs*' together. All our meetings were held jointly. Mr. *Hurd* did not address that in my behalf I had not any conversation about this matter with him again. My understanding was that my party had accepted him, and that I was willing to pay his personal expenses. I thought his personal expenses would cover his conveyance, the printing and his own personal expenses. He did not say anything about his time at the interview. He stated that he would have to leave his office and his son there, and he could not afford to do it unless his expenses were paid. He said he had a few Conservative clients he would have to settle with before he could come out in my favor, and that he wanted a little time for it. He was very much annoyed, I was informed, because he did not get his first speech in the *Globe* newspaper, and was near breaking off on account of it. He called meetings in the south portion of the riding. As near as I can understand, he held about five or six meetings, all within a radius of a few miles. He came to my house on the Sunday following the *Scott* meeting. I think it was on the next morning after the *Scott* meeting. We did not talk election matters over then. He wanted to know if I wanted him to go with me to attend any of the meetings that were regularly advertised, and I said no. Mr. *Hurd* spoke at *Cannington* on the following

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Tuesday evening; that was nomination day; that meeting was a joint one of Mr. *Gibbs'* and mine. I am satisfied I was not elected through Mr. *Hurd's* agency. I am satisfied he was an injury to me; I was satisfied of that before three days were over. Mr. *Hurd* spoke to me the next morning after the *Cannington* meeting, and said, "I did not expect to come to this meeting this evening, and I have not enough money; I wish you would let me have enough money to pay the expenses of my horses at *Sunderland*." I think he said *Sunderland*, and I gave him a dollar or two dollars; that was all the money I ever gave him. He has not sent me a statement of his personal expenses, and I have not settled up with him yet On the 12th of October, I think it was, the day the fair was there, I called at his office, and was there while his son was looking around for his father for an hour or an hour and a half, to get his bill of expenses to see what his expenses were. I left word with the son to write to me and send the bill of expenses. It was the younger son that I saw. I said to him that I wanted to see his father; he said his father was expecting to see me. This was at the fair, which was on that day. I afterwards went to his father's office, and the son went to try to find his father, but did not find him."

The Dominion Elections Act, 1874, sec. 92, provides that the following persons shall be deemed guilty of bribery, and shall be punishable accordingly:

"1. Every person who, directly or indirectly, by himself or by any other person on his behalf, gives, lends, or agrees to give or lend, or offers or promises any money or valuable consideration, or promises to procure, or to endeavor to procure any money or valuable consideration, to or for any voter, or to or for any person on behalf of any voter, or to or for any person in order to induce any voter to vote or refrain from voting, or corruptly does any such act as aforesaid on account of

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such voter having voted or refrained from voting at any election."

"2. Every person who, directly or indirectly, by himself or by any other person on his behalf, gives or procures, or agrees to give or procure, or offers or promises any office, place, or employment, or promises to procure, or to endeavour to procure any office, place, or employment, to or for any voter, or to or for any other person in order to induce such voter to vote or refrain from voting, or corruptly does such act as aforesaid on account of any voter having voted or refrained from voting at any election."

"3. Every person who, directly or indirectly, by himself or by any other person on his behalf, makes any gift, loan, offer, promise, procurement, or agreement, as aforesaid, to or for any person in order to induce such person to procure or endeavor to procure the return of any person to serve in the House of Commons or the vote of any voter at any election."

"And any person so offending shall be guilty of a misdemeanor, and shall also be liable to forfeit the sum of $200 to any person who shall sue for it; provided always that the actual personal expenses of any candidate, his expenses for actual professional services performed, and *bona fide* payments for the fair cost of printing and advertising, shall be held to be expenses lawfully incurred, and the payment thereof shall not be in contravention of this act."

Section 100 provides that:

"Every executory contract, or promise or undertaking in any way referring to, arising out of, or depending upon, any election under this Act, even for the payment of lawful expenses, or the doing of some lawful act, shall be void in law, but this provision shall not enable any person to recover back any money paid for lawful expenses connected with such election."

By section 101, corrupt practices by candidate or agent to void election.

By section 102, corrupt practices by candidate, or with his knowledge, renders him incapable during 7 years next (after found guilty) of being elected to or sitting in the House of Commons.

And section 125 provides that:

"The words personal expenses as used in this Act with respect to the expenditure of any candidate in relation to the election at which he is a candidate, shall include the reasonable travelling expenses of such candidate and the reasonable expenses of his living at hotels or elsewhere, for the purpose of and in relation to such election."

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

[In opening his argument, the learned counsel reviewed the evidence relating to the charge of bribery by appellant, alleging that appellant made a corrupt arrangement to secure the vote and influence of *Prosper A. Hurd*, and contended that the account given by the arrangement made with *Hurd* was the only one that the court could accept, as *Hurd's* testimony was contradictory, unreliable, and uncorroborated.]

As to the question of law, the rule adopted is that where there is no money paid, the court will not draw any inference unfavorable to the candidate. In the cases relied on by the judge of the court below, the promise to pay was executed and large sums of money expended, whilst the following cases show that courts of justice will refuse to assume that there has been an improper expenditure, or an intent of corruption, unless there is abundant evidence of the fact. The *Kingston* case (1); the *Quebec East* case (2); the *Middlesex* case (3); the *Jacques Cartier* case (4). Now, it was generally

(1) 11 C. L. J. 11.
(2) 1 Q. L. R. 285.
(3) 12 C. L. J. 16.
(4) 2 Can. Sup. C. R. 317.

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known throughout the riding that *Wheler* was lacking in talent as a public speaker, and he might without a violation of the spirit of the law employ one who was well known as a political speaker to represent his views.

But the learned judge at the trial held that the employment of a voter who was a lawyer and a professional public speaker, to make public speeches in favor of the political questions at issue in the election, was the "bribery of influence." This judgment overrules the judgments rendered from the earliest days to the present in *English* courts, as well as in *Ontario* and *Quebec* courts, on this point. In *Quebec* it has been held *orateurs* may be legally employed. Now there is no difference between the employment of a public canvasser and an *orator* as styled in the Province of *Quebec*. In *England* a landlord may canvass his tenants.

What is meant in *England* as the "bribery of influence" has never been extended to mean the public speeches of local politicians or lawyers, nor of prominent public men before the electors in favor of a particular candidate or of a particular policy of a political party. In the case cited by the learned judge (1), Mr. Justice *Willes* said: "But the candidate may pay his own expenses, and the candidate may, paying his own expenses, employ voters in a variety of ways; for instance, he may employ voters to take round advertising boards; to act as messengers as to the state of the poll; or to keep the polling booths clean. He may also adopt . . . committees . . . of selected persons who go about and canvass certain portions of the district, and for their services these persons are sometimes paid and sometimes not paid. Now, if the third clause was to be taken in its literal terms, the payment to canvassers under such circumstances, being as it is a payment to induce them

(1) Coventry case, 20 L. T. N. S., 405; 1 O.M. & H. 101.

to procure votes by means of their canvass, would come within the terms of this clause, and would avoid the election." But the learned judge in that case held that the employment and payment of such canvassers was legal.

There is more "influence" exerted in the private argument of the local canvasser, than in the public argument of the local professional speaker, and if the payment for such private arguments is not illegal, neither can it be held illegal to pay for the public argument of a professional speaker.

Will we bring down the law to say only a laborer can canvass a laborer; will we have to classify canvassers?

But we have also the *Ontario* Elections Act which contains a similar proviso to that contained in the Dominion Elections Act, and under that clause the late Chief Justice of the Supreme Court, Sir *William Buell Richards*, while Chief Justice of *Ontario*, held that "expenses for actual professional services performed," meant fees paid to lawyers. And lawyers, as professional public advocates, may be retained and paid for their arguments in courts of justice, arbitrations, meetings of creditors, meetings of public companies, such as banks, railway companies, &c., committees of parliament on private bills, and meetings for political, municipal or trade discussions.

The Elections Act, sec. 73, in effect allows a candidate to employ voters for the purposes of the election, and provides that "where any person retained or employed for reward, by or on behalf of such candidate, for all or any of the purposes of such election, as agent, clerk, messenger, or in any other employment," votes at the election, a vote shall be struck off from the poll of the candidate retaining or employing such voter.

The proviso in the Canadian Act is wider than the

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proviso in the English Act. The English Act excludes from the bribery clauses "money paid or agreed to be paid for or on account of any *legal expenses* (*i.e.*, expenses allowed by law) *bona fide* incurred at, or concerning the election. The Canadian Act sanctions "the actual personal expenses of any candidate, his expenses for *actual professional services performed*, and *bona fide* payments for the fair cost of printing and advertising," and declares that such shall be held to be expenses lawfully incurred, and the payment thereof shall not be a contravention of this Act.

The use of the terms "person *retained* for reward," and "professional services performed," indicate the sanction which the law intended to give to the retainer by a candidate of professional advocates "for the purposes of the election."

In the *Cambridge* case (1), it was held that the payment of messengers and canvassers was not illegal. See also *Tamworth* case (2), and the *Chambly* case (3).

Mr. *Hector Cameron*, Q. C., and Mr. *Dalton McCarthy*, Q. C., for respondent :—

The statute only refers to professional services; and the Chief Justice in the East *Toronto* case said it means *fees* paid to lawyers as such. It certainly is not a part of a barrister's duty to take the stump. It may be within the Act to get a person to act as canvasser, but there is a manifest difference between a canvasser, as the word is generally understood, and a hired orator; for the former, besides speaking to voters, has to distribute bills and do a great deal of other work absolutely necessary in such a campaign, but of such a nature as cannot be performed by the candidate himself. Now, in this case, we have

(1) Wolf & Dew 41. (2) 1 O'M. & H. 79.
(3) 19 L. C. Jur. 332.

a voter hired to use his political influence, and that for a pecuniary consideration. See The *Brantford* case (1); The *Coventry* case (2); and The *Preston* case (3). As to practice prevailing in *Québec* as to the hiring of young lawyers, this court will have to decide whether it is valid. There can be no doubt that if Mr. *Hurd* had been known to have been hired, that would have destroyed his influence. As Mr. Justice *Armour* puts it: The bribery of influence is defined in our Act in the same way and by the very same words as the bribery of voters, and it follows that the application to the one is equally applicable to the other.

Now, what would have been necessary on an indictment to convict the appellant? That there was an agreement between *Hurd* and the appellant to work for some consideration, and if this agreement comes within the literal terms of the Act, then there has been an offence. The terms used in our Act are designedly intended not to cover what the English Act does, so that in order to give effect to the plain meaning of the words in the 3rd sub-sec. of sec. 92, if the expenditure is not for *professional* services, the case against the appellant is made out. Now, the definition of the word *professional* had received a judicial construction when *The Dominion Elections Act*, 1874, came into force, and it cannot now be successfully contended that the hiring of orators and of canvassers comes within the words: "expenses for actual professional services."

The learned counsel then referred to and commented upon the evidence, and contended that the respondent, having proved not merely a *primâ facie* case, but a strong and clear case, having proved statements and correspondence by a prominent agent of the appellant, it lay on the appellant to call him as a witness to rebut

(1) 1 O'M. & H. 32.
(2) 1 O'M. & H. 100.
(3) Wolf. & Bris. 56.

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the charges, and, failing to do so, the evidence given and the statements themselves must be accepted as true, or at least to the extent that would not have denied, but would have substantiated them. It was for the appellant to call his friends and agents, not, under the circumstances, the respondent.

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

RITCHIE, C. J., after stating the case, proceeded as follows:

In deciding this case the learned judge did not determine which was the true agreement with *Hurd*, viz.: that deposed to by the respondent, or that deposed to by *Hurd*, because, in his opinion, "they were both equally illegal; and assuming that the true arrangement was that deposed to by the respondent, the respondent was thereby guilty of bribery within sub-sec. 3 of sec. 92, of the *Dominion Elections Act* of 1874." In the view I take of this case I am constrained to ascertain, as best I can, which was the true arrangement, for while under the arrangement as put forward by *Hurd* the question would arise as to whether the respondent had been guilty of bribery under the sub-sec. referred to, I am of the opinion that under the arrangement as detailed by the respondent he was not guilty; and I am compelled to say, at the outset, that I cannot accept the witness *Hurd's* account of the transaction as correct; it rests almost, if not entirely, on his unsupported testimony, or rather, I should say, on his unsupported testimony, directly contradicted by the appellant and by his own statements at different times, and the account he gives of himself, and his utter disregard for truthfulness in connection with the matters in controversy, would, if he were not contradicted, render it unsafe to treat him as a credible witness.

It is hardly possible to believe that any professional

man could have so little respect for himself and his duty as to have held the conversations, I can almost say the negotiations, which he details as having taken place between himself and Mr. *McClelland* and Mr. *Paxton*, with reference to selling himself and his influence to whomsoever would buy him, which may be summed up in the words he said *Paxton*, whom he describes as his personal friend, used to him: "*Hurd*, I will just say this to you as a friend, altho' I would like to have you support the party, I would not work for *Wheler* or anybody else unless he paid me; your circumstances won't warrant you. But if you get a good remuneration for it, work for *Wheler*, and if you do not and you get it from *Gibbs*, work for *Gibbs*."

If *Hurd's* testimony could be relied on, I think there, could be no doubt that Mr. *Wheler* agreed to purchase for a very large sum the support and influence of a most unscrupulous man. But I am constrained to say (and I say it with deep regret) that I am unable to place the least reliance on the testimony of Mr. *Hurd*, contradicted as he is so unequivocally by both *McClelland* and *Wheler*, and discredited as he is by himself. That Mr. *Wheler's* statement is true, that all he undertook to do was to pay Mr. *Hurd* his legal expenses is, I think, confirmed in the strongest manner by *Hurd's* own testimony as to his conversation with Mr. *Nott* and Mr. *Currie*, though he endeavors to escape from the effect of that conversation in a way most damaging to his reputation and to his credibility. He says:

I had communicated to a few other persons besides Mr. *Wright* that I had a claim against Mr. *Wheler*. My youngest son knew all about it, and my other son knew what I told about it. I told my wife about it. Before the thing came out at all, I told Mr. *Nott*; I spoke in some rather sharp terms against Mr. *Wheler*, and he asked me why, and I told him Mr. *Wheler* had never paid me my expenses yet. I told Mr. *George Currie*. My recollection is that I told Mr. *Nott* at

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the first conversation I had with him that Mr. *Wheler* was to pay my legal expenses, and that he had not done it. I do not think I went any farther with Mr. *Nott* before I put the matter in Mr. *Wright's* hands. It was perhaps a week or ten days before I put the matter in Mr. *Wright's* hands that I told Mr. *Nott* that. I told Mr. *Nott* that Mr. *Wheler* had agreed to pay me legal expenses. I think I told him and Mr. *Currie* too that the arrangement I had made with Mr. *Wheler* was that he was to pay me my legal expenses. I did not intend to give Mr. *Wheler* and Mr. *McClelland* away until I saw that they were not going to settle with me. There was never an agreement that Mr. *Wheler* was to pay my legal expenses.

Q. Then you stated to those two parties what was not true? A. Yes; when a man begins to sin he generally goes on.

Q. Then at that time, as a matter of fact, all you were complaining of was legal expenses? A. That is all I told them.

The ends of justice require that I should point out some of the contradictions, discrepancies, and self discrediting evidence of *Hurd*, to justify the position that his testimony is not of a character to be relied on.

In a letter from *Hurd* to *McClelland*, dated the 8th October, 1878, when pressing *McClelland* to interfere, he thus writes:

W. may think that it is only a question of veracity between him and me, but it so happened that I intentionally had my son hear every word that was said, when he said he accepted my proposal and requested me to go down and see you, as he said you were fully authorized to make the arrangement with me. *Paxton* says he told him he knew what the proposition was. But, as he has said nothing, and as some other matters within my knowledge, he don't intend to come to time unless he thinks you are legally bound.

The letter of the 8th October, 1878, shows two things: first, that he intentionally had his son to hear every word that was said when (as he alleges) he said "he accepted my proposal," but it also shews, that neither he nor *Wheler* could have considered that any agreement was then entered into, because he very clearly intimates that the arrangement into which *Hurd* was to enter, was to be, not with *Wheler*, but with *McClelland*, for he says: "*he said you were fully authorized to make the arrangement with me;*" and again, "he don't

intend to come to time unless he thinks *you are legally bound*;" strongly confirmatory of *Wheler's* contention that he made no such arrangement as *Hurd* at the trial sets up.

In the statement of facts, as he calls them, handed Mr. *Cameron*, dated 19th Oct., 1878, he heads it thus:

The following are facts which I am willing to put in the form of an affidavit:

I next met Mr. *Wheler;* he came to my office, said he had called to see me about election matters, and asked me if I had seen *McClelland.* I said I had, but that I had not heard from him since I had written him my definite proposals. He said he had seen *McClelland* and had instructed him to arrange with me, and that *Mac.* had with him; said that he had come to close up the matter with me, and said he accepted my proposals, and wanted me to name some person in whom we both had confidence to act between us; I said I should prefer *McClelland* to any one else as I had full confidence in *McClelland,* and as he was not in the riding he would not be suspected. He asked me how far he could arrange with me himself; I told him he could pay my legal expenses liberally, but if he went beyond that himself, it might create difficulty if he was put under oath. He said he had authorized *Mac.* to act in the matter, and that they fully understood each other. My son *Ralph* was at the office door purposely to hear what passed, as I had some fears as to *Wheler's* acting in good faith. He then requested me to write *Mac.* at once and make an appointment with him. I did so at his request and got a reply by telegraph, which I mark No. 2, naming *Whitby* on next Saturday morning, but *Wheler* and I fully discussed the purport of the letter. He did not then say he had seen my letter to *Mac,* but I was satisfied that he then knew its contents, and Mr. *Paxton* had previously told me that *Wheler* knew what the proposal was and read the contents of my letter to *Mac,* and said he would accept it. I parted then with *Wheler* with the understanding that *McClelland* was to consummate the arrangement and act as our confidant both as to my proposition and the acceptance of it. I met *McClelland* up at *Whitby* at the time appointed, and he then accepted my proposition as made in my letter of the 4th of August, on behalf of Mr. *Wheler.*

And again in the same document he says:

I have seen *Paxton* since, and he told me that he had seen *McClelland* on that subject; that *McClelland* told him the arrangement was just what I said it was, and that *Wheler* authorized him to make the terms with me, and that his attempt to get out of the matter was an

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outrageous breach of faith, and that he would see *Wheler* at once, and if *Wheler* did not pay over the balance of the money, he would protest the election himself. I can prove all I have stated here by *Paxton*, *McClelland*, and my son *Ralph*, as to the bargain.

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Here again putting forward that he (*McClelland*) and not *Wheler* made the terms with him, and yet both *McClelland* and *Wheler* contradict this statement, and the son *Ralph* denies having overheard the bargain and his ability to prove it, and *Hurd* himself contradicts the fact of the arrangement having been made with *McClelland*, and contradicts the fact that his son was placed to overhear the conversation, or that he could prove the bargain as stated by *Hurd*; and *Paxton*, though present and summoned by petitioner, is not placed in the box to confirm *Hurd* or discredit *McClelland*. The burthen of establishing the affirmative was clearly on the petitioner. *Paxton*, to whom *Hurd* so often refers, and who, he said, told him *Wheler* knew the contents of *Hurd's* letter to *McClelland*, having been summoned by the petitioner but not called, I think when *Hurd's* evidence was strongly impeached, should have been called to corroborate *Hurd* if he could do so, and I cannot escape the conviction that if his evidence could have corroborated *Hurd* he would have been put on the stand; and after having thus written to *McClelland* and having forwarded a solemn document to Mr. *Cameron*, which he is willing to put in the form of an affidavit, we find him on his examination before Judge *Armour* deposing thus:

On the same day I wrote to Mr. *Wheler* I wrote to *McClelland* about it.

Q. Why was it you did not write to Mr. *Wheler* in the same way you wrote to Mr. *McClelland*? A. Simply because I never had anything to say to Mr. *Wheler* about the matter.

Q. I see in this letter of the 10th of October you say you intentionally had your son hear the arrangement that was made between you? A. Well, I do not think that is correct. My son was not present —the whole conversation, anyway; and the word "intentional," if I

put it in there, I do not think I intended. There was no intention on my part of my son's being there. My son was in the office, as he is always in the office. I do not think he heard but very little of what passed between us. He knows the fact that Mr. *Wheler* was there, and he heard some part of the conversation. I spoke to my son about it afterwards, and he said, "I was not there purposely, and I did not go there to see what the case was."

Ralph Hurd, who seems as regardless of the truth as his father, speaking of the interview between his father and *Wheler*, says:

I would not swear positively that the interview lasted more than an hour, but I think it did. I will swear positively it was over half an hour. I will swear now positively that they were in there over an hour. The interview was in the afternoon. While I was in the outside room I did not hear anything that passed. I did not go into the room intentionally to hear what they were saying. It had not been arranged between me and my father that I should go in. I have not seen or heard read the statement my father made in this matter. I told my father one night that I was listening to what was said when *Wheler* was there; that was a lie.

On the trial he (*Hurd*) swears, notwithstanding what he had before said and written, the arrangement as to the $1,000 was made with *Wheler* thus:

Q. Whose promise was it you say exactly was made to you here? A. Mr. *Wheler* was the person I made the arrangement with.

Q. Then the arrangement you made with Mr. *Wheler* is, in fact, the only arrangement you made? A. I made no arrangement with any other person any further than *McClelland* was connected with it. No person but *McClelland* and *Wheler* made me any promise of anything. *Paxton* never made me any promise; he had not anything to promise.

And again he says:

I do not consider I ever had an arrangement with *McCleland*, any more than I looked upon it that the money was to come through *McClelland's* hands into mine. The arrangement was made between me and *Wheler*. It was simply this: Mr. *Wheler* said that he understood that I would support him on certain conditions, and that he was there for the purpose of closing it up. He referred to this letter I had written to *McClelland*. I stated to him the conversation that had taken place between me and *McClelland*, in the first place, and then referred him to the terms of this letter; and he told me he knew all about

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it; and Mr. *Paxton* had previously told me that he said he knew all about it. Then he said that he was there to close up the matter; and he asked if there was any third person there that the money could be paid to me by, and I said no; as *McClelland* had been engaged in the matter in the first place, and as I had confidence in him, he might act in the matter.

And he says:

I had a copy of the letter at the time but did not show it to Mr. *Wheler*.

If *McClelland's* evidence is correct that he never showed to, or told, any person about the letter, and *Hurd* says he never showed the letter to *Wheler*, or told him its contents, there appears to be no way that Mr. *Wheler* could have had any knowledge of its contents, and if *Paxton* did tell *Hurd*, as he swears, the inference to my mind is irresistible, that not having been called, he was not prepared to confirm *Hurd* or testify to the fact. But Mr. *Nott* swears that *Hurd* told him it was *McClelland* who promised him.

His evidence is this:

I live in *Port Perry*. I know Mr. *Hurd*.

Q. Have you had any conversations with him about this matter that has been in controversy, about the part he took in the election, and the circumstances in which he took part in it? A. I have. I understood him to say he was to be paid a thousand dollars for his services. I think it was about the 25th of November when he told me this.

Q. You had business at his office, I believe? A. He has been my lawyer. He told me from whom he was promised it.

Q. Who did he say? A. *McClelland*.

Q. Did he tell you that Mr. *Wheler* had ever assented to that, or promised to pay it? A. Never.

Q. What did he say about the question of the validity of the seat? A. I think it was something like this, that if he got paid for his services, he could either be the means of *Wheler* keeping his seat or losing it.

Q. Did he ever tell you anything definitely about his being paid the thousand dollars? A. I never understood him to state anything definitely; he said he had been at a great deal of expense, and he had got some money from some friends of

his; and that he had used his own money, and he thought it ought to be paid back. I think he said that on two occasions. I did not understand that Mr. *Wheler* was to pay him anything at all. Mr. *Hurd* stuck for his thousand dollars; and finally I understood him to state that if he could not get his thousand dollars he would be satisfied with less; that if the matter could be settled before protest was entered, less money would be accepted than a thousand dollars.

Cross-Examination—I did not understand that anything had taken place between him and *Wheler*. He said he had an interview with Mr. *Wheler* and talked over election matters with him. I did not understand him to say that any figures had passed between him and *Wheler*.

Re-examination—I did not understand from *Hurd* that Mr. *Wheler* had ever agreed or assented in any way to any proposition that he should be paid.

Then *George Currie* swears:

I live at *Port Perry*. I know Mr. *Hurd* very well. On one occasion he mentioned to me that he had been disappointed in getting money from Mr. *Wheler*; he said that he had been promised some money; expected to get $50 or $60 from Mr. *Wheler*, and had not been able to get a dollar from him; *Wheler* had not even recognized him, or recognized his letters or telegrams at all. He mentioned, I think, some $50 or $60 that he had expended. He did not say to me who had promised him that he should be paid anything; he did not say what the promise was that had been made to him any more definitely than that he had been promised his expenses during the election, and that he had disbursed to the extent of some $50 or $60. In speaking of expenses, he spoke of them as his travelling expenses and telegraphing; he might have mentioned horse hire, but I do not remember that. The conversation arose accidentally, and he just mentioned this as a reason why he had not repaid me a small sum of money he had borrowed of me. He spoke of the extreme difficulty he had in getting any recognition from Mr. *Wheler*, and the disappointment and vexation he had about it. I asked him if he had made any demand of *Wheler* for it, and he told me that he had repeatedly written and telegraphed, and got no response.

Q. Did he ask you to do anything in the matter? A. I think I suggested myself. I do not think he asked that. I think I expressed my surprise that *Wheler* should be so negligent about it; that if *Wheler* had promised to pay his expenses, I thought *Wheler* was not the man to do what was wrong about it; and I said, "If you like I will write to *Wheler* myself about it." I did not do

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so. This conversation took place in the early part of the afternoon, and I meant to write to *Wheler* that afternoon; I forgot to do so, and could not send the letter till the next day, and in the meantime I heard that *Hurd* had transferred his claim to the other party.

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I think *Hurd* always contemplated making money out of the election, that he very highly estimated his powers and his influence, and, if he was to be believed, deemed his services almost if not quite indispensable to Mr. *Wheler's* success; and, I believe, he thought that after the election was over, if successful for *Wheler*, as it was, he would recognize and reward him accordingly, and this is to be inferred from his letter to Mr. *Wheler* after the election, dated October 8th, 1878, in which, after remarking on the surprise at the result of the elections generally and those of *N.* and *S. Ontario* particularly, he writes thus:

Strictly private and confidential.

PORT PERRY, October 8th, 1878.

* * * * And while the contest has resulted satisfactorily to both you and your friends, so far as giving you a good majority, allow me to suggest that there is always after an election contest certain matters requiring the attention of the victorious candidate, and if neglected, produce great unpleasantness. What is to be done had better be done at once; neglect or indifference always leads to the supposition that it will never be done. I make these suggestions in all kindness, as the neglect of these little matters often leads to great dissatisfaction, and sometimes to an open rupture between the parties. Let me hear from you.

Yours, &c., P. A. HURD.

He puts forward here no agreement the fulfilment of which he claims on the basis of a legal or an honorable contract, but relies on some general understanding or practice as to what *always* takes place after an election and which requires the attention of the victorious candidate. I read this, put in plain English, as amounting to this:—I have been very instrumental, if not indispensable, in securing your election, and I expect you will do as other victorious candidates have done,

show your liberality and recognize my services. If you are neglectful or indifferent in this respect it will, *as it often does*, lead to great dissatisfaction, and *ometimes* to an open rupture.

I have no doubt many a victorious candidate has after an election been approached and pressed by unscrupulous persons who have made themselves busy in the election, and I have no doubt many such persons, when repelled and treated as they ought to be, have become dissatisfied, and the result an open rupture. He also addresses Mr. *McClelland* and *Wheler's* friends, and evidently seeks to impress on them that *Wheler* is in his power and he can upset the election, and puts forward a corrupt contract with *Wheler*, and that if *Wheler* should swear differently from him, and a question of credibility should arise between them, which he appears to have anticipated, he puts forward that he had, by placing his son in a certain position, secured a witness who would prove the contract. *Wheler* did not respond, and finding that his efforts were unsuccessful, we find him still determined to get money out of the election, and having failed on one side, he turns to the other, with obviously the same object, and seeks to make the defeated party believe that he possesses the necessary information to upset the election and disqualify *Wheler*, and with this view he prepares the materials for an affidavit, in which he again puts forward the same untruth as to his son, which he alleges he is prepared to put in an affidavit, and adds that *McClelland* and *Paxton* as well as his son could prove the corruption. I cannot on any other hypothesis reconcile his untruthfulness and conduct generally. But be this as it may, of a contract such as he alleges, there is, in my opinion, no reliable or trustworthy evidence.

In addition to all which contradictions, we find Mr.

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Hurd, when he can extract nothing from *Wheler*, taking steps to get money from the other side, and I have no doubt, what he did led to the present petition being filed, and in this operation we find from his own evidence that he was as regardless of truth as he has shown himself to have been in the earlier part of the business. He admits that he told a good many Grits, as he calls them, that he would get his money, his words are "that I intended to get it from the other party, if I did not get it from him" (*Wheler*), and in answer to this question: "Have you stated to any person that Mr *Gibbs* was advised that it would not be safe, or that he could not be advised that it would be safe to pay you $1000 till the trial was over?" we have this answer: "A. If I stated that, I have no recollection of it. I will not undertake to state that I did not state it. I may have stated a thing of the kind;" and then adds "It was not true if I stated it, because I have no authority for saying anything of the kind." And in reply to this question: "Q. Then the long and short of the matter is that you may have told a good many lies about this matter? A. That is very true, that I may have told a good many stories about it."

He then states what took place:

Q. When you put this matter in Mr. *Wright's* hands, and Mr. *Wright* gave these papers to Mr. *Cameron*, did he tell you that he had told any person about it? A. No. I do not think that he said at that time whether he had told any person or not; but he said that Mr. *Cameron* wanted to see me in *Lindsay*.

Q. Did Mr. *Wright* tell you at that time that he had told any person other than Mr. *Cameron* anything about this letter? A. I think he told me he had not. I won't swear positively that he did. He said to me, "Mr. *Hurd*, if you will allow me to mention this to anybody, I am satisfied that I can get your money." He mentioned a man's name to me.

Q. Then he knew how much it was you were claiming? A. Yes; we talked it over after he came back that evening. I authorized him to tell this person; the person was *Thomas Paxton*. He did not give me any assurance that I could get my money in any

way. Mr. *Wright* was a Conservative; he was a personal friend of mine.

Q. Did he give you any assurance that you would get your money from the other side in any way, or any payment at all? A. No.

Q. Did he ever say to you that any person would give anything for that information? A. No. I do not think he ever did; I am pretty sure he never did.

Q. Did you ever say he did? A. Yes; I said I would get my money. I told a good many of the Grits that I would get my money; that I intended to get it from the other party if I did not get it from him. I intended to get it from *Gibbs*; and I let them suppose I would too. I had had no communication with Mr. *Gibbs*. I was not aware that any person had had any communication with Mr. *Gibbs* about it, or heard that any person had had any communication with him at the time I handed these papers to Mr. *Wright*. Since then I have heard that Mr. *Gibbs* had placed a thousand dollars somewhere for my benefit, to be given to me.

Q. In any event? A. Yes; in the event of *Wheler* being unseated. But I did not believe a word of it. I was told by the Rev. Mr. *Young* in *Port Perry* that the thousand dollars was in cash. I was not told it by any other person. I did not have any talk with any person about getting a thousand dollars from Mr. *Gibbs*.

Q. Nor any sum of money at all? A. No; nor any arrangement with Mr. *Gibbs* or anybody else. * * *

Q. Have you not stated that a note for a thousand dollars has been put up as security for you? A. I have stated that I have heard so; I got that information. It was either a note or a thousand dollars put up by Mr. *Gibbs;* but I did not believe there was one single word of truth in it.

Q. Did you discuss the question about getting this thousand dollars with any other person than the person from whom you heard that? A. I do not know that I have; I have told them that I heard this thousand dollars was put up.

Q. Have you stated to any person that Mr. *Gibbs* was advised that it would not be safe, or that he could not be advised that it would be safe to pay you a thousand dollars till the trial was over? A. If I stated that I have no recollection of it. I will not undertake to state that I did not state it; I may have stated a thing of that kind. It was not true if I stated it, because I have no authority for saying anything of the kind.

Q. Have you received any assurance from any person that they held any security for you of any kind? A. I have not.

Q. Or that a promise has been made to them? A. No; I may have stated that it was so. I felt that I had been badly sold, and

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I knew that a good many of my enemies were chuckling over it, that they had secured my influence in this election, and that I had worked for the purpose of getting a thousand dollars, and they were getting my work for nothing and were laughing at me; and I wanted to make them believe I was not so badly sold as they thought I was. I do not recollect naming any person to whom this security was given.

Q. Will you swear that you have not stated that Mr. *M. C. Cameron* held a note as security for you? A. I do not think I ever said any such thing.

Q. Will you swear that you did not state that Mr. *Cameron* had promised that he would hold a note for you? A. I do not think I ever stated that; I won't swear that I did not. I will tell you the explanaton of that,

Q. Then you do recollect that you stated it? A. No, I do not, if there was anything stated about it. There was a person very much interested in this matter—I think it was my own brother; and he came to me to ask if I would be satisfied if I got my money in this matter, and if I would give up the papers; and I told him I had put the papers in Mr. *Cameron's* hands, and that they could do just as they pleased about the matter; I would get my money any way. And I may have said something of that kind to my eldest son. They thought I had been swindled from beginning to end; and I let it go out as a general report.

Q. Did you ever state to any person that Mr. *Gibbs* had been advised that he could not pay any money on it, but that a note could be deposited which would be security for you? A. I do not recollect saying anything of the kind.

Q. Then the long and short of the matter is, that you may have told a good many lies about this matter? A. That is very true, that I may have told a good many stories about it. I never had a promise fromMr. *Gibbs* himself in my life.

I will not pursue the very unpleasant enquiry further as to this branch of the case.

I have no doubt *Hurd* intended from the first to make money by the election, and having worked hard at the election, and the party he supported having been successful, he, no doubt, expected his services would be recognized and rewarded, but that there was any bargain or contract to that effect his evidence fails to convince me; and when he found he could not extract money from *Wheler*, which he evidently hoped to force

from him, by making him and his friends believe he could upset the election and implicate *Wheler*, he determined to get money from the other side by making them believe the same thing, and by selling to them his services to upset the election, and he appears in reference to this to have been no more truthful then than he was when looking to the successful party for remuneration. It is to me painful to think that any professional man in the Dominion should present himself in such a scandalous light before any judicial tribunal.

If there ever was a self-discredited witness, I am sorry to be compelled to say that *Hurd* must be looked on as such.

Mr. Justice *Blackburn* in the *Stafford* case (1) says:

> There is a peculiar class of evidence occurring upon these election petitions, I mean that of witnesses who, in a criminal court, one would call self-discrediting witnesses, spies, informers and persons guilty of crime, according to their own story, who come to seek the reward that is to be got by telling the truth the other way. In a criminal court a verdict of guilty would never be permitted upon the evidence of such witnesses without confirmation, – that has long ago been established.. In a civil court, though they are looked upon with distrust, there is no absolute necessity that they should be confirmed. In such enquiries as these we must look upon it with considerable distrust, but still treat it as information which may be true. It calls upon the other side to give evidence of how it was. In that way these witnesses are valuable, but, as a general rule, they should not be made the staple of a case or be too much relied upon.

Upon such contradicted discredited testimony I can adjudge no man a *quasi* criminal, subject him to penalties, and take away his civil rights and disgrace him in the eyes of his fellow subjects.

It then becomes necessary to determine whether, adopting Mr. *Wheler's* view, he has been guilty of bribery. I shall not discuss whether or not, under the law as it now is, candidates may, or may not, legally

(1) 1 O'M. & H. 233.

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employ and pay for the expenses and services of canvassers and orators to place their views and the views of their party before the electors individually or collectively at public meetings, with a view of influencing the constituency in favor of a particular candidate, or of inducing the public to look favorably on any particular policy either of the great parties in the country may be upholding, because, if illegal to do so, I think Mr. *Wheler* made no corrupt bargain with a view to the purchase of either *Hurd's* influence or services.

Wheler's arrangement amounted to no more, as I read the evidence, than this: I am anxious to have your vote and support, (as, of course, he would to have that of a majority of the electors, without which he could not succeed,) but I am determined to gain the election by legitimate means, and not to resort to any illegal practice which could affect the election. I do not know whether it will be legal or illegal to pay your travelling expenses, but if legal to do so I will do it. And he does not do it, surely then he made no corrupt bargain to pay, if he could not legally pay, and he made no payment. Where then was the breach of the law? Where a corrupt bargain? In what did the bribery consist? Surely the promise to do a thing, if it can be legally done, cannot amount to a corrupt or to a criminal act? And if the act is illegal, if it is not done, and if he never made a promise to do it, if illegal, it is beyond my comprehension to understand how a party who never promised to do an illegal or corrupt act, and never did the act alleged to be illegal and corrupt, can be adjudged guilty of a breach of sub-sec. 3 of sec 92, *Dominion Elections Act of* 1874. The arrangement contemplated was, I think, as the weight of evidence shows, entered into by *Wheler* with the *bonâ fide* object of securing services which might be legitimately rendered, and in connection therewith to pay only what

could be legally paid, and was not with a view of purchasing influence or corrupting, or unduly influencing the electors.

But it has been urged, that there was a corrupt payment made by *Wheler* to *Hurd* of $1.50. *Hurd* says:

> After a meeting at which I was, I asked Mr. *Wheler* for some money, I told him I was out of it, and he gave me a dollar and a half.

Wheler's account of the transaction is this; he says:

> *Hurd* said I did not expect to come to this meeting this evening, and I have not enough money; I wish you would let me have enough to pay the expenses of my horse at *Sunderland*. I think he said *Sunderland*, and I gave him a dollar or two, that was all the money I ever gave him.

If this money was given for the purpose of bribing *Hurd*, though the amount may seem small, if the act of bribery was clearly established, I should not, as at present advised, go into the question of the comparative insignificance of the act of bribery. But I cannot think, when a man unexpectedly finds himself away from home, without money to pay for the care of his horse, and applies to a person with whom he is acting in concert in a common cause for a small sum, such as this, to enable him to pay for the expenses of his horse, this ought to be tortured into an unlawful act of bribery. I do not think it can be considered to be done with any corrupt intent to bribe the party to whom it was advanced, or to purchase his influence, or that it was given or received with any intention on either side of producing any effect on the election. I think if this could be held an act of bribery sufficient to upset an election and disqualify a candidate, I might say as *Martin*, B., said in the *Salford* case (1) "it seems to me the law would be brought into contempt and ridicule."

The following cases enunciate principles applicable to this case:

(1) 1 O'M. & H. 142.

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The *Lambeth* case (1) referred to by *Willes*, J., in the *Coventry* case (2):

A payment to some person who has great influence in a place in order to purchase that influence, * * * must be a payment or gift or loan of something valuable to him in consideration of his lending his influence or his assistance in the election * * * You must show an intention to do that which is against the law before you bring the case within any of those highly penal clauses of the corrupt practices prevention Act, 1854.

In the *Westminster* case (3) Baron *Martin* says:

The first inquiry that I have made in every case is, whether it has been proved to my satisfaction that the candidate really and *bonâ fide* intended that the election should be conducted according to law.

In the *Lichfield* case (4) *Willes* J., says:

To prove a corrupt promise, as good evidence is required of that promise illegally made as would be required if the promise were a legal one to sustain an action by *B.* against the respondent, upon *B.* voting for him, for not procuring or trying to procure him a place in the hospital.

Sir *Wm. Richards*, C. J., in the *Kingston* case (5), citing the *Tamworth* case and *Willes'* J.'s, observations (6), says:

That Act is to be construed as any other penal statute, and the respondent must be proved guilty by the same kind of evidence as applies to penal proceedings.

* * * * * *

Petitioner should prove his allegations affirmatively by satisfactory evidence (7).

In the *Warrington* case (8) Baron *Martin* said:

I adhere to what Mr. Justice *Willes* said at *Lichfield*, that a Judge to upset an election ought to be satisfied beyond all doubt, that the election was altogether void, and that the return of a member is a serious matter and not to be lightly set aside.

In the *Londonderry* case (9), Mr. Justice *O'Brien* says:

(1) Wolf. & Dew 134.
(2) 20 L. T. N. S. 411; 1 O'M. & H. 103.
(3) 1 O'M. & H. 95.
(4) 1 O'M. & H. 27.
(5) 11 C. L. J. 22.
(6) 1 O'M. & H. at p. 84.
(7) 11 C. L. J. p. 26.
(8) 1 O'M. & H. 44.
(9) 1 O'M. & H. 278.

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The charge of bribery, whether by a candidate or his agent, is one which should be established by clear and satisfactory evidence, the consequences resulting from such a charge being established being very serious.

After referring to what Baron *Martin* said in the *Coventry* case and Justice *Willes* in the *Lichfield* case, and the severe penalties for the offence, he says:

Mere suspicion, therefore, will not be sufficient to establish a charge of bribery, and a Judge in discharging the duty imposed upon him by the statute, acting in the double capacity of Judge and Juror, should not hold that charge established upon evidence which, in his opinion, would not be sufficient to warrant a jury in finding the charge proved.

Therefore, I think, in this case the appeal should be allowed.

FOURNIER, J.:—

Sur les deux questions soulevées par le présent appel il ne reste plus à décider maintenant que celle de savoir si l'appelant s'est personnellement rendu coupable de menées corruptrices; l'autre, au sujet de la constitutionalité de l'acte des élections contestées de 1874 ayant été jugée dans la cause de *Valin* v. *Langlois*.

Afin de déterminer, non-seulement si l'appelant s'est rendu coupable des faits qui lui sont reprochés, mais pour décider la question plus importante encore de savoir si les faits en question constituent une offense prévue et définie par l'acte des élections de 1874, il est nécessaire de faire une courte exposition de ces faits. Il y en a deux versions tout-à-fait contradictoires—l'une donnée par l'appelant et l'autre par *P. A. Hurd*, qui aurait été l'objet de l'acte de corruption imputé au premier. L'hon. juge *Armour* n'a point décidé laquelle des deux il croyait la véritable, parce que cela n'était pas nécessaire à son point de vue. Prenant pour admis les faits tel que racontés par l'appelant lui-même, il en a conclu qu'ils étaient suffisants pour prouver que ce

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dernier s'était rendu coupable de l'offense que l'hon. juge désigne par les termes de *bribery of influence.*

L'appelant *Wheler*, après avoir été mis en nomination comme candidat du parti libéral aux élections de 1878, pour le comté de *North Ontario*, apprit par *Jos. McClelland* que *P. A. Hurd* de *Port Perry*, avocat et orateur politique d'une certaine importance, qui avait jusque-là donné son appui au parti conservateur, paraissait disposé à supporter sa candidature ; qu'il était dans tous les cas décidé à opposer celle de M *Gibbs*, et qu'il était contre la "Politique Nationale" sur laquelle se faisait en grande partie la lutte électorale de cette époque. *McClelland* dit de plus :

Hurd told me he would support him (*Wheler*) if he had his expenses paid ; that he would support him, and go and speak for him if he was remunerated for doing so.

Wheler répondit à cette information en disant à *McClelland* qu'il pensait remporter l'élection et qu'il ne voulait rien faire qui pût la compromettre,—mais qu'il ferait avec *Hurd* ce qui était juste et légal.

C'est dans une rencontre fortuite sur le steamboat "*Empress of India*" que *Hurd* avait fait de lui-même ces déclarations à *McClelland* qui, à lademande de *Hurd*, les communiqua ensuite à l'appelant. Celui-ci déclare formellement n'avoir jamais autorisé *McClelland* à faire aucune démarche ni aucune offre dans le but de s'assurer les services de *Hurd*. Il déclare de plus n'avoir eu avec M. *McClelland* que ce seul entretien avant l'élection et n'avoir eu non plus avec lui aucune communication par lettres au sujet de l'élection.

Wheler, ainsi renseigné sur les dispositions de *Hurd*, a naturellement cherché à le rencontrer. Vers le 10 août, il se rendit à son bureau et eut avec lui un entretien dont il donne la substance comme suit :

I asked his support, and then he stated that he had not exactly decided what course he would take; would not do so for a week.

He was going to the States; I think he said he would be away a week or two, and after he came back he would decide what he would do. *He asked me my views.* He said it depended much on my views on the National Policy—if I was in accord with him. He wanted me to give him my opinion on certain points. I did so, and he said, "Well, we are nearly in accord;" and he said, "I am determined not to support Mr. *Gibbs* after what he has done." I asked him then, "Will you give me *your support?*" He said he *would not decide then.* He said he had some business matter to arrange before he would give anybody to understand what he would do; he had some business to arrange with Conservative parties; I think he said parties who would give him trouble after he announced himself. He stated that he was going over to the States for some information respecting Protection, and if he decided to take any action in the matter, he would *require his personal expenses* to be defrayed by me if he addressed meetings. He asked me what I would require him to do. I *said, if he took hold of the matter it would be to address meetings only.* I told him I would want him to address meetings if my Reform friends decided to engage him to do it or to accept him. Nothing more was said about terms—*nothing about amount.* He asked me whether I would want him to hold meetings generally throughout the riding or in any locality. He said, "If I do take hold of the matter, I propose to hold a meeting at *Port Perry* in the first place, or at *Uxbridge Village*;" and he said, "I wish to take control of the meeting." He would not allow anybody to address the meeting but himself; and that he would take up about two or three hours, and not refer to Mr. *Gibbs* or anybody else.

* * * * * *

There was nothing more said about expenses at that time. He stated it was *quite correct and proper, and legal, for me to pay his legal expenses.* I stated if it was, and if our people decided to accept him as speaker for us, I would pay whatever was legal and proper towards his legal expenses; that was not to cover his trip to the States; it *was understood to be his travelling expenses.* There was not a word said about paying him for speaking. Then we parted without any definite understanding.

* * * * * *

I had not any conversation about this matter with him again. *My understanding was that my party had accepted him,* and that I was willing to pay his personal expenses. I thought his personal expenses would cover his conveyance, the printing, and his own personal expenses. He did not say anything about his time at the interview.

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Les faits qui ressortent de ce témoignage, sont que l'appellant est allé solliciter le vote de *Hurd*; qu'après un échange de vues sur les principales questions du jour, ce dernier s'est déclaré satisfait des opinions de *Wheler*, mais en remettant toutefois à plus tard sa décision sur le parti qu'il prendrait dans l'élection. Il est vrai qu'il a fait connaître alors que dans le cas où il parlerait aux assemblées publiques, il exigerait le paiement de ses dépenses personnelles,—en faisant remarquer que *Wheler* pouvait le faire légalement—"He stated it was quite correct and proper and legal for me to pay his legal expenses." *Hurd* n'est pas encore prêt à se prononcer et ne s'engage à rien. De son côté l'appellant déclare que s'il peut *légalement* payer les dépenses *légales* de *Hurd*, et si ses amis acceptent son concours, il fera ce qui est légal et convenable au sujet des dépenses légales. Par les expressions *dépenses légales*, il entend les dépenses personnelles de *Hurd*.

Qu'est-ce qu'il y a dans tout ceci qui prouve une offre, une promesse, ou autre fait quelconque déclaré menée corruptrice par la sec. 92 de l'acte des élections de 1874? Rien; à moins que la déclaration faite par *Wheler* de s'engager conditionnellement à ne payer que ce que la loi permettait de payer, ne soit considérée comme une offense. L'offre de *Wheler* ne va pas au-delà. Il est inutile d'argumenter pour prouver qu'une telle promesse, même si elle eût été acceptée, ne constitue pas une offense contre la loi électorale.

D'après la version de *Hurd*, l'appelant au lieu de se borner à promettre de lui payer ses dépense personnelles, se serait au contraire engagé à lui faire avoir $100 pendant l'élection, et dix jours après, une autre somme de $600, dans le cas de succès. Il n'y a d'autre preuve de ce fait que son propre témoignage auquel, pour les raisons données par l'hon. juge en chef, il m'est imposible d'ajouter aucune foi. D'ailleurs, l'Hon. Juge *Armour*

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ayant trouvé les faits tels que rapportés par *Wheler* suffisants pour constituer l'offense dont il l'a déclaré coupable, je crois qu'il est peu utile d'entrer dans une longue discussion sur ce témoignage. Il me suffira, je pense, d'examiner la question de savoir si les faits reconnus par *Wheler* constitue l'offense de *bribery of influence.*

Il faut d'abord remarquer que dans l'entrevue rapportée plus haut, bien que *Wheler* admette avoir sollicité le vote de *Hurd*, il n'y a absolument aucune preuve que cette demande a été accompagnée de promesse qui puisse en faire une offense contre la loi électorale. Le fait que *Hurd* était voteur n'est entré pour aucune considération dans l'offre conditionnelle de payer ses dépenses personnelles. Ce paiement devait être seulement de ses dépenses pour assister et parler aux assemblées publiques—et nullement pour son vote, ni pour les dépenses qu'il aurait pu faire pour se rendre au poll pour y donner son vote. Il n'en a été nullement question. Il n'a été non plus aucunement question de l'influence que *Hurd* pouvait avoir sur qui que ce soit, autrement que par la discussion publique comme orateur de *husting*. Il ne devait recevoir pour ses services comme tel aucun autre avantage que le paiement de ses dépenses personnelles de voyage. Il ne devait rien recevoir pour l'indemniser de la perte de son temps, du trouble et des fatigues que lui imposerait cette tâche. Il n'avait d'autre intérêt à l'accepter que celui de faire triompher ses vues particulières sur la "Politique Nationale," et sans doute aussi la satisfaction d'un ressentiment qu'il éprouvait contre M. *Gibbs* pour quelques griefs personnels. Dégagée des circonstances mentionnées plus haut, la question se réduit à savoir si l'offre conditionnellement faite de payer les dépenses personnelles de *Hurd* pour assister et parler aux assemblées publiques en faveur de la candidature de *Wheler*, (appelant) constituait l'offense de *bribery of influence.*

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C'est sur le parag. 3 de la sec. 92, de l'acte des élections de 1874, que l'hon. juge s'est appuyé pour arriver à la conclusion que le fait d'avoir offert de payer les dépenses personnelles de *Hurd*, comme orateur électoral constituait l'offense en question. Il est en ces termes :

> Every person who directly or indirectly, by himself or by any other person on his behalf, makes any gift, loan, offer, promise, procurement or agreement as aforesaid, to or for any person in order to induce such person to procure or endeavor to procure the return of any person to serve in the House of Commons, or the vote of any voter at any election.....

Cette disposition est textuellement la même que celle de l'acte Impérial 17 et 18 *Vict.*, ch. 102, sec. 2, clause 3. Le juge *Willes*, dont l'autorité a été invoquée par l'hon. juge *Armour*, en commentant cette section, dans la cause de *Coventry* (1), dit que toute chose donnée à quelqu'un pour acheter (*to purchase*) son influence à l'élection est indubitablement un acte de corruption. L'hon. juge *Armour* tire de cette autorité la conclusion suivante :

> Nor does it make any difference under what name the promised money is to be paid, whether for speeches to be made or for influence to be exerted in any other way, and whether for loss of time and inconvenience, or for travelling or other expenses, the law is equally violated in one case as in the others.

Le principe énoncé par le juge *Willes* est sans doute correct, mais l'application qui en est faite est-elle justifiable d'après le fait ci-dessus qui me semblent les seuls établis d'une manière suffisante par la preuve.

L'influence de *Hurd* a-t-elle été achetée ? comment ? et pour quelle considération ? A-t-il pour quelque motif intéressé changé ses opinions politiques ? Non. On a bien la preuve que dans les élections antérieures il soutenait le parti conservateur. Mais dans celle dont il s'agit, il est évident qu'il n'a changé de parti politique que par suite du changement des circonstances politi-

(1) 20 L. T. N. S., 405 ; 1 O'M. & H. 97.

ques. Il cessait d'être d'accord avec son parti sur un point important, il déclare qu'il ne votera pas pour le candidat de son parti. Il fait cette déclaration à plusieurs reprises avant d'avoir avec *Wheler* l'entretien rapporté plus haut. Le changement d'opinion n'est le résultat d'aucune influence étrangère.

La question politique du jour est nouvelle—elle se présente pour la première fois devant les électeurs,—et en exerçant son libre jugement il se trouve divisé d'opinion d'avec son parti. Sa séparation est faite et avouée avant sa rencontre avec *McClelland* et avec *Wheler*, plus tard. Il est tout-à-fait impossible d'après la preuve d'attribuer cette modification de son opinion aux entretiens qu'il a eus avec ces derniers, puisque ce changement est antérieur à cette époque. Ce n'est donc par aucune des considérations que *Wheler* et *McClelland* ont pu faire valoir que ce changement a été amené.

Il est vrai que *Wheler* consentait à certaines conditions, dans le cas où *Hurd* parlerait aux assemblées publiques, à lui payer ses dépenses personnelles. Mais cette promesse n'étant faite qu'après le changement d'opinion avoué par *Hurd*, peut-on dire qu'elle est une de celles que la loi avait en vue d'atteindre par la sec. 92? *Hurd* doit-il recevoir un avantage personnel, est-il indemnisé pour l'exercice de son talent oratoire, pour la perte de son temps, les troubles et les fatigues inévitables d'une pareille tâche? Non. Il ne doit absolument rien recevoir pour cela. Il sera seulement indemnisé de ses dépenses de voyage. Peut-on dire que cette indemnité ait pu l'engager à donner à *Wheler* un appui qu'il ne lui aurait pas donné sans cela? Il est évident qu'il n'avait aucun intérêt à le faire.

Il est certain que si le 3e parag. de la sec. 92 devait être interprété à la lettre, et si la signification générale et étendue dont il paraît susceptible ne devait être modifiée par d'autre section de l'acte, le simple fait de

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payer les dépenses personnelles d'un orateur supportant une candidature, serait prohibé par cette section. Car il n'est pas douteux que le but d'un orateur dans ce cas est d'assurer ou du moins de s'efforcer d'assurer le retour du candidat qu'il supporte, *in order to induce such person to procure or endeavour to procure the return of any person to serve in the House of Commons.*

Mais est-il vrai que toutes dépenses quelconques sont prohibées? Le proviso qui termine cette même section autorise en ces termes le paiement de certaines dépenses.

Provided always that the actual personal expenses of any candidate, his expenses for actual professional services performed, and *bona fide* payments for the fair costs of printing and advertising shall be held to be expenses lawfully incurred, and the payment thereof shall not be a contravention to this Act.

Dans la cause de *Coventry*, le juge *Willes*, commentant le même proviso de la 17e et 18e *Vic.*, ch. 102, autorisant comme notre acte d'élection le paiement de certaines dépenses d'élections reconnues comme légales, dit à propos de l'effet de ce proviso sur la 3e sec :

We have here, therefore, a test supplied of the meaning of the third clause of the second section, by means of which we see that it was not intended by this section to do away with every payment made by the candidate in the course of an election. And to come more nearly to the present case, it affords a test of whether this third clause was intended to prevent every payment to persons for assisting the candidate in obtaining the election.

Ce raisonnement appliqué à l'interprétation de la sec. 3 et du proviso ci-dessus, qui sont de même nature que les dispositions du statut criminel commentées par l'hon. juge *Willes*, doivent nous conduire comme lui à une conclusion contraire à celle de l'hon juge *Armour* en cette cause ; en effet, dans la cause de *Coventry*, l'hon. juge *Willes* conclut ainsi :—

Therefore, forming the best judgment I can, I must pronounce my opinion as I entertain it, that to bring forward another candidate

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under such circumstances, without a view to purchase his influence, with the *intention of serving a man's party*, and because he does not mind spending his money upon the legitimate expenses of the election of himself and of the other candidate, with the view only to serve his party, and not with the view to purchase influence for himself, does not fall within that third clause of the 17 and 18 *Vic.*, ch. 102, sec. 2. * * *

Therefore, I come to the conclusion that the fair payments of the expenses of a member, if he will stand, does not of itself constitute an illegality under the provisions of this Act.

Il y a une grande similitude entre ce cas et celui dont il s'agit en cette cause; dans le premier, c'est un candidat auquel on promettait de payer ses dépenses légales d'élection afin d'avoir son influence et son concours pour assurer, dans un intérêt de parti, l'élection de deux membres. Dans celui-ci, c'est un orateur d'élection possédant une certaine influence comme tel, auquel on promet de payer ses dépenses personnelles pour assister aux assemblées publiques et y discuter les questions politiques du jour. Il y a une si grande analogie entre ces deux cas que si le paiement a été légal dans l'un il est clair qu'il doit également l'être dans l'autre.

A part du proviso ci-dessus cité, il y a encore la sec. 73 qui admet le paiement de certains services rendus à propos d'élections, en déclarant seulement que ceux qui reçoivent une remunération pour leurs services n'auront pas le droit de voter; et que si leur vote a été enregistré il en sera retranché un au candidat qui les a employés. Elle est ainsi conçue:

73. Where a candidate on the trial of an election petition claiming the seat for any person, is proved to have been guilty by himself or by any person on his behalf, of bribery, treating, or undue influence in respect of any person who voted at such election, or where any person who voted at such election, or where any person retained or employed for reward by or on behalf of such candidate for all or any of the purposes of such election; as agent, clerk, messenger, or in any other employment, is proved on such trial to have voted at such election, there shall on the trial of such election petition be struck

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off from the number of votes appearing to have been given to such candidate, one vote for every person who voted at such election, and is proved to have been so bribed, treated, or unduly influenced, or so retained or employed for reward as aforesaid.

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Cette section introduite dans l'acte des élections de la Province de *Québec*, a été, dans la cause de *Gingras* v. *Sheyn* (1) l'objet de savants commentaires de la part de l'Hon. juge en chef de la Cour Supérieure de Québec, dont l'expérience égale le savoir. On avait soulevé dans cette cour la question de savoir si l'emploi et le paiement de bonne foi d'un cabaleur (*canvasser*) ne constituait pas une menée corruptrice. On se fondait pour établir cette proposition sur le parag. 3 de la sec. 249, qui est identiquement le même que celui de l'acte des élections de la Puissance. Dans une savante dissertation, trop longue pour être citée ici, mais à laquelle je réfère comme parfaitement applicable à la cause actuelle, l'hon. juge conclut ainsi :—

I necessarily come to the conclusion that we must reject the first proposition submitted by the petitioners, and hold, that the employment and payment *bona fide* of an elector as canvasser is not a corrupt practice so as to avoid the election, although an elector employed ought not to vote, and may be prevented from voting under sec. No. 167 of our Act.

Dans le cours de ses observations au sujet de la sec. 250, qui est la même que le proviso de la sec. 92, il s'exprime ainsi :—

It can hardly be contended that the object of this enactment was to render all payments illegal, excepting personal expenses, professional services and necessary printing ; for, according to that interpretation, as pointed out by the learned counsel for the respondent, a candidate could not pay for a committee room, or for a secretary, or messenger for a committee, nor even the disbursements of the agent to be appointed under the law.

If, as I think, the section No. 250, was not intended to render illegal all payments excepting those which it expressly legalizes, then, I think, it must have the meaning contended for in the supplementary factum for the respondent.

(1) 1 Q. L. R. 205.

Cette décision a maintenu que le paiement fait à un cabaleur employé de bonne foi n'est pas contraire à la loi. Il est évident que ce n'est pas une contravention à la sec. 73 de l'acte des élections de la Puissance. Cependant l'hon. juge *Armour* dit :—

The hiring of orators and of canvassers, is, in my opinion, outside of what is permitted by the proviso, and is within the very words of sub-section 3, and is therefore bribery.

Son attention ne me semble pas avoir été attirée sur la sec. 73. Il est clair que d'après cette section il y a un grand nombre de services pour les fins d'une élection qui peuvent être légitiment payés. L'énumération qui en est faite dans le proviso de la sec. 92, n'est pas restrictive. Si, comme il a été jugé, en vertu de cette section un cabaleur peut être payé de ses services, pourvu qu'il ne vote pas, pourquoi un orateur qui fait publiquement ce que fait privément le cabaleur ne le serait-il pas aussi ?

Les services d'un avocat qui est en même temps orateur politique ne peuvent-ils pas être considérés comme des services professionnels dont le paiement serait légitime d'après le proviso de la sec. 92 ? Les fonctions de l'avocat sont-elles nécessairement limités aux plaidoiries devant les tribunaux ? Certainement non. Leurs services sont fréquemment requis devant des bureaux d'affaires, conseils municipaux, etc. De plus, les termes de la sec. 73 ne sont-ils pas assez étendus pour comprendre le cas dont il s'agit : "Any person retained or employed for reward by or on behalf of such candidate for all or any other purposes of such election, as agent, clerk, messenger, or in *any other employment.*"

La seule pénalité que prononce cette section contre ceux qui sont ainsi employés est la perte du vote, et contre celui qui les emploie, le retranchement de leur vote dans le cas où ils ont voté. Il n'y en pas d'autre. Le fait dont il s'agit en cette cause n'est donc pas une

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offense contre la loi d'élection; déclarer qu'il en est une, ce serait aller contre la lettre et l'esprit de la loi, et imposer à la libre discussion des affaires publiques une restriction qui n'a pas été décrétée.

Il est vrai que depuis la décision de l'hon. juge en chef *Meredith*, l'acte d'élection de *Québec* a été amendé de manière a rendre illégal l'emploi de cabaleurs payés; mais l'acte d'élection de la Puissance n'ayant pas été modifié l'argumentation de l'hon. le juge en chef n'en a pas moins d'application à la présente cause, la loi fédérale étant la même que celle sur laquelle il a rendu le jugement ci-dessus cité.

Cette question du paiement des dépenses des orateurs politiques en temps d'élection a déjà été soumise à la considération des tribunaux dans la province de *Québec*, dans la cause de *Benoit et al* v. *Jodoin* (1). La portée de cette décision est en faveur de la légalité du paiement des dépenses des *orateurs*, quoique dans le cas particulier il n'ait pas été considéré comme légitimement fait. La raison en est que sous prétexte d'être des *orateurs* soutenant la candidature de *Jodoin*, un grand nombre de personnes s'était fait héberger, par un hôtelier du nom de *Gibeau*, sans avoir rendu aucun service en cette qualité. *Gibeau* appelé à s'expliquer sur le compte de leurs dépenses qui se montait à la somme de $362 .30, déclare:

Qu'il n'a aucun détail même dans son livre de mémoire, dont il a fait disparaître les feuillets aussitôt qu'il eut donné son compte. Il prétend qu'il y avait huit ou dix de ces orateurs, qui venaient chez lu tous les jours. Cependant plus loin il reconnaît qu'il y en avait quelquefois moins, quelquefois plus; mais il ne leur a jamais fait de questions, ni leur a demandé d'où ils venaient. Il suffisait qu'une personne se dit orateur de *Jodoin* pour être hébergée. De tous ces orateurs, il ne peut en nommer qu'un seul. Il est impossible de contrôler son compte et de dire que ces dépenses n'ont été faites que pour services professionnels en faveur du défendeur, *les seuls qui*

(1) 19 L. C. Jur. 185.

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pourraient être tolérés et échapper à la prohibition de traiter, contenu dans le statut.

Il est évident d'après cette dernière observation que si dans ce cas on s'était borné à payer la dépense personnelle de ceux qui auraient été employés de bonne fois comme *orateurs* pour faire valoir la candidature de *Jodoin*, l'hon. juge aurait déclaré que les services professionnels échappaient à la prohibition du statut.

Faisant application à la cause actuelle des principes exposés plus haut, j'en viens à la conclusion que la promesse faite par *Wheler* de payer à *Hurd* ses dépenses personnelles pour assister aux assemblées publiques, pendant l'élection, pour y discuter les questions publiques, comme orateur politique, n'est pas une dépense déclarée illégale par le statut.

Quant à la deuxième accusation portée contre *McClelland* comme agent de *Wheler*—je suis d'opinion qu'il n'existe aucune preuve de cette agence; *Wheler* n'a ni autorisé ni approuvé ni ratifié les démarches faites par *McClelland* auprès de *Hurd*. La suggestion de payer celui-ci $10.00 par assemblée émane de *McClelland* seul, et n'a jamais eu la moindre approbation de *Wheler*.

Quant à la remise par *Wheler* à *Hurd* d'une somme de $1.50 pour payer les dépenses de sa voiture, dans une circonstance où ils se sont fortuitement rencontrés, je partage entièrement l'opinion exprimée à ce sujet par l'hon. juge en chef, croyant comme lui que dans les circonstances où il a été fait cet acte n'a rien de blâmable.

Pour toutes ces raisons je suis d'avis que l'appel doit être alloué.

HENRY, J.:—

The charge against the appellant in this case is called by the learned judge, who tried the petition "bribery

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of influence," and it is necessary in the first place to ascertain what the law is as to that particular offence. It is alleged to be an offence under sub-sec. 3 of sec. 92 of *The Dominion Elections Act*, 1874, and under the provision of that section the learned judge found against him. The section commences with the declaration that—

> The following persons shall be deemed guilty of bribery, and shall be punished accordingly.

Sub-section 3 :—

> Every person who directly or indirectly by himself, or by any other person on his behalf, makes any gift, loan, promise, procurement or agreement as aforesaid, to or for any person in order to induce such person to procure, or endeavour to procure, the return of any person to serve in the House of Commons, or the vote of any voter at any election.

Under the leading provision of the section, the offences enumerated are stated to be bribery; and by section 102 the election of a candidate found guilty of bribery or undue influence shall be void, and the candidate so found guilty be incapable of being again elected for seven years, or of voting at any election, or holding an office in the nomination of the Crown, or of the Governor in *Canada*.

The consequences of a conviction are therefore very serious and penal, and consequently the proof should leave no reasonable doubt before such should be adjudged. Where the offence charged is not a payment of money, or the giving of some other valuable consideration, but a mere offer or promise of such, the evidence by all well established authorities requires to be irresistibly strong and explicit, for the reason that misapprehensions often arise on the part of one person as to the meaning of what another may say.

The circumstances of this case are very peculiar. The candidate was not the moving party, but the witness

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Hurd. He commenced by informing a friend of the appellant (Mr. *McClelland* of the South Riding) that he was opposed to what was known as the National Policy, which had been adopted by the respondent, and expressed his readiness to address meetings against him and it. He was apparently prepared to aid the appellant and give him ordinary support. Subsequently Mr. *McClelland* communicated what *Hurd* said to the appellant, but the latter alleges that he did not ask *McClelland* to say anything to *Hurd* on the subject. When *McClelland* told the appellant that *Hurd* would likely be willing to address meetings if his expenses were paid, he replied that he was not prepared to give any answer; that he was not aware whether the law would allow him to pay any expenses; that he was looking for information on that point, and that until he got that information he would not give any answer whatever. He says:

I did not ask him to go and see Mr. *Hurd*, nor make him any such request, because I was not exactly favorable to receiving Mr. *Hurd*.

Again:

I never heard from *McClelland* again about it. I never saw him again on that subject till the day of Mr. *Glen's* trial in *Whitby*. I never got a letter from Mr. *McClelland* on the subject, or wrote one to him.

This evidence is uncontradicted and may be considered reliable, and, if so, the appellant never in any way authorized *McClelland* to negociate with *Hurd*, and, as far as relates to the question before us, is in no way responsible for what took place between them. If he is responsible at all, it is for what he himself said or did.

I have considered the whole evidence very carefully, and feel bound to rest my judgment upon that of the appellant alone as to the main point in issue. In doing so I am following the course of the learned judge who

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tried the petition. He seems to have placed no reliance on the testimony of *Hurd* or his son, and I am not surprised that he should have done so.

The appellant detailed the conversation he had with *Hurd* before the election about the 10th of August. He says:

> I called on him to solicit his vote. I did solicit it * * * I asked his support, and then he stated that he had not exactly decided what course he would take; would not do so for a week.

They then conversed about the "National Policy" and other points, after which *Hurd* said:

> Well, we are nearly in accord. I am determined not to support Mr. *Gibbs* after what he has done. I asked him then, will you give me your support? He said he would not decide then. * * * He asked me what I would require him to do? I said if he took hold of the matter, it would be *to address meetings only*. I told him I would want him to address meetings *if my Reform friends decided to engage him to do it or to accept him.* * * * He stated it was quite correct and proper and legal for me to pay his legal expenses. I stated *if it was*, and *if our people decided to accept him* as speaker for us, I would pay *whatever was legal and proper* towards his legal expenses. * * It was understood to be his travelling expenses. There was not a word said about paying him for speaking. Then we parted without any definite understanding. The interview lasted about twenty minutes.

The appellant further says that he never had any interview at which it was arranged that *Hurd's* expenses should be paid, but subsequently says:

> At our interview, I told him I was prepared to pay his *legitimate expenses* for addressing meetings, if the party accepted him. * * I had not any conversation about this matter with him again.

These extracts contain the substance of what the appellant said and did before and during the election, in regard to the matter which forms the charge under consideration. There is nothing to shew that *Hurd* was willing to accept at any time the repayment of his expenses, as the consideration for his holding and addressing meetings on behalf of the appellant. His

letter to *McClelland*, of the 5th of August, shews clearly he would not have agreed to do so at the subsequent meeting with the appellant, even had the latter unconditionally offered such terms. There was no promise actually made, or indeed any definite understanding arrived at. Looking at the petition in this case, and the answer, it is impossible to discover what the charge is, and the case contains no particulars. Under such circumstances we have to look only to the judgment of the learned judge who tried the petition to see what it is. The offence then adjudicated upon is for having *promised* money to *Hurd* to hold and address meetings in the interest of the appellant. Does the evidence justify that finding? The evidence of what the appellant was willing to do after the election is not of much consequence. Such willingness to re-imburse *Hurd* would constitute in itself no offence, and unless in pursuance of a corrupt promise made before or during the election, re-imbursement by actual payment would be no offence. The subsequent circumstances would only be evidence to construe an ambiguous promise or understanding, but not to affect one where no such ambiguity exists. From the evidence, we see that the offer of *Hurd's* services was not induced in the first place, directly or indirectly, by the appellant. *Hurd* from the first was desirous of making money by means of his speaking qualifications at meetings. He commenced by a conversation with *McClelland*, who communicated with the appellant. The latter, from what he heard, expected *Hurd's* support, and called upon him and solicited it in the usual way, but the latter said he would not then decide, and would not until after he had visited the *United States* a week or two later. Then he asked the appellant what he would require him to do. He is the first to speak of his services. The appellant was not then prepared to make him any offer, but said he

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would want him to address meetings only. *Hurd* told him it was quite correct, and proper, and legal, for him to pay his legal expenses. If, then, the appellant engaged his services, and promised to pay his expenses, and that amounted in law to an offence, there would be sufficient evidence to sustain the charge, but what he said did not reach that point. There were two important qualifications and conditions contained in the reply "I stated if it was," (referring to the statement of *Hurd* that it was) "legal and proper to pay his expenses and if our people decided to accept him as a speaker for us, I would pay whatever *was legal and proper* towards his expenses." To recover on such a promise, proof would be necessary that the appellant could legally make the payment, and that his people had accepted the services. They must, therefore, have parted, as the appellant states, without any definite understanding, and how could, therefore, what passed be tortured into a promise, a definite and unconditional promise, which alone could militate against a candidate as being contrary to the statute; and when no subsequent interview or promise is shown, I feel myself unwarranted in finding that any corrupt practice is shown as the result of the interview in question.

Taking this view of the evidence it is unnecessary to give any opinion as to the legal bearing of the question, whether it would be against the provision of the subsection mentioned, if a candidate *bonâ fide* agreed to pay the travelling expenses of one of his supporters to address meetings on his behalf. If, however, it be done to procure the support or influence of a party or his friends, it would no doubt be within it.

The small sum of one or two dollars advanced by the appellant to *Hurd* to pay for his bill at a hotel cannot, I think, have any necessary reference to what previously passed between them. It was given at the request of

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Hurd, who said he did not expect to have been at the meeting held by the appellant and respondent, and was without money. It was not one of the meetings held by *Hurd*, or one of those for addressing which he expected to be paid his expenses for holding. It would, I think, be making the law oppressive to unseat and disqualify a candidate for such an act.

I think the appeal should be allowed and judgment given for the appellant with costs.

TASCHEREAU, J.:—

I am of opinion, with Mr. Justice *Armour*, who presided at the trial in this cause, that the hiring of electors as orators and canvassers is within the very words of sub-sec. 3 of sec. 92 of the Election Act, and is therefore bribery. Taking, then, *Wheler's* own version of the engagement with *Hurd*, this engagement was clearly illegal. Whether he thought it to be so or not does not make any difference. Corrupt practices in elections would easily be committed with impunity if courts of justice required their perpetrators to acknowledge under oath that they have acted with the intention to violate the law, before finding them guilty. The *Quebec East* election (1) has been referred to, as holding that the payment of canvassers is not a corrupt practice, under a statute similar to the one which rules this case. It is true, that it was so held in the case referred to, but what clearly shows that this decision was entirely opposed to the intentions of the legislature by which it was enacted is, that a few weeks after this decision they passed a special enactment (2), by which it is expressly ordered that the payment of canvassers shall be corrupt practices, and this, no doubt, to meet the point decided in the *Quebec East* election.

But, in the present case, I am of opinion further, that

(1) 1 Q. L. R. 295.

(2) 39 Vic., ch. 13, sec. 19, Q.

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a gross case of bribery has been proved against *Wheler*. That *Hurd* sold himself to *Wheler's* party, with *Wheler's* knowledge, seems to me clearly proved. There is no doubt that *Hurd* is a witness of a very contemptible character, and that his evidence must be received with great caution. But there is, in my opinion, sufficient corroboration of his evidence to support the material parts of it. I need not refer at length here, to the depositions given by the witnesses. Mr. Justice *Gwynne* has done so, and having had communication of his notes, I can only say that I fully concur in all his views of the case. I will merely state, that the fact that *Wheler*, who knew all that *Paxton* could say in the matter, did not put him in the witness box, tells, in my mind, strongly against him. I think this appeal should be dismissed.

GWYNNE, J.:—

It is painful to see a gentleman of the legal profession, a practitioner of upwards of eighteen years' standing, obliged to accuse himself in the unblushing manner in which the witness *Hurd*, in his evidence given under oath, has accused himself, of the infamy of selling his services and his influence to procure the return of the appellant as a member of parliament; but the picture which he has painted of his own infamy may serve to indicate the height to which corruption in parliamentary elections had reached, and the urgent necessity which there was for the stringent provisions enacted in the Dominion Election Acts of 1874, with a view to the purging and purifying the body politic from the odious plague spot. Of the fitness of the appellant to fill the high office to which he aspired, the venal advocate, upon his own shewing, seems to have known little. In a postscript to his letter of the 8th Oct., 1878, to Mr. *McClelland*, the convenient go-between, he says:

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If I had known this man as well before as I do now I would not have voted for him or worked for him if he had given me $2,000. He kept poor *Paxton* on starving allowance during the campaign. I know *Paxton* had to borrow $20 to pay his expenses, and without *Paxton* and myself he had no more chance of being elected than he had of Heaven.

How much beyond $2,000 would have been sufficient to have induced him to vote and to work for the appellant, if he had known him as well when he made the bargain which he says he did, as he did know him after the election was over, he does not say; but looking at the whole character of the witness's evidence, it would not seem to be an uncharitable conclusion to draw, that the price he would have set upon his venality would have been upon a scale in inverse ratio to the opinion he entertained of the qualifications and fitness of the candidate.

Whether the bargain was of the nature which the witness swears he made the condition of his corruption, or of the nature which the appellant in his testimony admits, matters little; the only substantial difference between them, as it seems to me, is as to amount, the appellant admitting that he agreed to pay the witness the expenses attending his rendering the services contracted for, and the witness insisting, that besides his expenses he was to receive $400 in any event, and the further sum of $600 in the event of success. The learned judge who tried the case has found as a matter of fact, that the arrangement which the appellant, in his evidence, admitted that he made with *Hurd* was so made *to induce Hurd to endeavor to secure the return of the appellant to serve in the House of Commons.*

In all cases we should have great delicacy in overruling the finding of a learned judge upon a pure matter of fact. He has the superior advantage of observing the manner in which parties give their evidence to assist him in forming a correct judgment of

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their acts and of their motives, but without this aid, in this case, the *matter* of the appellant's evidence as appearing in the case before us is abundantly sufficient in my judgment to support that finding, at all events to prevent our overruling it and declaring that the fact so found by him is not warranted by the evidence. The appellant gave evidence, that *McClelland* had stated to him that he had spoken to *Hurd*, who said he could do appellant some good; that *Hurd* said he had not decided what course he would take, but that if he addressed meetings *he would have to be paid his expenses.* The appellant said that his reply to this was, that he was not aware whether the law would allow him to pay any expenses, that he was looking for information on that point, and that until he got that information *he could not give any answer* whatever. The appellant adds: "I understood Mr. *Hurd* would require his expenses paid." Again he admits, that at an interview which he subsequently had with Mr. *Hurd*, he asked *Hurd* for his support, and that *Hurd* replied that he had not exactly decided what course he would take, that he would not do so for a week, that he was going over to the *States* for some information respecting protection, and *if he decided to take any action in the matter he would require his personal expenses to be paid by appellant if he addressed meetings.* The appellant adds:

He asked me what I would require him to do; I said, if he took hold of the matter, it would be to address meetings only. I told him I would want him to address meetings, if my Reform friends decided to engage him to do it, or to accept him. Nothing more was said about terms; nothing about amount. He asked me whether I would want him to hold meetings generally throughout the riding, or in any locality. He said, if I do take hold of the matter, I propose to hold a meeting at *Port Perry* in the first place, or at *Uxbridge* village; and he said, I wish to take control of the meeting. He would not allow anybody to address the meeting but himself, and that he would take about two or three hours and not refer to Mr. *Gibbs* or anybody else. He said he would not allow Mr. *Gibbs*

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or myself to address the meetings, and that he wanted his speech to be revised and printed in fly form, and five or six thousand distributed through the riding, and he *wanted to know if I would go to that expense.* I said that if he went on and addressed the meeting, and my friends considered his speech was worth it, we would consider whether it would be worth while going to that expense. There was nothing more said about expense at that time. He stated it was quite correct and proper and legal for me to pay his legal expenses. I stated if it was, and if our people decided to accept him as a speaker for us, I would pay whatever was legal and proper towards his legal expenses.

And again he says:

At our interview I told him I was prepared to pay legitimate expenses for addressing meetings if the party accepted him. *My understanding was that my party had accepted him, and that I was willing to pay his personal expenses.* I thought his personal expenses would cover his conveyance, the printing and his own personal expenses. He stated he would have to leave his office and his son there, and he could not afford to do it unless his expenses were paid. He called meetings in the south portion of the riding. As near as I can understand, he held five or six meetings, all within a radius of a few miles.

Again he says:

Mr. *Hurd* spoke to me the next morning after the *Cannington* meeting, and said "I did not expect to come to this meeting this evening, and I have not enough money. I wish you would let me have enough to pay the expenses of my horse at *Sunderland.*" I think he said *Sunderland.* And I gave him a dollar, or two dollars. That was all the money I ever gave him. *He has not sent me a statement of his personal expenses, and I have not settled up with him yet.* On the 12th October, I think it was the day the fair was there. I called at his office, and was there while his son was looking around for his father for an hour or an hour and a half, *to get his bill of expenses, to see what his expenses were. I left word with his son to write to me and to send the bill of expenses.*

Then, upon being asked if he remembered asking *Hurd's* son if he had heard anything about a protest, he replied:—

No, I did not ask him that question. I did not send any message to his father by him, *except that I wanted him to send a statement of his accounts.*

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And again, being asked whether, at the interview which he had with Mr. *Hurd* on the 10th August, he did not say to Mr. *Hurd*—"I understand you will support me on certain conditions?" he replied:

Well, I said to him that I understood he would support me and address meetings. He told me he would support me, but that he would take no part unless his expenses were paid attending meetings.

Upon this evidence, I cannot see that any objection can well be taken to the finding of the learned judge upon the simple question of fact, as to the promise by the now appellant to pay *Hurd* his expenses, in order to induce the latter to use his influence, (which he had refused to use unless paid) to procure the return of appellant as a member of the House of Commons.

The secrecy attending the whole transaction and the evidence generally, in my opinion, warrant the conclusion that, notwithstanding that *Hurd* may have expressed to the appellant his opinion that payment for such services was legal, the appellant himself entertained grave doubts as to the correctness of this opinion; but, however this may be, the appellant's belief in the correctness of the opinion will not exempt him from responsibility, if the opinion be not sound and the act be declared by law to be bribery and corruption.

Upon principle then, and upon the authority of what was said by *Martin*, B., in the *Bradford* case (1) and by *Willes*, J., in the *Coventry* case (2), the conclusion of the learned judge that the appellant was guilty of bribery within sub-sec. 3 of sec. 92 of the *Dominion Elections Act* of 1874, cannot be impeached. Nor is this judgment at all at variance with what is said in the *Lambeth* case (3), to the effect that:

Where the consideration for the payment was the *bonâ fide* employ-

(1) 1 O'M. & H. 32. (2) 1 O'M. & H. 100.
(3) Wolf. & Dew, 135.

ment of persons as canvassers to ascertain the votes of the constituency, although, in the course of their employment, they had to recommend the candidate employing them, that is not within the Act, for there is a great difference between the case of a person being employed to ascertain how the voters would vote, being paid for that service as the *bonâ fide* consideration of the payment, although the persons so employed should recommend the voters to vote for their employer, and the case of a person being employed for the express purpose of inducing, persuading and endeavoring to procure the voters to vote for his employer, upon a promise of payment to be made to the person so employed for such services. If, under the guise of employment as ordinary canvassers, persons are in fact employed and paid, or promised payment, for rendering services, such as *Hurd* was employed to render here, I see no reason why the person so employing them and paying, or promising payment, for such services should not, (within the express provisions of the Act) be deemed guilty of bribery.

It would be a mockery of justice and a reproach upon common sense to hold the promise of payment, to a poor voter, of his expenses in coming to the poll to record his vote (otherwise perhaps conscientiously given), to be bribery, and the promise of payment to the witness of his expenses, in consideration of his going through the electoral division using all his influence, by the exercise of his persuasive and oratorical powers, and of his local and professional influence, to procure the return of the appellant, not to be. Indeed, as was pointed out by the learned judge in his judgment, bribery of influence is more extensive, more effectual, and more pernicious than the bribery of a voter merely to give his vote. It is difficult to conceive any conduct more odious or corrupt than that of an

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advocate who, by his oratorical powers, and the extent of his acquaintance with the electors which the practice of his profession among them had given him, while concealing the fact that his praise and his advocacy was purchased, should, under the assumed character of an independent elector, disinterestedly and conscientiously in the public interest supporting a particular candidate, exert his influence by persuading his fellow electors to vote for the man whom, in truth, he was serving under a contract of hiring.

But the letter of the Act is clear that,

> Every person who, directly or indirectly, makes any promise of any money or valuable consideration to any person, in order to induce such person to endeavor to procure the return of any person to serve in the House of Commons, shall be deemed guilty of bribery;

And we have no right to cripple the Act by depriving this section of the smallest particle of its literal force and effect. Parliament has deemed it necessary to enact this peremptory provision, in order to secure the utmost purity in the election of members to serve in parliament, and to make them be in reality, as in name, the freely chosen representatives of an independent people. And, undoubtedly, the promise to pay *Hurd* even his expenses attending his rendering the services which the appellant admits he agreed to render, does come within the letter of the clause, unless it comes within the protection of the proviso which enacts:

> Provided always, that the actual personal expenses of any candidate, his expenses for actual professional services performed, and *bona fide* payments for the fair cost of printing, shall be held to be expenses lawfully incurred and the payment thereof shall not be a contravention of this Act.

Now, that services of this nature should not be held to come within the term "actual professional services," the honor of the profession and electoral purity, which it was the express object of this act to secure, alike

require. Indeed, if the services contracted to be rendered, and which appear to have been rendered by *Hurd*, could be held to be professional within the meaning of the proviso, payment of the amount which *he* swore was the consideration agreed upon would be equally legal, for the *amount agreed to be paid* for services could not determine whether or not they were, in fact, *professional* services; it is the nature of the service which must determine that question, and the learned counsel for the appellant was forced to admit, that if the contract was for the amount sworn to by *Hurd*, he could not stand up in court to justify it as legal. If the services are not protected as professional, there is nothing in the proviso which protects the promise to pay anything for them from the operation of the clause. I do not feel disposed to extend the construction to be put upon the term "expenses for actual professional services" beyond that put upon it by *Richards*, C. J., in the *East Toronto* election case (1), namely, the fees payable for services rendered by lawyers as such.

We cannot construe the Act as making the promise to be bribery, only in case it should be made to any one but a lawyer, as if the clause ran thus: "Every one who directly or indirectly promises, &c., in order to induce, &c., shall be deemed guilty of bribery and shall be punishable accordingly, provided always that such promise made to a lawyer shall not be a contravention of this Act."

The statute has expressly declared the Act of which the appellant has been found guilty, by the judgment of the learned judge, who tried the case and heard all the witnesses, to be bribery, and I can see no sufficient grounds to justify us in annulling that finding.

With the severity of the punishment annexed to the offence, we have nothing to do, but we are concerned

(1) 8 C. L. J. N. S. 118.

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to take care that we do not, by reversing upon insufficient grounds the finding of the learned judge, cause an Act which parliament has deemed to be so necessary to secure its independence to become a dead letter.

The appeal should, in my opinion, be dismissed with costs, and the Registrar should be directed to report the judgment of Mr. Justice *Armour*, and the appeal therefrom, and our judgment thereon to the House of Commons.

Appeal allowed with costs.

Solicitors for appellant: *Hodgins & Spragge.*

Solicitors for respondent: *Cameron & Appelbe.*

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*May 12,13.

*June 31.

CONTROVERTED ELECTION OF THE COUNTY OF SELKIRK.

DAVID YOUNG AND ARCHIBALD WRIGHT..... } APPELLANTS;

AND

DONALD A. SMITH..... RESPONDENT.

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

The Dominion Elections Act, 1874, *secs.* 96 *and* 98—*Hiring a team to bring voter to poll a corrupt practice—"Wilful" offence —Advance of money when not made in order to induce voter to procure the return of the candidate not bribery.*

As to the case of one *J. F. G.*, the charge was that the respondent bribed him by the payment of a promissory note for $89. The evidence showed that *J. F. G.* had been canvassing for respondent a long time before the note fell due, and had always supported him. He was on his way to retire his note, which was overdue or falling due that day, when respondent asked him to canvass that day, and promised to send into town and have the note arranged for him. At the same time *J. F. G.* was negotiating for a loan on a mortgage to respondent and it was at first stipulated that the amount of this note should be

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

taken out of the mortgage money. The agent of the respondent, after the election, at the request of *J. F. G.*, paid the mortgage money in full and allowed the matter of the note to stand until *J. F. G.* could see respondent. *J. F. G.* stated that neither the note nor the mortgage transaction influenced him in any way, and that he had to pay the note and did not expect respondent to make him a present of it.

Held:—That the evidence did not show that the advance of money was made in order to induce *J. F. G.* to procure or to endeavor to procure the return of respondent, and was not therefore bribery within the meaning of sub-sec. 3 of sec. 92 of the Dominion Elections Act, 1874.

As to the case of one *M.*, the evidence shewed that *M's* team was hired some days before the opening of the poll by *C.*, an agent of the respondent, for the purpose of bringing two voters to the polls. *M.* went for the voters, returned the day previous to the polling day without the voters and was paid fifteen dollars.

Held:—That the term "six preceding sections" in the 98th section of "The Dominion Elections, 1874," means the six sections immediately preceding the 98th, and therefore the hiring of a team to convey voters to the polls, prohibited by the 96th section (1), was a corrupt practice within the meaning of the 98th section (2). [*Henry*, J., dissenting.]

(1) 37 Vic., ch. 9., sec. 96 :—"And whereas doubts may arise as to whether the hiring of teams and vehicles to convey voters to and from the polls, and the paying of railway fares and other expenses of voters, be or be not according to law, it is declared and enacted, that the hiring or promising to pay or paying for any horse, team, carriage, cab, or other vehicle, by any candidate, or by any person on his behalf, to convey any voter or voters to or from the poll, or to or from the neighbourhood thereof, at any election, or the paymentby any candidate, or by any person on his behalf, of the travelling and other expenses of any voter, in going to or returning from any election, are and shall be unlawful acts; and the person so offending shall forfeit the sum of one hundred dollars to any person who shall sue for the same; and any voter hiring any horse, cab, cart, waggon, sleigh, carriage or other conveyance for any candidate, or for any agent of a candidate, for the purpose of conveying any voter or voters to or from the polling place or places, shall, *ipso facto*, be disqualifiedfrom voting at such election, and for every such offence shall forfeit the sum of one hundred dollars, to any person suing for the same."

(2) Sec. 98 :—"The offences of bribery, treating, or undue

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APPEAL from the decision of Mr. Justice *Betournay*, of the Court of Queen's Bench for the Province of *Manitoba*, dismissing the petition against the return of *Donald Alexander Smith*, as member of the House of Commons for the Electoral District of the County of *Selkirk*, in the Province of *Manitoba*.

The petition charged the respondent with bribery, treating, undue influence, hiring teams to convey voters to and from the polls, and with corrupt practices, but the appellants limited their appeal to four cases of alleged corrupt practices, viz. :—

(1). The case of *Donald Alexander Smith*, as briber, and *John F. Grant*, as bribee.

(2). The case of *James Penrose*, as briber, and *Henry King*, as bribee.

(3). The case of *Elias George Conklin*, as the person hiring teams, and *John Henry Mason*, as the person from whom *Conklin* hired the teams.

(4). The case of *Donald Alexander Smith* and *Sedley Blanchard*, bribers, and *Jean Baptiste Lapointe*, *Elzéar Lafemodière*, *Louis Deschambault*, *L. J. A. Levecque*, *J. A. Provencher*, *Alexander Begg*, and *A. F. DeGagnier* (or *Gauthier*), as bribees.

The facts and the evidence relating to these charges are reviewed in the arguments and judgments hereinafter given.

Mr. *Hector Cameron*, Q.C., for appellants :

The evidence in the *Smith-Grant* case consists only of the testimony of Mr. *Grant* and Mr. *Blanchard*, and the facts are not in controversy. *Smith* desired to get *Grant* to

influence, or any of such offences, as defined by this or any other Act of the Parliament of *Canada*, personation, or the inducing any person to commit personation, or any wilful offence against any one of the six next preceding of this Act, shall be corrupt practices within the meaning of the provisions of this Act."

go with him to canvass the voters in a particular district, and had been advised by Mr. *Blanchard*, his solicitor and election agent, to do so. *Grant* goes to *Smith's* house on his way to town to take up an overdue note of $89. *Smith* asks him to go to canvass with him that day and, as an inducement, promises to send into town and get the note paid. In the words of *Grant*, "I suppose the consideration for the arrangement was, that I should accompany Mr. *Smith* to *Headingly*. I consented to go with him after that. He canvassed the parish and I accompanied him. I advised the voters to vote for Mr. *Smith*. Mr. *Smith* knew that I was doing this." *Grant* was at that time negotiating for a loan on mortgage from *Smith*, and it was at first stipulated that the amount of this note should be taken out of the mortgage money: but when he settled the mortgage transaction with *Blanchard*, *Smith's* agent, a week or 10 days before the election, the mortgage money was paid over in full, without deducting the amount of the note. *Grant* thus states it: "I did not tell Mr. *Blanchard* that I never would pay the note, but said I had a claim against Mr. *Smith*. The claim was for previous election services rendered 4 or 8 years ago, and I wanted to see Mr. *Smith* about it." Mr. *Blanchard* says (page 11): "He begged so hard that I gave him the whole of the mortgage money and there the thing has stood ever since."

There was here undoubtedly a loan of money, if not an entire gift of it, under the suspicious pretext of paying an old election debt of 4 or 8 years standing, for the corrupt purpose of procuring the vote and influence of a leading man in the constituency, and even if the object of the respondent was not to influence the vote of the elector, of which he may have felt secure, yet if it was to procure his influence and to reward him for exerting it in the respondent's favour, it was equally

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a corrupt practice within the statute and the law of Parliament. The procuring of influence for a consideration is a violation of the 92nd and 93rd sections of the Dominion Elections Act, 1874.

The learned Counsel referred to the judgment of Mr. Justice *Armour*, in the *North Ontario* case (before this Court in appeal) (1), and to the *Coventry* case (2); *Cashel* case (3); *Bradford* case (4).

[As to the *Penrose* case the learned counsel did not rely on it.]

The next case, on which there can be no doubt, is the *Conklin-Mason* case, that of hiring a team to bring voters to the poll, which hiring was contrary to the statute. The Judge in the Election Court disposed of this charge on the ground that while the hiring of teams was illegal, yet it was not a corrupt practice. Mr. *Conklin* was on Mr. *Smith's* committee, and I did not think from the face of the evidence the respondent could deny the fact. *Mason's* team was hired and paid for by *Conklin;* the teamster was given the name of two voters on a slip of paper. It is said that he could not get the orders. The mere fact, however, that the teamster was hired to fetch them is in itself corrupt by the statute.

The respondent endeavors to uphold the learned Judge's decision on this point by *Woodhouse* v. *O'Donohoe* (5), decided under the repealed Act of 1873. The Act of 1874 expressly altered the law; the language of the 98th section is clear and decisive on the point. Neither of my learned friends have ever doubted since the Act of 1876, that the hiring of a team, prohibited by the 96th section, is a corrupt practice. The construction which is for the first time put forward is that the

(1) See p. 430
(2) 1 O'M. & H. 98 and 101.
(3) 1 O'M. & H. 289.
(4) 1 O'M. & H. 30 and 35.
(5) 10 C. L. J. N. S. 248.

words "six next preceding sections" in section 98 apply to the sections preceding section 93, and not sections 92 to 98. The language is clear and unambiguous and must be construed in their literal sense and include the 96th section which prohibits the hiring of teams to carry voters to the polls.

The agency cannot be denied successfully, when we come to look at Mr. *Conklin's* evidence. He was on a committee which Mr. *Smith* recognized, and he canvassed.

The learned counsel then concluded his argument by shortly referring to the evidence in the *Gauthier* case.

Mr. *Robinson*, Q. C., and Mr. *Bethune* for respondent:

The first case is the *Grant* case upon which my learned friend seems to insist.

This loan was not made to *Grant* to induce him to give a general support or his vote to *Smith*, because that would have been given without the inducement. The loan was offered to *Grant* to induce him to give on a particular day, to suit the convenience of Mr. *Smith*, the assistance which he would have given without the inducement on another day. There was no corruption in the act.

It is no use arguing whether this is a case of undue influence or not. The charge is not that he canvassed on that particular day, but that *Grant* was personally bribed by respondent. Now he neither bought his influence or his vote. [The learned counsel then briefly referred to the cases of *Penrose* and *Gauthier*.]

The only case which involves a question of law is that of the hiring of *Mason* to convey voters to the poll. First of all we contend there is no evidence to show Mr. *Smith* knew Mr. *Conklin* was on the committee. There was nobody influenced at all by the transaction. *Conklin* did not know whether *Mason* had a vote, and *Mason* did not know which side *Conklin* supported.

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It was merely an ordinary case of hiring a team, and the teams actually returned before polling day without the voters.

Then as to the question of law. It is clear until this clause was put in, hiring *per se* was illegal and not corrupt. The view taken by the learned Judge who decided this case, is that the act must be corrupt. Now, the hiring took place as a teamster and not as voter, and the object of the act was to prevent the conveyance of the voters and not the sending of the cabman for the voter, and that is all that was done in this case.

The term "the six next preceding sections of this Act," referred to in sec. 98, cannot mean the secs. 92 to 97 inclusive; for the word "wilful" is insensible as applied to most of the acts there specified, which are in themselves illegal acts even at Common Law, and involve a corrupt intention and purpose as part of the offence.

It seems absurd to speak, for example, of wilfully giving money, or agreeing to obtain an office for a vote, or corruptly doing so as a reward for having voted; of wilfully paying money with the intent that it shall be spent in bribery; of wilfully receiving money for votes; of wilfully treating for the purpose of corruptly influencing voters; of wilfully threatening or inflicting violence, or using fraud, to compel voters to vote or abstain from voting; or of wilfully inducing any one to personate a voter or take a false oath. The word "wilful" cannot have been used here in the sense either of doing these acts intentionally, or of doing them knowing that they were illegal.

Then what do these words mean? We say that the word "preceding" means preceding the definition of *bribery, personation, treating* and *undue influence* in this Act; and that the clause may be so read. It seems probable that the clause has been transposed in framing

the statute, or that sections 93 to 98 inclusive were originally framed as sub-sections of section 92. The word "wilful," in the sense of knowing it to be an offence, would have a reasonable application to the acts prohibited in the then six next preceding sections, (secs. 86 to 91) many of which are acts which are in themselves innocent, and might well be supposed to be so by any one not aware of the statute, or conversant with the special law of elections. It is further to be observed that the effect of section 98, if applied to sections 92 to 97, is first to declare bribery, &c., to be a corrupt practice without disqualification, and then to make it so only if done wilfully. As to the effect of the word "wilfully," see *Regina* v. *Prince* (1), *Abbott's* Law Dictionary (2), *United States* v. *Three Railroad Cars* (3), *Bishop's* Crim. Law (4), *Lewis* v. *Great West. Railway* (5), the *Brockville* case (6), the *Bolton* case (7), *Cunningham* on Elections (8), *Rogers* on Elections (9), *Meirelles* v. *Banning* (10).

Mr. *Hector Cameron*, Q.C., in reply.

RITCHIE, C. J.:

Four charges were pressed before us in this case. First the payment of a tavern bill incurred by the respondent and a few friends during the canvass. The agent did not pay the bill till after the election, and although the charges appeared to him very high, he said he paid the amount rather than have a dispute. Moreover I have no means of discovering from the evidence what it would have been reasonable to pay under the circumstances, nor what are the usual charges in that part of the country. I can see nothing corrupt in this.

(1) L. R. 2 C. C. R. 154.
(2) Vol. 2. p. 654.
(3) 1 Abb. U. S. 196.
(4) Sec. 428.
(5) L. R. 3 Q. B. D. 195.
(6) 32 U. C. Q. B. 138.
(7) 2 O'M. & H. 142.
(8) P. 128.
(9) P. 350.
(10) 2 B. & Ad. 909.

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There is another charge as to the payment of a note. Mr. *Smith* called on one of his supporters (Mr. *Grant*) to canvass with him on a certain day, and the supporter said he could not, because he was then going into *Winnipeg* to settle a promissory note which had fallen due. Mr. *Smith* said: "Oh, my agent is going in and he can attend to that." The respondent then instructed his agent to pay the note and charge it against the mortgage money he was lending *Grant*. I do not think there was any loan or gift of money. I think it was only natural for Mr. *Smith* to say in such a case, if you will go with me I will have your note attended to. There was no corrupt object in lending the money, as *Grant* was and had been always a strong supporter and canvasser of the respondent, and certainly there was actually no loan in the general acceptance of the word.

As to the *Penrose* case I am not prepared to say the Judge was wrong.

But then we come to the *Conklin* case. In this case I think there has been a corrupt act done by the agent which must avoid the election. The charge is: "that *Donald Alexander Smith*, by his agent, hired and promised to pay and paid for divers horses, teams, carriages and other vehicles to convey divers voters to and from the poll, and to and from the neighbourhood thereof." The particulars of this charge are as follows: "Name of person hiring, *Elias George Conklin*; name of person from whom hired, *John Henry Mason*; sum promised to be paid, fifteen dollars a day, by *Elias George Conklin* to *John Henry Mason*; sum paid, fifteen dollars per day, by *Elias George Conklin* to *John Henry Mason*." Now what are the facts? *Conklin* hired a teamster to fetch two electors a few days before the polling. The teamster went into the country for them and returned the day before polling, but without the two men.

The learned Judge has certainly misapprehended the

law in this case. He was under the impression that the 96th section only disqualified the voter and exposed him to penalties. [The Chief Justice then read the 96th section.] But he seems to have entirely overlooked and been unaware of the 98th section, and held that the act complained of, though unlawful, was not a corrupt act.

Mr. *Bethune* argued very ingeniously that it should not apply to the "six next preceding sections," but to the sections preceding the 97th section. I do not think we can enter into such a refined process of reasoning. If this clause has been put in its wrong place, the error must be rectified by Parliament and not by us.

Then was this a "wilful" offence or not?

If this statute had simply declared that whosoever shall wilfully pay a voter to bring voters to the polls shall be guilty of a misdemeanor, can it be doubted that on an indictment on proof of the act done, it would be no defence to set up ignorance of the law? It is too clear for argument that ignorance of the law does not excuse.

Here the illegal act was done without any legal excuse, and without any ignorance or mistake in fact, and consequently it was a wilful breach of the law, and consequently a corrupt act.

It seems to me impossible to suppose that the intention of the legislature could have been to make the corrupt act depend upon the knowledge of the doer of the act of the law. When he engaged in that election and undertook to do acts in connection therewith, he was bound to know the law and to take care that he did no illegal act. If he had stated to the person: I do not know the law, I do not intend to break the law, but if it is lawful to pay you for bringing the voter to the poll, I will do so, but never does pay, and so never promises to do an illegal act and never does it, he would be within the principle of the *Wheler* v. *Gibbs* case, just decided, and as I understand the law in such a case,

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there would be no corrupt act. But that is not this case. Here the unquestionably unlawful act was done, and his only justification or excuse to denude it of its wilful character is, I did not know it was illegal. But it is very clear, in my opinion, that such a pretence will not deprive the act of its wilful character. If a man voluntarily breaks the law, this, in the eye of the law, is a wilful act, because the act done is a wrongful act without just cause or excuse. To deprive an unlawful act of wilfulness, there must be an ignorance or mistake of fact, not ignorance or error in point of law.

All the cases turn on ignorance of fact, not ignorance of law :—

Ignorance or mistake is not the defect of will when a man intending to do a lawful act does that which is unlawful, for here the deed and the will acting separately, there is not that conjunction between them which is necessary to form a criminal act. *But this must be an ignorance or mistake of fact,* and not an error in point of law. As if a man intending to kill a thief or house breaker in his own house, by mistake kills one of his own family, this is no criminal action, but if a man thinks he has a right to kill a person excommunicated or outlawed wherever he meets him and does so, this is wilful murder (1).

In this case the maxim "*Actus non facit reum nisi mens sit rea*" does not apply.

In a very late case also—*Reg.* v. *Prince* (2)—this doctrine was clearly laid down. In that case, a man was charged with having abducted a girl under age; and all the judges agreed in saying that mistake in law is not a defence.

The respondent in this case, however, had, according to the evidence, no knowledge whatever of the transaction.

The appeal is allowed, with costs, and the House of Commons will be notified that the election is void.

FOURNIER, J. :—

I will not enter my dissent in this case, although I

(1) Black Com. by Stephen, 2 Ed. book 6 of Crimes, p. 98 and 105.
(2) 13 Cox C. C. 138.

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confess it is hard to unseat the respondent because there has been an unintentional violation of the law.

Conklin said that he was under the impression that he could send for voters before the polling day, so long as he did not send for them on the actual polling day. However, against the weight of authorities, I must admit the respondent's agent was bound to know the law, and, therefore, the appeal must be allowed.

HENRY, J. :—

There were four cases of alleged corrupt practices argued before us in this case:

1. For alleged bribery by the respondent for corruptly lending or advancing money to one *John F. Grant.*

2. The case of alleged bribery by the offer of one *James Penrose* to bribe *Henry King* to vote for the respondent

3. The alleged bribery by respondent and his agent, *Sedley Blanchard*, of *Lapointe* and six others named, by the payment after the election by *Blanchard* of about $30 to one *Gauthier* for the hire of committee rooms, for fire and light, and for board and the feeding of horses, including the boarding of five parties and the keeping of their horses.

4. The hiring of *Mason's* team by one *Conklin* to convey voters to the poll.

I will deal with these charges in their order. As to the first, I have carefully read over and considered the evidence applicable to it. It amounts to this: That *Grant*, some months previous to the election, without any reference being made to it, obtained from *Blanchard*, the respondent's solicitor, subsequently his agent for the election, the promise to advance him six or eight hundred dollars on a mortgage security on his real estate. The respondent, before the election, set out to canvass an outlying dis-

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trict and was recommended by *Blanchard* to get *Grant* to go with him. Before reaching *Grant's* house, he met him on his way to *Winnipeg*, and requested him to return with him. Grant had been previously a pronounced supporter of the respondent and had been canvassing for him, but at first declined to accompany the respondent because he had a note for about $89 due that day in a bank and said he must go to *Winnipeg* to have it taken up, upon which the respondent said he would send in and have that done in the meantime. *Grant* thereupon went with the respondent, and the latter sent and had the note paid and retired by *Blanchard*, who charged the amount of it to *Grant* as a part of the sum he had agreed, on the part of the respondent, to advance upon the mortgage. After the election, the mortgage was executed by *Grant* and the balance offered to him by *Blanchard*. *Grant*, however, objected to allow the amount of the note to be deducted from the amount of the mortgage, as he had a bill against the respondent for a previous election, and because he required the whole amount of the loan to pay off the demand for which he wanted it. Under the circumstances, *Blanchard* paid it to him, upon a promise from *Grant*, that he would repay the amount of the note to him, if the respondent did not allow the account against him. Under such facts I cannot understand anything corrupt. If a candidate wanted the presence with him of his warm supporter, and to obtain it it was necessary to substitute some other means of having done what alone could secure that presence, I think that under the circumstances it would be adding to the rigour of the statute to decide that there was anything corrupt in the transaction; which, from the evidence, we have every reason to consider *bona fide*.

As to the second case: The evidence is so conflicting that I do not feel at all at liberty to question the finding

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of the learned judge who tried the petition; besides, there is no sufficient evidence of the agency of *Penrose* to make the respondent liable for the serious consequences of his acts. He says he at first thought he was on one of respondent's committee, but that the day before the election he found he was not; he, however, thinks he attended one or two committee meetings afterwards. Attendance at committee meetings is not confined to persons composing them, and there is nothing to show what he calls committee meetings were called with the knowledge or sanction of the respondent. Frequently the friends of a candidate form themselves into committees and clubs without his knowledge, and it would be unwarrantable to hold him personally answerable for their acts, so as to bring them within the laws which make candidates answerable for the acts of their agents.

The third charge is not at all sustained. It was for the payment by *Blanchard*, the respondent's agent, after the election, of a bill for which the respondent is in no way liable. The agency terminated with the election. No arrangement or agreement was made with *Gauthier*, before he supplied to the persons named the board and feed for their horses, by the respondent, or any one on his behalf, that the bill would be paid. He appears to have furnished what he charged for without orders from any one, and after the election was over made up a pretty high bill as many others do against candidates in such cases, and more especially against successful ones. I can speak from a long personal experience of such cases.

The fourth and last charge remains for consideration. It is founded on sections 96 and 98 of the Election Act of 1874.

Section 96, after reciting that doubts might arise as to whether the hiring of teams and vehicles to convey

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voters to and from the polls, and the paying of railway fares and other expenses of voters, be, or be not according to law, it is declared and enacted that

The hiring or promising to pay or paying for any horse, team, carriage, cab or other vehicle, by any candidate, or by any person on his behalf, to convey any voter or voters to or from the poll, or to or from the neighbourhood thereof, at any election, or the payment by any candidate, or by any person on his behalf, of the travelling and other expenses of any voter in going to or returning from any election, are, and shall be unlawful acts, and the person so offending shall forfeit the sum of one hundred dollars to any person who shall sue for the same.

Section 98 provides that

Any *wilful* offence against any of the six next preceding sections of this Act shall be corrupt practices within the meaning of the provisions of this Act.

Although it would, in my opinion, be difficult to point out six *next* preceding sections to section 98, as provided by it, we must assume that the legislature intended it to apply to the next preceding six sections, and therefore to refer to and include section 96, and thereby provides for another and more serious offence. Section 96 creates an offence against a candidate, and also against another person for doing any of the acts prohibited by it, including as well the person who hires as the person who lets to hire a horse, team, &c., and subjects them to the penalties provided by the section, no matter how innocently done. Section 98, however, which is much more penal, requires that when a charge is made under it there must be evidence that it was done *wilfully*. The evidence under it should show that the act was done in such a way, and in such circumstances, that a jury would be justified in finding it to have been done wilfully. That it was done negligently, though sufficient under section 96, would not be so under 98, for the legislature has clearly provided for something more when consequences much

more important and severe are to be the result. By a comparison and consideration of the two sections, no other conclusion can be arrived at. That every one must be presumed to know the law is a judicial maxim well known and long established, but, like every general maxim and rule, there are limitations of it in the construction of statutes, and authorities are found to shew that in cases similar to that now under consideration, the maxim is not always fully applicable.

The case cited on the argument by Mr. *Robinson*, *Meirelles* v. *Banning* (1), establishes that view. In giving judgment in that case Lord *Tenterden*, C. J., said :

The words "wittingly," "willingly" and "knowingly," in this penal clause must have been introduced with some view. If we suppose them to have no particular meaning, it would have been sufficient without adding more, to impose the penalty on any person opening or detaining letters, or suffering them to be opened or detained. Then, if these words have a meaning, we must look for the explanation of them, first to the preamble clause in question; and that recites that *abuses* may be committed by wilfully opening, embezzeling and detaining letters. The enacting part states what shall be the consequences of so doing, namely, that the person so *offending*, or *who shall embezzle any letter*, shall for every such offence forfeit £20 to be recovered by a *qui tam* action; and, over and above such penalty shall be forever incapable of exercising any office, trust or employment in, or relating to the post office. Now, in the interpretation of the act so highly penal on the party *offending*, we must be careful to adopt such a construction as will strictly answer to the intention expressed by the legislature: and so construing the clauses in question it seems to me that the words 'wittingly," "willingly" and "knowingly" must be taken to denote acts done with a conscious mind that the party is doing wrong.

Parke, J., said :

In an action for penalties and where a judgment against the defendant would be attended with such serious consequences, the law must be strictly construed: and I think we must consider the fortieth section of this Act as applying to cases where the officer knowingly and willingly does what is wrong * * *

(1) 2B. & Ad. 909.

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And cites *Wright* v. *Smith* (1), wherein it was decided by the Court of Exchequer: that a holding of the premises by a tenant without fraud, and a fair claim of right, was not a *wilful* holding over within the statute.

Patterson, J., added:

The statement in this case being that the delivery of the letters was *bonâ fide*, I think it cannot be said that the defendant acted "wittingly, willingly and knowingly," against the statute.

See also *Lewis* v. *Great Western Railway Co.* (2), in which the same doctrine is held. In that case *Brett*, L. J., says:

In a contract where the term wilful misconduct is put as something different from and excluding negligence of every kind, it seems to me that it must mean the doing of something, or the omitting to do something, which it is wrong to do or omit, where the person who is guilty of the act or the omission knows that the act which he is doing, or that which he is omitting to do, is a wrong thing to do or to omit; and it involves the knowledge of the person that the thing he is doing is wrong (3).

Bramwell, L. J., says:

There is such a mass of authorities to shew what "*wilful* misconduct" is, that we should hardly be justified as a Court of Appeal in departing from them even if we thought them to be wrong. "Wilful misconduct" means misconduct to which the will is a party. Something opposed to accident or negligence; the *mis*-conduct not the conduct, must be wilful (4).

I have made the foregoing extracts from the judgments in the two cases mentioned for the purpose of applying them, as I will now briefly do, to this case, after another brief reference to the statute and the evidence. We have only to refer to section 96 to find the legislative declaration that up to the passage of that Act doubts existed as to the law bearing on the question now under consideration, and the enactment was considered necessary to remove them. The offence by the section is

(1) 5 Esp. N. P. C. 203.
(2) L. R. 3 Q. B. D. 195.
(3) Ibid. p. 210.
(4) Ibid. p. 206.

stated to be for conveying voters to or from the polls, or the neighborhood thereof. The evidence in this case shows that the hiring of *Mason* and his team was not to bring the voters sent for to the polls or the neighborhood of it on polling day but some days previous. The party hired went for them and returned before polling day without them. *Conklin* swears that he understood the prohibition only to apply to polling day, and therefore thought, in hiring *Mason* to go and return before polling day, he was doing what the law permitted. If, therefore, he *bonâ fide* and honestly believed he was within the law and doing what it permitted, and I see no reason to doubt the fact, then I cannot conclude he was wilfully guilty of misconduct within the principles and doctrines held in the judgments which I have just referred to. By the authority of these cases, in the words of *Bramwell*, L. J., it is not the conduct that is to be wilful, but the misconduct. If *Conklin* believed he was not doing an illegal act, there was no *wilful* misconduct on his part. If he violated the provision of the section, it is not at all to be wondered at, for the construction he put upon it is that which most people would be likely to do, and although I will not say it is the right one, still I have little doubt professional men could be found who would agree with him, and it is certainly the one an unprofessional man would be most likely to adopt. The section being capable of two constructions, is a man to be found guilty of a wilful breach of it who is unconscious that he is violating it. A man unaccustomed to criticise acts of parliament might reasonably assume that as no polling booths had been erected or polls open, he might, previous to polling day, hire teams to bring voters from greater distances than would be practicable on polling day. Such being the case, we can the more readily give credence to the statement of *Conklin*, that he con-

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sidered the law would permit his doing legally what he is charged with and acknowledges having done.

It will be seen that there is no difference between the case of *Conklin* and the postmaster who was the defendant in *Meirelles* v. *Banning*, before cited. In the latter there was but the one offence created by the statute, and the court drew its conclusions solely from the words of the section "wittingly," "willingly" and "knowingly." In this case two offences are created with different penalties, the second only providing that the offence should be committed "wilfully." The two must therefore be differently construed, and I feel bound to conclude, the legislature intended that before the more serious penalties attached, there must be evidence that the "misconduct" and not the "conduct," was wilful. Proof of the prohibited act might be itself sufficient *prima facie* evidence to sustain the charge of wilful misconduct, but if so, that is in my opinion sufficiently rebutted by the sworn statement of *Conklin* as to his view of the law. As the result of this case he is a disinterested witness—the consequences of the decision will not immediately affect him, but the respondent and his constituency generally. The Judges in *England* are unwilling to avoid an election, which to do, is there considered a serious matter, but in this case, if our decision is against the respondent, the election will be avoided, not because of any wilful misconduct, but because an agent of the respondent took what may be held to be a mistaken view of a statutory provision, but one not at all to be wondered at. I cannot bring myself to think a construction producing such a result is at all necessary to secure the fredom or purity of elections, or that it would be in accordance with the letter or spirit of the statute. I am of opinion for the reasons I have given, that the appeal should be dismissed and the original judgment affirmed with costs.

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TASCHEREAU, J.:—

Ignorantia juris non excusat, and he who wilfully commits an act which the law declares illegal, wilfully commits an offence against that law. The word "knowingly" is not in the statute, and *wilfully* here cannot mean "knowingly."

GWYNNE, J.:—

I see no reason for objecting to the finding of the learned Judge before whom this Election Petition was tried, to the effect that the advance made by the respondent to take up the note of Mr. *Grant*, then about falling, or fallen, due, was not made *in order to induce* Mr. *Grant* to procure, or to endeavor to procure, the return of the respondent to serve in the House of Commons. The *purpose for which* any gift, loan, offer or promise is made is the essence of the offence. It is that which makes it bribery within the 3rd sub-sec. of the 92nd section of the Dominion Elections Act of 1874, and upon that point I concur in the judgment of the learned Judge, that no such purpose or intent was established by the evidence.

Upon the other point, namely, the hiring of a team or vehicle by *Conklin* to convey voters to the polls, I am of opinion that the term "six next preceding sections," as used in sec. 98, must mean the six sections next preceding the 98th, and not, as was contended, the six next preceding the 92nd sec.

The 98th sec. is certainly not very felicitously expressed, for the 92nd and 93rd cover "bribery," the 94th covers "treating," the 95th "undue influence," and the 97th "the inducing a person to commit personation"; all of which are expressly mentioned in the 98th sec., before the words "or any wilful offence against any one of the six next preceding sections of this Act." So that under these latter words there is only "the hiring

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of teams, &c." which is prohibited by the 96th section, to apply; however, no such strained construction can be entertained as that the "six next preceding sections" should be referred back to the sections preceding the 92nd, or to any other sections than the six preceding the 98th. And as to the words "wilful offence" in the latter section, the meaning of the Act, I think, must be held to be that, whereas the 96th sec. declared the act, there pointed to, to be an unlawful act, the 98th section declares that the wilful or intentional doing of an unlawful act shall be corrupt. Now, that the hiring here was wilful, that is, intentional, there can be no doubt, and the excuse that the party doing it did not know that it was made a corrupt act, or that it was an illegal act, cannot be received without frustrating the intent of the legislature by a judicial repeal of the act—*ignorantia juris non excusat.* As, however, the evidence does not affect the respondent personally with the act, the election can only be set aside for the corrupt act of an agent, with which corrupt act the evidence fails personally to connect the respondent, and to this effect the report to the House of Commons should be.

The appeal must therefore be allowed with costs, and the election be set aside for the above cause, also with costs.

Appeal allowed with costs.

Solicitor for appellants:—*John Milnes Macdonell.*

Solicitor for respondent:—*Sedley Blanchard.*

WILLIAM FRASER.....APPELLANT; 1879

AND

*June 7.
*Dec. 12.

J. B. POULIOT, *ès-qualité*.....RESPONDENT.

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

Prohibition to alienate in a purely onerous title void—Art. 970 *C. C. L. C.*, 18 *Vic., ch.* 250.

By 18 *Vic.*, ch. 250, *W. F.* and his brother were authorized to sell certain entailed property in consideration of a non-redeemable rent representing the value of the property. On the 7th September, 1860, *W. F.*, the appellant, and *E. F.*, assigned to their brother, *A. F.*, a piece of land forming part of the above entailed property, in consideration of a *rente foncière* of six pounds, payable the first day of October of each year. The deed was registered and contained the following stipulation: "But it is agreed that the assignee cannot alienate in any manner whatsoever the said land, nor any part thereof, to any person without the express and written consent of the assignors under penalty of the nullity of the said deed." The property was subsequently seized by a judgment creditor of *A. F.*, and appellant opposed the sale and asked that the seizure be declared null, because the property seized could not be sold by reason of the above prohibition to alienate.

Held,—On appeal, affirming the judgment of the Court below, that the deed was made in accordance with the provisions of 18 *Vic.*, ch. 250, and being a purely onerous title on its face, the prohibition to alienate contained in said deed was void. Art. 970 C. C. *L. C.*

Query: Whether the substitutes may not, when the substitution opens, attack the deed for want of sufficient consideration.

APPEAL from a judgment of the Court of Queen's Bench for *Lower Canada* (Appeal side), rendered on the 8th March, 1878.

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

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The respondent, under a judgment obtained by him against *Alexander Fraser*, on the 9th February, 1856, seized an immovable property, lot No. 3, as belonging to the said *Alexander Fraser*, and which lot, forming part of the Seigniorial Domain of the Seigniory of *Rivière du Loup*, had been bequeathed by the late *Alexander Fraser* to the said appellant and his brother *Edward Fraser*, charged with a substitution in favor of their children. The appellant and his brother *Edward Fraser* fyled against this seizure an opposition, to prevent the sheriff from proceeding to the sale of the property. The grounds of this last proceeding were, that the immovable property seized had been granted *à titre de bail à rente foncière*, to the said *Alexander Fraser*, by the said *William* and *Edward Fraser*, under the condition that the said grantee should not part with it, or with any part thereof, in favor of any person soever, without the express consent in writing of the said grantors, under penalty of the nullity of the said grant, and that therefore the said immovable property could not be seized and sold without the consent of the said grantors.

The sale, or *bail à rente foncière*, was made for divers considerations, amongst others, for an annual rent of £6; it was registered on the 12th of September, 1860, and it contains the following stipulation: "It is agreed that the grantee cannot alienate in any way the said lot or any part thereof to whomsoever, without the express and written consent of the grantors, under pain of nullity of the present deed."

The said respondent contested the said opposition and pretended that the said clause could not be enforced and was not legal. The Court of original jurisdiction to wit: the Superior Court sitting in and for the district of *Kamouraska* dismissed the opposition. Appeal having been instituted from this judgment to the Provincial Court of Appeal for the Province of *Quebec*, the last

Court confirmed the said judgment on division of three against two. Against this last judgment this appeal is now instituted.

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Mr. *Langlois*, Q.C., for appellant:—

The point to be decided in this case depends entirely upon the interpretation to be given to the statute, 18 *Vic.*, ch. 250, which grants to the appellant and to his brother the power to sell and concede in lots the "Domaine" of the Seigniory of *Rivière du Loup*, notwithstanding the entail. The lot in question, worth six or seven thousand dollars, was sold by the appellant to his brother for an irredeemable ground rent of only £6, and it is clear that the clause prohibiting the grantee from alienating the lot in question was part of the consideration. The contract was really more one in the nature of a donation than of a sale, and, as such, was contrary to the provisions of the statute. The learned Chief Justice of the Court of Queen's Bench relied on Art. 970 C. C. and says: "The prohibition to alienate things sold or conveyed by *purely* onerous title is void." But this article cannot apply to this case, because I submit we have clearly shown that the property in question was not conveyed by a *purely* onerous title.

[FOURNIER, J.:—Can we give to an authentic deed a different character than that which it purports to have?]

The deed does not express on its face the actual consideration, and therefore appellant can give extrinsic evidence which is consistent with the deed. The evidence clearly shows that the parties had an interest in stipulating such a clause, as well on account of the entail in favor of their children, as to prevent their having as a neighbour, instead of their brother, a stranger with whom they might not agree.

The appellant had the right to insert the condition that the lessee should not alienate, and this clause will

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not have its effect, if the sale of the property under execution cannot be prevented.

Moreover, as our Civil Code came into force on the first of August, 1866, and the date of the deed containing the stipulation giving rise to this case is the 7th Sept., 1860, Art. 970 can only be considered as the ruling of the codifiers upon a point of law. By referring to their remarks on this article, we are far from being satisfied that the article in question was, in their opinion, the existing law.

The learned counsel then cited *Fafard* v. *Bélanger* (1), *Bourassa* v. *Bédard* (2).

Mr. *Pouliot* for respondent:

The statute 18 *Vic.*, ch. 250, gave the right to the appellant and his brother to alienate, free from all substitution, any piece of land in their seigniorial domain at *Rivière du Loup*, but respondent contends that, independent of the statute, the sale made was a valid sale under Art. 949 C. C. Because, it might occur that the institute would eventually become the absolute owner of the property substituted, for instance, by the pre-decease of the substitute. The law affords ample protection to the substitute. See Art. 710, C. C. P. But, as I have said, the sale in this case, being *un bail à rente foncière perpetuelle et non rachetable*, made for divers considerations, amongst others, for an annual rent of £6, was expressly authorized by the statute, and to contend that it is a nullity is to contend that appellant was guilty of fraud. No fraud has been proven, and, it it existed, surely it is not the appellant who can claim any advantage therefrom, his children being the ones to complain when the substitution may open. For the present, the appellant must stand by his own act.

Now, the appellant has endeavored to change the

(1) 4 L. C. R. 215. (2) 14 L. C. R. 251.

nature of the deed by establishing a supposed verbal agreement; this evidence was objected to, and the court declared it illegal and inadmissible. See Art. 1234 C. C.

It is also urged that the prohibition to alienate is a part of the consideration for which the lot in question was granted. But such a condition is invalid when the deed is a purely onerous one, and all the judges agree in saying that there is no doubt that the title of *Alexander Fraser* is a purely onerous one. The case of *Tourangeau* v. *Renaud* (1) is in point.

This case was decided in the first instance by the Superior Court, and subsequently brought to the Privy Council in *England*; and a disposition made by a testator, by which he prohibited his children to alienate, for the space of twenty years only, the bequeathed property, was declared null, being contrary to public order and made without consideration; and yet this case was much more favorable than the one now under consideration, since the restriction was only for a limited time. From the appellant's mode of reasoning, it would seem that any one desirous of maintaining the prohibition inserted in the above mentioned testament could well say that it was made for laudable reasons of foresight and prudence, e. g. through fear that the legatees might abuse the right of property thus conferred upon them, or to secure them means of existence for a certain period.

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

RITCHIE, C. J.:—

Mr. *Langlois*, who argued this case on the part of the appellant, stated frankly that the simple question is, whether the deed is an onerous or a gratuitous deed, if onerous he admitted the appeal fails—to use his own expression. Now, it is clear, I think, beyond all dispute,

(1) 12 L. C. Jur. 90.

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that this deed on its face creates a purely onerous title, with nothing whatever to indicate to the contrary, that the deed was in whole or in part, gratuitous, which deed, so on the face of it being onerous, I think, the appellants, the grantors, cannot gainsay in this proceeding in any way, and as to which the prohibition to alienate is null. One of the grounds taken is, that it has been alleged that the property was of a larger value than the monetary rent fixed in the deed would represent. As I understand the law in the province of *Quebec*, that evidence ought not to have been received at all, because in a proceeding of this kind it was not open to grantors to destroy the effect of this official instrument which they had made under this statute; but, if this transfer is, by reason of inadequacy of price or want of consideration, in derogation of the right to sell under the statute, and in derogation of the rights of the substitutes, and thus the grantors have not acted in good faith as against them, then they, the grantors, cannot set up such their bad faith to defeat their own deed valid on its face against their own grantee. But the substitutes may possibly, when the substitution shall be opened, contest the transaction. In the meantime, as against the appellants, I think the deed must stand, and therefore the decision of the Superior Court, confirmed by the Court of Queen's Bench, was right, and both those judgments should be affirmed.

STRONG, J., stated that he concurred in the judgment of *Fournier*, J.

FOURNIER, J.:

La substitution créée suivant les formes légales par le testament d'*Alexandre Fraser*, en date du 11 février 1833, a d'abord été ouverte en faveur de *Malcolm Fraser*,

son fils ; puis après son décès sans enfants, elle l'a été en faveur des Appelants qui, par le même testament, étaient, dans ce cas, appelés à remettre les mêmes biens à charge aussi de substitution en faveur de leurs enfants.

Les Appelants, comme grevés de substitution, ne pouvaient aliéner les biens substitués que sous la condition résolutoire inhérente à leur titre,—mais pour des raisons d'intérêt public énoncées dans le préambule de l'acte 18 *Vic.* ch. 250, ils ont obtenu la faculté d'aliéner le domaine de la seigneurie de la *Rivière-du-Loup* aux conditions suivantes :

La 1er section valide les concessions qui avaient déjà été faites de partie du domaine. La 2e sec. autorise les Appelants *William* et *Edouard Fraser* à vendre et aliéner conjointement par lots et portions le domaine de la dite seigneurie,—pourvu toujours que cette vente soit faite pour une rente foncière non rachetable, ou pour une rente constituée. La 3e sec. déclare que les dits *William* et *Edouard Fraser* ne pourront recevoir et placer le capital des rentes constituées sans le consentement du tuteur à la substitution.

Conformément aux pouvoirs qui leur étaient ainsi conférés, les Appelants ont, par acte en date du 7 septembre 1860, concédé à *Alexandre Fraser*, en considération d'une rente annuelle de £6 courant un terrain faisant partie du domaine en question, situé dans le village de *Fraserville*, paroisse de *St. Patrice* de la *Rivière-du-Loup*.

Cet acte a été enregistré le 12 septembre 1860. Outre la rente annuelle, cet acte contient les réserves et charges suivantes :

" 1o De toutes les bâtisses qui se trouvent présentement sur le terrain sus-baillé, pour les enlever aussitôt que le preneur le requerra, si ce n'est celle occupée par *Honoré Sirois* que les bailleurs ne seront tenus d'enle-

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ver qu'à l'expiration du bail consenti par le dit *William Fraser* à ce dernier. 2o Droit de redresser la dite avenue, en prenant sur le terrain sus-baillé l'étendue de terrain nécessaire, sans diminution du prix du présent bail, et sans indemnité en faveur du premier, pour l'étendue de terrain ainsi prise, de laquelle avenue ils jouiront en commun, et qu'ils entretiendront chacun pour moitié. 3o De tout le terrain occupé par l'église anglicane. 4o Du droit de communication sur le dit terrain pour l'exploitation de leur moulin à farine et autres industries qu'ils pourront pratiquer sur la dite rivière.

"Ce bail fait à charge par le preneur qui s'y oblige: 1o de faire mesurer, chaîner et borner le dit terrain, et d'en fournir un procès-verbal aux bailleurs à ses frais. 2o De leur fournir copie des présentes dûment enregistrées aussi à ses frais. 3o D'enclore le terrain et le tenir clos et de répondre à tous devoirs de voisin auxquels il peut être tenu, sans que les bailleurs y soient tenus comme voisin ordinaire. 4o De leur payer en leur bureau, au dit lieu de la *Rivière-du-Loup*, le premier octobre chaque année, et dont le paiement se fera le premier octobre de l'année prochaine, la somme de six louis courant de rente foncière, pour ensuite continuer le dit paiement à pareille époque chaque année, au paiement duquel prix de fermage le dit lot de terre sus-baillé demeure spécialement hypothéqué en faveur des bailleurs de fonds."

Cet acte contient de plus la stipulation suivante qui fait le sujet de la difficulté en cette cause:

"Mais il est convenu que le preneur ne pourra aliéner d'aucune manière le dit terrain, ni aucune partie d'icelui à qui que ce soit, sans le consentement exprès et par écrit des baillenrs, à peine de nullité du présent acte."

La question que soulève cette clause est de savoir si

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dans l'acte de concession dont les conditions sont énoncées plus haut, la prohibition d'aliéner imposée au concessionnaire *Alexandre Fraser*, est légale.

Le Code Civil, art. 970, contient à ce sujet la disposition suivante: "La prohibition d'aliéner la chose "vendue ou cédée à titre purement onéreux est nulle." Cet article est donné comme étant conforme à l'ancien droit, d'après lequel la validité de cette clause doit être décidée parce qu'elle est contenue dans un contrat antérieur au code.

Le principe énoncé aussi clairement qu'il l'est dans l'art. cité, n'étant pas susceptible de doute, il ne reste donc pour en faire l'application à cette cause qu'à déterminer le caractère de l'acte de concession. Est-il à titre purement onéreux? La simple lecture de l'acte suffit pour en convaincre. Il ne contient que des réserves, des conditions et charges onéreuses. On n'y trouve pas une seule expression qui puisse dénoter de la part des Appelants la moindre intention de faire un acte de libéralité en faveur du concessionnaire. D'ailleur si telle eût été leur intention ils n'auraient pu le faire, car les Appelants, comme grevés de substitution, ne pouvaient pas disposer de cette propriété à titre gratuit directement ni indirectement. De plus, ils en étaient empêchés par le statut qui les autorise à ne vendre ou concéder qu'à des conditions onéreuses afin de protéger les droits des appelés à recueillir plus tard les biens substitués. Leur acte de concession est donc à sa face, ce qu'il devait être d'après le statut, un titre onéreux.

Mais pour lui enlever ce caractère et le faire accepter comme fait à titre gratuit pour une partie, afin de faire maintenir la prohibition d'aliéner, les Appelants ont allégué que par convention verbale "il avait été con-"venu entre les parties que le preneur remettrait à "demande le dit terrain aux bailleurs qui voulaient s'y "bâtir chacun une maison, et que sans cette convention

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"les dits opposants n'auraient pas baillé pour un prix si "modique un terrain valant plusieurs milliers de pias- "tres." Un témoin a été entendu pour en faire la preuve, mais la preuve testimoniale de toute convention tendant à contredire un acte authentique est interdite, art 1234 C. C. "Dans aucun cas la preuve testimoniale ne peut "être admise pour contredire ou changer les termes "d'un écrit valablement fait." Cette preuve doit nécessairement être rejetée et l'acte doit subsister dans toute son intégrité.

Les Appelants ont aussi attaqué la validité de leur acte en prétendant qu'ils n'avaient pas le droit de le faire à raison de la substitution dont ils sont grevés. Ils commettent en cela une double erreur : d'abord parce que le statut ci-dessus cité a été passé spécialement à leur demande pour les autoriser à faire un acte de la nature de celui dont-il s'agit, et ensuite parce que sans ce statut un pareil acte serait valable pour au moins leur vie durante et ne serait dans tous les cas sujet à révocation que par l'événement de l'ouverture de la substitution en faveur des enfants des bailleurs. Ils se plaignent aussi que la concession n'a été faite que pour un prix modique, tandis que le terrain est d'une valeur beaucoup plus considérable. Cela se peut, mais ce n'est pas une raison suffisante pour revenir contre leur propre acte. Le contrat ayant été valablement fait, il ne peut pas être anéanti par la volonté d'une seule des parties,—il ne pourraient l'être que du consentement de toutes les parties—ou sur une contestation régulière entre elles pour quelques causes légales,—et encore dans le cas où son annulation n'interviendrait pas avec les droits acquis par les tiers.

Il se peut que les intérêts des appelés aient été lésés dans cette transaction, mais comme leurs droits ne sont encore qu'une espérance de recueillir les biens substitués si la condition arrive, ils seront toujours à temps

lors de l'ouverture de la substitution en leur faveur pour se faire remettre dans les droits que leur assurent la substitution et le statut en vertu duquel l'acte en question a été passé.

Pour ces motifs je suis d'opinion que la prohibition d'aliéner contenue dans cet act est nulle et que le jugement de la Cour du Banc de la Reine doit être confirmé avec dépens.

HENRY, J.:

I concur in the judgment which has just been read. The statute was passed barring the rights of the substitutes, and to enable the parties to convey to purchasers clear and full title of the premises. They did not pursue the course pointed out by the statute, but made transfers, reserving certain rights to themselves. Under these circumstances, I think the terms and the intention of the statute were not pursued, and that, having done so, and not having gone according to the statute, there is no person who could claim under the Act, or take any advantage of the reservations in the transfers except the substitutes themselves. I do not think it is in the mouth of these parties to say they shall take advantage of a provision, under the impression that they have made a gratuitous gift. A gratuitous gift and the principles applicable to it are not at all applicable where there is an onerous grant. In one case the party is supposed to have the right to annex conditions to what he freely gives away. In the other, where there is a consideration, no matter how small, it partakes of all the conditions of an onerous grant, and therefore I do not think it comes within the rule which allows a party to take possession of the property again on some condition, such as that stated in this case. Therefore, I think the judgment of the court below should be confirmed and the appeal dismissed.

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GWYNNE, J.:—

I entirely concur in the judgments delivered by the learned judge of the Superior Court, and by the learned Chief Justice of the Court of Queen's Bench in appeal. It is admitted, by the learned counsel for the appellant, that if the article 970 of the Civil Code applies, the case must fall to the ground.

The points urged in support of the appeal are: Firstly, That this case does not come within article 970, because, as is contended, the property in question has not been conveyed by *purely* onerous title, but for a consideration partly pecuniary and partly gratuitous. The gratuitous consideration (which it is contended sufficiently appears upon the deed) consisting in a desire to benefit a brother: and the interest relied upon to shew that the prohibition to alienate was not without cause consisting in the entail in favor of the children of the *Bailleurs* under the will of *Alexander Fraser*, deceased, and in the interest which the *Bailleurs* had to have their brother as a neighbour instead of a stranger. Secondly, conceding the title of the grantee in the deed of concession to be a *purely* onerous title, still (the deed having been executed before the Civil Code came into force) that this case is not to be governed by article 970, but by the old law, which, (as is contended) was different, and which, (as is also contended,) did not make a prohibition to alienate things conveyed by *purely* onerous title void, unless, in addition thereto, the *défense d'aliéner* was *sans cause*, and it is contended that here it was not *sans cause*, for the reasons suggested in the first objection.

This objection appears to amount simply to this, that article 970 announces new law, and that the old law did not avoid the agreement not to alienate in a case like the present, for the reasons suggested. In support of this contention, certain remarks of the codifiers in their report made under the act have been quoted, for

the purpose of establishing that their intention was to create new law by this article 970. And thirdly: that the article 970, though not given as new law, is to be regarded as no more than an affirmation of the previously received maxim that a *défense d'aliéner pure et simple et sans cause* was without effect, and so that this case is to be governed by the application of that maxim which, as is contended, authorized the *défense d'aliéner* in this particular case, for the reasons above suggested. This objection seems to be much the same as the previous one.

Now, assuming the article as here suggested, an *affirmation* of the previously received maxim, that, as it seems to me, is equivalent to construing it as *declaratory* of what the old law was, and this is the light in which the articles of the code which are not stated to be alterations or amendments of the old law are to be regarded. In this view, article 970 must be read as declaring that, by the old law, the prohibition to alienate things sold or conveyed by *purely* onerous title is void.

In this view the remarks of the codifiers relied upon could not alter the character of the article, if, which I do not think to be the case, the remarks, as quoted, can fairly be said to afford evidence that the article was not intended by them to be declaratory of the existing law.

The case, however, as it appears to me, must be wholly regarded in the light of the statute 18 *Vic.*, ch. 250, and, so regarding it, *cadit questio.*

The grounds of opposition relied upon are, that the opposants had no right to convey the land to the defendant as they did, because that they were charged with a substitution in favor of their children by the will of *Alexander Fraser*, deceased, and further that it was never intended that the said deed of conveyance should be seriously what it purports to be, but that on the contrary it was agreed between the opposants and the defendant,

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that the defendant should give up the land to the opposants whenever they should desire it.

That the opposants had no right whatever to execute the deed of concession so as to bind the substitutes otherwise than in virtue of the statute, is admitted; indeed it is so declared in the Act of Parliament.

The deed upon its face purports to be in precise accordance with the provisions of the statute. It is admitted upon all hands, that the opposants, by executing this deed which, but for the statute, they had no power to execute, are estopped from asserting that it was executed in fraud of the statute, or that it was not intended to be real. Upon the same principle they are equally estopped from asserting that there was any secret agreement to avoid the deed; and as the statute only contemplates and authorizes the execution of a deed *purely* onerous, they are estopped from saying that this is not such a deed, or that part of the consideration was gratuitous, or that they had an interest reserved entitling them at their pleasure to avoid the deed and to demand a surrender of the land. They are estopped, in fact, from contending, that the deed does not take effect in the plain sense in which it is expressed, or that it is not in every respect a good and valid deed having its force in virtue of the statute, and conclusively binding upon them, and from asserting any interest in the land in derogation of the plain terms of the deed, which are that the defendant shall enjoy the land as perpetual proprietor at an irredeemable ground rent; the deed must therefore be held as conveying, by force of the statute, perfect title to the defendant indefeasible by the opposants. All the grounds, therefore, of the opposition urged are removed. It may be that the substitutes may, when substitution opens, assert their rights, if the deed was executed under the circumstances and for the consideration which the opposants

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Gwynne, J.

now desire to contend, but are estopped from contending; but in such case, their rights would not be affected by this forced judicial sale.

If these considerations were not sufficient to uphold the judgments appealed from, the 10th paragraph of the defendant's contestation, and the point there raised, would have, as it seems to me, to receive much consideration before judgment could be rendered in favor of the opposants.

Appeal dismissed with costs.

Solicitors for appellant: *Langlois, Angers, Larue & Angers.*

Solicitors for respondent: *Larue & Pouliot.*

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*Feb'y. 4.

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*March 13.

WILLIAM DESMOND O'BRIEN.....APPELLANT;

AND

THE QUEEN.....RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Petition of right—Contract—Claim for extra work—Certificate of engineer—Condition precedent—31 *Vic., ch.* 12 (*D*).

The suppliant engaged by contract under seal, dated 4th December, 1872, with the Minister of Public Works, to construct, finish and complete for a lump sum of $78,000 a deep sea wharf at the *Richmond* station, at *Halifax, N. S.*, agreeably to the plans in the engineer's office and specifications, and with such directions as would be given by the engineer in charge during the progress of the work. By the 7th clause of the contract no extra work could be performed, unless "ordered in writing by the engineer in charge before the execution of the work." By

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

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letter, dated 26th August, 1873, the Minister of Public Works authorized the suppliant to make an addition to the wharf by the erection of a superstructure to be used as a coal floor, for the additional sum of $18,400. Further extra work, which amounted to $2,781, was performed under another letter from the Public Works Department. The work was completed, and on the final certificate of the Government's engineer in charge of the works, the sum of $9,681, as the balance due, was paid to the suppliant, who gave the following receipt, dated 30th April, 1875: "Received from the Intercolonial Railway, in full, for all amounts against the government for works under contract, as follows: '*Richmond* deep water wharf works for storage of coals, works for bracing wharf, rebuilding two stone cribs, the sum of $9,681.'" The suppliant sued for extra work, which he alleged was not covered by the payment made on the 30th April, 1875, and also for damages caused to him by deficiency in and irregularity of payments. The petition was dismissed with cost; and a rule *nisi* for a new trial was subsequently moved for and discharged.

Held, affirming judgment of Court below: That all the work performed by the suppliant for the government was either contract work within the plans or specifications, or extra work within the meaning of the 7th clause of the contract, and that he was paid in full the contract price, and also the price of all extra work for which he could produce written authority, and that written authority of the engineer and the estimate of the value of the work are conditions precedent to the right of the suppliant to recover payment for any other extra work. (*Henry*, J., dissenting.)

Per *Ritchie*, C. J.—That neither the engineer, nor the clerk of the works, nor any subordinate officer in charge of any of the works of the Dominion of *Canada*, have any power or authority, express or implied, under the law to bind the Crown to any contract or expenditure not specially authorized by the express terms of contract duly entered into between the Crown and the contractor according to law, and then only in the specific manner provided for by the express terms of the contract.

APPEAL from a judgment of the Exchequer Court of *Canada*, discharging a rule *nisi*, for a new trial in a petition of right case tried before *Fournier*, J.

The suppliant filed a petition of right, claiming compensation for extra work performed in connection

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with the building a deep sea wharf and coal floor, &c., at the *Richmond* Station, at *Halifax*, *N.S.*

The petition alleged as follows:—

"That on the fourth day of December, in the year of our Lord, one thousand eight hundred and seventy-two, your suppliant by articles of agreement under seal and duly executed in duplicate, between your suppliant of the first part, and Her Majesty Queen *Victoria*, represented by the Honorable the Minister of Public Works of the Dominion of *Canada*, of the second part, bound and obliged himself to construct, complete and finish in every respect to the satisfaction of the said Minister, all the work required in and for the construction of a deep-water wharf at or near the *Richmond* Station of the *Nova Scotia* Railway in the said Province of *Nova Scotia*, and in accordance with certain plans and specifications also duly signed, remaining on record in the Department of Public Works for said Dominion of *Canada*, which said plans and specifications are respectively deemed and taken and read as part and parcel of said agreement, as by reference thereto will fully and at large appear. In consideraton whereof Her Majesty Queen *Victoria*, represented by the said Minister aforesaid, agreed to pay the sum of seventy-eight thousand dollars, to be paid according to certain schedule of prices designated to be used to ascertain the approximate value of the work done. And it was further agreed that if any change or alteration, either in the position or details of any part of the work during the progress thereof, your suppliant, the contractor, was bound to make such alteration or change, and if such alteration or change should entail extra expense on him, the same was to be allowed him.

"That your suppliant proceeded with the work. That in the summer of the year 1873, material alterations were made in the plans changing the original

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structure providing for a coal floor, &c., at an expense of eighteen thousand four hundred dollars as estimated by the Engineer. This alteration proving injurious to the structure, a further sum of two thousand seven hundred dollars additional was estimated by the Engineer for bracing the structure. On the completion of all the aforesaid works the Engineer required of your suppliant to perform a vast amount of extra work involving additional labor and expenditure of material not provided for in any former contract or estimates. That your claimant claimed extra payment therefor which the Engineer refused to allow, but obliged your suppliant to do the work which he did under protest, always claiming, however, that such work should be paid for as extra.

"That your suppliant alleges that the extra work for which he claims compensation consists of additional fenders, besides other works, extra ballasts, scarfing timbers, substitution of long for short timbers, labor and material occasioned by alteration of plan of elevation, alterations in site and level of elevation, additional piles required and furnished, extra bracing and framing to cribs, longitudinal framing for elevation, scarfing longitudinal timber, cutting ends of logs under low water for which marine divers were employed at great expense; extra fenders for cribs and floors; all these besides divers other additional work and labor were required to be done, and which compelled your suppliant to lay out and expend divers large sums of money in the employment of labor and purchase of material—for which he has received no compensation whatever.

Your suppliant alleges that the foregoing outlay and expenditure of labor and material was rendered absolutely necessary from the want of proper foresight in making the original plans, and for not providing for the additional strain or pressure on the work occasioned

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by the alterations and additions hereinbefore set forth. That this additional work was ordered by the engineer or officer in charge, was strictly performed as directed, but has never been paid for.

"Your suppliant alleges that he sustained great damage and loss from inequality of payments, falling very far short of what he was strictly entitled to under the contracts and amount of work done; he also sustained heavy loss and damage from the great irregularity of payments which not only crippled his operations, but put him to loss and expense in procuriug money which was long overdue him under his contract, and which, even if it had been paid, with reasonable punctuality, would have saved him a large amount of interest expended in obtaining money elsewhere.

"Your suppliant alleges that his claim for compensation does not come within the provisions of the Act of 31st *Vic.*, entitled, "An Act respecting the Public Works of *Canada*," or Acts in amendment thereof; because under the terms of the contract signed by suppliant, it is provided that the determination of any matter of difference arising out of or concerned with the same shall be decided by the Minister or Architect, or by an Engineer or Officer of the Department, and that his claim for compensation comes strictly within the provisions of the Act passed during the last Session of the Dominion of *Canada*, entitled, 'An Act to provide for the Institution of Suits against the Crown by Petition of Right, and respecting procedure in Crown suits.'

"Your suppliant therefore humbly prays that," &c.

The Attorney General on behalf of Her Majesty by his answer admitted the contract and said:

"2. I admit that the suppliant proceeded with the work mentioned in the said contract, and that certain alterations were made in the plan thereof, providing for

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a coal floor, and that the cost of such alterations was estimated by the engineer in charge, and agreed to by the suppliant at the sum of $18,400.

"3. I admit that additional bracing was required in the work, and that the sum of $2,781 was estimated by the engineer, and agreed to by the suppliant as the cost thereof.

"4. The price which the suppliant was to receive for alterations occasioned by the construction of the coal floor, and the extra bracing as aforesaid, was agreed to by the suppliant as aforesaid, before he did the work, and the supplicant was fully paid and satisfied, the original contract price of $78,000, and also the other two sums of $18,400, and of $2,781, before the institution of this suit.

"5. Besides the last mentioned sums, the suppliant demanded and was paid before suit, a sum of $400 as and for the cost of repairs of a crib or cribs in the said work of faulty construction, to which the suppliant had no just claim, inasmuch as by the terms of contract, he was bound to lay the same down in a proper and sufficient manner, without any extra remuneration beyond the contract price.

"6. After all the works in the said petition mentioned, were fully completed by the suppliant, to wit on the 30th day of April, A.D. 1875, there was a settlement of accounts between the suppliant and the engineer in charge of the said works, acting thereon on behalf of Her Majesty, when it was found that there was a balance due to the suppliant, in respect to the said works of $9,681; and upon the last mentioned day, the said sum of $9,681 was paid to the suppliant, and was received and accepted by him in full satisfaction and discharge of all demands against Her Majesty in respect of the said works.

"7. The suppliant performed none of the work men-

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tioned in the said petition after the last mentioned settlement of accounts and payment, and I deny that the petitioner has any just claim against Her Majesty in respect of any of the matters mentioned in the said petition, and I plead the said settlement and payment as a complete bar thereto.

"8. I deny that, with the exception of the extra works hereinbefore mentioned, and which have been fully paid for as aforesaid, any other work was performed by the suppliant, for which he was or is entitled to be paid, over and above the contract price.

"9. Such of the works mentioned in the third paragraph of the suppliant's petition as were in fact done, were done in the proper construction and completion of the works comprised in the contract and to remedy defects therein, and to make the same conform to the terms of the contract and in fulfilment thereof and not otherwise.

"10. I deny that the outlay and expenditure of labor and material mentioned in the third and fourth paragraphs of the said petition were rendered necessary by the want of foresight in making the original plans, or by not providing for the additional strain or pressure on the work occasioned by the alterations and additions in the said petition mentioned; and I say that, except the alterations hereinbefore mentioned, and which have been paid for as aforesaid, no alterations in, or additions to, the said work were ordered by the engineer or officer in charge, or were performed by the suppliant, except what was required to complete the work in a proper manner, according to the requirements of the contract.

"11. I submit that the Honorable the Minister of Public Works having, through the engineer in charge, as the fact is, determined that the works mentioned in the said petition, other than those paid for as aforesaid, were within the terms of the said contract, and the

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plans and specifications, the said determination is final and conclusive upon the suppliant under the 9th clause of the said contract, and is a bar to this suit.

"12. The suppliant was bound, by the terms of the contract, to have the said work completed by the 30th day of April, 1873, but it was not finished until about the end of the year 1874, and Her Majesty might justly have claimed a large sum for damages for the said delay, and for expense of superintendence under the 11th clause of the said contract, but I submit that all matters in question between Her Majesty and the suppliant were finally settled by the payment of the 30th day of April, 1875, hereinbefore mentioned.

"13. I deny that the suppliant has any just ground of complaint by reason of delay or irregularity of payments as alleged in the 5th paragraph of the said petition. He was, at his special request, paid the sum of $15,000 on account of materials before he had any part thereof on the ground. He was afterwards regularly paid on progress estimates given by the engineer, who on some occasions, however, necessarily and properly delayed giving the same until faulty work was done according to his directions, but which the suppliant for some time refused to do.

"14. I charge that the suppliant has been fully paid and satisfied for all the work comprised in the said contract, and for all the extra work he was authorized in writing to do, according to the terms of the 7th clause of the said contract, and that he is bound by the amount of the said extra work, as determined by the engineer in charge, as also provided in the said 7th clause.

"15. I pray, on behalf of Her Majesty, that the said petition may be dismissed with costs."

The portions of the agreement which bear on the matters in controversy, are as follows;—

"ARTICLES OF AGREEMENT, entered into on the

fourth day of December, in the year of our Lord one thousand eight hundred and seventy-two, and made in duplicate between *William Desmond O'Brien* of the City of *Halifax*, in the Province of *Nova Scotia*, contractor, of the first part, and Her Majesty Queen *Victoria*, represented herein by the Minister or Public Works of the Dominion of *Canada*, of the second part: Witness, that the party of the first part hereby binds and obliges himself, his heirs and assigns, to and in favor of Her said Majesty, her heirs and successors, for and in consideration of the covenants, conditions and agreements hereinafter mentioned, to find all necessary tools, implements and materials whatsoever, and to construct, complete and finish, in every respect, to the satisfaction of the said Minister, in a good substantial and workmanlike manner, agreeably to the true intent and meaning of the specification hereunto annexed and duly signed, "*ne varietur*" by the parties hereto, and in accordance with the plans, also duly signed, remaining on record in the Department of Public Works, where reference thereto may be had:

"All the work required in and for the construction of a deep water wharf, at or near the *Richmond* Station of the *Nova Scotia* Railway, in the said Province of *Nova Scotia*.

"The whole to be completed and finished, and to be in every respect ready for use, on or before the thirtieth day of April, A. D. one thousand eight hundred and seventy-three.

"In consideration whereof, Her Majesty Queen *Victoria*, represented by the said Minister as aforesaid, doth hereby promise and agree to pay to the party of the first part, or to the heirs, assigns, or legal representatives of the party of the first part, the rates and prices hereinafter mentioned, which shall be computed in currency, and payment thereof will be made by Her said Majesty

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according to the provisions of the Act thirty-first Victoria, ch. twelve, that is to say:

"For the full final and satisfactory completion of the said wharf agreeable to the plans in the Engineer's office and specification hereunto annexed, and with such directions as shall be given by the engineer or officers in charge during the progress of the work; the party of the first part shall be paid by Her Majesty, represented by the said party of the second part, the sum of seventy-eight thousand dollars. And for the purposes of monthly certificates the following schedule of prices shall be used to ascertain the approximate value of the work done, but in no case shall the whole contract price of seventy-eight thousand dollars be exceeded, that being the total amount which the said party of the first part is to receive from the said party of the second part for the full and final completion of the said wharf.

"And the said party of the first part and Her said Majesty, represented as aforesaid, do hereby declare, covenant and agree that the said contract and undertaking shall be and is further made and entered into by them, the said party of the first part and Her said Majesty, represented as aforesaid, under the express agreements, stipulations, covenants and conditions following, that is to say:—

"*Firstly.*—That payments of the price hereinbefore mentioned, shall be made to the party of the first part within ten days after an estimate of the engineer or officer in charge shall have been received by the Minister, specifying the amount of work done, to the satisfaction of the said Minister or of his Engineer, during the month then ending; but that, nevertheless, it shall be lawful for Her Majesty to withhold from the party of the first part and retain ten per cent. out of the amount of the estimates until the perfect completion of the work, and the acceptance of the same by the Minister, which

ten per cent., so withheld and retained, shall be paid with the last instalment, within ten days after the engineer or officer in charge shall have delivered to the Minister his final estimate of the work performed, and the materials furnished, in virtue of these presents, with detailed measurements, weights, &c., and his certificate of the work having been fully completed and finished, if the Minister shall so soon have accepted and approved of the work; and that in forming his final estimate, the engineer or other officer shall not be bound or governed by the preceding monthly estimates, which shall be taken and considered merely as approximate. Provided always, and it is further agreed, that Her said Majesty from time to time during the progress of the works, may pay to the party of the first part the whole or any portion of the ten per cent, so withheld and retained.

"*Fourthly.*—That all materials for the said work shall be inspected and approved of, before being used, either by the Minister or such person as he may appoint, and any materials disapproved of shall not be used in the work, and if not removed by the party of the first part, when directed by the minister or his engineer or person in charge, then the rejected materials shall be removed by the Minister, his engineer or person in charge, to such place as he may deem proper, at the cost and charge, and at the risk of the party of the first part, but it is distinctly understood and agreed that the inspection and approval of materials shall not in any wise subject Her said Majesty to pay for the said materials, or any portion thereof, unless employed or used in the said works, nor prevent the rejection, afterwards, of any portion thereof, which may turn out unsound or unfit to be used in the work, nor shall such inspection be considered as any waiver of objection to the work on

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the account of the unsoundness or imperfection of the materials used.

"*Seventhly.*—That if any change or alteration, either in the position or details of any part of the work shall be required by the said minister during the progress thereof, the party of the first part is hereby bound to make such alteration or change, and if such alteration or change shall entail extra expense on the said party of the first part, either in labor or materials, the same shall be allowed to the said party of the first part, or should it be saving to the said party of the first part in either labor or materials, the same shall be deducted from the amount of this contract; in either case the amount is to be determined by the estimate made by the Minister, his engineer or officer in charge. But no such change or alteration, whatever may be the extent or quality thereof, or at whatever time the same may be required to be made, *pending the said contract*, shall in any wise have the effect of suspending, superseding, annulling or rescinding this contract, which shall continue to subsist, notwithstanding any such change or alteration; and every such change or alteration shall be performed and made by the said party of the first part, under and subject to the conditions, stipulations and covenants herein expressed, as if such a change or alteration had been expressed or specified in the terms of this contract; and should the said party of the first part be required by Her Majesty, represented as aforesaid, to do any work, or furnish any materials for which there is not any price specified in this contract, the same shall be paid for at the estimated prices of the engineer in charge of the works; but no change or alteration as aforesaid whatever, and no extra work whatever, shall be done without the written authority of the engineer in charge, given prior to the execution of such work, nor will any allowance or pay-

ment whatever be made for the same, in case it should be done without such authority.

"*Eighthly.*—That the party of the first part shall not in any way dispose of, sub-let or re-let any portion of the work embraced in this contract, except the procuring of materials.

"*Ninthly.*—Should any difference of opinion arise as to the construction to be put upon any part of the specifications or plans, the same shall be determined by the minister alone, and such determination shall be final and conclusive, and binding upon the parties to this contract, and every of them.

"*Fourteenthly.*—The specification hereunto annexed, together with the plans of the work herein agreed to be performed, shall respectively be deemed taken and read as parts and parcels of these presents as if the same were actually embodied herein."

The following clauses of the specifications were referred to:—

"4. On figure one are laid down three parallel lines of soundings taken on west side, centre and east side of wharf, but contractors are required to verify the same before tendering for the work; as soon as the work is commenced accurate soundings for each crib must be made by the contractor that the outline of the bottom may be known previous to their being founded, and provision must be made for the slope of the ground by stepping the bottom courses in the manner shewn on the plan, as each crib must be carried up perfectly level.

"5. The cribs must be placed in a straight line and at the proper distances apart, and if considered necessary by the engineer or officer in charge of the work, guide piles shall be driven to assist in founding each crib and preserving the alignment.

"13. So soon as it is considered by the engineer or officer in charge that a firm foundation has been obtained,

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and the cribs have settled to their position, they will be connected at the top both in a horizontal and transverse direction by three rows of timber, each row having two courses and being secured to the cribs by iron bolts $\frac{7}{8}$ inch diameter; the timbers on the outside are to be squared to 12 inches on three sides, and the remainder flatted on the upper and under sides to 12 inches in depth.

"26. The contractor must exercise great care in sinking the cribs, and distribute the weight of stone over the whole area that they may strike the bottom when perfectly plumb.

"28. The work throughout must be executed in a substantial and workmanlike manner in accordance with the plan and specification, and to the satisfaction of the engineer or officer in charge, who shall have full power and authority to reject any materials or workmanship not in accordance with the true intent and meaning of this specification as expressed or understood.

"29. This specification, together with the plan exhibited, are to be taken to give a general idea of the work required, and omissions in either are not to be considered as invalidating the contract, and parties tendering must embrace everything in their tender, whether mentioned or not, as they will be required to complete the work according to the true intent and meaning of the specification and plan at the contract sum.

"30. The bulk sum mentioned in the tender must include the entire cost of furnishing all labor, materials, tools and machinery, and every contingency connected with the work, and the contractor is to assume all risks, and make good, at his own cost, any damage which may result from loss of materials or otherwise by storms, or from any other cause whatsoever during the progress of the work, and up to its full and satisfactory completion.

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"31. Contractors must prepare for themselves an estimate of the quantities of material required for the work, and shew the same in the schedule attached to the tender.

"34. Payments will be made as the work proceeds on the certificate of the engineer, less 10 per cent. to be retained until the completion of the contract."

The case was tried in May, A.D. 1877, before the Hon. Mr. Justice *Fournier*, who delivered the following judgment:—

"The suppliant, a contractor, on the 4th day of December, 1872, entered into a contract with Her Majesty, represented by the Honorable the Minister of Public Works of the Dominion of *Canada*, to construct a deep-water wharf at or near the *Richmond* Station of the *Nova Scotia* Railway, in the Province of *Nova Scotia*. All the works mentioned and detailed in the said contract, in accordance with the plans and specifications, which are deemed and taken and read as part and parcel of the contract, were duly executed by the contractor and were (as admitted by suppliant) paid for. Suppliant avers that by a special agreement he bound and obliged himself to construct on the said wharf a structure providing for a coal floor, with additional trestle-work to support an elevated railway, for the sum of $18,400, and that he also performed additional extra work to the amount of two thousand seven hundred and eighty-one dollars.

"He admits also to have been paid these two last mentioned sums. He does not therefore, make any claim for these works, which are only referred to for the purpose of better understanding the subsequent averments of his petition of right. Suppliant's actual claim is based on the fact that on the completion of all the aforesaid works, the engineer who was in charge of the works, required him to perform a vast amount of extra

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work involving additional labor and expenditure of material not provided for in any former contracts or estimates. The works for which he claims compensation are enumerated in the third paragraph of his petition, and are as follows:—

"June, July and August, 1873—Divers and assistants employed in removing boulder stones and fixing ballast to sustain cribs on the outside	$600 08
Ballast for same	160 00
"October 6, 1873—25 and 30 feet timbers in front of 28 cribs, 345 tons at $7	2,415 00
(Directed by Engineer, and insisted upon by contractor as extra.)	
"October 22, 1873—Extra pay to *Graham* Bros. for change in plan of elevation after contract	300 00
"May 4, 1874—First raising trestle work—cash paid	100 00
Timber for same—60 tons at $8	480 00
"July, 1874—Scarfing long timbers (ordered by Engineer, but not required by contract)	300 00
"Sept., Oct. and Nov., 1874—135 fenders at $7, not in specification	945 00
"Nov. 1, 1874—72 extra fenders on 4 cribs, $8	576 00
"Nov. 10, " —22 piles, 60 feet each, 1,320 feet, at 75c. per foot	990 00
"Outside crib framing and bracing 2,000, board measure at $40	80 00
"Inside cribs, framing and bracing, 6,500 board measure	260 00
"Cutting off by divers of ends of logs to a depth of 20 feet under low water on all outside cribs	2,000 00
"Damage and loss sustained by deficiency	

in, and irregularity of payment; expense incurred in procuring money elsewhere, when same due and payable under contract, interest, &c.....	1,500 00
	$11,166 00

"Suppliant also claims interest on amount of claim from date of petition of right until judgment.

"It is also alleged that these extra works were rendered absolutely necessary from the want of proper foresight in making the original plans, and for not providing for the additional strain or pressure occasioned by the structure necessary for a coal floor and the trestle work erected on one side of the wharf.

"Another averment is for the damage and loss he sustained from the inequality of payments and insufficiency of the monthly progress estimates.

"And, lastly, it is alleged that suppliant's claim for compensation does not come within the provisions of the Act of 31st *Vic.*, ch. 12, entitled "An Act respecting the Public Works of *Canada*," but comes strictly within the provisions of the Act intituled "The Petition of Right Act of 1876."

"With reference to this allegation, it is as well to dispose of it at once by stating that the contract in question formally declared that it was entered into in accordance with the provisions of the Act 31 *Vic.*, ch. 12, respecting the Public Works of *Canada*. I will not therefore say anything further on this point.

"It will be seen by this summary of the petition of the suppliant that his claim can be stated in the following words: 1st, For extra works rendered necessary from the want of proper foresight on the part of the engineer in making the original plans for the construction of the wharf; 2nd, For extra works rendered necessary by not having previous-

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ly calculated what would be the consequences of altering the original plan in constructing a coal floor and a trestle-work for an elevated railway on the wharf.

"The defence produced in the name of Her Majesty by the Attorney General of the Dominion admits that the suppliant was entitled, 1st, to the sum of $78,000 as the amount of the original contract; 2nd, to $18,400, being the price of the coal floor and trestle work; 3rd, to a sum of $2,781 for divers extra works ordered by the engineer; 4th, to a sum of $400 for repairs, which amount, though not legally due, was admitted.

"Beside these admissions, it is also pleaded that a final settlement took place and payment was made. The defence is worded as follows:

After all the works mentioned in the said petition were fully completed by the suppliant on the 30th day of April, A. D. 1875, there was a settlement of accounts between the suppliant and engineer-in-chief of the said works, acting thereon on behalf of Her Majesty, when it was found that there was a balance due to the suppliant in respect of the said works of $9,681; and upon the last mentioned day, the sum of $9,681 was paid to the suppliant, and accepted by him in full satisfaction and discharge of all demand against Her Majesty in respect of the said works.

"By the 11th paragraph of the defence, the decision rendered on the suppliant's claim by the Minister of Public Works is invoked as being final and as being a peremptory answer to suppliant's demands, viz.:

I submit that the Minister of Public Works, having through the engineer-in-charge, as the fact is, determined that the works mentioned in the said petition, others than those paid for as aforesaid, were within the terms of the said contract, and the plans, specifications, the said determination is final and conclusive upon the suppliant under the 9th clause of the said contract, and is a bar to this suit.

"The other paragraphs of the defence deny specially each and every allegation of the said petition.

"The principal question which arises in this case is, whether the suppliant has established his right to be paid the value of the extra works he alleges to have

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performed. In order to answer this question it is necessary that reference should be made to the agreement entered into between the suppliant and Her Majesty. Towards the end of the year 1872, the Honorable the Minister of Public Works, wishing to have a deep water wharf constructed as before stated, ordered plans and specifications of the works to be prepared, in order to receive tenders for the work. The suppliant's tender having been accepted on the 4th of December of the same year, a contract duly signed by the suppliant and the Honorable the Minister of Public Works, and countersigned by the Secretary of Public Works and sealed with the official seal of the Department of Public Works, was executed in conformity with the provisions of ch. 12, 31 *Vic.* By this contract the suppliant bound and obliged himself to construct and complete, on or before the 30th April, 1873, to the satisfaction of the Minister of Public Works, and in accordance with the specifications annexed to the said contract, all the works required in and for the construction of the said deep water wharf; and as a consideration for the complete execution of the siad work in accordance with the plans and specifications and directions to be given to him by the engineer who would be in charge of the said works, the suppliant was to receive from Her Majesty the sum of $78,000, payable by monthly instalments on the certificate of the engineer stating the quantity of work done during the month.

"By the 7th clause of the contract, which provides for alterations which the Minister of Public Works may deem necessary during the progress of the work, and for any increase or diminution of price which these alterations might cause, it was expressly agreed and declared that, in either case, the amount was to be determined by the Minister, his engineer or other officer in charge, and that such alterations would be made subject

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to the provisions of the contract, and in the same manner as if said alterations and changes were inserted and specified in the said contract.

"This clause concludes as follows:—

But no change or alteration as aforesaid whatever shall be done without the *written authority* of the engineer in charge, given prior to the execution of such work, nor will any allowance or payment whatever be made for the same, in case it should be done without such authority.

"According to the terms of the contract no extra work can be performed, except as provided for, that is to say:

If ordered in writing by the engineer in charge before the execution of the work.

"Has this condition, under which alone the suppliant can have the legal right of being paid for his alleged extra work, been complied with? Does the suppliant produce in support of his claim any written authority signed by the engineer? No.

"On the contrary, when he is questioned he declares he has received no such authority and does not produce any. He refers, however, to a letter from engineer *McNabb*, dated 10th November, 1874, as a written authority for certain items of his claim. This letter is produced, but on reading it, it is evident that the works therein mentioned were ordered as works within the terms of the contract. It is in the following terms:—

It is necessary that the following works (reported upon by the clerk of works) should be performed by you under your contract for the construction of the *Richmond* wharf, and I beg to request that you will lose no time in their execution.

"In a letter of a later date, 19th January, 1875, in answer to a demand of payment for extras, the engineer, referring in the following words to what he had answered him in his letter of the 10th November, says: 'You will observe that no payment will be allowed for the four first items named in my letter of

the 19th November, they forming part of the work mentioned in your contract as stated therein.'

"It is clear to my mind from the admissions of the suppliant and from his correspondence with the Engineer that *no written authority* was ever given to the suppliant to perform the said work. He is necessarily bound by the clauses of the contract he has signed, and which furnish a direct answer to the case, viz: that he shall be refused payment for any extra work done without a written authority. Can he now complain of his position and address himself to a Court of Justice in order to have his contract set aside and be relieved of his obligations? Certainly not.

"It is an elementary principle, that agreements made between parties are binding in law on those who make them, and that Courts of Justice have no other power than to enforce the execution of the agreements. A Judge must also respect them, and it is only when the terms of the agreements, are uncertain or doubtful that he should intervene, in order to interpret the agreement in such cases in accordance with the intention of the parties, but he has no power to make a contract other than the one they mutually agreed upon. This is certainly not a case in which the Judge can exercise his power. The clause above cited and which has reference to extra work is so clear and precise that it does not admit of a doubt. Such a clause is binding. It has been decided frequently by Courts of Justice in a number of cases of which I will give a list later on. It would not be necessary for me to add anything further, and I might dispose of that part of the suppliant's claim which has reference to extra work without examining the evidence offered in support of this portion of the petition; but I think it is as well to ascertain if the work done is really *extra* work for which the suppliant would be entitled to recover, had he complied with

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the condition or formality of obtaining a written authority from the engineer; or if it is work done, as stated by the engineer within the terms of the contract; or again, if it is work done in consequence of the unskilfulness of the contractor, or as one of the risks he undertook when he signed his contract.

"This I will endeavor to ascertain by going over the items of the suppliant's claim, not in the order given in his bill of particulars, but as classed by the suppliant himself when giving his evidence. The first two items of his bill, which, as he states, refer to the said work, are for works which he was required to do in consequence of a want of proper foresight on the part of the engineer and of the insufficiency of information given as to the nature of the soil or bottom on which he was to rest the foundations of the wharf. The work consisted in removing boulder stones which prevented him from fixing his cribs on a level on the bottom on which they were to rest, and also in fixing ballast to sustain cribs on the outside.

"He admits having executed the work without being directed to do so, and that he did so in order to protect the work already done, and which would have been otherwise endangered.

"The works were in jeopardy because the ground beneath the water was very steep and irregular, and the cribs, constructed in what they call "steps" according to the plan, had no firm hold on the bottom, and the result was they had a tendency to step.

"He says he placed his cribs in accordance with the plan, and the work was done to protect the cribs, which were in danger from the unevenness of the bottom. This was no fault of his. It is true the plan, in order to give a general idea of the way in which the cribs should be placed, shows that the lower parts of the cribs to have a firm hold on the bottom, should be con-

structed like the steps of a stairs. The plan does not exactly correspond with the unevenness of the bottom, and the suppliant concluded that the work claimed under these two items was necessitated in consequence of the insufficiency of the plan, and want of proper foresight on the part of the engineer. However, after giving this explanation in the first part of his evidence, he states afterwards that it was only after the shifting of some of the cribs that he employed divers to examine the foundations, and that it was only through his own experience, that he was able to know what the bottom was like, and to ascertain that the engineer was as ignorant as himself on this point. Now, whose duty was it more especially to make the necessary soundings to know the outline of the bottom?

"Do not the specifications oblige the contractor to perform certain work in reference to these soundings? Yes, most certainly. The work is distinctly specified, and he must have entirely forgotten that he was obliged to perform it, for there can be no other reason why he makes a claim for these two items. To settle this point it is sufficient to refer to the specifications. By the 4th clause the party who tenders is notified that soundings made at the places marked by three parallel lines on the plan, should be verified "before tendering for work." Thus, even before putting in his tender, suppliant was cautioned as to the foundations. He is told that he must verify the soundings made by the engineer. The reason for this, no doubt, was because the Government did not care to cause disappointment to contractors, or wish to incur any responsibility in consequence of the insufficiency of these soundings. Thus notified, was it not the duty of every person who desired to tender to ascertain most precisely what the nature of the foundations were, in order to ask a price calculated on difficulties which did not appear by the

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soundings made by the engineer, but which by the terms of the contract he was bound to include in his estimate.

"Not only is the party who tenders cautioned to be prudent, but once he becomes the contractor his first duty is:

As soon as the work is commenced, accurate soundings for each crib must be made by the contractor, so that the outline of the bottom may be known previous to their being founded, and provision must be made for the slope of the ground by stepping the bottom courses in the manner shown on the plan, as each crib must be carried up *perfectly level.*

"This certainly seems sufficient to leave no doubt as to the duty of the contractor with regard to the foundations, but sections 13 and 16 of the specifications prove in a more positive manner, if it is possible, the necessity for the contractor to comply with this obligation, by stating that the contractor shall not brace together the cribs until the engineer in charge shall be satisfied that the contractor has got a solid foundation, and that the cribs have settled to their position. The 16th clause is as follows:—

The contractor must exercise great care in sinking the cribs, and distribute the weight of stone over the whole area, that they may strike the bottom when perfectly plumb.

"Now, if the suppliant did not deem it necessary to make soundings before making his tender; if he did not complete the soundings, as it was his duty to do when he commenced the work; if he did not protest the engineer in order to ascertain if the foundation was firm; if he did not ask his opinion, or exact a report, as to whether the cribs had settled to their position in order to continue without any danger his works; if after neglecting to take the necessary precautions, it was only after an accident that he perceived the foundations were bad, who should be responsible for the consequences? Is it not the party who had neglected to

take the necessary precautionary means which were imposed on him in his interest by his contract? Most assuredly, he alone is responsible. The Crown could not, without injustice, be made responsible for what it has so positively guarded against.

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"Moreover, whatever might be the consequences, it is one of those risks which the suppliant has assumed in virtue of the 30th clause of the specification, viz:—

> The bulk sum mentioned in the tender must include the entire cost of furnishing all labor, materials, tools and machinery, and every contingency connected with the work, and the contractor *is to assume all risk and make good at his own cost any damage which may result from loss of materials or otherwise by storms or from any other cause whatsoever*, during the progress of the work and up to its full and satisfactory completion.

"I must also add that the suppliant admits that, previous to the filing of his petition of right, he did not ask payment for these two items. He relied so little upon this part of his claim, that he only made it known for the first time, four years after the works were completed, when he prepared the bill of particulars annexed to the present petition.

"Would it not have been better for him not to include these two ill-founded items in his claim?

"For the above reasons I do not hesitate to declare, that the work included in items 1 and 2 were rendered necessary in consequence of want of foresight on the part of the suppliant, and because he did not comply with the conditions of the contract and of the specifications in regard to the foundations. On this part of his demand he cannot even rely on equity.

"The third item of suppliant's claim is $2,415 for having placed 25 and 30 feet timbers in front of twenty-eight cribs by order of the engineer. By the specifications the shore cribs are smaller than the outer cribs which were to be sixty by twenty-five feet. The 22nd

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clause of the specifications refers to these outer cribs in the following words:

In building the three large cribs both logs and square timber are to break joint at least eight feet.

"If no specification of the length the logs and square timber to be used in building the smaller cribs is given, it is because the plan sufficiently shows that the timber must be of the same length as the cribs, viz.: 25 to 30 feet without *breaking joint*; the *break joint* in section 22 refers to the large cribs only in order to show that they may be different from the others.

"In this paragraph of the specifications the suppliant deemed there was a singular contradiction and that he would be guilty of an error of architecture in *not breaking joint*. True, it does appear strange at first to say that it is necessary to employ timber of a greater length for building smaller cribs than you would for large cribs; but the engineer, in accordance with the specification in his correspondence, as well as in his evidence, explains this in a satisfactory manner.

"In his letter of the 2nd October, 1873, in answer to suppliant's contention, the engineer in charge says:

The clause in the specifications referring to joints broken at eight feet, refers to the sides of the long cribs 60 x 25 but not to the end, as it would not be possible to get them of the former length unless at great expense. The sides of the large cribs are treated in a manner similar to solid, or continuous crib work, which necessitates the joints to be broken at a proper distance.

"In the same letter he insists on his using timber of the same length as the short cribs. I will cite his words:

I regret that I cannot withdraw the objection made to your using short pieces of square timber for the cribs. There can be no difficulty whatever in your procuring timber 30 and 25 feet long, and even if such were the case, it is of the first importance that such difficulty should be met and overcome when it has so direct a connection with the strength and durability of the work, not to speak of the workmanship.

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"I am of opinion that the engineer has thus correctly interpreted the specifications and the plan. It must also be borne in mind that in such cases his opinion is to determine, for the suppliant has so covenanted by the 28th clause of the specifications which form part of the contract, and is as follows:

The work throughout must be executed in a substantial manner *in accordance* with the plan and this specification, and to the satisfaction of the engineer or officer in charge, who shall have full power and authority to reject any materials or workmanship, not in accordance with the true intent and meaning of this specification as expressed or understood.

"This clause, as well as that referring to the payment of extras, is binding, provided bad faith is not imputed to the arbitrator agreed upon. The law on this point is as well settled as on the first; this was a matter over which the engineer had entire control, and which he decided in accordance with the meaning of the contract. I am, therefore, compelled to dismiss also this item of suppliant's claim.

"Items 4, 5 and 6 refer to a change made by the Government in the original plan of the works contracted for by the suppliant. In the month of May, 1874, a short time after the works were commenced, the Honorable the Minister of Public Works availing himself of the 7th clause of the contract, which authorizes him on certain conditions therein specified to make such alteration or changes in the work contracted for, directed the engineer to get information as to building on the said wharf a coal floor and a trestle work for an elevated railway. Engineer *McNabb* had an interview with the suppliant and explained to him the nature of the work that was wanted. In order to be well understood he showed him as a model a similar structure erected on an adjoining wharf, with this difference, that it should be more elevated. On this occasion a fixed sum of $18,400, was agreed upon, but the authority of the

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Minister of Public Works was still wanted to complete the agreement. Before it was given the suppliant transferred this new contract to Messrs. *Graham* Brothers. One of them (*James*) thereon interviewed engineer *McNabb*, who repeated to him what he had already explained to the suppliant, and directed him not to commence work until he got the plans of the work. These plans were afterwards furnished. By the evidence of *McNabb* it appears the work was executed on the model that was given, with this difference, that it was slightly more elevated and somewhat larger, but in accordance with the plans. It is in consequence of this difference that suppliant claims as extra the price of these three items; alleging that the change took place after his verbal contract with engineer *McNabb* was concluded. It is evident there was an agreement passed as to this work, but at what date? Certainly not when suppliant interviewed *McNabb*, and was told by him that he had no authority to make the contract unless authorized by the Minister, and that he was not to commence work before he had been furnished with the plans. The agreement was not therefore binding until this authorization was obtained, and this was given by telegram on the 1st of September, after the plans had been furnished. On that date the contract came into force. *Graham*, in his deposition admits that it was only after he had received the plans he made a binding contract with *O'Brien*. It is also proved that no alteration was ordered after he had received them. But it appears that the suppliant, in his eagerness to dispose of the new contract to *Graham*, with whom he was making a large profit (as *Graham* executed the work for $6,000 for which suppliant was getting $18,400) did not give him sufficient information as to the size of this new building. He was consequently obliged to pay him $300, which he now claims under

item 4, and to personally incur the expense which forms items 5 and 6. This expense was incurred because the work was commenced before the plans were furnished, and evidently must be paid for by the suppliant. The engineer, by obliging the contractor to increase the height of the building in accordance with the plan of the works, only did his duty.

"For these reasons I declare and adjudge his claim under these items, ill-founded.

"Items 9, 10, 12, 13 and 14, may be considered together; they proceed from the one cause (as suppliant himself says) which was above mentioned, a change made in the original plan. He claims these works were rendered necessary because the building of the coal floor and the elevated railway on trestles on one side of the cribs weakened very much the wharf.

"At pp. 32, 33 and 34 of his evidence he explains in the following words the effect of the change:—

To make this new class of work, the strength of the works was weakened very much. Owing to that and the nature of this superincumbent work, the elevated railway on trestles being placed on one side of the cribs caused a lodgement on that side, and when the work was completed by agreement, it was found the work sank with it, and it did not present a perfectly level front, Mr. *McNabb* ordered it to be lifted up, which was a costly operation to do, and to be protected underneath.

Q. You say those two items became necessary in consequence of the yielding of the work under the original plan? A. Under the altered plan. Had the original work been kept in its entirety as I signed the contract for, it would not have yielded. The alteration of the coal yard required the wharf to be lowered some six feet on one side, and the binding was thereby broken up. The binding was broken and weakened the wharf very much.

"*Graham*, sub-contractor, of these works, when examined by the suppliant as one of his witnesses, corroborates this statement; he says:—

I think the coal floor had the effect of settling the seaside of the inner row of cribs, the east side—the furthest out into the harbor. Cribs that form the coal floor settled towards the east. I think it was the effect of the superstructure.

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"This witness is not an engineer and his position of sub-contractor of the suppliant for the same work, naturally prejudiced him in his favor. It will be seen that in this respect he goes much further than *Keating*, the engineer, who was also examined as a witness on behalf of the suppliant, and who, while declaring that: The effect of lowering part of the wharf for that floor was bad, as it cut the top timbers which run from side to side of the wharf, points out, however, that the bad foundations were the principal cause of the settling of the wharf, of the leaning over of certain cribs and of the yielding of others. He corroborates on this point *McNabb*, the engineer, and to show this I will cite a part of his evidence. When asked what caused the yielding of the cribs he answered:—

The bottom must have been soft to begin with, and of course the weight of the superstructure made it settle.

"Another question being put to him as to whether the weight of the trestle would cause the difference he answers:—

It is the *additional* weight of any thing that may be put on it in connection with its use, the condition of the bottom and everything taken together. I have referred to the structure as a whole.

"Further on he adds:—

Shore end cribs were canted a great deal. The top was bent towards the sea. Pretty nearly all of them. * * * This is owing to a *soft* bottom in one instance, *their own weight* and any additional weight that may have been put on the top of them.

"Again, in answer to a subsequent question, he explains in a more precise manner the principal cause of the setting of the works. I will cite the passage.

Q. These cribs were put down upon a soft bottom and they necessarily had some weight of their own and they were intended to be used for putting heavy weights upon them, how do you conceive they should have been put down? A. I think provision should have been made for them to rest upon a level bottom, on a solid bottom of

some kind or other. * * *. If this had been done the work would not have canted.

Q. The canting, in your opinion, then, was not occasioned by the change from the original structure to the coal floor. A. No. It may have been assisted by the additional weight of that structure put on top of it.

Q. If the cribs had been properly put down, the placing of the trestle work would have canted them? A. If a proper provision had been made for the bottom it would not.

Q. I suppose the trestle work was not heavy enough to crush the cribs? A. No.

Q. Then if it was on a proper foundation it would not disturb the cribs? A. No, certainly not.

"It is clear that in this engineer's opinion, one of the suppliant's witnesses, if the foundations had been made in accordance with the specifications, the suppliant's work would not have suffered any damage. But in addition to this witness, we have the evidence of engineer *McNabb*, who proves beyond all doubt what really rendered necessary the additional works comprised in the different items now under consideration. I think it necessary, in order to clearly establish this all important fact, to give an extract of his evidence on this point. The following question was put:

Q. It has been said that the change in the plan of structure necessarily weakened the structure and produced injurious effects to it, what is your opinion? A. My opinion is the alteration did not weaken it. There were more struts beyond the timber than called for in the original contract, and therefore the tendency, in my opinion would be to protect the structure. There were more timbers spanning the western and centre rows of cribs than originally.

Q. Now what was the cause of that? (The canting of the crib.) A. It made a serious bend or bow in the wharf.

Q. How did it happen? A. The difficulty was in the bottom in my opinion.

Q. I see by the specification, it says, in the first section, that it was the duty of the contractor to ascertain carefully the nature of the bottom and place his cribs down in such a way that they would be adapted to the formation of the bottom and come up square? A. Yes.

Q. Now if that had been done would this canting have occurred?

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A. I consider if the cribs had touched the solid foundation of the bottom they would not have canted.

Q. Would the trestle work which was built upon the *cribs*, or any other reasonable weight have canted the cribs, if that had been done? A. I don't think it would have been possible for them to have done so.

Q. What did the soundings show the formation to be? In what direction did it slant? A. It slanted seawards and it slanted towards the centre of the structure.

Q. That is longitudinally? A. Yes, and cross-wise also.

Q. So, each crib had to be stepped in two ways? A. Yes, in two directions.

Q. Would there have been any greater weight upon the cribs if the wharf had been constructed according to the original design than according to its present construction? A. I think not because they were reduced in height five feet.

Q. And that was all heavy structure? A. Yes, it was similar in character to the balance of the crib.

"On this point, as well as on many others, engineer *McNabb's* opinion is directly opposed to that of suppliant. *McNabb* declares that the yielding and settling of the wharf, which rendered necessary the works mentioned in the above items, is not due to the change from the original plan, but to the bad foundations.

"I have already stated what were the contractor's obligations with regard to the foundations and the placing down of the cribs, and I only refer to them to show that the items now under consideration must also be dismissed for the same reasons as the first item.

"It cannot be doubted, according to the opinions above cited, that had the suppliant taken the precautionary measures which his contract had imposed upon him, he would not have been obliged to execute works to repair the effects of his negligence or his imprudence and which he now claims as extras. I also am of opinion that this was the reason why the wharf and the trestle-work yielded, and why other changes took place. It was to make it *substantial and workmanlike* work (as has been said), in accordance with the plans

and specifications, that the works mentioned in these items were deemed necessary.

"For these reasons I cannot admit the suppliant's contention with respect to these items.

"I now come to items 7, 8 and 15, which should be separately considered, because they are of a different category, and are based on different grounds. Item 7 refers to scarfing long timbers (ordered by engineer, but not required by contract.) The contract, it is true, does not specify any particular mode of scarfing or joining the long pieces of timber; but in this case, as in the former, it is a matter of difference of opinion between the engineer and the contractor as to the right mode of executing the work (scarfing long timbers.) In such cases, by virtue of the contract, the engineer is to determine and his opinion is final. For this reason, and for the reasons given at length when considering item 3, I am of opinion that he is not entitled to recover anything under this item.

"As to item 8, amounting to $945.00, claimed also as an extra, and which is for having put fenders to the wharf, the suppliant contends that they are not mentioned in the specifications, and that they were not indicated on the plans furnished to him. If the first part of this contention is well founded the second is certainly not so. It is true that the fenders are not mentioned in the specifications, but there can be no possible mistake as to their being marked on the plan. The plan produced by the suppliant at the trial shews the position of these fenders. The original produced by the Crown is exactly the same. The fenders are marked on figure No. 3, and they are shewn in other places by dotted lines. The plan is in exactly the same condition as when the suppliant signed his contract. The size of these fenders and the manner in which they should be attached to the wharf is even shewn on the plan. It is more than

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sufficient to prove that the suppliant's claim for this item is ill-founded. I deem it again necessary to refer to item 14 which has already been considered. The suppliant claims under this item $2,000 for having employed divers to cut the ends of the ties or logs which hold together the two sides of the wharf. I find a still more complete answer to the suppliant's contention on this point than the one I have before given. It is to be found in the 8th paragraph of the specification, which is as follows: 'The logs are to be notched 2½ inches on the underside at their intersection, and the *ends* are to project *eight* inches beyond the face of the crib.'

"Instead of complying with this condition, the suppliant allowed the ends of the ties to project much more than eight (8) inches, and that against engineer *McNabb's* and superintendent *Walsh's* directions. It was only when the engineer refused to certify to the payment of the work, that the suppliant executed this work. He has tried to justify his refusal to do the work as part of the contract, by contending that the projection was increased and became dangerous only when (resulting in his opinion on account of a change in the plan) the cribs canted. I have already shown that the cause was quite different. These cribs, according to *McNabb's* evidence, canted in a body, so that the ends of the ties could not project more afterwards than when they were put into position; the altered position of the cribs cannot have increased or lessened this projection. If the cribs had been built with logs projecting eight inches at first, there would have been nothing to cut off. The suppliant has therefore no one to blame but himself if this work, the cost of which was greatly increased because executed in winter, had to be done. Had he complied with the conditions of the specifications and the directions of the engineer, he would not have incurred this expense.

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"The suppliant also complains in his correspondence that he was tyrannically treated by engineer *McNabb*. It seems to me, on the contrary, that this last gentleman on many occasions shewed a great deal of indulgence towards the contractor. With reference to this last item, he is far from having exacted what he might have under the specifications.

"In accordance with the specifications, he could have ordered that the projecting ends be cut as far down as the foundations to their proper dimension—whilst he was satisfied with their being cut to only twenty feet below the low water mark. Neither did he exact that they should project but eight inches as stated in the specifications, but allowed them to project as much as the fenders alongside of the wharf that are twelve inches thick. This work was rendered necessary in order that vessels be not damaged by these projections. No vessel could have otherwise moored alongside of the wharf. *McNabb* in his evidence uses the following words:—

No vessel would have dared to approach the wharf while those projections remained as they were.

Q. Her sides would have been staved in, in a few minutes? A. Yes.

"We now come to the last item of $1,500, which the suppliant claims for damages suffered by reason of the insufficiency of the monthly progress estimates and irregularity of payments. The insufficiency of the estimates has not been proved. The work omitted in the engineer's estimates was the work claimed by the suppliant as extra, and which the engineer determined to reject, as being either work within the terms of the contract, or work rendered necessary by the contractor's negligence.

"It is true payments were not made in every month, but there is no proof of any negligence or delay in granting the certificates on which the payments were made. Engineer *McNabb* in his evidence satisfactorily

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explains these delays. The first payment of $15,000 was made on the engineer's certificate given by a telegram dated the 13th of April, 1873, before the contractor had brought materials on the ground or had commenced work. This amount was advanced in order to allow the contractor to procure the means to start his works. No money afterwards was paid until September, 1873, as the works were only then sufficiently advanced to warrant the engineer to give another certificate for eight thousand seven hundred and ninety-six dollars. Certificates were granted in October, November and December of the same year, also in January, February, March, April, May, June, July, September and October, 1874. The certificate for August was refused because the engineer was not satisfied of the progress made in the "bracing" which he had ordered as forming part of the work included in the contract, and which the suppliant refused to go on with because he wanted to be paid for it as an extra. Here the engineer only exercised such powers as were given him by the contract, and it was for the suppliant to comply with the directions received, and thus not prolong the delay.

"The last but one of the certificates was for the $4,185.55 granted in October, 1874. From that date until the 17th of March, 1875, no certificate was granted, because the suppliant neglected to perform works ordered by the engineer in his letter of the 10th of November, 1874. He was endeavoring to have them declared extra before executing them.

"It was only on the 17th of March, 1875, when the wharf was sufficiently completed to be accepted, that the engineer granted his final certificate, for the amount which was paid to the suppliant, as appears by his receipt dated the 30th April, following. The engineer positively declares that this certificate was granted by him in his professional capacity, without favor and in

good faith. The suppliant has not adduced any evidence to contradict this statement, and I have failed to discover anything in his conduct which can lead me to believe that he acted otherwise than in good faith.

"For these reasons I am satisfied that the suppliant's claim under this item is as ill-founded as under the preceding items.

"By reviewing these different items I have shown, I think, that none of them can properly be classed as extra; but that on the contrary they are for work which either formed part of the contract or were rendered necessary (through the contractor's fault) to complete the works in accordance with the agreement. I am, therefore, of opinion that the receipt of the 30th April, 1875, produced with the plea of payment in full, covers not only the items admitted by the defence but also those claimed under this petition of right. The suppliant cannot, after being paid the amount and after giving a receipt in full of all demands, now endeavor to avoid the consequences of this receipt by alleging that it was given under protest. It is true that on the same day, immediately after he received the sum of $9,681, he wrote to the Minister of Public Works to inform him that when he signed this receipt he had no intention of abandoning his claim for extras, and of which, till that moment, he had not spoken. Why did he not then press his claim and refuse to sign the final receipt they demanded? Can he now repudiate his own act, or does he give a good reason? No, certainly not. I consider the plea of payment is legally proved and is a complete bar to all the items claimed by the petition, and covers the prices agreed upon by the contracts as well as the extra work ordered in writing by the engineer.

"The Crown has moreover invoked another plea, which is to be found in the eleventh paragraph of the defence, and is as follows;

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That by the 9th clause of the contract the determination of the Minister of Public Works on all differences which might arise during the execution of the works, was final and conclusive.

The clause in the contract reads thus:

Ninthly. Should any difference of opinion arise as to the construction to be put upon any part of the specification or plans, the same shall be determined by the Minister alone, and such determination shall be final and conclusive, and binding upon the parties to this contract and every of them.

"As it has not been proved that such a determination was ever made by the Minister of Public Works, the Crown could not take advantage of this clause. It appears by the evidence that the report on which the final settlement of the 30th April, 1875, was based, was made by Mr. *Schreiber*, the engineer in chief, but as there is no power given to the minister to appoint a substitute to fulfil this duty, I cannot give to this report the same effect as I would to the determination of the minister himself as mentioned in the ninth clause. The learned counsel for the Crown contended on this point, that it was an error in the contract, and that the word *engineer* should be read instead of the word *minister*. Nothing in my opinion warrants such an interpretation or modification of the contract. A party cannot for any reason whatever, without the consent of the other party, modify his obligation. However, from what I have already said, it is evident that this point is of no importance to the decision of this case.

"The conclusion at which I have arrived is founded on the reasons which I have before given at length, and which can be summed up in the following words: 1st. The want of a written authorization in accordance with the terms of the contract to perform the *extra work*; 2nd. The fact that part of the works for which extra payment is claimed, are works within the terms of the contract; 3rd. That part of the works alleged to be extra were rendered necessary on account of the sup-

pliant's negligence and unskilfulness; 4th. That the payment and final settlement which took place on the 30th April, 1875, comprised all the items of the claims.

"For these reasons I must dismiss the petition with costs."

On the 16th April, 1878, the suppliant took out the following rule *nisi*:

It is ordered that the defendant, upon notice of this rule to be given to Her Majesty's Attorney General for *Canada*, and to Messrs. *Walker, McIntyre, & Ferguson*, the agents of the Attorney General, shall at the expiration of eight days from the date of this order, or so soon after as the case can be heard, show cause why the verdict or judgment rendered for the defendant in this cause should not be set aside, and, instead thereof, a verdict or judgment entered for the suppliant for such sum or sums as the Court shall see fit, or why a new trial should not be directed in this cause on the following grounds:

1. On the grounds disclosed in the affidavit of the suppliant filed.

2. For the erroneous admission as evidence for the defence of certain reports and written papers signed by one *William Marshall*, the same not having been duly verified nor the statements therein proved by evidence.

3. For the erroneous finding of the learned Judge that there had been a final settlement between the parties before action brought.

4. For the erroneous omission of the learned Judge to find that the damage to works was caused by the dumping of stone and earth against the cribs as also by change of the plans and weight of superstructure added to the work, as also by the omission to provide for any solid foundation for the cribs and for dredging the bottom, and also by the general weakening of the binding of the works (as provided by the contract) necessitated by the superstructure and change of plan.

5. For the erroneous finding of the learned Judge that certain extra works charged for had been done without the written authority of the engineer, whereas such written authority was proved and is in evidence.

6. For the erroneous finding of the learned Judge that it was the suppliant's duty under the contract to do more than he was proved to have done before sinking the cribs in regard to securing a more firm foundation.

7. For that the claims for scarfing and for piles and fenders and the sum paid for divers, for ballasting and other extras enumerated in his Lordship's judgment were not allowed, although the same were

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ordered and adopted by the engineer and accepted by the Government, and the same are not mentioned or estimated for in the contract.

8. For that certain of the charges are in connection with the trestle work and are necessary to that work and extras to the verbal contract, and should have been allowed the special conditions of the written contract not applying thereto.

9. For the discovery of new and important evidence as set forth in the affidavit so filed as aforesaid.

10. That the verdict was against law and evidence and against the weight of evidence.

11. For not finding for the suppliant some damages or compensation for the delays in the payments as required by the contract. And in the meantime it is ordered that all proceedings be stayed.

On the 29th April, 1878, this rule *nisi* was discharged and the suppliant thereupon appealed to the Supreme Court of *Canada*.

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

This petition of right was brought to recover extras and additions under a contract under seal, with the Minister of Public Works, to construct a deep sea wharf at *Richmond Station*, at *Halifax*, *N. S.*, and claimed compensation for serious changes in, and damages to, the works already constructed, entailing expense, and for delays in the monthly payments made to the suppliant.

The new works required by the Government, consisting in a coal floor and a trestle work and railway upon the floor, materially weakened the wharf, as so far constructed under the contract, and suppliant contends that the damage caused to the whole works was by weight of this superstructure, by the settling and canting of the cribs.

The contract for the wharf is dated 4th Dec., 1872. The 7th section, which provides for alterations during the progress of the work, is the one on which the case will turn. We contend the estimates of the engineer is

not a condition precedent, but the only condition precedent is that authority in writing to do the work must be given in advance. But we do not admit that we claim for extra work, with the exception perhaps of a small part of our claim, as to which there may be a doubt, and it can only be as to this part that this condition precedent can apply.

In the first place the suppliant contends, that he was not required by his contract to prepare a solid foundation to receive the cribs, (a contention put forward on part of defendant at the trial). On the contrary, the provision as to stepping the bottoms of the cribs after soundings was all that suppliant was required to do, and all this was faithfully done under the daily inspection of the engineer or his officers in charge, without objection, and no such objection was ever urged till after this action was brought.

Now, it was some months after work was in progress that the engineer in charge entered into a verbal contract with the suppliant to put up the coal floor and railway on the wharf. This, we maintain, was a distinct work. There is nothing in the contract to show the wharf was to be used for shipping coal. The foundation of wharf had been constructed by suppliant for a wharf, and not for any superstructure of 200 tons. There was no guarantee of any kind. Under the contract, the cribs were to be bound together at the top, but when the superstructure was required, this building had to be cut through, so that, not only by the weight of superstructure, but also by the loosening of the bonds, the cribs canted.

The contract relates to the wharf. The coal floor was done under the personal inspection of the engineer, as to the sufficiency of the work. It was an independent work not contemplated at first. There were certain extras flowing out of this new work for which we claim,

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and also certain extras entailed on former work by this new work.

The answer admits the work was all completed and the government entered into possession, and have had possession ever since.

The provision in the contract, that the minister shall "determine, &c.," applies only to the work under the contract, and, in any event, the evidence shews the minister was applied to, but failed to comply; and there are cases to show that where what is to be done is in the power of one of the parties, and everything has been done by the other to have that done, this is equivalent to performance of the condition (1).

Another defence is, there was a receipt in full. This is only in full of items mentioned in it, and does not apply to the extras, the subject-matter of this action. The evidence shews suppliant received the money with a qualification, *Read* v. *Lancashire* (2).

The contractor was ordered to desist until the cribs should find a solid foundation, showing that no other foundation was contemplated. The steps cannot be used where there is a rock foundation.

[The learned counsel then referred to the evidence to show that the new work had weakened the original structure, and had it not been for this new work the cribs would not have canted.]

This claim for compensation does not come within 31 *Vic.*, ch. 12.

The question comes back to this—whose duty was it to prepare the foundation for these cribs?

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

The contract in question was made under the Public

(1) *Hotham* v. *E. India Co.*, 1 D. & E. 638; *McIntosh* v. *G. W. Ry. Co.*, 2 McN. & G. 74.

(2) L. R. 6 Chy. 527.

Works Act, 31 *Vic.*, c. 12, and every provision in that Act applies to it.

The tendency has been towards the curtailment of the powers of Ministers by the Legislature. This has been shown in all departments, (see especially 31 *Vic.*, c. 5,) as regards the contingencies, and the various statutes provide as to how the Crown shall be bound for articles furnished.

Sec. 7 of the Act therefore disposes of all claims outside the contract, for there was no authority to bind the Crown in any other way than provided for by the statute.

Moreover, the evidence does not show any claim upon the favour of the Crown—the case is one without merit. The learned judge, who tried the case, has so found. In the court below my learned friend did not contend he had any claim outside the contract. It is put on a *quantum meruit* for the first time in appellant's factum.

Under the terms of the contract the plaintiff is not entitled to recover.

The evidence shows the wharf was to be constructed to bear the heavy traffic of the ocean steamships.

To entitle the appellant to be paid for work outside of the contract, the written authority of the engineer was required therefor previous to its execution. No such authority was given for the works claimed as extras, except what has been paid for.

The engineer told him certain things would have to be done in connection with the work before a final estimate would be given. The contractor does these things without claiming extra pay. The coal floors, trestle work and railway, were not separate work and could only be done under the contract. When the changes were made, the contractor was informed of them, and he was paid for them under the terms

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of the contract. It was the Minister who was to determine what alterations were to be made. The appellant has been paid for everything he had the written authority of the engineer to do. There is no evidence that any particular question was submitted to him for his decision under this clause.

Then as to the adaption of the cribs to the bottom. The contract shows what the duty of the contractor was as to the soundings. The suppliant was told he should do this extra work as part of his contract, and to make his contract good, and he agreed to do it. Sec. 28 of contract says the work throughout must be executed to the satisfaction of the engineer, who had full power and authority to reject work and materials not in accordance with the specifications, as expressed or understood. The cribs tilted from causes apart from the coal floor, and the engineer required certain things to be done which were proper and reasonable. The engineer acted in a manner favorable to the contractor as may be seen by referring to the correspondence.

The item of $2,000 for "cutting off, &c.," was for work he was bound to do in accordance with the specifications.

The structure had made no great progress when the coal floor was agreed upon. It was an alteration coming within the contract. The original structure was altered. This he was bound to give up in a business workmanlike manner. He contracted to do it for $18,000. He paid to sub-contractors $6,000 for doing it. The original contract was for a work which might be varied.

The wharf was intended to bear thousands of tons, and yet the trestle work disturbed his cribs. *Keating* was obliged to admit that the superstructure could not be the cause of the tilting of the cribs, if the cribs

had been put down in a proper manner in the first place.

When the engineer required the protective works, he required only what was his duty to require, and his determination is binding upon the suppliant.

The two first items in the settlement have been abandoned. The learned Counsel then referred to:

Ferguson v. *Corp. Galt* (1); *Diamond* v. *McAnnany* (2); *Ekins* v. *Corp. Cy. of Bruce* (3); *Elliott* v. *Roy. Ex. Ins. Co.* (4); *Stodhart* v. *Lee* (5); *Sharp* v. *San Paolo Ry.* (6); *Scott* v. *Liverpool* (7); *Clarke* v. *Watson* (8); *Ranger* v. *Great Western Ry. Co.* (9); *Roberts* v. *Bury* (10).

As to the receipt: Mr. *O'Brien* does not say it was given under any mistake. The documents annexed to the receipt show how careful the Public Works Department were in such matters. The receipt not having been signed under any mistake or misapprehension, and with a full knowledge, (for all the substantial items of his claim had been agitated before,) it should be binding on him.

Mr. *Cockburn* in reply:

The clause in the Public Works Act does not apply to executed contracts.

Our claim does not come within the contract and sec. 20 shows that it is not an invariable rule that the contractor should be bound by a written contract.

RITCHIE, C. J.:—

This was an appeal from the judgment of Mr. Justice *Fournier*, dismissing the suppliant's petition with costs.

[After referring to the pleadings, His Lordship continued as follows:]

(1) 23 U. C. C. P. 67.
(2) 16 U. C. C. P. 9.
(3) 30 U. C. Q. B. 49.
(4) L. R. 2 Exch. 237.
(5) 3 B. & S. 372.
(6) L. R. 8 Chy. 597.
(7) 3 DeG. & J. 334.
(8) 18 C. B. N. S. 278.
(9) 5 H. L. 72.
(10) L. R. 5 C. P. 310.

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I have no hesitation, at the outset, in saying that the suppliant's contention that this contract and the work done under it, and his claim for compensation, is not to be subject to the provisions of the Act 31 *Vic.*, ch. 12, "An Act respecting the Public Works of *Canada*," cannot be sustained. The contract was undoubtedly made by virtue of the authority of that Act, and was duly executed under seal, in accordance with, and must be governed by, its provisions. By the seventh section of this Act it is provided that

> No deeds, contracts, documents or writings, shall be deemed to be binding upon the department, or shall be held to be the acts of the said minister, unless signed and sealed by him or his deputy, and countersigned by the secretary.

And by section 21, which provides that security shall be taken where any public works are being carried out by contract, and makes provision when the lowest tender is not taken, it is enacted:

> But no sum of money shall be paid to the contractor on any contract, nor shall any work be commenced until the contract has been signed by all the parties therein named, nor until the requisite security shall have been given.

The substance, then, of suppliant's complaint is, that independent of the original structure agreed for at $78,000, and the coal floor at $18,400, and the sum of $2,700 for additional bracing estimated by the engineer, all which sums were duly paid to the suppliant, the engineer required the suppliant to perform a vast amount of extra works, involving additional labor and expenditure of materials not provided for in any former contracts or estimates, for which the suppliant claimed extra payment, but which the engineer refused to allow, and obliged suppliant to do the work which, he alleges, he did under protest, always claiming that such work should be paid for as extra.

The suppliant also complains that such outlay and expenditure of labor and material was rendered abso-

lutely necessary from want of proper foresight in making the original plans, and for not providing for the additional strain or pressure on the work, occasioned by the alterations and additions.

He likewise complains of damage and loss from inequality of payments, falling short of what he was entitled to, and that he sustained heavy loss and damage from irregularity of payments. The answer denies that, with the exception of the sums so paid, and the $400 paid for the costs of repairs to a crib, to which it is alleged the suppliant had no just claim, any other work was performed by the suppliant, for which he was, or is, entitled to be paid over and above the contract price.

The rights of the suppliant must be determined by the contract and the statute, and by these alone. It is not necessary to enquire into or express any opinion as to the legal binding effect on the Crown of the verbal contract for the coal structure, assuming that work to be outside of and *dehors* the original contract, because it was submitted to the Minister of Public Works, assented to by him, and the amount agreed on by him has been paid; but it cannot, I think, be too unequivocally put forward, that neither the engineer, nor the clerk of the works, nor any subordinate officer in charge of any of the public works of the Dominion, have any power or authority, express or implied, under the law to bind the Crown to any contract or expenditure not specifically authorized by the express terms of the contract duly entered into between the Crown and the contractor according to law, and then only in the specific manner provided for by the express terms of the contract.

In examining the contract we find that the contractor undertook for a lump sum to construct, complete and finish, in every respect to the satisfaction of the minister, all the work required for the construction of a deep

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water wharf agreeably to the plans in the engineer's office and specifications, and with such directions as would be given by the engineer in charge during the progress of the work; and while the specification and plan exhibited are to be taken to give a general idea of the work required, omissions in them are not to be considered as invalidating the contract, but the contracting parties must, as the specification says, embrace everything in their tender, whether mentioned or not, as they will be required to complete the work, according to the true intent and meaning of the specification and plan, for the contract sum; and, as if to prevent the possibility of any doubt arising as to the whole work and everything connected with it necessary for its full and final completion being done and provided by the contractor, it is expressly declared:

> The bulk sum in the tender must include the entire cost of furnishing all labor, materials, tools and machinery, and every contingency connected with the work, and the contractor is to assume all risks, and make good, at his own cost, any damage which may result from loss of materials, or otherwise, by storms, or from any other cause whatever during the progress of the work, and up to its full and satisfactory completion.

And while provision is made for any change or alteration of any part of the work which shall be required by the minister, and whether it should entail extra expense, or should be a saving to the contractor, the amount was to be determined by the estimate made by the minister, his engineer, or officer in charge, and while providing that every such change or alteration shall be made subject to the conditions, stipulations and covenants in the agreement expressed, as if such change or alteration had been expressed or specified in the terms of the contract, it is provided that if the contractor is required to do any work, or furnish any materials, for which there is not any price specified in the contract, the same shall be paid for *at*

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the estimated prices of the engineer in charge of the works. But it also expressly provided that

> No change or alteration whatever, and no extra work whatever, shall be done without the written authority of the engineer in charge, given prior to the execution of such work, nor will any allowance or payment whatever be made for the same, in case it should be done without such authority.

And in case of a difference of opinion as to the construction to be put upon any part of the specifications or plans, the same shall be determined by the minister alone, and his determination shall be final and conclusive and binding on all parties to the contract.

Now, to enable the contractor to fulfil his contract and construct such a wharf as he undertook to build, it was absolutely necessary that a good, solid and sufficient foundation should be obtained. This the contractor, I think, clearly undertook to secure. He undertook to complete the whole work with every thing that was requisite for the purpose of completion from the beginning to the end for a lump sum.

There is not a word in the contract from which any covenant, agreement or undertaking, express or implied, can be inferred, indicating that the Crown in any way guaranteed the foundation or assumed any responsibility therefor. On the contrary, secs. 4, 26, 29 and 30, of the specifications most clearly shew that the entire risk and responsibility was thrown upon the contractor, who could not possibly do what he undertook to do with a defective foundation.

[The learned Chief Justice then read these sections (1).]

A great portion of the labor expended and materials furnished for which the suppliant claims compensation, with reference to both the wharf and coal floor, was unquestionably caused by the defective foundation, and this arose from the want of a thorough and proper

(1) See p. 541

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examination of the bottom, which does not appear to have been made by the contractor till he found his work in danger, when he says he got divers to explore the bottom to find if any obstructions lay in the sites of the cribs, when they found several large boulders at the bottom.

And as he was, in my opinion, responsible for the foundation, and could not complete the wharf and coal floor as he agreed to do, by reason of his not having placed the original wharf on a proper foundation, the risk and burthen of securing which, I think, he assumed under his contract, he has no claim whatever, in my opinion, on the Crown for any such expenses or outlays occasioned by his own failure to perform his own undertaking. But I have gone through the items of his claim, and I cannot discover from his own showing, that under the terms of his contract he has established a claim to any one of the items.

The suppliant admits the receipt of the contract price, and also the $18,400 for the coal floor and additional trestle work, and $2,781 for extra work, which "was agreed on" (he says) "between engineer and himself, and accepted and paid for," and $400 for rebuilding two cribs which were injured by another contractor, which, he says, was paid for as an extra. The amounts he now claims to recover are as follows: [His Lordship read the statement of claim (1)]

I have numbered them in the order put forward in the suppliant's statement of claim; they are 15 in all. As to Nos. 1 and 2, which refer to removing the boulder stones and fixing ballast to sustain the cribs, they are, in my opinion, most clearly matters the contractor was bound to do under his contract; in addition to which he says:

They were not ordered. I did it because the work was in jeopardy.

(1) See p. 544.

They were done without any instructions or order, but simply because the damage to the cribs was imminent, and I had to protect them at this cost.

This, no doubt, arose from not securing a proper foundation, by reason of which the cribs were likely to shift their ground. His cross-examination clearly shows that he made no proper exploration of the bottom, as he was bound to do, but relied, he says, on the engineer's and his own soundings, which conveyed no adequate idea of the bottom, or what was necessary to be done to secure a solid and proper foundation. He says, on cross-examination, in the winter of 1873-'74 he began to find the cribs sliding away.

Q. And it was in consequence of this sliding away that you made this work to protect it? A. When I found my first cribs likely to change their position, and having great trouble to take them up and remake parts of them, when I got them into position again, I thought that what led to that trouble might lead to further trouble with the other cribs. I got divers to explore the bottom, and to find if any obstructions lay in the sites of the cribs. They found there were several large boulders at the bottom which they leaded and attached a piece of cork to a line so as to indicate their presence.

Q. What I asked you was this: it was when you found the cribs subsiding or giving way, you did this work to protect the cribs for which you claim payment? A. Not at all. It is a distinct thing altogether.

Q. I am asking you about the two first items? A. It was when I ound that these cribs were likely to shift their ground, and were shifting their ground, I protected them.

Q. What month was that in? A. Possibly it was March or April. About April, as near as I can guess, the first year.

Q. Then I understand you had to take some of the work up? A. Yes, I had.

Q. What was that owing to? A. Owing to the subsidence this same way, and the work breaking asunder in consequence of the cribs slipping away.

Q. After you put them down? A. Yes.

Q. Were these the first you put down? A. Yes.

Q. Were they sinking in the mud? A. Not so much that as slipping out into deeper water.

Q. So you took them up, and what did you do? A. I did not take

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them up altogether, one went away and I had to tear it to pieces and put it together again.

Q. What was the cause of that? A. The unevenness of the bottom and the want of a level surface for those narrow cribs to rest upon.

Q. That was just one of the difficulties of the situation? A. The surface below was exceedingly irregular. It was a very difficult place to build crib-work on.

Q. You had considerable difficulty and one crib you had to tear to pieces and re-build in consequence of its not standing after its being put down? A. Yes.

Q. Was it to prevent a recurrence of that you performed this work? A. It was that led me to explore the whole ground, to see if there were any difficulties in the way that we did not see before and remove them. The soundings did not give them before.

Q. This expenditure was incurred in removing those difficulties and protecting the cribs from the injuries you feared? A. Yes.

Q. To make the work safer, in point of fact? A. Yes, to provide that the future work, I would put down, would be safer.

Q. That was done without any orders from the engineer or any body else? A. I had none.

He says he had no written order, nor any communication with the engineer on the subject. And if any inference is to be drawn from his conduct, it is very strongly to the effect that he did not suppose he had any past claim to them; for on his cross-examination in answer to the question: "Did you submit the first two items of your account to the engineer?" he says: "I did not." "Q. You never made any claim for those items until you fyled your petition? A. No." And this was years after the work was done and the receipt to be spoken of hereafter given.

Item No. 3.—Suppliant says: "Those timbers were not specified in the contract to be those lengths. The engineer insisted I should put in those lengths. I demurred to it. We had a correspondence. He finally ordered it and I did so." He says the engineer refused to allow the contractor to put in shorter pieces. The engineer required it to be done according to his con-

struction of the specification; he says he demurred and claimed it was an extra. I think it was clearly within the contract, but if an extra no estimated price or written order is shewn, without which the contractor is expressly prevented from claiming or recovering.

Item 4—For extra payment to *Graham* Bros. This item grew out of what the suppliant calls the second subordinate or verbal contract. He appears to have proceeded with the work without waiting for a plan which was promised him. He says the engineer, after some work was done, changed the plan. So far from this being a change or alteration under the contract for which the suppliant has a claim against the Crown, not only was there no estimate of the cost, or written authority, but the suppliant says: "I telegraphed to Mr. *McNabb* about this $300, and requested him to pay it to me, but he said he had no authority to pay it." *McNabb's* answer, which he received, says: "I have no authority to increase contract price." He says: "It was deemed necessary, and I had to bow." Clearly this is not a claim enforceable against the crown.

As to items 5 and 6, the necessity for this expenditure grew out of the yielding of his own work by reason of the defective foundations, and therefore, for the reasons before assigned, not chargeable against the government; but in addition to this the suppliant could not recover if the work had been extra, because he has shewn no estimated price or written authority. He says in answer to the question: "Had you any orders as to this too? A. I had none but verbally, that I know of." And here again, like the first two items, the inference from his answers on cross-examination are certainly not favorable to his own belief in his present contention, for he says in answer to the question—

You made a claim for that as for extra work? A. Yes, the engineer ordered the work and I did it. I conceived at the time that every

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order he made I was to be paid for. He ordered the work, and I did it. Q. Did you claim for it as extra at that time? A. Not at that particular time. Q. When did you? A. When I put in my bill of costs. Q. Did you submit these two items to the engineer? A. I think not.

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As to No. 7, it appears by the suppliant's statement he was putting in the timbers in a manner objected to by the engineer, and as to which the suppliant says:

My own way was not strictly in accordance with the plan but it was far better.

And again:

Q. Then you were not following the plan? A. No. I was putting them in a way I believed to be better.

He failed to convince the engineer of this, he says his work was not approved of—

And I was ordered to put in a sort of notch called a scarf in the timbers. It was not in the specification or in the plan. I protested against it, but it was insisted on. It was extra work.

He says he put it before the engineer as an extra work which should be paid for. "Q. What did he say? A. He insisted it should be done as part of the contract."

As to item No. 8, 135 fenders not in the specifications, suppliant says: "they are upright timbers that fend off vessels," "such things are attached to wharves more or less, but they are not in my specification or plan." And in answer to the question:

And they are not mentioned in the specifications anywhere? A. No, not in this specification anywhere, but the clerk of the works showed me a specification in his hands where they were mentioned, and I felt if they were in any specification they should be put in.

On his cross-examination he gives this account of the transaction:

Q. What distinction do you make between items 8 and 9? A. The first item, "135 fenders at $7," were properly to fend off vessels. They were put all around the whole structure. These extra fenders were added with a view of putting a false face upon some of the cribs that went backward out of line, and to bring them back to a true line. Timbers were put down in front and braced back, and a floor run out to make a smooth surface.

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Q. It was to remedy the defect in the way in which the cribs rested on the bottom? A. No; you beg the question there. It was not to remedy the defect on the bottom, it was to remedy the defect that accrued from the alteration of the plan.

Q. These cribs did not lie evenly on the bottom? A. They did lie smoothly, but they did not lie on the same bottom. They press on the ground the same as before, but they will tilt—the front will not be perpendicular as it was before.

Q. At all events it was to protect vessels from the effects of the subsidence of the cribs, the fenders were put in? A. No; it was not. It was to bring the frontage out, so as to make one uniform line.

Q. Why was it not a uniform line? A. Because the cribs had moved a year after they were built.

Q. So the outer wall of the crib was uneven and dangerous to vessels —was that it? A. That was not the intention of the work. The work was merely to please the eye.

Q. So it was not dangerous to vessels then? A. It was dangerous —just as dangerous after it was done. They were put on to please the eye merely.

Q. Whose eye was it intended to please? A. Everybody's eye.

Q. That was your intention in putting them there? A. It was, and it was the intention with every one.

Q. How did you gather that? A. I gathered it from conversation. I explained to Mr. *McNabb* before that, I intended to do it.

Q. So you put that particular item in of your own motion? A. Yes; so as to give a good appearance to the work.

Q. Without any request or order for it? A. It was done without any order, but there was a verbal instruction.

Q. On what ground did you expect pay for it? A. For improving the wharf and rendering it more uniform; I did not do it to please myself.

I am at a loss to conceive what legal claim under this evidence can be set up against the Crown.

No. 9. He says he has no writing for this item. I think there is no doubt that the contractor was bound to put them in, in consequence of his own defective work, but as he admits there was no estimate or written authority, it is clear he has no claim.

As to No. 10, "22 piles," there appears to be no writing authorizing these. They became necessary in consequence of defendant's bad work and bad founda-

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tion; they became necessary in order to make his work satisfactory, and from *McNabb's* evidence it was an indulgence to him, instead of requiring him to build a new crib, and the suppliant admits that he went on with the work and did the work in the face of the distinct declaration that he was not to be paid for it.

The items 11, 12, 13, 14, the suppliant was, in my opinion, clearly bound to do to fulfil his contract, and were not extra, but he claims them as such, and that he had a written order to do them as such; but a reference to the letter from the engineer to him, which he claims contains the authority to do the work as extra work, shows the exact opposite. So far from treating or ordering the works as extra they were expressly required to be done by the contractor as part of his contract in these words:

> It is necessary that the following works (reported on by the clerk of works) should be performed by you under your contract for the construction of *Richmond* wharf, and I beg to request that you will lose no time in their execution.

And on the 19th Nov., the engineer writes to *O'Brien:*

> My letter to you on the 10th instant did not specify any payments for items 1 to 4 inclusive, for the reason it forms part of your contract for the construction of the wharf.

As to the item for damage and loss sustained by deficiency in and irregularity of payments, and expense incurred in procuring money elsewhere, the only merit that this claim has, is that of novelty. It has not, in my opinion, the slightest legal foundation, to rest on.

If suppliant's contention could prevail, that the Crown could be bound by verbal communications between himself and the engineer or officers superintending the construction of public works, or that he could, when called upon to do work as work which the engineer, to whose satisfaction under the contract the work was to be done, claimed he was bound to do under his con-

tract and which he would not be allowed for as extra, do the work and afterwards found thereon a legal claim against the Crown for the work so done, would be simply to permit him to repudiate the express provisions of his contract, ignore the authority of the Minister of Public Works and set at defiance all the statutory provisions enacted for the protection of the Crown and the public interest, and would allow, nay encourage, contractors to impose liabilities on the Crown without any authority or sanction recognized by law as competent to bind the Crown.

From the suppliant's own account of these transactions, considered in connection with the statute and the contract, it is, to my mind, abundantly clear that he has established no case to justify this Court in reversing my brother *Fournier's* decision. But it is still clearer when the suppliant's evidence is considered in connection with that on the part of the Crown, all which has been so fully and so satisfactorily referred to in the able judgment of my brother *Fournier*, that it is unnecessary for me to go over it again. In addition to all which, after the work was completed, a final estimate, dated 17th March, 1875, was made out and signed by the engineer, "for work done and materials delivered up to 9th March, 1875, at *Richmond* deep water wharf," specifying the particulars on "contract work" and on "extra work," with a certificate signed by the engineer, that the above estimate is correct; that the *total value* of the work performed and materials furnished by Mr. *Wm. D. O'Brien* up to the 9th March, 1875, is $99,581, and the net amount due $99,581 less previous payments. This estimate is the final estimate of the engineer after the work was performed, and without which, nor till ten days after, the contractor could not claim the final balance as provided for by the contract, and beneath

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which is the following receipt, dated 30th April, 1875, signed by the suppliant:

Received from the Intercolonial Railway, in full of all demands against the Government for works under contract, as follows: *Richmond* deep water wharf works for storage of coal, works for bracing wharf, rebuilding two shore cribs, the sum of $9,681.

I think this receipt was intended to cover, and does cover, as expressed in the engineer's certificate, the total value of work performed and materials furnished by Mr. *Wm. D. O'Brien* up to 9th March, 1875, notwithstanding any secret or open intention of Mr. *O'Brien* to put forward, after receiving this amount, further claims for more extra work than was included in the estimates and certificate.

Under all these circumstances, I have no hesitation in adopting and affirming the conclusions of my brother *Fournier*, which he sums up as follows:

1st. The want of a written authorization in accordance with the terms of the contract to perform the *extra* work; 2nd. The fact that part of the works, for which extra payment is claimed, are works within the terms of the contract; 3rd. that part of the works, alleged to be extra, were rendered necessary on account of the suppliant's negligence and unskilfulness; 4th. That the payment and final settlement, which took place on the 30th April, 1875, comprised all the items of the claims.

It is quite unnecessary to cite any authorities, as the principles of law which govern contracts of this description have been so often and so clearly laid down, and are now so well understood and established. I will merely mention two or three cases in which the observations of several of the learned judges seem peculiarly applicable.

In *Westwood* v. *The Secretary of State for India in Council* (1):

A contract contained a clause that the engineer for the time being should have power to make such additions to or deductions from the

(1) 7 L. T. N. S. 736.

work as he might think proper, and to make such alterations and deviations as he might judge expedient during the progress of the work; * * * * * * and that the value of all such additions, deductions, alterations and deviations should be ascertained and added to or deducted from the amount of the contract price; * * * * * * and further that if any doubt, dispute or difference should arise concerning the work, or relating to the quantity or quality of the materials employed, or as to any additions, alterations, deductions, or deviations made to, in or from the said work, the same should from time to time be referred to and decided by the engineer, whose decision should be final and binding on both parties. * * * * * *

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In an action to recover the amount of certain extra works:

Held: that the ascertainment of the value of the extra works was a condition precedent to the right of the plaintiffs to maintain their action.

Wightman, J.:—

The great question in this case is, whether or no the 11th clause of this contract amounts to a condition precedent. The present case may be limited to the extra works, and the question is, whether there was a condition precedent, that the value of the additions should be ascertained before the plaintiff's are entitled to maintain their * * * * * * Then it is said, that the uncertainty of having the value ascertained renders the provision inoperative. As a preliminary, it seems to me, that the value must be ascertained by agreement between the parties themselves; but supposing they do not agree, there is a provision in the contract that it is to be referred to the decision of the consulting engineer. I think, therefore, that on this point the defendant is entitled to judgment.

In *Sharpe* v. *San Paulo Railway Co.* (1), the head note is as follows:

In this case the engineer of a railway company prepared a specification of the works on a proposed railway, and certain contractors fixed prices to the several items in the specifications, and offered to construct the railway for the sum total of the prices affixed to the items. A contract, under seal, was thereupon made between the contractors and the company, by which the contractors agreed to construct and deliver the railway completed by a certain day at a sum equal to the sum total above mentioned. * * *

(1) L. R. 8 Ch. App. 597.

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The contract contained provisions making the certificate of the engineer conclusive between the parties; and it was provided that all accounts relating to the contract should be submitted to and settled by the engineer, and that his certificate for the ultimate balance should be final and conclusive. * * *

The railway was completed, and the engineer gave his final certificate as to the balance due the contractors. * * *

The contractors filed a bill against the company, making claims on several grounds and praying an account and payment.

Held: That the contractors could not, on mere verbal promises by the engineer, maintain against the company a claim, to be paid sums beyond the sums specified in the contract under seal.

Held: That although the amount of the works to be executed might have been under-stated in the engineer's specification, the contractors could not, under the circumstances, maintain any claim against the company on that ground.

Held: That in the absence of fraud on the part of the engineer, and where his certificate has been made a condition precedent to payment, his certificate must be conclusive between the parties.

In the Exchequer Chamber, the Master of the Rolls allowed the demurrer, and Lord *Romilly*, M. R., said (1):

It is quite clear that the engineer had no power to vary the contract; he had power to give directions to do certain things upon the line within the limits of the contract, and, if the contractors thought that these things were not within the contract, they were not bound to do them. The bill alleged that the contractors had executed certain other works on the faith of the promises and agreements of Mr. *Brunlees;* that the contractors should be paid for those works by the company; but these were merely the inferences and opinions of the contractors on which the Court could not act, and the company certainly never led the contractors to take any such view. * * *

Then, as to the extra works, the mere allegation that the contractors did these things upon certain vague statements of the engineer (*Brunlees*), and the allegation of their own feelings and opinions, and the reasons why they did these things, would not ground an equity by which they would be entitled to come for relief to this court. His Lordship was of opinion that they were bound by the contract, and that the contract was precise and distinct upon this subject, and that unless the plaintiff could show that the company had by some means or other in writing, not necessarily under seal,

(1) See ibid p. 605, note 1.

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clearly and decisively bound themselves, the plaintiffs could not vary the contract, and make a new and substituted contract by reason of any conversations said to have been held with the engineer, which it was obvious, upon the bill itself, he had repudiated, and would not assent to. * * *

The plaintiff had no grounds for relief, because Mr. *Brunlees* had not given the certificates required. In *Kimberly* v. *Dick*, he considered the case very fully, and had held that if persons chose to enter into a contract by which they agreed that they should be paid what a certain engineer or a certain builder should certify is the proper amount, and nothing more, they were bound by that, if they could not show any dishonesty or any fraud or sinister motive. They must be bound by their contract, and they ought to have considered that before they entered into it.

The Master of the Rolls allowed the demurrer.

The plaintiffs appealed, when the decision of the Master of the Rolls was held right, and the appeal refused.

Sir *W. M. James*, L. J. (1):

In this case the contractors undertook to make the railway, not to do certain works; but they undertook to complete the whole line, with everything that was requisite for the purpose of completion, from the beginning to the end; and they undertook to do it for a lump sum, something short of two millions sterling, which was the amount upon which the *Brazilian* Government had undertaken to guarantee the interest.

* * * * * *

The first contract was that the line should be completed for a fixed sum. But the plaintiffs say they are, upon several heads, entitled to a great deal more than that sum. The first head is, that the earthworks were insufficiently calculated, that the engineer had made out that the earthworks were two million and odd cubic yards, whereas they turned out to be four million and odd cubic yards. But that is precisely the thing which they took the chance of.

* * * * * *

The plaintiffs say it is quite clear that this was a miscalculation. But that was a thing the contractors ought to have looked at for themselves. If they did not rely on Mr. *Brunlees'* experience and skill as an engineer, they ought to have looked at the consequences and made out their own calculations.

* * * * * *

(1) Ibid. p. 607.

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The bill says that the original specification was not sufficient to make a complete railway, and that it became obvious that something more would be required to be done in order to make the line. But their business, and what they had contracted to do for a lump sum, was to make the line from terminus to terminus complete, and both these items seem to me to be on the face of them entirely included in the contract. They are not in any sense of the word extra works.

Then it is alleged that the engineer, finding out that this involved more expense than he had calculated upon, promised that he would make other alterations in the line, making a corresponding diminution so as to save the contractors from loss on account of that mistake. And then in the vaguest possible way it is said that all these promises of the engineer were known to and ratified by the company. I am of opinion you cannot in that way alter a contract under seal to do works for a particular sum of money. The plaintiffs cannot say that the company is to give more because the engineer found he had made a mistake and promised he would give more, and the company, verbally, or in some vague way, ratified that promise. To my mind it was a perfectly *nudum pactum*. It is a totally distinct thing from a claim to payment for actual extra works not included in the contract.

* * * * * *

The very object of leaving these things to be settled by an engineer is that you are to have the practical knowledge of the engineer applied to it, and that he, as an independent man, a surveyor, a valuer, an engineer, is to say what is the proper sum to be paid under all the circumstances. That was the agreement between the parties. The contractors relied upon Mr. *Brunlees*, and the Railway Company relied upon Mr. *Brunlees*. That is the ordinary course between such companies and such contractors, and practically it is found to be the only course that is convenient for all parties, and just to all parties. I myself should be very loath to interfere with any such stipulation upon any ground except default or breach of duty on the part of the engineer.

* * * * * *

Sir *G. Mellish*, L. J.:

I am entirely of the same opinion, and I agree with the reasons given by the Lord Justice.

In *Thorne* v. *Mayor of London* (1) the marginal note of which is:

The defendants being about to erect a bridge, an engineer prepared for them at their request certain plans and specifications, both of the

(1) L. R. 9 Exch. 163.

bridge and of the mode in which it would be constructed; the plaintiff on the faith of these plans and specifications, and without any independent inquiry whether the work could be done as specified, entered into a contract with the defendants to do it in accordance with the terms of the plans and specifications. After the plaintiff had incurred great expense, it was found the work could not be executed in the manner specified. The plaintiff sued the defendants on the ground of an implied warranty by them, that the work could be executed in the manner described in the plans and specifications.

Held that no such warranty could be implied.

Kelly, C. B., said (1):

We must beware how we hold, that in contemplation of law people have contracted for something which is not to be found within the written contract to which they have put their hands, or that they must have intended something which they have not declared they intended, and which one of the parties in this case certainly did not contemplate, namely, that the work contracted for could be performed in the time and mode contained in the specification. There is no authority for so holding, and, looking to principle, it appears to me that we should be making a contract for the parties and a different one from that into which they have entered, if we implied this warranty. It is said that the engineer was the agent of the corporation, and must be taken to have contracted for and on behalf of the corporation that the specification was sufficient, and that it was reasonably practicable to execute the work in the mode prescribed; but the contract entered into by the plaintiff was absolute and unconditional, that he would execute these particular works for a certain sum and in a certain time.

And *Amphlett*, B., says (2):

The plaintiff, instead of employing on his own account a competent engineer, made his tender on the footing of the plans and specifications of the engineer of the corporation, who was known to him as an engineer of eminence and reputation. The contractor chose to rely on his well known ability. If there had been any case set up of an attempt to impose on the contractors, this matter would have assumed a different aspect, but nothing of this kind is suggested. The question, which underlies the whole matter, is whether the corporation impliedly contracted that the plans were such as to make the work reasonably practicable. To say that a contractor, who has chosen to rely on the name and reputation of the person employed

(1) Ibid. p. 172. (2) Ibid. p. 175.

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by the other party, when he finds that he should not have done so, can make the principal liable, is going far beyond any case that has been cited.

This case went to the Exchequer Chamber, and the judgment of the Court of Exchequer was affirmed (1):

Blackburn, J., says:

Now, certainly when you have a formal document under seal without a warranty in express terms, we should not be likely to imply a warranty unless there is the clearest reason for it. Mr. *Benjamin* admits that he is unable to find any analogous cases in which a warranty has been implied under circumstances similar to these; and it seems to me that the burden is on the plaintiff to show that a warranty is fairly implied. I may say that, far from seeing any reasons, legally or morally just, from which we should imply it, it seems to me that the convenience and the right of things are all on the other side. As was well expressed by Mr. Baron *Amphlett* on the occasion of the consideration of this case by the court below, the contractor might, if he doubted whether the scheme was practicable, have asked the corporation for an express stipulation, or he might have declined to enter into the contract. He has done neither. He has chosen rather to act on Mr. *Cubitt's* reputation or his own notions as to its being practicable, and has asked for nothing. It seems to me that if we were to introduce a warranty, we should be putting something into the contract, which not only the parties did not put in it, but which they did not intend to put in it, and which if it had been proposed to them, would probably have been refused, or if they had agreed to any at all, it would have been a warranty considerably modifying any provisions as to how the work was to be carried out. Taking that view of it, I agree with what is the substance of the judgment below, that the plaintiff cannot recover on an implied warranty, there being no express warranty in the contract, and consequently the judgment of the court below must be affirmed.

Mellor, J., says:

The contractors were at liberty, if they pleased, to employ their own engineer to see whether or not these plans were such as could be executed, and executed within the time limited. Both of the parties were, I think, on equal terms.

Lush, J., says:

I also concur in the opinion of my learned brothers, that the judgment of the court below ought to be affirmed; and I do so on the short

(3) L. R. 10 Exch. 112.

ground that there is nothing in the contract which shows an intention on the part of the corporation to warrant the efficiency of the mode described of keeping out the water and so enabling the contractors to go on with the work of building up the piers of the bridge. It is admitted that there is no express contract of the kind, and there is nothing whatever, in my opinion, to justify the court in implying any such contract; therefore, to impose such an obligation on the corporation would be to introduce a stipulation into the contract which the parties, either from design or inadvertence, it does not matter which, omitted; and we should, by so doing, introduce a new term into the contract, which the court certainly is not competent to do.

Tharsis Sulphur Coy. v. *M'Elroy* (1):

A contract for the construction of large iron buildings for a lump sum contained a clause that no alterations or additions should be made without a written order from the employer's engineer, and no allegation from the contractors or knowledge of, or acquiesence in, such alterations or additions on the part of the employers, their engineers or inspectors should be accepted or available as equivalent to the certificate of the engineer, or as in any way superseding the necessity of such certificate as the sole warrant for such alterations and additions during the execution of the contract; the contractors alleged it was impossible to cast certain iron trough girders of a specified weight, and subsequently they were allowed to erect girders of a much heavier weight, and the actual weights were entered in the engineers certificate issued from time to time authorizing interim payments. On the completion of the work the contractors claimed a considerable amount in excess of the contract price for the extra weight of metal required. *Held*:—That the engineer's certificates were not written orders, and the claim was therefore excluded by the terms of the contract.

STRONG, J., was of opinion that the judgment of the Exchequer Court should be affirmed, and delivered a written judgment to that effect.

FOURNIER, J., adhered to the judgment delivered by him in the Court below.

HENRY, J.:—

This action was brought by the suppliant by petition to recover payment for extra work alleged to have been

(1) L. R. 3 App. Cases 1040.

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done by him, in connection with two contracts entered into by him for the erection, in the first place, of a wharf at *Richmond, Nova Scotia*, and secondly, for a trellis work thereon for the shipment of coal. He was paid the contract prices for both, and also for some extra work done by him, for which he gave a receipt in full.

One defence set up is that the receipt in question is a discharge in full of all claims and demands, and it would be, if the amount stated in it was received and accepted as the full amount then due the suppliant or claimed by him. The receipt is in these words:

> Received from the Intercolonial Railway, in full of all amounts against the Government *for works under contract as follows: Richmond* deep water wharf, works for storage of coal, work for bracing wharf, re-building two stone cribs, the sum of nine thousand six hundred and eighty one dollars, this 30th day of April, 1875.
>
> (Signed,) WILLIAM D. O'BRIEN.

Preceding this receipt on the same sheet is a full statement of the items for which the suppliant was paid, shewing the amount stated in the receipt as the balance then due him for but four items which do not in any way include or refer to any of the items which form his present demand. The receipt or discharge is for other works than those in question in this suit, and, therefore, inapplicable to those latter items, and no release for them, and the issue raised by the sixth plea that the sum of $9,681 "Was received and accepted by him in full satisfaction and discharge of all demands against Her Majesty in respect of the said works," is not proved, and must, therefore, in my opinion, be adjudged in favor of the suppliant.

The seventh clause of the contract provides for changes or alterations either in the position or details of the work, but no change or alteration whatever was to be made and no extra work whatever to be done: "Without the written authority of the engineer in charge given prior to the execution of such work."

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The contractor, according to the terms of that clause, could only recover for such changes or alterations or extra work as had been so ordered in writing. He would not be bound to make any changes or alterations, or do any extra work, unless ordered in writing.

The evidence on both sides, written and oral, shows that a large amount of the extra work for which the suppliant claims compensation was ordered in writing by the engineer in charge of the works, but he alleged, at the same time, that such work was a part of the contract, and that the compensation therefor was included in the lump sum therein named. The suppliant, however, at the time disagreed to that contention, but, being bound to perform the work so ordered, under the said seventh clause, he notified the engineer that he would perform the work ordered, but only under the terms of that clause.

The ninth clause of the agreement contains a provision that:

> Should any difference of opinion arise as to the construction to be put upon any part of the specifications or plans, the same shall be determined *by the Minister alone*, and such determination shall be final and conclusive and binding upon the parties to this contract, and every of them.

There is nothing in the evidence to show that the question in difference in this respect between the engineer and the suppliant was ever submitted by the engineer for the decision of the Minister, or that he (the Minister) ever made any decision, or, in reference to such work, put any construction on the specifications or plans. That such was not done appears not to have been the fault of the suppliant, for he addressed letters to the Chief Engineer of the Intercolonial Railway (Mr. *Schreiber*), to Mr. *Brydges*, and also to the Minister, protesting against the ruling of the resident engineer, and asking for an investigation and decision, to which

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he received but one answer, and that was from Mr. *Schreiber*, declining to interfere. The work having been ordered in writing, and the Minister failing even to reply to the urgent request of the suppliant to decide the matters in dispute, and the resident engineer having no power to construe judicially the agreement, specifications, or plans, the question is an open one which we are called upon to decide as we best may from the evidence before us, and that, under the circumstances, I think we can legitimately do.

It is admitted on all sides that a great part of the extra work was rendered necessary by the sinking, tilting and upsetting of some of the cribs—caused in a great degree by their foundation being soft and unsustaining, and, as alleged by the suppliant, and, to some extent, admitted by the resident engineer, in consequence of a change made by the latter in the construction of the wharf, and the erection of a raised trellis work and coal-floor, in the building. by which, it is alleged, the connections of the cribs was weakened and unable on one side of the trellis-work to bear the extra weight of the added works. In respect, therefore, of the question of a sustaining foundation—the want of which seems to have created the necessity for the extra expenditure—we must see where the fault lies ; and, in doing so, we must first ascertain what the work was that the suppliant undertook to perform.

It was to build a wharf of certain dimensions, and in such a manner as the specifications and plans showed, and, undoubtedly, on the site and foundation selected by the engineer and pointed out to the suppliant.

Section 4 of the specification, referring to one of the plans, is as follows :

On figure one are laid down *three parallel lines of soundings* taken on west side, centre and east side of wharf, but contractors are re-

quired to verify the same before tendering for the work. As soon as the work is commenced accurate soundings for each crib must be made by the contractor that the *outline of the bottom* may be known previous to their being founded, and provision must be made for the *slope of the ground, by stepping the bottom courses* in the manner shown on the plan, as each crib must be carried up perfectly level.

There is here no provision for a sustaining bottom. It was not the sustaining power of the bottom, but the correctness of the "three parallel lines of soundings" that was to be proved, and contractors were called upon to verify "the same." *The outline* of the *then existing bottom* was, therefore, alone to be verified by the contractors *before tendering*, and "accurate soundings were to be made for each crib and any unevenness in the "*outline of the bottom*" was to be overcome by the "stepping of the cribs." Such, then, is the description of the work the contractor was expected, and contracted to do, and not in any way touching the question of a sustaining bottom. In fact, the contractor was not to alter or change the bottom, but to fit the cribs to it as it then was. If he had been expected to excavate and remove any accumulation of unsustaining matter or to make a sustaining bottom by means of stones thrown down and graded or levelled, or otherwise, the specification would have shown it ; and the agreement would have included a reference to it and compensation for the outlay ; and the schedule of prices for the monthly payments would have included the cost of that artificial sustaining foundation. Such a provision would have nevertheless been to some extent in conflict with the provision to erect the wharf by verifying the "soundings" to the top of the bottom as then existing, and on which the work was to be laid. The contract and specification contain no one expression to sustain the construction that the suppliant was to do anything more than to erect the cribs upon, and step them to suit, the form and shape of the then exist-

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ing bottom. All the documents show he was paid for nothing else, and when a contractor tenders for a work and enters into a contract to perform certain and defined works according to a specification and plans, how can he be expected to perform works not mentioned or included therein, and for which no compensation is provided.

Section 13 of the specification shows conclusively to my mind, that when the tenders were asked for and the contract entered into, the party who prepared the specification, acting for the Minister, fully intended that the cribs should be adapted to and settled upon the then *outline of the bottom*, under the belief it would be sufficiently sustaining, or that at least, if the cribs were stepped to suit the existing bottom, they would settle evenly. It provides that:

> So soon as it is considered by the engineer or officer in charge that a *firm foundation* has been obtained and *the cribs have settled to their proper position*, they will be connected at the top both in a horizontal and transverse direction by three rows of timber, &c.

This shows plainly that it was expected there would be some settling, for which the stepping of the cribs was intended to sufficiently prevent to any great extent and to overcome. From such evidence of facts I can come to no other conclusion than that the suppliant in stepping and sinking the cribs on the then outline of the bottom, did exactly what he had contracted to do. He was bound to do the work: "With such directions as shall be given by the engineer or officer in charge during the progress of the work." It is shown that a man named *William Marshall*, apparently a very competent person, was the officer in constant supervision and direction of the works. The cribs were all made, stepped and sunk by his direction and with his approval. They were so sunk on the *outline of the bottom* then existing, with the exception of

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the removal of some boulders by the suppliant which would have interfered with the proper settling of the cribs on the bottom. The cribs were properly ballasted and sunk, and stepped so as to be level and according to the specification. The work was done to the satisfaction of *Marshall*, and that is all the suppliant contracted to do. Although all this appears satisfactorily by the evidence, it is contended that, because during the progress of the works, after the completion of the cribs, some of them tilted and moved, and one tumbled over in consequence of the soft bottom, the suppliant was bound by fenders, piles, and other means not included in the specification to remedy the damage so as to render the wharf safe for vessels to lie beside and load at it. Under the true construction of the agreement, as far as I have yet referred to it and the work to be done under it, I feel bound to say, that such a conclusion would be wholy inequitable, and I think unwarranted. The suppliant was not only told by the specification to place the cribs where, and in the manner he did place them, but did so by the direction and with the approval of the other contracting party by his agent the officer in charge, as provided by the agreement; and how then can that other contracting party be permitted to transfer the blame of not providing in the contract for a proper sustaining bottom from the engineer who planned the work to the innocent contractor who erected the works according to his contract and to the satisfaction of the officers in charge? How can he be permitted to order the works to be erected on a certain foundation and then complain that his own orders were carried out, when his plans have failed; and to call upon the contractor to bear a heavy loss arising from the fault of his own specification. If I engage a contractor to build a stone wall in a trench a foot deep, and after two-thirds of it is set up and

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accepted and approved, wet weather supervenes, the foundations give way, and the wall topples over or sinks into a bog, could I either equitably or legally require him at his own cost to rebuild or repair it? That position is, in my opinion, identical with that in the present case.

If a party undertakes to perform work in a situation and under circumstances which he subsequently finds impracticable, he is, I admit, liable to the consequences of his failure, unless he has a guarantee from the other contracting party against the existence of the controlling causes of failure. Here the position is different, for when the cribs tilted and got into wrong position, the engineer, instead of leaving the suppliant to fulfil his contract as he best could, relieved him of his responsibility to have them replaced, if he were, under the circumstances, bound to do so, by ordering the execution of other and extra works not provided for in the specification. There was no *agreement* for the *substitution* of the works ordered and claimed as extra by the suppliant. If there had been, the suppliant would have been estopped from claiming compensation. The engineer had the right to order changes and alterations of the details of the works in progress, or any extra works. Those claimed for are clearly not in the shape of changes or alterations, but extra works. When the cribs got tilted or injured, and it was the duty of the suppliant to replace them, the engineer could have required him to do so; and the former could either have done so, or resisted the demand that he should do so. Or the engineer might have waived his replacing them, on condition that he, the suppliant, would perform the extra work as a compromise for not being required to replace them. Nothing of this was done, but the engineer peremptorily ordered the execution of the extra works, as being covered by

and included in the original specification, when such was not the case, and the necessity for which could not have been foreseen or anticipated. If the suppliant failed in his contract, of which I, however, see no evidence, he was legally answerable for the consequences; but I know of no law, and can discover no authority in the contract, to make the engineer judge of the *penalty* for such failure. The suppliant never agreed to perform, at his own cost, the extra labour, and furnish the materials, which became necessary from the giving way of the cribs, but did it, as he protested at the time, under the seventh clause of the agreement. I am therefore of the opinion that he is entitled to recover therefor a sufficient sum to indemnify him for his outlay.

For the first two items of the suppliant's claim he cannot, in my opinion, recover, as he admits he had no orders to do the work charged for.

As to the third item, I have some doubts, owing to the absence of satisfactory scientific evidence, and as I feel unable to say that the specification would have been fulfilled by the use of shorter timbers breaking joints, as provided for in the case of the three large cribs, I do not feel justified in deciding the engineer had not the right, under the specification, to require the lengths insisted upon by him.

As to item four, I have some difficulty, arising from the want of explicit evidence, as to whether the alleged change was really made. From the evidence of the suppliant, I would say it was different from the original agreement for the coal structure, but the plan had not been prepared when the agreement was made. When it was, extra work appeared by it to be necessary, which cost the suppliant $300. I am inclined to think him entitled to it, but, owing to the loose way the verbal contract was entered into, I have some doubt, and therefore do not feel justified in allowing for it.

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For the 5th and 6th items for raising trestle-work, and for timber for the same, I think the suppliant should be paid. The work was duly ordered and became necessary, as the engineer himself admits, in consequence, to a great extent, of the subsiding or canting of the cribs, caused by the soft foundation.

Item 7, I think also, he is entitled to be paid for, as the work was ordered but not included in the specification.

Items 8, 9 and 10 were not required by the specification, and, for the reasons already given, I think the suppliant is entitled to recover for 9 and 10 ordered by the engineer, but not for 8, which work was done by the suppliant himself without any such order.

Items 11, 12 and 13 were not included in the specification, but the work was ordered in writing to be done by the engineer. It was required in consequence of the upsetting or canting of the cribs by the yielding of the foundation, and, for the reasons already given, I think the suppliant is entitled to compensation for the extra work done.

Item 14, for cutting off the projecting ends of logs, although ordered by the engineer to be done, should not, I think, be allowed under the evidence. By the specification the ends of the logs were to be cut off at the distance of eight inches from the connecting notch for the junction with the side timbers, and if they had been so cut I cannot see how they could have been outside of the fenders which were 12 inches outside of the side timbers, and had the cross timbers been so cut they would certainly not only not have required cutting again, but would have been four inches inside of the fenders. All the cutting then to bring the ends of the logs even with the fenders was, in my judgment only pursuing the agreement as stated in the specification, and for which I cannot see the suppliant has any claim for compensation.

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As to item 15, I think the evidence is insufficient to base any claim for damages. It is conflicting, and although delays did take place, and possibly unnecessary in some of the cases, there is shown no legal claim for damages. The payments were to be made monthly as the work proceeded, on the certificate of the engineer, and they were so made; but the suppliant complains the engineer improperly, on some occasions, withheld his certificate. This is denied by the engineer, and reasons are given by him for the delay; but although in one instance they may be considered hardly sufficient, I don't think the withholding of the certificate for a certain time under the circumstances, would warrant a judgment for special damages.

There is one clause of the specification (No. 30) to which I am bound to refer:

> The bulk sum mentioned in the tender must include the entire cost of furnishing all labour, materials, tools and machinery, and every contingency *connected with the work*, and the contractor is to assume all risks and make good, at his own cost, any damage which may result from loss of materials, or otherwise, by storms, or from any other cause whatsoever during the progress of the work, and up to its full and satisfactory completion.

This clause is not specially pleaded as an answer to the suppliant's claims, nor is it in any way alleged that under the sweeping and comprehensive expression therein: "or from any other cause whatever during the progress of the work," the suppliant took upon himself the risk of a sustaining foundation for the cribs—the want of which necessitated the performance of so much extra work. That issue was not raised by the pleadings, and we are, therefore, not called upon to decide it; but, if we were, I would feel bound to say, in addition to the views I have already expressed, that such a defence could not be set up where the cause of the extra work was solely

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to be attributed to the defect in the foundation of the cribs, by their having been placed with the concurrence and by the direction of the engineer, and provided for so plainly and palpably in the specification. The bulk sum mentioned was certainly to include compensation for "*every contingency connected with the work*," but that work was the building of the wharf, as described in the specification, from "the outline of the bottom" then existing, and the "contingency" was limited to *that work*. The contractor was certainly to assume all risks, and make good, at his own cost, any damage which might result from loss of materials or otherwise by storms, and then follow the words "or from any cause whatsoever," but the latter cannot be construed to include the overt acts of the other contracting party, or to vary the true construction of the specification. The "causes" covered by the words in question must, I think, be *ejusdem generis* with the two preceding provisions and within the terms of the contract, as stated and set out in the specification, and within the compass of the work prescribed to be done. The law, as found in the cases cited by my learned Chief, is unquestionable; but, in my opinion, this case is essentially different from any of them.

I think for the reasons given the appeal should be allowed and that a judgment should be entered for the plaintiff for the amount of the items I have enumerated, with costs.

TASCHEREAU, J.:—

I concur in the reasons given by the Chief Justice for dismissing this appeal. I think that the appellant has been paid in full the contract price and all the extras done in pursuance thereof; that for the extras outside of the contract, the appellant has failed to produce a written authorization in accordance with the

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clear terms of section seven of the said contract, and without which he can not claim such extras; and, lastly, that the receipt dated April 30, 1875, by the appellant to the Crown, is a complete bar to appellant's claim.

I am of opinion the appeal should be dismissed.

Appeal dismissed with costs.

Solicitor for appellant: *Robert Motton.*

Solicitors for respondent: *Mowat, Maclennan & Downey.*

JOSEPH HONORÉ CHEVALIER.....APPELLANT;

AND

DAME MARIE A. CUVILLIER *et al*.....RESPONDENTS.

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*Nov. 12.

*Dec. 13.

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

Appeal.—Final judgment.—Judicial proceeding.—42 *Vic.*, *c.* 39, *Secs.* 3 *and* 9.

In an action instituted in the Superior Court of the Province of *Quebec* by the appellant against *M. A. C.* and nine other defendants, the respondents, three of the defendants, severally demurred to the appellant's action, except as regards two lots of land, in which they acknowledged the appellant had an undivided share. The Superior Court sustained the demurrer, and, on appeal, the Court of Queen's Bench for *Lower Canada* (appeal side) affirmed the judgment. The appellant thereupon appealed to the Supreme Court, and moved to quash the appeal on the ground that the Supreme Court had no jurisdiction.

Held,—That as the judgment of the Court of Queen's Bench (the high-

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

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est court of last resort having jurisdiction in the Province) finally determined and put an end to the appeal, which was a judicial proceeding within the meaning of sec. 9 of *The Supreme Court Amendment Act of* 1879, such judgment was one from which an appeal would lie to the Supreme Court of *Canada*; and though an appeal cannot be taken from a court of first instance directly to the Supreme Court until there is a final judgment, yet, whenever a Provincial Court of appeal has jurisdiction, this Court can entertain an appeal from its judgment finally disposing of the appeal, the case being in other respects a proper subject of appeal.

APPEAL from a judgment of the Court of Queen's Bench for the Province of *Quebec* (Appeal side), maintaining the judgment of the Superior Court of the said Province in an action instituted by the appellant against the respondents and others.

By his action, the appellant claimed an account of the *tutelle*, gestion and administration of the property of the late *Marie Francoise Marguerite Cuvillier*, and also demanded that a *partage* be made of all the real estate described in the declaration, in which he claimed to be entitled to an undivided share. The respondents severally demurred to the appellant's action, except as regards two lots of land and in which they acknowledge the appellant has an undivided share.

The Superior Court maintained the demurrers and dismissed the appellant's action, *quoad* the respondents, except as to the two lots in question.

The appellant then appealed to the Court of Queen's Bench, which affirmed the first judgment.

From this judgment the appellant appealed to the Supreme Court of *Canada* and the respondents moved to quash the appeal, upon the ground that the Supreme Court had no jurisdiction.

Mr. *Monk* for respondents:

The judgment appealed from is not a final judgment within the meaning of sec. 3, c. 39, 42 *Vic.* It only decides

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a part of the case, and would not certainly be appealable to the Privy Council. See *Simard* v. *Townshend* (1); and *Lacroix* v. *Moreau* (2). If the judgment of the court below is reversed, the parties will have to go before the Superior Court, and when a final judgment is obtained on the merits of the case, the whole case will come up again. The legislature did not contemplate that there should be two appeals in the same case.

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

My learned friend has failed to show that any remedy would be left to the appellant if this judgment is allowed to stand.

The same provisions as to the right of appeal are to be found in our code, and I was allowed to go to the Court of Queen's Bench, because this judgment was considered a final judgment. As the case now stands my action is dismissed as regards the greater amount I claim, and I am left a remedy for a small amount; suppose I succeed in the Superior Court for this small amount, how can I then appeal from the judgment dismissing my action for the greater, for I would not be supposed to appeal from a judgment in my favor. Under the 9th section of 42 *Vic.*, c. 39, this is a *final* judgment in a judicial proceeding.

Mr. *Monk*, in reply.

The judgment of the court was delivered by

STRONG, J.:

This was a motion to quash an appeal upon the ground that this court has no jurisdiction. The original action was instituted in the Superior Court of the Province of Quebec against ten defendants, three of whom demurred to the declaration. The Superior Court sustained the demurrers. The Plaintiff (the appellant in

(1) 6 L. C. R. 147. (2) 15 L. C. R. 485.

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this court) then appealed to the Court of Queen's Bench, which affirmed the first judgment. From this judgment of the Court of Queen's Bench, the present appeal is taken.

The objection to the appeal is that the judgment appealed against is not a final judgment within the meaning of sec. 9 of *The Supreme Court Amendment Act of* 1879. In support of this contention it is argued that no appeal lies unless there has been a final disposition of the action by the court of first instance, for which sec. 3 of the act first quoted is relied on. That section is in these words, "An appeal shall lie from final judgments only, in actions, suits, causes, matters and other judicial proceedings originally instituted in the Superior Court of the Province of *Quebec*." It must be remarked, that this section does not say that there shall be no appeal unless there has been a final judgment of the Superior Court. The argument of the Counsel for the respondent proceeded on that assumption however. There can be no appeal directly from the Superior Court of the Province of *Quebec*, for sec. 5 of the act of 1879 expressly provides that no appeal shall lie to this Court except from the highest Court of last resort having jurisdiction in the Province. This, as applied to the Province of *Quebec*, means, of course, the Court of Queen's Bench on its appellate side. Then, the appeal is not from the judgment of the Superior Court, but from that of the Court of Queen's Bench; and what we have to determine on this motion is, whether the judgment of the Court of Queen's Bench was a final judgment. The interpretation clause (sec. 9 already referred to) shews plainly that it was, for it enacts that the words "final judgment" shall mean any judgment, rule, order or decision whereby the action, suit, cause, matter, *or other judicial proceeding*, is finally determined and put an end to. Then the judgment of the Court of Queen's Bench

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finally determined and put an end to the appeal, and the appeal was a judicial proceeding within the meaning of this section. The result is, that though an appeal cannot be taken from a Court of first instance directly to this Court until there is a final judgment, yet, wherever a Provincial Court of Appeal has jurisdiction, this Court can entertain an appeal from its judgment finally disposing of the appeal, the case being in other respects a proper subject of appeal. Any other construction of the Act would take a large class of cases subject to appeal to the intermediate Courts out of the provisions of this Act. The present case affords an instance of this, for if the appellant is bound to await the termination of the suit in the Superior Court, his right of appeal *de plano* from the judgment of the Queen's Bench will be gone, and he will only be able to seek a revision of that judgment here by the order of a judge or of the court made by way of granting him an indulgence.

I am of opinion that the motion should be refused.

Motion refused with costs.

Solicitors for appellant: *Doutre, Branchaud & McCord.*

Solicitors for respondents: *Barnard & Monk.*

FRANCIS McCONAGHY *et al*.....APPELLANTS; 1879

AND *Nov. 13.

GEORGE DENMARK.....RESPONDENT. 1880

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO. *April 13.

Trespass—Plea of liberum tenementum—Limitations, Statute of—Possession, title by.

In an action of trespass *quare clausum fregit* for the purpose of trying the title to certain land adjoining the city of *Belleville*, the de-

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

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fendants pleaded not guilty; and 2nd, that at the time of the alleged trespass the said land was the freehold of the defendants, *M. E. McC.* and *L. J. McC.*, and they justified breaking and entering the said close in their own right, and the other defendants as their servants, and by their command.

The case was tried by *Armour*, J., without a jury, and he rendered a verdict for plaintiff with thirty dollars damages. The judgment was set aside by the Court of Common Pleas, and they entered a verdict for the defendants in pursuance of R. S. O. c. 50, sec. 287.

On appeal, the Court of Appeal for *Ontario* reversed this judgment, and restored the verdict as originally found by *Armour*, J. The defendants thereupon appealed to the Supreme Court.

Held: That the appellants (defendants), on whom the onus lay of proving their plea of *liberum tenementum*, had not proved a valid documentary title, or possession for twenty years of that actual, continuous and visible character necessary to give them a title under the Statute of Limitations; therefore plaintiff was entitled to his verdict. (*Henry*, J., dissenting.)

APPEAL from a judgment of the Court of Appeal for *Ontario* restoring a verdict as originally found in favor of respondent (plaintiff.)

This was an action of trespass *quare clausum fregit* brought by the respondent against the appellants. The trespass complained of was the breaking down of a fence erected, or in course of erection, around the said land by the respondent, and the action was brought for the purpose of trying the title to the said lands which comprise fifty acres adjoining the city of *Belleville*.

The pleas were: 1. Not guilty. 2. That at the time of the alleged trespass the said land was the freehold of the defendants, *Mary Elizabeth McConaghy* and *Louisa Jane McConaghy*. 3. "And for a third plea the defendants say that, at the time of the alleged trespass, the said land was the freehold of *Mary Elizabeth McConaghy* and *Louisa Jane McConaghy*, and the defendants *Francis McConaghy*, *Sarah Ann Kennedy* and *Patrick O'Hara*, as the servants, and by the com-

mand of the said *Mary Elizabeth McConaghy* and *Louisa Jane McConaghy*, broke and entered the said close and committed the alleged trespass."

The plaintiff joined issue on the defendants' pleas.

The case was tried at *Belleville* at the autumn assizes of 1878, before the Honorable Mr. Justice *Armour*, who found all the issues for the plaintiff, and entered a verdict for him for $30.

The Court of Common Pleas, composed of *Wilson* C.J., and *Galt*, J., set aside this verdict and entered a verdict for the defendants in pursuance of R. S. O. cap. 50, sec. 287.

From this judgment the respondent appealed to the Court of Appeal for *Ontario*, and the said court allowed the said appeal, and restored the verdict as originally found by Mr. Justice *Armour*.

The question to be decided on this appeal was whether the evidence shewed that the appellants had acquired a title under the Statute of Limitations.

The evidence is reviewed at length in the judgments hereinafter given.

Mr. *Hector Cameron*, Q.C., for appellants:

The plaintiff failed to prove title by possession, as he professed and attempted to do, and should not have been allowed to go into a paper title in rebuttal of defendants' possessory title. See *Doe dem. McKay* v. *Purdy* (1).

The opinion of the Chief Justice of the Common Pleas was that the title was in the Crown, and that defendants' possession was better than plaintiff's. The Court of Appeal declare that our possession was not sufficient and not according to law. I submit that it was, for there is great difference between a man who takes possession under a title and a squatter. In applying the

(1) 6 U. C. Q. B. O. S. 144.

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law to the facts, no weight has been given to defendants' title, and for this reason I contend the judgment of the Court below is erroneous.

Now, the evidence adduced at the trial shows that the defendant, *Francis McConaghy*, and one *Hugh McGuire*, in good faith and for a good and adequate consideration, purchased the south half of lot number one in the second concession of the Township of *Thurlow* from one *Alexander Chisholm*, the heir-at-law of *John Chisholm*, one of the alleged patentees, through whom the respondent professes to claim title to the lands in question, who in the presence and to the knowledge of one *Zwick*, through whom the respondent also professes to claim, was in possession and occupation of the said half lot (100 acres) as early as A.D. 1825, and who in A.D. 1831 conveyed the same, apparently in fee, by deed to them the said *Francis McConaghy* and *Hugh McGuire*. In pursuance of this purchase they went into possession and occupation of the said half lot and cleared and cultivated a part of the same, and continued so to occupy, clear and cultivate until the time of the partition of the said half lot between them, in the year 1832 or 1833, as shown by the evidence, when by the said partition the said *McGuire* was allotted the west 50 acres and the possession thereof, and the said *McConaghy* the east 50 acres and the possession thereof, (which said east 50 acres embrace the lands on which the trespasses complained of by the respondent are alleged to have been committed by the appellants). *Francis McConaghy* in pursuance of the said partition then entered into possession of the said east 50 acres, and from that time continued in uninterrupted peaceable possession of the same until the time of the said alleged trespasses, being a period of over 40 years; and if the prior joint possession of the said *Francis McConaghy* and *Hugh McGuire*, and the possession of the said *Alexander Chis-*

holm were included, the period would be over 50 years, and the said partition, though not shown to have been in writing or by deed, was a good and valid partition. The contract therefore shown by the evidence being proved to have been followed immediately by a survey of the lands, for the purposes of such partition, and a change in the possession by the said *Francis McConaghy* and *Hugh McGuire*, as well as other acts of performance, so that the alleged dispossession of the said *Hugh McGuire*, even if proved, could not affect the title acquired by such length of possession, and possession under these circumstances, even if actual as to part of the lands, is in law deemed a possession of the whole, and this title is shown by the evidence to have been acquired by the appellants *Mary Elizabeth McConaghy* and *Louisa Jane McConaghy*, and to have been in them at the time of the said alleged trespasses, and as they the said *Mary Elizabeth McConaghy* and *Louisa Jane McConaghy* in their defence set up this title and the other appellants, (defendants) in their defence, justified them, and proved such justification, the judgment of the said Court of Common Pleas was correct.

The learned counsel relied also upon the following authorities:

Davis v. *Henderson* (1); *Dundas* v. *Johnston* (2); *Mulholland* v. *Conklin* (3); *McKinnon* v. *Conklin* (4); *Findlay* v. *Peden* (5); *Attorney General* v. *Harris* (6).

Mr. *Henry J. Scott* for respondent:

Mr. Justice *Armour*, who tried the case, found all the issues for the plaintiff. The Court of Common Pleas, under sec. 287 c. 50 Revised Stats. *Ontario*, practically retried the case. I contend that as the learned judge

(1) 29 U. C. Q. B. 344.
(2) 24 U. C. Q. B. 547.
(3) 22 U. C. C. P. 372; 8 U. C. C. P. 325; 19 U. C. C. P. 165.
(4) 13 Grant 152.
(5) 26 U. C. C. P. 483.
(6) 33 U. C. Q. B. 94.

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who tried the case found as a matter of fact that the defendants had not acquired any title by possession, such finding should not have been disturbed by the Court of Common Pleas, which did not see the witnesses and could not judge as to their credibility; nor should the Court disturb the verdict. As to the objection that the judge at the trial should not have allowed the plaintiff to prove a paper title, this objection was not taken in the Court below, and moreover, having taken a verdict in his favor in the Court of Common Pleas, he cannot now say the trial was all wrong. It is too late.

Before coming down to the substantial question between the parties, I will call the attention of the Court to this important fact—that all through these years the acts *Francis McConaghy* proved were only acts of ownership and not of possession, and these acts are stretched over a period of 30 years.

I contend that the defendant *Francis McConaghy* never had such possession of the land as is required to acquire a title under the Statute of Limitations.

In order to oust the legal owner and acquire a title under the statute, the person must be in adverse possession, which has been variously defined to be "an actual occupation and appropriation within some defined boundaries" (1); "that constant visible possession of it which could only be regarded as exclusive possession, and a shutting out of the true owner" (2) "not only an entry on the land, but a visible and notorious continuance of the possession so taken" (3). And all definitions, both in text books and in cases, recognize the fact that the possession must be such as to give notice to the world and the owner of the occupancy, and put him

(1) Angel on Limitations, s. 392.
(2) Per Robinson, C. J., in *Allison* v. *Rednor*, 14 U. C. Q. B. 462.
(3) Per Burton, J. A., in *Kay* v. *Wilson*, 2 Ont. App. R. 136.

to assert his rights if he means to retain them, and that mere occasional acts of trespass do not give a title under the statute as they are not an adverse possession, or in fact any possession at all, and such a doctrine should be enforced more stringently in a new country, where land is continually left unoccupied by the owner.

I am quite prepared to admit that, if the appellants had been in possession under colour of title of any part, they would have the right to claim the whole. But neither the appellants, nor any one through whom they claimed, ever lived on the lot, or on any adjoining land.

The learned counsel then reviewed the evidence and claimed that it was altogether insufficient to establish the fact of the possession of the lands in dispute by the appellant *Francis McConaghy*, so as to give him a title under the Statute of Limitations, even if it stood unquestioned.

Mr. *Cameron*, Q.C., in reply;

This is an appeal from a final judgment of the Court of Appeal in which arises a mixed question of law and fact, and it is open for this Court to review the whole case as the Court of Appeal did. From the evidence it was clearly a case for the jury.

RITCHIE, C. J.:—

This was an action of trespass brought by plaintiff against defendants for entering certain lands of the plaintiff, known as lots Nos. 2, 6, 8, 10, 12, 14, 15, 16 and 17 on a certain plan of lots laid out on lots Nos. 1 and 2 in the second concession of the township of *Thurlow*, in the County of *Hastings*. He claimed one thousand dollars, and also claimed a writ of injunction to restrain the defendants. To this declaration the defendants pleaded, 1st, not guilty; 2nd, That at the time

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of the alleged trespass the said land was the freehold of the appellants, *M. E. McConaghy* and *L. J. McConaghy*; 3rd. That by command of the appellants, *M. E. McConaghy* and *L. J. McConaghy*, the other defendants, as servants, broke and entered the said close and committed the alleged trespass. The plaintiff joined issue on defendants' pleas.

This state of the pleadings threw upon the defendants the burden of shewing that this land at the time of the alleged trespass was the soil and freehold of the defendants, *Mary Elizabeth* and *Louisa Jane McConaghy*. It is not pretended that they produced any valid documentary title vesting this property in them, but they relied upon a title by virtue of the Statute of Limitations. I have gone over the evidence very carefully, and I have not been able to arrive at the conclusion that they have made out such a continuous, open, undisturbed possession of this property as would justify me in saying that the Court of Appeals were wrong in coming to the conclusion that the statutory title had not been made out.

My brother *Gwynne* has kindly permitted me to look at a judgment he has prepared in this case, and he has gone through the evidence so fully, and, to my mind, so satisfactorily, that it would only be an imposition on the patience of the court if I were to deal with the evidence more minutely. I am not prepared to reverse the judgment of the Court of Appeals in this case.

HENRY, J.:

The action in this case is trespass for breaking and entering certain lands of the respondent known as lots numbers two, six, eight, ten, twelve, fourteen, sixteen and seventeen, on a certain plan of lots laid out on lots number one and two, in the second concession of the township of *Thurlow*, in the county of *Hastings*, *Ontario*,

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by *Henry A. F. McLeod*, Provincial Land Surveyor, for the Honorable *John Ross*, duly registered, and known as the "*Lemoine* Lands," and for cutting and breaking down certain fences of the respondent thereon. The writ was issued on the 29th of April, 1878.

The pleas are: 1st. Not guilty. 2nd. Claims title in two of the defendants. 3rd. Claims title in the same defendants, and a justification for the other defendants, as their servants and by their command.

Upon the pleas issue was joined.

The trespasses are proved against all the defendants except *Patrick O'Hara*, and, under the evidence, he was entitled to have had a verdict under the first plea, and is now equally entitled to our judgment. To recover against the others, the respondent must, at the time of the alleged trespass, have been in either the actual or constructive possession of the land upon which the trespasses are alleged to have been committed. Apart from title, he had, it is clear, no possession to sustain the action, unless the entering into the land and house, formerly in possession of some of the defendants, and the putting up of the fences, partly by the materials of the house which he had pulled down, could be called so.

Without title, or some justification, these acts would themselves be trespasses which could give no right of action against *Francis McConaghy* and those claiming under him. To sustain the action therefore, title is necessary to be shown in the land as described in the declaration. The description is not by metes and bounds, but by numbers of lots "known as lots numbers two, six, eight, ten, twelve, fourteen, fifteen, sixteen and seventeen, on a certain plan of lots laid out on lots numbers one and two in the second concession of the township of *Thurlow*, in the county of *Hastings*, by *Henry A. F. McLeod*, Provincial Land Surveyor, for the

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Honorable *John Ross*, and known as the '*Lemoine* Lands.'"

A copy of a plan is in evidence, but it is not in any way proved to be a copy of the plan referred to in the declaration. It is not even signed or certified, or proved in any way as identical with any plan made by the surveyor *McLeod*. The respondent, in order to identify the land described in the declaration with that covered by his title, is bound to locate each. Without some evidence, how could any court or jury decide that the lands marked in the plan is the same as in *McLeod's* plan. This copy is but a sketch, which is useful to illustrate the contents of documents in evidence, but by itself constitutes no proof. No witness was examined who, from knowledge of the locality, was able to say that the land in the sketch was identical with the title produced by the respondent. A particular plan was referred to in the declaration, and under the general denial of the appellants the respondent was bound to show that on the identical piece of land described in the declaration the alleged trespasses were committed, and that his title covered the *locus*. Even should the respondent have shown that his title covers the eastern half of the front of lot one in the second concession, it is not shown that *McLeod's* plan by the particular numbers given it is the same land. Nor do I see how it could have been so shown unless *McLeod's* plan were produced and proved, and evidence given of the necessary identity. It would seem, however, that the plan in evidence was not objected to, and that in the case it is referred to as *McLeod's* plan, showing the sub-divisions of lots 1 and 2 in the second concession.

Admitting, however, that the serious difficulty just mentioned did not exist, has the respondent shown title to the *locus*? He relies upon title from the Crown to himself by two distinct series of con-

veyances, one through a person named *John Chisholm*, the other *Joseph Lemoine*. If the conveyances either way cover the *locus* it is sufficient. The land upon which the respondent alleges the trespasses to have been committed is what is understood as the eastern half of the southern or front part of lot one in the second concession. Let us first see if there was any title shown in the respondent through the grantee *John Chisholm*. The grant to the latter is dated 6th March, 1798. The land conveyed by it is called generally lot 1 in concession 1 and part of lot 1 in the 2nd concession. It is, however, particularly described. The line, beginning at a post in the front marked ½, is to run a course north 16° west, 125 ch. and 25 links, then westwardly parallel to the bank in front to township line; then S. 16° E., 105 ch., 27 links to the Bay of *Quinte*; then easterly along the front to the place of beginning. By the plan and survey of the surveyor *Emerson*, a witness called by the respondent, it is clearly shown that the lines, according to the description in the grant, would not only not include any part of lot 1 in the 2nd concession, but would exclude also a part of lot 1 in the 1st. concession across the lot about 4 chains in depth on the east side and 22 chains on the west. The particular description—controlling the general one—limits the boundaries of the grant. The latter does not therefore cover any part of lot 1 in the 2nd concession. The description in the deed from *Chisholm* to *Zwick* is a copy of that in the grant, and therefore covers no part of lot 1 in the 2nd concession. The title, by that branch of the conveyances, entirely fails.

The first link in the other chain of title is a grant from the Crown to *Joseph Lemoine*, dated 17th May, 1802. The evidence leaves no little obscurity as to the land covered by it. It purports to grant 450 acres, being *the rear parts* of lots numbers 1 and 2 in the 2nd conces-

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sion and lot 18 in the 7th concession. It requires the line for the former to commence at the north eastern angle of certain lands granted *Peter Vanderhyden* in the said lot number 2 second concession, at a distance of 106 chains from the front, thence N. 16 W. to the front line of the third concession; then S. 74 W. 38 chains; then S. 16 E. to certain lands granted *John Chisholm*; then north easterly along the rear boundary of said lands to lot number 2; then N. 74 E., 19 chains to the place of beginning. The position of *Vanderhyden's* north east corner is not shown. The description however places it somewhere in lot number 2 in the 2nd concession. If so, and the lines are run as in the grant, we have this singular fact, that they will surround and include the lands referred to as granted to *Vanderhyden*. If again, the third course of *Lemoine's* grant be taken from the front line of the third concession till it strikes the rear line of *Chisholm's* grant, it will come over the line between concessions 1 and 2 by about 22 chains, and then, running along the rear of *Chisholm's* lot, it will strike the side line between lots 1 and 2 in the first concession about four chains in front of the rear line of the first concession as shown on the plan, and would not, in that case, as directed by the description, come at all to number two in the 2nd concession, and therefore could not, by the course indicated, reach, as required, the point of commencement. By running the course of the side line for about 4 chains, a course not in the grant, it would strike the south west angle of lot number two in the 2nd concession, and by running from that point the course and distance indicated in the grant, it would strike the south east angle of lot number two but not the north east angle of *Vanderhyden's* grant, the point of commencement, as provided by the grant. It would be at least 40 chains south of it. The description is therefore wholly defective. Had it been shown by the

production of the grant to *Vanderhyden*, or otherwise, where his north east corner was, when *Lemoine's* grant was issued, there might have been possibly no difficulty in locating *Lemoine's* grant, but without that, any decision arrived at cannot be the result of conclusions from evidence but from assumptions that may or may not be well founded. It was the duty of the respondent to have given the evidence necessary to locate properly his own grant, upon which his right to recover is based, and if, by not furnishing available evidence, he unnecessarily leaves the location of his grant in doubt or difficulty he must take the consequences.

There is, however, a more serious and controlling difficulty. No conveyance from the grantee *Joseph Lemoine* is shown. He is not identified. In fact he is not in the slightest degree referred to. There is a deed from one *William Lemoine*, who therein is alleged to be the heir at law of *Joseph Lemoine*, late of the town of *Kingston*, deceased.

To establish title in *William Lemoine* some, even if slight, evidence of the identity of *Joseph Lemoine* was, under the circumstances, necessary. Secondly, his death; and, thirdly, that *William Lemoine* was his heir. Without evidence of all three the deed of *William Lemoine* is worthless as a conveyance under the grant to *Joseph Lemoine*. There is, therefore, as I think, no conveyance of title under the deed from *William Lemoine* to Mr. *Ross*, and consequently none transferred through him from the grantee to the respondent.

Turning then to the defence, and the evidence on both sides, we find that in 1831 (46 years before the commencement of this suit) *Francis McConaghy*, one of the defendants, and *Hugh McGuire* purchased for fifty pounds from *Alex. Chisholm*, the son of the grantee, *John Chisholm*, and received from him a deed of the front part (being 100 acres) of lot number 1, in the 2nd concession, of

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which the eastern half part is the land now in dispute. Some years previously *Alexander Chisholm* entered upon the lot—then in a wilderness state—and commenced a clearing by cutting down a piece across the front. *McConaghy* and *McGuire*, on getting the deed, immediately went into possession, cut down and jointly cleared upon the land for two or three years. They then got a surveyor and divided it between them, *McGuire* taking the western and *McConaghy* the eastern half. A line fence was put up between them and each took possession by the survey. They continued to hold possession by the division line then established between them. *McGuire* put up a house on his half and lived on it. He cultivated it and claimed it as his own until 1845, when he sold and conveyed it to *Peter O'Reilly*. The deed shews the sale was intended to convey fifty acres, being what he occupied, but it really covers the whole front of lot 1, and includes the lot now in dispute. In 1848, *Reilly* conveyed all his right to the 100 acres conveyed to him by *McGuire* to *John Ross*. By those two conveyances *Ross* is brought into priority of estate with *McGuire*, and is bound by the same estoppels as he would be. *McConaghy* had been then in possession by the purchase, and the overt act and admission, by the division, of *McGuire*, as sole owner of the east half for 12 or 13 years, and by virtue of the former statute of limitations that possession, as against *McGuire* and those claiming under him, ripened into a title in the year 1852 or 1853. After twenty years *McGuire* would be estopped from disputing the title and possession of *McConaghy*; and those claiming under him would occupy the same position. *McConaghy* was never ousted from the possession, nor did either *Ross* or any one claiming under him ever enter upon the land, except to make a survey in 1852 without the knowledge of *McConaghy*, until the respon-

dent did so in the first place by committing a trespass in taking possession of *McConaghy's* house in the autumn of 1877, and by the destruction of it and putting up a fence round the lot in the spring or summer following. *McConaghy*, under the compact with *McGuire* for the division and occupation of the land, had held it from 1832 or 1833 up to the autumn of 1877—44 or 45 years before respondent entered. The respondent, then, without title otherwise, as I have shown, than through *McGuire*, enters upon the land, commits acts of trespass thereon, claims to be in possession as against *McConaghy* and his assigns, and sues them for knocking down the fence he erected partly out of boards taken from *McConaghy's* house. This position is not taken or claimed by the respondent, but it is the one established by the evidence, and with which we have to deal.

By the pleas, however, the respondent is admitted to be in possession at the time of the alleged trespass, and the defendant under the justification by the plea of *liberum tenementum*, must show a right to enter upon the land and break down the fences.

Had the appellants denied the possession of the respondent, the latter, on the evidence, must have entirely failed; but having depended on the plea of *liberum tenementum* we must now consider if they have proved it.

They claim title under a deed from *Alexander Chisholm* in 1831 to *McGuire* and *McConaghy* of the front one hundred acres of lot one in the second concession, of which the *locus* is the eastern half part. *Chisholm* six years before had entered upon the lot and cut down a part of it in front to make a clearing. The consideration of the deed was £50. They immediately entered into the possession of the lot and commenced making improvements and clearings thereon. In 1832 or 1833

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they employed a surveyor to divide the lot from front to rear. He ran a line between them which they adopted, and ever after held by, *McGuire* taking the west and *McConaghy* the east half. From that time each occupied, according to a line fence put up between their lots on the division line run and established by the surveyor which both agreed to. *McConaghy's* possession was, therefore, under the deed and agreement with *McGuire* by the division, that of owner, and unless disseized by *McGuire*, or some one claiming through him, that possession ripened into a good title against him and them. They became estopped, after the prescribed limitation, from claiming title to or entering upon it. The only title shown in the respondent is through *McGuire*, and he is therefore estopped from disputing *McConaghy's* possession or title. But in the absence of that fatal objection, the title of *McGuire* is through the deed from *Alexander Chisholm* to him and *McConaghy*, and if *McGuire* could convey a title to his fifty acres, surely that of *McConaghy* was, as to his 50 acres, at least as good.

If that question of estoppel had not arisen, what position did the appellants occupy who had a deed of the lot from their father at the time the respondent first entered in 1877? The evidence of the appellants establishes the fact that, for forty-six years from the time *Alexander Chisholm* conveyed the lot until that time, no one but *McConaghy* had entered upon the lot as owner (except the survey made for Mr. *Ross*,) which I will hereafter refer to,) or had in any way possession of it. It is in evidence that every year *McConaghy* and *McGuire* cleared upon the lot and had previously burnt over what *Chisholm* had cut down. In the spring of 1832 they fenced round 20 acres and sowed wheat in the place fenced in. In 1833 they arranged with three men, and got them to cut down about 20 acres more,

Those 20 acres were some years afterwards ploughed and sown. It is also shown that *McConaghy* afterwards by his tenants occupied the lot at different periods, and he swears (and is in no way contradicted) that the line fence put up between him and *McGuire* was always kept up till the year before the suit was tried. It is shown that the whole lot was fenced in the ordinary way for several years. During all that time no one interfered with *McConaghy's* possession. It is true he did not live on the lot, but in the adjacent town of *Belleville*. He was a cooper by trade, and from year to year got firewood and cooper's stuff off it as he required. It is not pretended that any other party was in possession as owner or claimant of the lot at any time during that long period. The first act of possession was by the respondent, who in the autumn of 1877 took possession of a small house put up on the lot by *McConaghy*. This, without title, was simply a trespass for which *McConaghy* might have recovered damages. His next and only act of possession was in tearing down the house, and, with the boards with which it was built and other materials, putting up the fence, the pulling down of which is the trespass complained of. It is true, that the plea of *liberum tenementum* admits such a possession in the respondent as would have enabled him to sustain trespass against a wrong doer, but *McConaghy's* grantees could have maintained trespass against him for his acts in 1877 and 1878. The defective pleading of the appellants, in not contesting the respondent's possession, no doubt alters the nature and form, but not the substance, of the enquiry. Nobody will contend (successfully at all events) that if A buys, pays for, and obtains a deed of a piece of land, goes into immediate possession, clears, crops, improves it, and no one for forty-six years interferes with his manual possession of it, or in any way disturbs him, he would not have a good title against

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all the world, except, it might be, under very peculiar circumstances, the owner, through title derived from the Crown. Such, then, in my matured and well considered judgment, is the position of the appellants who set up title as the defence to this action.

In 1845, *McGuire* conveyed the whole lot of 100 acres, which he and *McConaghy* purchased from *Chisholm*, to *O'Reilly*, and in 1848 *O'Reilly* conveyed the same to *Ross*. In 1852, a judgment in ejectment was recovered on the demise of *Philip Zwick* against *McGuire*, who remained in possession of his fifty acres, and it was called in the record "the front fifty acres of lot number one in the second concession." The action was substantially that of Mr. *Ross*, who brought it in the name of *Lemoine* and *Zwick*. No writ of possession was issued, as *McGuire* became, by a lease for a year from *Ross*, the tenant of the premises, and in that lease the judgment was recited, and the lease was of the same fifty acres. The evidence shows that the front 100 acres was divided by *McGuire* and *McConaghy* from front to rear, making, consequently, two front fifty acre lots. It was the western fifty acres that *McGuire* was in possession of, and for which the action was brought to recover, and which the subsequent lease covered. No possession was attempted to be taken under the judgment of the fifty acres now in dispute, which is shown to have all along been in *McConaghy's* possession. *McGuire* occupied till his death the fifty acres under the lease from *Ross*. Under such circumstances, the recovery against *McGuire*, and his subsequent possession under *Ross*, can have no effect in regard to the possession of *McConaghy* of his lot.

As I before stated, the evidence establishes the fact of *McConaghy's* possession during the long period before mentioned. It is true some witnesses stated they knew the place at different periods, saw *McGuire*

working upon his lot, but saw neither *McConaghy* or any one else working on the eastern lot. There is nothing in this to negative the fact that *Chisholm*, *McGuire* and *McConaghy* cut down and cleared a portion of the 100 acres, and that after the division *McConaghy* yearly cut and carried away the wood and timber until the whole lot was cleared. If *McConaghy* had, like *McGuire*, been a farmer and lived on the lot, as he probably would have done, his possession would have certainly been more palpable and better known, but such was not necessary—his possession was marked by line fences; he yearly exercised acts of ownership over it *animo domini*; he had tenants on it for some years, and his possession and claim by all these circumstances must have been, and no doubt was, well known in the neighborhood. There was some evidence that *McGuire's* son-in-law raised some wheat one year on the east half. The witness who spoke of it seems rather to have known it from what that person told him than from his own observation, but if it even had been so, if done without *McConaghy's* assent, he would have been but a trespasser, and his act would not have disseized *McConaghy*.

The only other point necessary to be noticed is that of prescription.

By section 4 of chapter 108 of the Revised Statutes of *Ontario*, prescription of ten years against grantees who did not enter into possession was not to run until knowledge of the actual possession of another was shown, "but the right to bring an action shall be deemed to have accrued from the time such knowledge was obtained; but no such action shall be brought or entry made after twenty years from the time such possession was taken as aforesaid."

In the application of this legislative provision no reference need be made to the question of the know-

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ledge by the grantees, *Chisholm* or *Lemoine*, or those claiming under them, for, as I have shown, the respondent has traced no title from the Crown through them; but how will it affect him under the title derived through *McGuire*, *OReilly* and others?

The knowledge of either of them for ten years before the suit would be sufficient to bar any right of entry or action. It cannot be pretended that *McGuire* had not such knowledge, for *McConaghy* was in possession by his assent and knowledge, and as to Mr. *Ross*, we have only to consider what took place when he offered the small lots for sale, to conclude that he also had full knowledge of *McConaghy's* possession. After the sale by *Ross*, *McConaghy* posted up public notices dated October 30th, 1863, in which he claimed to be the owner of the 50 acres, alleging he had been in possession of the same by a deed for valuable consideration since 1829, and that he had been in peaceable possession ever since, and threatening to "prosecute all persons found trespassing on said fifty acres or any portion thereof, as Mr. *Ross* never had a claim or right to it." It was shown that in consequence of these notices parties who had purchased declined to complete the purchases, and the sale was abortive. We must conclude therefore from these facts, and what it is otherwise shown Mr. *Ross* was aware of, that he had full knowledge of *McConaghy's* possession and claim of title. That there being more than ten years before the suit, the right of entry or action was barred. But, claiming under *McGuire*, the respondent having no claim through a grantee, the knowledge is not at all necessary to be shown. The prescription without knowledge of another being in possession is, by the clause, limited to twenty years, and certainly the respondent's right was barred, for the right under any circumstances was limited to the latter period.

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I am of opinion the two defendants who have pleaded title have proved their plea, that the other defendants, except *O'Hara*, have established a justification under them, and that *O'Hara* should have judgment under his plea of denial—the whole with costs.

GWYNNE, J.:

This was an action of trespass, *quare clausum fregit*, brought by the respondent against the appellants for breaking and entering the lands of the plaintiff, known as lots numbers two, six, eight, ten, twelve, fourteen, sixteen and seventeen, on a certain plan of lots laid out on lots numbers 1 and 2, in the second concession of the township of *Thurlow*, known as the "*Lemoine* lands," and cutting and breaking down certain fences of the plaintiff's thereon erected, and committing other injuries upon the said lands of the plaintiff.

In this action the defendants have pleaded only: 1st, Not guilty; and 2nd, that at the time of the alleged trespass the said land was the freehold of the defendants, *Mary Elizabeth McConaghy* and *Louisa Jane McConaghy*, and they justified the breaking and entering the said close in their own right, and the other defendants as their servants, and by their command.

The case came down for trial before *Armour*, J., with a jury, when two witnesses having been called, who established the act of entry of some of the defendants, such entry having been effected by the breaking the plaintiff's fence, and a third witness, one *Reuben Jackson*, having been called for the like purpose, namely, to prove the trespass, the defendants' counsel admitted that *Jackson* was there, and that he had assisted to take down the fence in question, at the instance of the defendants.

This admission put an end to all occasion for the plaintiff to give any further evidence, and he accord-

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ingly closed his case and the defendants entered upon their defence, under the plea of *liberum tenementum*.

In the course of the trial of the issue upon the plea, the learned judge, in order to enable the plaintiff to procure the exemplification of letters patent, under which the plaintiff set up title in reply to the evidence of title offered by the defendants, discharged the jury and put the case at the foot of the list, and afterwards took up the case and disposed of it as a case tried by a judge without a jury, under the provisions of the revised statutes of *Ontario*, ch. 50, and he rendered a verdict for the plaintiff, with thirty dollars damages.

The defendants moved for and obtained a rule to shew cause why this verdict should not be set aside and a non-suit or verdict for defendants entered, the latter upon the ground that the verdict was against law and evidence and the weight of evidence. The interposition of the court to enter a verdict upon this latter ground could only be invoked or justified upon the basis that the case was properly tried by the judge without a jury. Yet, in the rule, the defendants also asked to set aside the trial upon the ground that the case was improperly withdrawn from the consideration of the jury, and that the jury was improperly discharged by the learned judge who tried the cause. The Court of Common Pleas was of opinion that the discharge of the jury was an improper act of the learned judge, but that the defendants had waived all objection upon that ground, and they made the rule absolute to enter a verdict for the defendants upon the law and evidence, treating the case as one properly tried by a judge without a jury, in which case the whole action, both on the law and evidence, comes at large before the Court. From this judgment the plaintiff appealed to the Court of Appeal for *Ontario*, which court unanimously reversed the judgment of the Court of Common Pleas,

and restored the verdict in favor of the plaintiff which had been rendered by the learned judge who tried the cause. From this latter judgment an appeal is brought before us by the defendants, in which the sole point which arises is; Did the defendants (upon whom it is clear that the onus lay of proving their plea of *liberum tenementum*) establish that plea by showing a good title to the land in question, which appears to be admitted to be situate upon the south-east or front of lot No. 1 in the 2nd concession of *Thurlow*?

Now this plea admits such possession in the plaintiff as entitles him to recover in trespass against every one except the defendants, who, in right of the freehold estate alleged to be vested in *Mary Elizabeth* and *Louisa Jane McConaghy*, are asserted to have had a right to the immediate possession at the time they made the entry upon the plaintiff's possession which the plea admits (1).

The plea asserts, in fact, such a title as would enable *Mary Elizabeth* and *Louisa Jane McConaghy* to recover as plaintiffs in an action of ejectment, and to evict the plaintiff. The title thus asserted could only be established by showing a good paper title, or such a possession for 20 years as under the statute of limitations would have the effect, not only of barring the title of the true original owner, but of transferring that title by force of the statutes to the defendants *Mary Elizabeth* and *Louisa Jane*, or to some person under whom they claim. In this case the defendants showed no paper title, for although it is true that a memorial was produced of a deed poll, dated the 29th June, 1831, whereby one *Alexander Chisholm* purported to remise, release and quit claim to *Hugh McGuire* and *Francis McConaghy*, their heirs and assigns, the front part of lot No. 1 in the 2nd concession of the township of *Thurlow*,

(1) *Doe* v. *Wright*, 10 Ad. & El. 763; *Ryan* v. *Clark*, 14 Q. B. 71.

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covering the land in question in this suit, and whatever might be the operation of that release as against any person claiming through *Alexander Chisholm*, if he had the fee simple estate in the land at the time of the execution of that release and quit claim, yet it does not appear, that in 1831 *Alexander Chisholm* had any title to, or estate in, the land; indeed, it is admitted now, although the releasees may at the time have believed him to have had title, that, in truth, he had none; and although there was evidence to show, that in 1825 *Alexander Chisholm* had some chopping done on the land, which, however, was never cleared off, yet there was no evidence to show that he ever occupied the lot, or had any possession of it in 1831, or at any time, unless when the chopping was being done in 1825; indeed, the evidence rather shews that he had not, and that he lived in a neighboring township, viz.: *Sydney*, of which he is described in the release. The defendants therefore could shew title in *Mary Elizabeth* and *Louisa Jane McConaghy* only by such a possession under the Statute of Limitations as would be sufficient to have vested the freehold estate of inheritance in them, or in their father, the defendant, *Francis McConaghy*, one of the releasees in the deed of 1831, and from whom, by deed executed in 1876, they claim, and the commencement of such possession can date no further back than the time when *Francis McConaghy* took possession (if ever he did take such possession as enabled the statute to operate) after the execution of the release of 1831.

Now, by a long unbroken chain of decisions extending over a period of upwards of 40 years, it has been held by the courts in *Upper Canada* that the possession which will be necessary to bar the title of the true owner must be an actual, constant, visible occupation by some person or persons (it matters not, whether in

privity with each other in succession or not) to the exclusion of the true owner for the full period of 20 years; and that to transfer the title to the person in possession at the expiration of the 20 years such person must claim privity with the persons preceding him in the possession during the period of 20 years, unless he himself was continuously in such possession during that period. The difference being that, while any person in possession, after the title of the true owner is barred by a possession to his exclusion for 20 years, may defend successfully an action of ejectment brought by the original owner, however short may have been the possession of such defendant, and notwithstanding his want of privity with the persons in possession during the 20 years, yet no one can *recover as plaintiff* in ejectment in virtue of a *title acquired* by possession against the true owner for 20 years under the provisions of the statute, unless he himself alone or *in privity* with others in possession before him had that continous possession which was required *to bar* the true owner; and payment of taxes, or the committing of acts of trespass, by cutting timber from time to time, by a person not in actual, visible possession, will avail nothing towards establishing the possession which the statute requires (1).

The defendant *Francis McConaghy* admits that he never lived upon the land, nor, according to his own showing, does he appear to have entered upon the land (until within the last few years) for any purpose since the year 1835, except from time to time to take some

(1) *Morgan* v. *Simpson*, 5 U. C. Q. B.O. S. 335; *Doe Taylor* v. *Sexton*, 8 U. C. Q. B. 266; *Allison* v. *Rednor*, 14 U. C. Q. B. 462; *Doe Lloyd* v. *Henderson*, 25 U. C. C. P. 256; *Doe Carter* v. *Bernard*, 13 Q. B. 945; *Canada Co.* v. *Douglas*, 27 U. C. C. P. 343; *Clements* v. *Martin*, 21 U. C. C. P. 512; *Doe McDonell* v. *Rattray*, 7 U. C. Q. B. 321; *Doe Shepherd* v. *Bayley*, 10 U. C. Q. B. 320; *Young* v. *Elliott*, 23 U. C. Q. B. 424; *Doe Goody* v. *Carter*, 9 Q. B. 863; *Doe Cuthbertson* v. *McGillis*, 2 U. C. C. P. 124-150; *Randall* v. *Stevens*, 2 El. & B. 641.

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timber off the land, and if we look to the other evidence, which is more to be relied upon than his, there seems good reason to conclude that he did not even enter for that purpose subsequently to 1838 or 1839, or perhaps 1840.

John Mulquin says that he knows the lot, that he has seen *McGuire* and *Zwick* his son-in-law cultivating the lot, and that *Zwick worked across the whole front of it.* Witness saw *McConaghy* putting up a shanty on it *two or three years* ago.

William Dafoe says he knows the lot, that he lived for a long time on a farm a mile from it, that *McGuire* and *Bill Morgan* were in possession of it, that he has had conversations with *McGuire* who claimed to own it, then there was a suit, and afterwards he understood that *McGuire* had given it up to Mr. *Ross* and had taken a lease; he does not recollect ever seeing *McConaghy* there. *McGuire* worked on the south part of the west half, and his son-in-law, *Zwick, worked on the east half.*

Charles Wilkins has lived near the lot since 1844. He says that *McGuire* was in ocupation of *the front part then, and from that time until his death,* (from other evidence he appears to have died 3 or 4 years before the trial of this action). Morgan was on the rear part. Witness never knew of *McConaghy* having been in possession; witness has known *McConaghy* for a great many years, he has bought cooper stuff from witness; but witness never knew him to get timber off the lot.

William Morgan lived at the rear of the lot for 12 years, 25 years ago. During that time *McGuire was in possession of the front*; witness was put on the lot as care-taker for Mr. *Ross. He found McGuire living on the front when witness went to live on the rear.* While witness lived there, *McGuire*, with the assistance of his son-in-law, cultivated *the lot right across the front*, the

south *end of the lot all the way across.* Witness knew *McConaghy*, but witness never saw him at work there, nor did he ever to witness's knowledge get timber there.

Philip Roblin, now 60 years of age, has known the lot ever since he was a boy big enough to know anything. He lived across the road; he says:

> For a long time we did not know that there was any one who owned it but *McGuire.* Then it came out that *Lemoine* owned it; then the Hon. *John Ross.* A man named *Calvert* cleared 15 or 20 acres in the rear, and put in fall grain and fenced it. *McGuire* was the only man I ever saw doing so on the front. *Zwick, McGuire's* son-in-law, worked with *McGuire* on shares. He worked the part that *McGuire* had fenced, and part of the east *all across the front.*

Witness never knew of *McConaghy* chopping on it at any time, nor of his getting timber or cooper's stuff there. Witness has bought rails off the lot from a man there under *Ross.*

Patrick O'Hara, a defendant, has known the lot for 30 years. He did not see any person in possession of the east part. He never saw anybody working on it. It was in the same state as all commons. It was not cultivated. No person was living on the land. Land had been in dispute. Witness never saw *McConaghy* or any one else doing anything on it. *McGuire* had enclosed 10 or 12 acres on the west half. This was a witness called by defendants.

James Maghar, a witness also called by the defendants, says that he has known the property for forty years. That he lived then two lots away from it. He says that he does not know that he ever saw the east half cultivated. "It was," he says, "generally what we used to term a common." He never knew of any person living on the east half. About 30 years ago he understood that *Ross* claimed it.

John Emerson, a surveyor, surveyed the lot, and made a plan of the lot in dispute in 1845, for Mr. *FitzGibbon*,

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who was acting as attorney for *Lemoine*. *Hugh McGuire was in possession of the front at that time.* He does not recollect anybody else. He was on the lot several times, and he knew that *McGuire* was there all the time. He never saw any one else there except *McGuire*. Witness was a witness in the suit of *Lemoine* v. *McGuire*, for which suit the survey was made, and it was after that trial he says that the war began between the Hon. *John Ross* and *McGuire*.

From this evidence, it is apparent that at this time, in 1845, when *Emerson* entered in right of *Lemoine*, who claimed to be seized of the land, and made his survey, there was no one then having any possession which, consistently with the authorities cited, could have ever matured into a title, by virtue of the Statute of Limitations, unless it was *McGuire*, and *his* possession lacked, in so far as appears in evidence, the first essential element to have enabled *it* to have ever matured into a title; for there is no evidence that the grantee of the Crown, his heirs or assigns, their servants or agents, *had ever taken actual possession by residing upon or cultivating any portion of it*, and it does sufficiently appear that when *McGuire* and *Francis McConaghy* entered in 1831, the land was in a state of nature. It was necessary, therefore, for *McGuire*, or any person claiming in privity with him, in order to acquire and establish a title to the land in virtue of 20 years' possession, as the first step, to shew that the grantee of the Crown, or some person claiming under him, while entitled to the land, had knowledge that it was in the actual possession of *McGuire*, or of some person in privity with him, and until such knowledge should be brought home to the person entitled to the land under the grantee of the Crown the statute would not begin to run. Of such knowledge there was no evidence whatever, so that even if *Mary Elizabeth*

and *Louisa Jane McConaghy* had claimed in privity with *McGuire*, which they do not, they failed to show any title.

But further, it appears by Mr. *Bell's* evidence, who proves a lease executed by the Hon. Mr. *Ross* and *McGuire* in March, 1852, that an action of ejectment, which had been brought against *McGuire* at the suit of *John Doe* on the several demises of *William Lemoine* and *Philip Zwick* for the whole of the front 50 acres of this lot No. 1 and so including the land for trespass upon which this action is brought, had then recently been determined by a judgment in favor of the plaintiff upon the demise of *Philip Zwick*, and that a writ of possession having been issued to give effect to that judgment, *McGuire* surrendered possession to *Ross*, who had purchased all the title of *Lemoine* and of *Zwick* in the whole lot, and who thereupon executed a lease of the said front 50 acres for a year, at a rent of £7 10s., to *McGuire*, who entered thereunder, and who continued in possession thenceforth as tenant of *Ross* and his assigns, the owners of the property up to *McGuire's* death, which occurred three or four years ago, and that until his death *McGuire* retained the possession as such tenant, looking after the property and protecting it from trespass and injury in lieu of rent, and that, in fact, during such possession, Mr. *Bell*, upon the information of *McGuire*, prosecuted *Francis McConaghy*, and had him fined for trespassing on the lot and removing gravel.

From *McConaghy's* own evidence, it appears that he was aware of this action of ejectment having been brought, and from all the evidence it is apparent, that when it was brought *McConaghy* was not, nor during its pendency was he, in visible, actual occupation of the land for which it was brought, or of any part of it. The bringing of the action against the only person against whom it could be brought, namely, the person

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in actual, visible occupation, broke the continuity of any possession, if any there was, which could have matured into a title, and from the moment that *McGuire* accepted the lease from *Ross* and entered thereunder, such his entry was the entry of *Ross*, and his possession was the possession of *Ross* and of his assigns who, therefore, by *McGuire*, their tenant, have been ever since, as the evidence shows, in possession until *McGuire's* death ; the title therefore of any person claiming title by possession must commence in virtue of a possession actual and visible taken to the exclusion of *Ross* and his assigns while *McGuire* was in possession under them or since his death (1).

Now, title is shown in *Ross* and his assigns by conveyances from *Lemoine* and *Zwick*, the lessors of the plaintiff in the ejectment suit, one or other of whom was seized of the land under Letters Patent from the Crown, if ever the land has been granted by the Crown. The learned Chief Justice of the Common Pleas seems to have doubted whether the description in either of the Letters Patent to *Lemoine* or to *John Chisholm*, in virtue of which letters *Zwick* claimed, was sufficient to cover the land in dispute, although he thought there was no doubt that the Letters Patent to *Chisholm* were intended to cover the land ; but if this doubt be well founded, it will be no better for the defendants, because, if the land has not been granted by the Crown, it is plain that the freehold title, (in assertion of which the defendants justify the trespass which they admit,) was never vested in *Mary Elizabeth* and *Louisa Jane McConaghy*, and upon the trial of the issue joined upon this plea of *liberum tenementum* (if not in them) the defendants must fail upon this record, in whomsoever the title is, for the plaintiff, being in possession, was entitled to retain that

(1) *Randall* v. *Stevens*, 2 El. & B. 641; *Clements* v. *Martin*, 21 U. C. C. P. 512; *Canada Co.* v. *Douglass*, 27 U. C. C. P. 343.

possession against all the world, except against the person having title. The notice published Oct. 30th, 1863, was spoken of as a piece of evidence supporting *Francis McConaghy's* alleged title by possession, but it is plain it can have no such effect. The notice purports to be signed by *James McConaghy*. Who he is does not appear. But not to object upon that ground, and assuming it to be signed by *Francis McConaghy* himself, it could make no difference, for in 1863, it is clear that *Ross* was in actual possession, and that he was exercising very marked acts of actual ownership. He had the land surveyed into town lots, with streets laid down across it, and was offering those lots for sale, and it was to interfere with his sales, that the notice was published. At the time, then, of its being published *McConaghy*, as a fact, was not in actual possession, and by the notice what he claimed was that constructive possession and right to possession, which is incident to the title which he set up, namely: "by deed for valuable consideration from the nominee "of the Crown since the year 1829."

That he had no such title is clear, and upon the whole evidence the learned judge who tried the case could not with any propriety have rendered any verdict other than in favor of the plaintiff.

The appeal therefore must be dismissed with costs.

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

Appeal dismissed with costs.

Solicitor for Appellants: *M. A. Dixon.*

Solicitor for Respondent: *W. H. Ponton.*

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*Oct. 29.

STEPHEN D. OAKES.....APPELLANT;

AND

THE CITY OF HALIFAX.....RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Award—Final judgment—Power of attorneys to enlarge time for making award—Appeal, additional ground on.

In an action on contract, the matters in difference were, by rule of court, by and with the consent of the parties, submitted to arbitration. By the rule of reference the award was directed to be made on or before the 1st May, 1877, or such further or ulterior day as the arbitrators might endorse from time to time on the order. The time for making the award was extended by the arbitrators till the 1st of September, 1877. On the 31st August, 1877, the attorneys for plaintiff and defendants, by consent in writing endorsed on the rule of reference, extended the time for making the award till the 8th September. On the 7th September the arbitrators made their award in favor of the plaintiff for the sum of $5,001.42, in full settlement of all matters in difference in the cause.

Held—reversing the judgment of the Supreme Court of *Nova Scotia*—that where the parties, through their respective attorneys in the action, consent to extend the time for making an award under a rule of reference, such consent does not operate as a new submission, but is an enlargement of the time under the rule and a continuation to the extended period of the authority of the arbitrators, and therefore an award made within the extended period is an award made under the rule of reference, and is valid and binding on the parties.

2. That the fact of one of the parties being a municipal corporation makes no difference.

3. That in *Nova Scotia*, where the rule *nisi* to set aside an award specifies certain grounds of objection, and no new grounds are added by way of amendment in the court below, no other ground of objection to the award can be raised on appeal.

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

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APPEAL from the judgment of the Supreme Court of *Nova Scotia* pronounced on the 31st day of March, A. D. 1879, setting aside an award made in favor of the appellant.

The suit was brought by the appellant against the respondents on a contract for the construction of certain sewers across the north common in the city of *Halifax*. After the cause was at issue, by a rule of the Supreme Court, the matters in difference were referred to two arbitrators named in the rule, with power to select a third arbitrator in case of a difference between them. The arbitrators named appointed a third.

The award was to have been made on or before the 1st day of May, 1877, or such further or ulterior day as the arbitrators, or any two of them, might endorse from time to time on the order. The arbitrators first extended the rule to 1st July, 1877, and then to 1st September, 1877. On the 31st August, 1877, by consent in writing endorsed on the rule of reference, the attorneys for plaintiff and attorney for the defendants, who is by statute the Recorder of the city, and as such is bound to act as counsel and attorney for the city in any suits within the Provincial Courts, to which the corporation is a party, extended the time to the 8th of September.

On the 7th of September, the following award was made:

"*Halifax*, SS. Supreme Court.

"*Stephen D. Oakes*, plaintiff, v. *The city of Halifax*, defendants.

"We have heard the parties and their witnesses and fully considered the matters referred to us under the annexed rule made in this cause on the 28th day of December, A.D., 1876, and the endorsements thereon, and we do award and order that the city of *Halifax*, defendants herein, do pay the plaintiff the sum of five thousand and one dollars and forty-two cents ($5,001.42),

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in full settlement of all matters in difference in this cause.

"In making this award we have disallowed an item of $1,727.00 in the defendants set off, alleged to have been paid *J. B. Neilly & Co.*, as we considered that it was not a matter of set off against the plaintiff in this suit, or payment on the contract to a person authorized to receive it.

"*Halifax*, 7th September, 1877.

"Fees for 29 meetings, $400.00.

"(Signed) B. G. GRAY,
"(Signed) J. N. RITCHIE,
"(Signed) ROBERT SEDGEWICK,
} Arbitrators."

A rule *nisi* was subsequently obtained by the respondents from a judge in chambers returnable before the court *in banco* to set aside the rule of reference and the award on a great number of grounds, the following grounds being chiefly relied upon, viz:—

"17. Because the said award was not made until after the first day of September now last past, and the time for making said award expired on the first day of September.

"18. Because no extension of the time for making the award was made by said arbitrators, or any two of them extending beyond the first day of September, A.D. 1877, and said award was not made until after that day, to wit: on the seventh day of September aforesaid."

After argument of the said rule *nisi* the Supreme Court of *Nova Scotia* (*Weatherbe*, J., dissenting,) set aside the award.

From the rule setting aside the award, the appellant appealed to the Supreme Court of *Canada*, and the respondent there moved to quash the appeal on the ground that the court had no jurisdiction to entertain the appeal, because the rule appealed from was not a final judgment within the meaning of the Supreme and Exchequer Court Act. This motion was rejected.

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

There are two grounds only on which this award was set aside, viz.: That there was not a valid enlargement of the time for the arbitrators to make their award, and that there was no valid waiver by defendants' counsel as to certain irregularities in the conduct of the arbitrators. It is true that the last enlargement was made by the attorneys in the cause, but this is sufficient. See ch. 109, sec. 19, of the Rev. Stat. *N. S*, 4th series. But independently of this statute, the enlargement was valid. Instead of being a nullity, it was a continuance of the former submission, an enlargement by a higher authority than that of the arbitrators—the authority from which alone the arbitrators obtained their power—the parties themselves, acting through their attorneys.

[The CHIEF JUSTICE:—We will hear what Mr. *Gormully* says on this point.]

Mr. *Gormully*, for respondents:

The parties here are not, I think, to be governed by sec. 19, of ch. 109, of the Rev. Stat. of *Nova Scotia*, just cited, but by the 1st sec. of that Act. The reference in this case was by rule of court, and, being a delegated authority, it must be construed strictly. The enlargement could only be made by the two arbitrators in a particular manner. They properly made an enlargement until the 1st of September. They did not make their award, however, till the 7th September. It is true the parties, through their attorneys, enlarged the time to the 8th of September. This enlargement was not in pursuance of the rule of reference. If anything, it amounted to a new submission, and, if so, the attorney on the record, representing a municipal corporation, could not, as such attorney, and by virtue of his retainer only, bind such corporation by a new submission, not in a suit.

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Then there is another point, whether the award is valid on the face of it,

[The CHIEF JUSTICE:—Was this point raised in the Court below? if not, it cannot be raised on appeal.]

No, my lord, but that objection is open, because it appears on the face of the award. This fact was before the Court below, and this is merely a new argument on the fact.

The award in this case does not find specifically on each issue. By the law of *Nova Scotia* the costs of each issue are borne by the party against whom such issue is found. This award does not so dispose of the issues as to enable the Court to tax the costs.

Mr. *Cockburn*, Q. C., was not called upon to reply.

RITCHIE, C. J.:

We all think this appeal should be allowed. The last point suggested by counsel for the respondent I do not think is open. In the first place, I do not think, as at present advised, that the award is bad on the face of it. We should read this award, as it ought to be read, as the language of persons to whom this matter has been referred should be read, that is, reasonably, by principles and rules which ought to guide us in construing language in the ordinary transactions of life. They have directed the sum awarded to be paid in full settlement of all matters in difference. The reasonable inference is that they took into consideration all matters in difference. They could not have done that without considering all the issues in the cause, and in doing that and awarding as they did, they must have found for the plaintiff upon all those issues. They found nothing in favor of the defendant at all, and as to one issue—the plea of set-off—they explained that they had not allowed it, because they did not think it was a matter of set-off against the plaintiff. In such a

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case as this, where the rule was taken out on a certain number of points submitted for the consideration of the court and argued before the court below on those points, and where no application was made to that court to alter the rule, so as to allow other grounds to be put forward, as is necessary in the *Nova Scotia* Supreme Court, I think it is too late now to raise an entirely new point here and make this court as it were a court of original jurisdiction.

As to the extension of time, it appears to me that this was a proper continuation of the original submission.

I do not think any sufficient ground is shewn for setting aside the award, and I think, therefore the appeal must be allowed with costs.

FOURNIER, J., concurred.

HENRY, J.:

I have looked through the pleas, and I cannot find any of them that is not answered by the statement made in the award. It covers every single one of them, and I can see no difficulty at all in saying that the arbitrators found for the plaintiff on every issue that was raised in the trial. The rules in regard to corporations appearing by an attorney, I think, in a case like this, are the same as if the attorney appeared for an individual. I consider that the attorneys for the corporation had by law the full authority of the corporation to refer this matter to arbitration, in the first place without consulting them at all; and in the next place, the same power to extend the time; and, although there is a provision in the rule of reference giving the arbitrators power to extend it, it does not interfere with the inherent right of the attorneys to extend the time independently of it. In these rules of reference under the common law, it is not strictly speak-

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ing, the action of the court. In order to keep the cause in court and enable the court to have jurisdiction either to set aside the verdict, or confirm it and enter judgment upon it, it is necessary that it should have the sanction of the court; but it is virtually, to all intents and purposes, a mere agreement between the parties to refer the case to arbitration. I think, therefore, that the attorneys, having the original power, had the power afterwards to extend the time independently of what is stated in the rule. The other is an extra power given to the arbitrators to extend the time, whether both parties are willing or not, and to that extent, it takes away from either party the power to say the time for making the award shall not be extended. That is the object of the provision, and that is accomplished up to September 1st, whether the parties like it or not; but one or two days before that time arrives the attorneys, fully authorized, as I think they were, extended the time. I think that binds the principals of both parties, and the extension of time in question is no ground for setting aside this award. In regard to the rule *nisi* on the order of a judge out of court, I may say that I am not at all satisfied that any judge has the power to interfere in that way in a case of that kind. I know that in *Nova Scotia* the practice has been that the judges, in place of making any order in the matter of an award, or taking any affidavits, have refused them, and given instead an order to stay proceedings, until the parties could have an opportunity of applying to the full court to set it aside. This case appears to have been different. This plaintiff had not an opportunity of an argument before the full court before this rule *nisi* was granted by a single judge. I think neither the rule of reference appointing the arbitrators, nor their award, as I understand the practice in *England*, and the power of a judge in chambers

there, can be controlled by a judge sitting at chambers; nor do I think that a judge in *Nova Scotia* can grant an order returnable before the whole court, except where he has power to decide the whole case itself. Entertaining these views, I certainly concur in saying that this appeal should be allowed, and that the plaintiff in this action should have judgment for the amount of his award.

TASCHEREAU, J., concurred.

GWYNNE, J.:—

We have no right, neither had the court below, to enter into this case upon the merits. We have nothing, therefore, to do with the facts, and I must say it seems strange to me that an award which the court setting it aside pronounced to be unimpeachable on the face of it, and made by a court of arbitrators, which the chairman of the Board of Works, the member of the corporation most conversant with the matter, admitted to be composed of gentlemen most eminently competent to decide the matters in difference, should be set aside upon a technical point, such as that of the power of the attornies to extend the time. I am of opinion that the parties represented by attornies had, by their attornies, power to extend the time for making the award, and that their doing so was only an extension of the time under the old submission, and not a new submission.

It would, I think, have been a matter much to be regretted, if the Court had come to the conclusion that this case had not been appealable. In a matter in which the court below should set aside an award for some cause which may be said to come within the exercise of their discretion, a right of appeal might be well questioned, but here the court has proceeded wholly upon what they pronounced to be a point of law, viz.;

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that an extension of the time by the attornies was null and void.

Appeal allowed with costs.

Gwynne, J.

Solicitor for appellant: *J. S. D. Thompson.*

Solicitor for respondents: *William Sutherland.*

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*June 16, 17.

*Dec. 13.

C. J. McCUAIG AND E. B. SMITH.....APPELLANTS;

AND

DAVID SMITH KEITH .....RESPONDENT.

ON APPEAL FROM THE MARITIME COURT OF ONTARIO.

Appeal involving questions of fact—Discretion of Judge, on appeal not in general interfered with—40 Vic., ch. 21, *Constitutionality of.*

Held,—Where a disputed fact, involving nautical questions, is raised by an appeal from the judgment of the Maritime Court of *Ontario*, as in the case of a collision, the Supreme Court will not reverse the decree of the Judge of the court below, merely upon a balance of testimony.

2. That 40 *Vic.*, ch. 21, establishing a court of maritime jurisdiction for the Province of *Ontario*, is *intra vires* of the Dominion Parliament.

APPEAL from a decree of the Maritime Court of *Ontario*, in a case of damage, instituted by the owners of the steamer *Southern Belle* against the steamer *Picton*, the owners intervening.

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

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The case on behalf of the plaintiffs in the Maritime Court was, that the *Southern Belle* was, on the 12th day of August, 1878, in the Port *Dalhousie*, lying at the wharf, waiting for a full cargo of passengers, on an excursion trip to *Toronto*; that the *Picton* was lying at the same wharf, with her bows in under the port quarters of the *Southern Belle*; that the *Belle*, having received her cargo, was heavily laden, and employed the tug *H. Neelon* to hitch on her prow and draw her head away from the wharf, so as to bring her into her course, heading towards Lake *Ontario*; and when the *Southern Belle* was about broadside on to the *Picton*, the *Picton* cast off her ropes and, putting on steam, ran stem on into the starboard side of the *Southern Belle*, amidships, and broke in her wheel-house, beside doing her other damage.

The contention of the defendant was, that the *Southern Belle* was negligently and improperly towed upon the bow of the *Picton*, thus hemming the latter boat in and hindering her freedom of motion; that when a collision was imminent the *Southern Belle* was being towed towards the prow of the *Picton*, and in fact ran into the *Picton*; that the *Picton* had not completed her "winding," and though she had been moving in the course of her "winding," and though at the moment of the collision the stern line was not actually fastened to the dock, the *Picton* had then no appreciable forward motion and was not further from the dock than she properly might be in the process of "winding;" that it was the duty of the *Southern Belle* to have waited till the *Picton* (as the boat nearest the lake) had gone out of the basin, or to have seen and considered the position of the *Picton*; and to have kept out of her way by moving nearer to the western pier in crossing the *Picton's* bow; and that the *Southern Belle*, by using her own engines, might have moved ahead and avoided a collision, while

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the *Picton* was helpless, being unable to move ahead without running into the *Southern Belle*, and unable to move astern without endangering her steering gear by backing against the dock.

The defendants also claimed the benefit of the Merchants' Shipping Act, and the statutes in force in the Province of *Ontario*, respecting the navigation of Canadian waters.

The case came on for hearing on the 5th and 6th of February, 1879, before his Honor the Judge of the Maritime Court and two assessors.

At the close of the plaintiff's case, the defendants submitted that the plaintiff had not proved—

1. That the *Picton* was to blame. 2. That the *Belle* was not to blame.

That the case came within Article fourteen of 31 *Vic.*, ch. 58, and the *Belle*, not having got out of the way of the *Picton*, must be deemed to be in default, unless she showed circumstances justifying a departure from the rules, which the evidence did not disclose, and therefore that the plaintiff could not recover.

These objections were overruled.

At the close of the whole case, the assessors reported:

1. That the stern of the *Belle*, being lapped over the bow of the *Picton*, it was proper that the *Belle* should leave first.

2. That the *Belle* left the dock in the tow of the tug to wind her, and prudence required the *Picton* to remain until the *Belle* was in a position to proceed down the piers.

3. That the apparent mismanagement on the part of the *Belle* in parting her towline on the stern, did not appear to them to be a direct cause of the disaster, and the *Belle* was not to blame.

4. That they considered the direct cause of the disaster was the *Picton* hauling aboard her stern line, while

proceeding in the direction of the *Belle*, and not taking due precaution to reverse her engine before the vessels came into collision, seeing that there was a space of from thirty to fifty feet between the stern of the *Picton* and the east pier. 1879 THE PICTON.

The learned judge's views coincided with those of the assessors, and he gave judgment in favor of the plaintiffs, referring it to the Registrar to take an account of the damage and reserving further directions and costs.

From this judgment the defendants appealed to the Supreme Court of *Canada*.

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

The first point I will raise is, whether the constitution of the Maritime Court was illegal and *ultra vires* of the Parliament of the Dominion of *Canada*. This is a Dominion Court established to execute Dominion laws in the Province of *Ontario*. If the power exists under sub-section 2 of section 91, which gives the Dominion Parliament power to legislate about *trade and commerce*, then it would be competent for the Dominion to create a court which would have exclusive jurisdiction over subject matters, which are now tried by our provincial courts. If it is a Dominion Court, its jurisdiction should not be limited to one province.

[THE CHIEF JUSTICE:—If there is one subject-matter over which the Dominion parliament has legislative authority, it is this. There is nothing to prevent the parliament from limiting the territorial jurisdiction of a Dominion Court. You might as well contend that the Exchequer Court Act is *ultra vires*, because some parts are only applicable to one province. I do not think this is an arguable point.]

The learned counsel then argued on the facts, that the Maritime Court should have found that the *Southern*

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Belle was not free from blame, and that, at most, the damages should be divided.

The *Southern Belle* having violated Art. 14 of the Rules of Navigation, and the plaintiff having failed to show circumstances justifying a deviation from Art. 14, the plaintiff is not entitled to recover any damages, even though the *Picton* should be also considered to blame in respect to the collision. See 31 *V.*, c. 58, s. 6; The *Palestine* (1); The *Arabian* and the *Alma* (2); The *Ada* (3).

Mr. *John E. Rose* for respondent:

The issues are two: Was the *Picton* to blame? the burthen of proof on that issue being on the *Southern Belle*. Was the *Southern Belle* to blame? the burthen of proof on that issue being on the *Picton*. The *Oceano* (4).

The appellants are wrong in their contention that the plaintiff must prove that the *Belle* was not to blame.

It appeared at the trial that the assessors, in addition to their nautical knowledge, had the advantage of a personal practical knowledge of the port, and a decree founded on their opinion on credibility of witnesses will not be reversed by a court of appeal unassisted by nautical asssessors. The *Sisters* (5).

RITCHIE, C. J.:—

I think the evidence fully justifies the conclusion at which the assessors and the learned judge of the court below arrived, and that there is no ground whatever for disturbing the decision of the court. I think the evidence satisfactorily establishes, in view of the relative positions of the *Southern Belle* and the *Picton*, and of the *Southern Belle* having been the first to leave the

(1) 13 W. R. 111.
(2) Stuart, 72.
(3) 28 L. T. N. S. 825.
(4) L. R. 3 P. Div. 62.
(5) 3 Asp. R. N. S. 124.

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wharf, as the assessors found it was proper she should do, placed as she was with her stern overlapping the bow of the *Picton*, that the *Picton* should not have started so soon as she did, but should have waited a few minutes, the very trifling length of time necessary to have enabled the *Southern Belle* to get clear off, and also that the stern line of the *Picton* should not have been let go as it was by orders from the *Picton*, and that the engines should have been reversed before the collision took place, as the evidence shows might have been done in the space between the stern of the *Picton* and the piers.

The *Picton*, being to blame in these particulars, in my opinion, caused the collision, and I cannot discover from the evidence that the *Southern Belle* in any way, by any misconduct or negligence on her part, contributed to the accident, and consequently the *Picton* cannot escape the consequences of her misconduct.

Had the evidence, in our opinion, raised doubt on all or any of these points, it would not have been proper under the authorities for this court to have interfered with the finding of the court.

As this is the first case of the kind that has been before us, it may be as well to cite some authorities as to the duty of an appellate court in dealing with cases of this description.

In *Moore* v. *Clucas* (1), on the counsel remarking: "The case of *Baboo Ulruck Sing* v. *Beny Persad* (2), relied upon by the appellant, is a strong authority in our favor, as it shows this court will not reverse a finding of the court below upon a pure question of fact," Mr. Baron *Parke* says:

> The appellant must show that the judgment is wrong. We never reverse unless we are satisfied that the judgment is clearly wrong. *Khoorshed-jee Manik-jee* v. *Mehrwan-jee Khoorshed-jee* (3).

(1) 7 Moo. P. C. 352. (2) 2 Knapp's P. C. C. 265.
(3) 1 Moo. Ind. Ap. Cas. 442.

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In *Bland* v. *Ross* (the "*Julia*") (1), the Privy Council held that where a disputed fact, involving nautical questions, is raised by an appeal from the Admiralty Court, as in the case of a collision, the Privy Council would not reverse the decree appealed from, unless conclusively satisfied that the decree is wrong, though the Court may entertain doubts as to the finding of the Admiralty Court; and at pages 235, 236 and 237 the reasons for this rule are given at length, in order, as the court say,

> That the vexation and expense of hopeless appeals may, as far as possible, be avoided, by parties being made aware of the difficulties which the appellants must have to encounter when the merits depend upon the differing opinions of nautical men.

And in the case of the "*Araxes*" and the "*Black Prince*" (2), the principles laid down in the case of the "*Julia*" were confirmed in these words;

> In order to reverse the judgment we must be satisfied it is founded on some mistake either on the law or the facts of the case. It is useless to repeat the observations which we made in the case of the "*Julia*."

In *Dean* v. *Mark*, the "*Constitution*" (3), the Court says:

> We laid down in the case of the "*Julia*" (4), in the year 1861, the rules by which we must be guided.

And again in the case of the "*Alice*" (5), the law laid down in the case of the "*Julia*" is followed in these words:

> But, in the opinion of their Lordships, the principal point upon which we should rest our decision is this, that following the doctrine laid down in the case of the "*Julia*," we should be most unwilling to come to a conclusion different from that of the Judge of the Court below merely upon a balance of testimony.

See also *Gray* v. *Turnbull* (6) in which Lord *Chelmsford* says:

(1) 14 Moo. P. C. 210.
(2) 15 Moo. P. C. 122.
(3) 2 Moo. P. C. N. S. 461.
(4) 14 Moo. P. C. Cas. 235.
(5) L. R. 2 P. C. 252.
(6) L. R. 2 Sc. App. Cases 53.

If there is to be an appeal on questions of fact (and I regret that there should be such) I think that this principle should be firmly adhered to, namely, that we must call upon the party appealing to show us irresistibly that the opinion of the Judges on the question of fact was not only wrong, but entirely erroneous. 1879 THE PICTOU. Ritchie, C.J.

If this principle is so uniformly acted on in the Privy Council, where they have the benefit of the assistance which they receive from the able marine officers who are ordered to attend the Privy Council in cases of this description, how much more is it the duty of this court to be in like manner governed where we have no such assistance.

As to the constitutional question which has been suggested in reference to the court: the 40 *Vic.*, ch. 21, which establishes a Court of Maritime Jurisdiction in the Province of *Ontario*, and gives to all persons the like rights and remedies in all matters (including cases of contract and tort, and proceedings *in rem* and *in personam*) arising out of or connected with navigation, shipping, trade or commerce on any river &c., of which the whole or part is in the Province of *Ontario*, as such persons would have in any existing British Vice-Admiralty Court, if the process of such court extended to the said Province, the *British North America* Act, sec. 91, gives to the Dominion parliament the exclusive legislative authority over these several subjects, and also power to establish courts for the better administration of the laws of *Canada*. I have not heard a word that in my opinion casts the slightest doubt on the validity of this act.

STRONG and FOURNIER, J. J., concurred.

HENRY, J.:—

The appeal in this case is from a decree of the Maritime Court of *Ontario*, in a case brought by the respondent to recover damages, alleged to have been caused by a collision of the steamer *Southern Belle*, of which he

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was owner, with the steamer *Picton*, by proceedings *in rem* against the last mentioned steamer, but in which the appellants intervened as owners.

By the decree the fact of the collision is found, and the damage to the *Southern Belle* ascertained. It is founded on the report of two assessors, according to which the *Picton* was found in fault and the *Southern Belle* not in fault, and that to the improper management of the *Picton* the collision and consequent damage to the *Southern Belle* was due. The learned judge confirmed the report and the court decreed "that the appellants were liable to the respondent for all damages which he sustained by reason of the collision," with an order for reference to the registrar to inquire and state the amount of the damages. On the part of the appellants it is contended that "the judge did not exercise his own judgment upon the law and the facts ; but decided the case wholly upon the opinion of the assessors." I cannot agree with that contention. The evidence was before him, and we are, I think, bound to conclude that he fully considered it. When the report of the assessors was made it had to be disposed of—in one of two ways—either by adopting or rejecting it. To decide, he had to consider the evidence, and the decree is evidence that he concurred in the views of the assessors. It cannot, I think, be fairly contended that he did not exercise his own judgment. The objection, therefore, in that form cannot be successfully taken.

The real question is : does the evidence sufficiently sustain the report and decree ? The former was made by two gentlemen who, from the fact of their selection alone, in the absence of anything to the contrary, we may conclude to have been competent to consider and decide upon the nautical questions involved, and to occupy such a position as to efficiency as would entitle their report to respect and consideration. I

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think that to reject their report, confirmed, as I view it, by the court, we must be fully convinced the weight of evidence was largely the other way, or that the proved facts laid no foundation in law for a claim to recover damages.

I have read and considered the evidence and so far from being of the opinion that the report and decree are against the weight of evidence I think the opposite, and that it fully justifies both. That the *Picton* had any right to cast off, and, instead of following the course taken in turning by the *Southern Belle*, run straight for her when only a few yards distant, was justified in doing so, is a conclusion that, I think, few disinterested persons would arrive at. The principle of law in such cases is, that even when one party has got into a wrong position, and that another using ordinary care can avoid a collision, but does not use that ordinary care, he is answerable for damages consequent on his negligent conduct. I do not consider, however, that the *Southern Belle* was negligently or illegally in the position she occupied at the time of the collision. She had started on her voyage in a manner she had the legal right to do, and it was the duty of the *Picton* to have waited till she could do the same thing without the necessity (which is set up here as a defence) of running into the steamer ahead of her, or to have followed her course when turning.

I have considered the objection to the jurisdiction, but have been unable to discover any reason to doubt that the act establishing the court was *intra vires*.

I think the appeal should be dismissed and a judgment entered to sustain the decree with costs.

GWYNNE, J.:—

The asssesors who sat in this case with the learned

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Judge of the Maritime Court have, in their finding, expressed their opinion upon the facts involved in this enquiry to be: That the *Southern Belle* having left her dock in tow of a tug to wind her out, the *Picton* should have remained at the dock where she was until the *Belle* was in a position to proceed down the piers, and that the direct cause of the disaster was, the *Picton* hauling aboard her stern line while proceeding in the direction of the *Southern Belle*, and not taking due precaution to reverse the engine before the vessels came into collision, seeing there was a space of from 30 to 50 feet from the stern of the *Picton* and the east pier.

In this finding the learned Judge of the Maritime Court has entirely concurred. Sitting as a Court of Appeal, we should be satisfied beyond all doubt of the incorrectness of this finding before we should reverse it. But, in view of the circumstances of the case, I can not say that I see anything in the evidence to justify a rational doubt as to the correctness of the finding. It can scarcely, I think, have been seriously expected that reasonable men should have adopted the view urged by the defendants, namely, that it was not the *Picton* which ran stem on to the midships of the *Belle*, but the *Belle* which had come down broadside on to the stem of the *Picton*; neither do the circumstances of the case warrant (as was contended for by the defendants) the application of the 14th article of sec. 2 of 31st *Vic.*, c. 58. No one can, I think, read the evidence without perceiving that the object of the captain of the *Picton* was to get out of the harbor ahead of the *Belle*, although the latter had started first, and that to attain this object he swung round on the stern of the *Picton* at the dock where she was, instead of following, as he could without any danger, the course taken by the *Belle*; and the evidence leads, I think, fairly to the conclusion, that, failing to effect his object as he had

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designed, whether from the breaking of his swing rope, or for some other cause, he most recklessly and negligently gave the order to advance instead of to back, to which cause, I think, most justly the collision is to be attributed. It was contended also that if the *Belle* had gone ahead with her engines when she saw the *Picton* coming on to her she might have avoided the collision, and that by not doing so she was herself partly to blame; but the evidence fails to satisfy my mind that by going ahead at that critical moment she could have avoided the collision. Some of the evidence upon that point is to the effect, that if she had gone ahead (if she could have done so, being then in tow), the consequence would have been that the collision would have occurred in a manner which would have occasioned greater damage to her. However, the giving a wrong order, or the omission to give one by the execution of which the collision might have been avoided, by a person in the excitement of impending and imminent peril, cannot be imputed by the person who brings the other into such peril for the purpose of shifting a portion of the blame of the ensuing collision from the party who had brought the other into the peril and of attributing to the party so injured a portion of the blame attending the injury, and this has recently been decided in *England* in two cases—the "*Bywell Castle*" (1) and the "*Khedive*" (2).

I think, therefore, that the appeal should be dismissed.

Appeal dismissed with costs.

Solicitors for appellants: *Mowat, Maclennan & Downey.*

Solicitors for respondent: *Rose, McDonald, Merritt & Blackstock.*

(1) L. R. 4 Pro. Div. 219. (2) Weekly Notes, Aug. 2d, 1879, p. 150.

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*March 13.

JAMES McQUEEN.....APPELLANT;

AND

THE PHŒNIX MUTUAL FIRE INSURANCE COMPANY..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Insurance—Trust Assignment—Conditions of Policy—Notice to Agent—Loss Payable to Creditors—Right of Action.

The appellant, being indebted to certain persons and desiring to have his stock of goods insured, applied to the agents of respondents for insurance to the amount of $2,000 for three months, "loss if any to be payable to his creditors of whom *G. McK.* is one and *McM. & Co.* are second." An interim receipt was issued by the company, dated 19th November, 1877, which stated the insurance to be subject to the conditions contained in and endorsed upon the printed form of policy in use by the company, one of which conditions (No. 4) stated, that if the property insured should be assigned without a written permission endorsed on the policy by an agent of the company duly authorized for such purpose, the policy should be void.

On the 28th November the appellant transferred the insured property to the said *G. McK.*, in trust for his creditors, the balance, if any, to be payable to himself. The agent of the company was notified of this transfer and assented to it, stating that no notice to the company was necessary, the policy being made payable to the creditors. The property was destroyed by fire on the 15th January, 1878. The policy sued upon was dated the 12th December, 1877, but was not delivered until the morning after the fire. By it the loss was made "payable to *G. McK.* and *McM. & Co.*, and others as creditors, as their interests may appear." After the fire the Inspector of the company wrote twice to *McK.* calling for proof of loss.

Held,—Reversing the judgment of the Court of Appeal for *Ontario*—that the notice of the trust assignment to the company's agent

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

was sufficient, that the company must be considered as having assented to such assignment and to have executed the policy with full knowledge of it; and that such assignment was not one contemplated by the condition on the policy.

2. That the words "loss payable, if any, to *G. McK.*, &c.," operated to enable the respondents, in fulfilment of that covenant, to pay the parties named; but as they had not paid them, and the policy expressly stated the appellant to be the person with whom the contract and the respondents' covenant was made, the action for a breach of that covenant was properly brought by him alone.

APPEAL from a judgment of the Court of Appeal for *Ontario* (1), reversing a judgment of the Court of Common Pleas (2).

The facts of the case are sufficiently stated in the head note and judgments hereinafter given.

Mr. *Mowat*, Q. C., for appellant.

It is important, in this case, to consider carefully the terms and the object of the assignment and the circumstances under which it was executed by the insured. Clearly the object of the assignment was not, and the effect of it is not, to divest the appellant of all interest in the goods, but as the evidence of both *McKenzie* and *McQueen* shows, to enable the appellant to dispose of the goods and to apply the proceeds towards paying the appellant's creditors, the very men to whom the policy is made payable, the appellant still retaining an interest in the goods.

Then also by the terms of the application the loss is made payable to "*George McKenzie* and *McMaster & Co.*" only. The policy is made payable to "*George McKenzie*, *McMaster & Co.*, and others, creditors" of the appellant. The trust assignment makes the proceeds of the goods payable to all the creditors of the appellant, exactly in the terms of the policy, thus largely extending the number of payees mentioned in the

(1) 4 Ont. App. R. 289. (2) 29 U. C. C. P. 511.

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application and in this respect differing materially from the application. From this circumstance alone the appellant contends that it is clear that, between the date of the trust assignment on the 28th November, 1877, and the date of the policy 12th December, 1877, the respondents must have had notice of the trust assignment, else how does it come that the payees in the trust assignment and the policy are identical, and both differ from the payees in the application.

Moreover, with full knowledge of this assignment, at latest in the month of January, 1878, the respondents call on the appellant for proof of loss. *Peck*, the Inspector of respondents, sent *McKenzie* a postal card; and again, on the 13th February, 1878, and by direction of the manager wrote a letter, both communications calling for proof of the loss—and all this long after the manager had full knowledge of the assignment, "knowledge" before the date of policy as appellant contends, or at all events "knowledge" before calling on appellant for proof of loss, as the manager in his evidence admits.

Another answer to the argument founded upon the execution of this trust deed is this, when the assignment was made the interim receipt was the only contract between the parties, the policy had not issued, the defendants were not bound to issue it at all. The appellant is not shown to have had any notice of the conditions. No evidence to show that condition 4 was one of the conditions on policies issued by respondents at the date of the interim receipt. The appellant should not be bound by conditions not made known to him, and not shown to be one of the conditions in respondent's policy when insurance effected. *Fourdrinier* v. *Hartford Fire Ins. Co.* (1). And the respondents, having held the policy until after the fire, dispensed with the

(1) 15 U. C. C. P. at p. 414.

necessity of endorsing the assignment on the policy. Appellant could not have this done, and it was not necessary that it should be done. Where an endorsement is required to be on a policy that assumes the issue of a policy. *Parsons* v. *Citizens Insurance Co.* (1). The want of this interest is one of the two grounds on which the Court of Appeal reversed the judgment of the Common Pleas.

If during the currency of the policy the insured transferred his interest in the goods, but *before* the loss he regains it, the policy will not be void. Here the appellant transferred the goods to pay his creditors, reserving to himself the residue after paying such creditors; before the loss these creditors were paid, and whatever goods remained revested in appellant. *Crozier* v. *Phœnix Ins. Co.* (2).

The words "*aliened* by sale" in condition 4 mean an *absolute* and *unconditional sale*, in which no interest is reserved to vendor. Here an interest is reserved in the trust deed to vendor, and he, therefore, had an interest in the property at the time of loss. *Sands* v. *Standard Ins. Co.* (3) and the cases there cited. See also *Hardcastle* on Statutes (4).

And I may add also that condition No. 4 only refers to alienations made after the policy was *issued.* Here the policy is dated on the 12th Dec., 1877, but not issued to appellant until after the fire, while the alleged alienation was on the 28th Nov., 1877. The condition says: "In case any property be alienated by sale, &c., the policy shall be void," clearly implying the existence of a policy prior to the act of alienation. The condition does not say that the insurance in existence at the time of change of owner-

(1) 43 U. C. Q. B. at p: 279.
(2) 2 Hannay 200.
(3) 26 Grant 113.
(4) P. 243.

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ship under an interim receipt shall be void, but only when policy issued.

We have also express decisions by American courts that an assignment for benefit of creditors does not avoid a policy unless the assignment is of such a character as to deprive the debtor of all interest in a loss. *Lazarus* v. *The Commonwealth Ins. Co.* (1).

We also contend the evidence shows that the agent of the company had notice of the assignment. And notice to the agent is sufficient. *Rowe* v. *The London & L. F. Ins. Co.* (2).

And in any event, if the respondent's agent led the appellant to believe that notice of the assignment to the company was unnecessary, the company cannot now take advantage of the want of notice to them or of non-compliance with condition 4. *Beebee* v. *The Hartford Insurance Co.* (3), referred to in *Herbert* v. *Mechanics F. Ins. Co.* (4).

Here the agent had express notice of the assignment, and when told to notify the respondent, said "Notice to company not necessary," and when the agent thus misleads the insured, and tells him not to do a thing called for by the condition, the company is bound by the act of the agent. *Hastings M. F. Ins. Co.* v. *Shannon* (5); *Gore D. M. F. Ins. Co.* v. *Samo.* (6).

Finally I submit that *R. S. of O.* ch.161, sec.43, leaves it optional with the company to pay claims which are void under, and to waive objections mentioned in, sec. 41, which covers condition 4. Here the company by calling for proof of loss waived the objection now relied on, and did not exercise their option by cancelling the policy when made aware of the assignment. *Smith* v. *Commercial Union Ins. Co.* (7).

(1) 3 Pick. 76.
(2) 12 Grant 311.
(3) 25 Conn. 51.
(4) 43 U. C. Q. B. at 392.
(5) 2 Can. S. C. R. 394 at 408, 409 and cases there cited.
(6) 2 Can. S. C. R. 411, 425, 426.
(7) 33 U. C. Q. B. 82.

The learned counsel also referred to *Richards* v. *Liv. & London Ins. Co.* (1); *Hutchinson* v. *Wright* (2).

Mr. Foster for respondents:

The appellant sues upon the policy issued by the respondents, with its conditions, as a perfect and complete contract. The thirty days insurance effected by the interim receipt had expired prior to the date of the policy and the occurrence of the loss.

If the statements in the application are correct, they form continuing representations upon which the policy issued, and form the basis of the respondents' liability. Now, at the time of the application, there was no idea of an assignment, such as was made on the 29th Nov., 1877. The policy is the only contract upon which the appellant can succeed, and this policy includes the conditions upon which we rely, and upon a breach of which the learned Chief Justice found a verdict for the respondents. See *Pim* v. *Reid* (3); *Sillem* v. *Thornton* (4).

We contend that the conditions avoid the policy, for at the time of the loss the appellant had ceased to be the owner of the property insured, and the insurance had been rendered null by the alienation. *Dadman Manufacturing Co.* v. *Worcester* (5); *Kanady* v. *Gore District Mut. Ins. Co.* (6). Nor can it be open to the appellant to rely upon the interim contract, as he has not declared upon it. But in any event the interim contract was by its terms subject "to all the conditions, rules and regulations contained in and endorsed upon the printed form of policy, in use by the company," and, if relied upon by the plaintiff, became void under the conditions mentioned. *Grant* v. *Reliance M. F. Ins. Co.* (7); *Hatton* v. *Beacon Ins. Co.* (8).

(1) 25 U. C. Q. B. 400.
(2) 25 Beav. 453.
(3) 6 Man. & Gr. 1.
(4) 3 El. & B. 881.
(5) 11 Met. Mass. 429.
(6) 44 U. C. Q. B. 261.
(7) 44 U. C. Q. B. 229.
(8) 16 U. C. Q. B. 316.

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Then as to what took place between the agent and the insured, it is immaterial, as notice to the local agent of the respondents cannot bind them, because when the local agent had transmitted the application to the head office of the respondents he was *functus officio.* To bind the respondents, notice to the chief agent, or the board of directors, was requisite. *Billington* v. *The Provincial Insurance Company* (1); *Stringham* v. *National Ins. Co.* (2).

As to waiver by respondents. The policy of insurance and the conditions of the policy date from the day on which the application was signed, and to make out a case of waiver it must be proved the agent had power to waive a statutory condition. The alienation was without the knowledge, assent, permission, or ratification of the defendants, their directors, secretary, or duly authorized agent. There was no written endorsement of, or valid, authorized assent to, the alienation, or to a waiver of the conditions of the insurance: *Hawke* v. *Niagara District*, (3); *Mason* v. *Hartford* (4); *Hendrickson* v. *The Queen* (5); *McCrae* v. *Waterloo County M. F. Ins. Co.* (6); *Shannon* v. *Gore District M. F. Ins. Co.* (7); *Xenos* v. *Wickman* (8). There was no transfer of the insurance to the alienee.

Mr. *Mowat*, Q.C., in reply:

Sillem v. *Thornton* was overruled by *Thompson* v. *Hopper* (9) on the point relied on by respondent Moreover the variation relied upon does not apply to a cash policy, for the very words used in the whole clause show they are only applicable to a mutual policy. This company had power to issue cash policies and this was a policy of that character.

(1) 2 Ont. App. R. 158.
(2) 42 N. Y. R. 280.
(3) 23 Grant 148.
(4) 37 U. C. Q. B. 437.
(5) 31 U. C. Q. B. 549.
(6) 1 Ont. App. Rep. 218.
(7) 2 Ont. App. R. 396.
(8) L. R. 2 H. L. 296.
(9) El. B. & El. 1038.

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RITCHIE, C. J. :—

The plaintiff, being indebted to certain persons, and desiring to have his stock of goods insured, applied to defendants' agent for insurance to the amount of $2,000 for three months. "Loss, if any, to be paid to his creditors, of whom *George McKenzie*, of *Wingham*, is one, and *McMaster & Co.*, of *Toronto*, are second." Whereupon the said agent granted to plaintiff an interim receipt in these words :—

INTERIM RECEIPT.

PHŒNIX MUTUAL FIRE INSURANCE COMPANY—HEAD OFFICE, TORONTO.

Provisional Receipt No. 9. *Agent's Office*, 19*th November*, 1877.

Received from *James McQueen* (Post Office), *Wingham*, twenty-two dollars, being the premium for an insurance to the extent of $2,000 on the property described in his application of this date, numbered 9, subject, however, to the approval of the Board of Directors in *Toronto*, and it is hereby declared that the property so described shall be held insured for thirty days from this date, or until notice be given that the proposal is declined, but the insurance hereby made is subject to all the conditions, rules and regulations contained in, and endorsed upon the printed form of policy in use by the Company at the date hereof.

Cash received, $18.50.

THOMAS HOLMES.

N. B.—In the event of the above insurance not being completed, an equivalent portion of the premium now paid will be retained for the period during which the company has been upon the risk.

R. J. W. M.

On the 28th November the plaintiff, by deed, transferred, *inter alia*, the property so insured, to the said *McKenzie*, in trust to sell the said property, and out of the proceeds thereof, in the first place, to pay all costs, &c., connected with the trust, and in the second place, to pay the creditors of the plaintiff named in the schedule annexed, including the claims of *McKenzie* (they being all creditors of plaintiff) in proportion to their respective claims, and in the third place to pay the balance of such proceeds (if any) to the plaintiff.

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McKenzie and *Holmes*, defendants' agent, and plaintiff, give this account of the transaction:

McKenzie's examination resumed—We went to *Holmes'* office and made application to have an insurance effected on the goods of *McQueen*; that was on the 13th November It was to the amount of $4,000.00. *Holmes* said on that occasion he would put it in the *Western Assurance Company*; he asked how long we wished to insure, and then wanted to know the reason why we only wanted it for three months; we told him *McQueen* intended to run the goods off, and at the end of three months he would insure for a less amount. Then the application was made; and, shortly after, *Holmes* called me in, and told me the *Western* had accepted $2,000.00, and he was going to put the other $2,000.00 in the *Phœnix*; he stated he had filled up a policy. Mr. *Holmes* filled in the application. That is *Holmes'* writing; the loss is made payable to *McMaster* and me. *Holmes* filled it up, knowing that *McQueen* had called a meeting of creditors on the 12th November, and that the creditors insisted the goods should be insured; the agent of *McMaster* insisted upon the goods being insured, and if *McQueen* had not done it he would have done it himself. We were the largest creditors, and it was made payable to us. Nothing was said about the assignment at that time. That is, I think, about the sum and substance of it; that the creditors insisted upon having the insurance put on for their security. The application was drawn out first on the *Western*, on the 18th November, and this application on the 10th. Up to the making of this application nothing was said about an assignment; from the time of the application to the *Western* to the date of the application to the *Phœnix*, nothing was said. When we made the application to the *Western*, it was said the creditors were to get the loss; and it was still understood in putting it in the *Phœnix* that the payment was to be the same. I cannot say whether the interim receipt was given that day or not. From the time of the application until the time the trust deed was given Mr. *McQueen* went on carrying on the business—up to the 28th November. I went to Mr. *Holmes'* office two or three times—cannot say when, to a day—before the deed was made, and I told Mr. *Holmes* that Mr. *McQueen* wanted to make the assignment for the benefit of his creditors; wanted this, as the creditors, some of them, were crowding him. It was intended to make the assignment to myself, in order to not go into the regular system of assignment, to save expense. I asked *Holmes* if he could fill a document of that kind, and he advised me to go to you—Mr. *Cameron*. I asked *Holmes* on that occasion if it was necessary to notify the Insurance Company of this proposed assignment, and as I understood

him, he said no, as the policy was payable to us, it was not necessary to notify them. I went to him twice on that business. One time I wished him to notify the Company, and afterwards I told him of the agreement; on which occasion I told him, I cannot say. I came to you. It was in pursuance of that arrangement I got the document prepared. When I got the document prepared, I went to *Holmes* and told him I had got the thing arranged; that there was an agreement drawn up between *McQueen* and myself, with the consent of some of the creditors. I told *Holmes* about it, and spoke to him about the insurance again. Either on one occasion or the other I wished him to write to the Company and tell them what had been done; he told me on one occasion there was no necessity, as the policy was payable to the creditors—and I, being one, it was not necessary. *McQueen* was not insolvent; if he had been, this arrangement would never have been made. After the deed was signed, I went into the shop and sold goods. *McQueen* continued there all the while; he continued business the same as before, until the fire. I managed, and my son was the principal one. He was a clerk there and was employed by *McQueen*. *McQueen* was carrying on business all the time. There was no change whatever in the mode of carrying on the business—only I took charge of the cash; they counted the cash to me, and I took charge of it. We pushed the business a little harder and tried to dispose of the goods. I got the policy from *Holmes*. I got it on the morning after the fire. I did not get the policy until after the fire. The policy was not handed over to either *McQueen* or myself until after the fire—the morning after the fire. I knew nothing of the terms of the policy whatever. Neither the application or the policy were read by me or to me by any one. If the amount of the policy is paid there will be over $900.00 coming to *McQueen*; that is, if he succeeds in this suit, there will be over $900.00 coming to him. This is after payment of all his debts.

Cross-Examined—I am the person who gave instructions for this suit. I managed this throughout under the power of Attorney annexed to the deed, and another power of Attorney was given at the time of the fire for the purpose of collecting this loss. We did not intend at the time we made application to keep up the stock. Both *McQueen* and I intended to reduce the stock. This was in order to satisfy the creditors. It was not arranged what was to be done afterwards. There was no amount fixed to reduce it; we intended to reduce it as much as we could in order to satisfy the pushing creditors. Mr. *McQueen's* lease continued for three years. We had no idea of the assignment at the time we made the application; we intended to reduce the stock. The agent ought to have known what

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was necessary. The amount of stock, if it had been properly taken at that time, would be $7,000.00. At the time the insurance was effected, Mr. *Holmes* was told to insure it for three months, and that the reason of the short date policy being asked for was that we intended to reduce the stock; that they did not wish to pay insurance on a larger stock than they were carrying. That they intended to reduce the stock, and then insure on the smaller stock. I have now got the claims of most of the other creditors—nine-tenths of them. I purchased some of them at a shave. I have got about the same amount of interest as Mr. *McQueen*. There was some cash on hand at the time of the fire. I have got a larger interest than Mr. *McQueen*; it is close on a thousand dollars. There is not much difference between us. I did not see the policy in the hands of *Holmes* before the fire. I did not ask for it. I did not know he had that one. I knew he had the *Western*. I thought it necessary to notify the Company of the transfer. I thought the agent was the proper party to notify. I was not often in Toronto at that time.

Thomas Holmes—I am the agent of the *Phœnix* at *Wingham*. I knew *McQueen* and *Mackenzie*. I think Mr. *Mackenzie* spoke to me first about the insurance. The application was made to the *Western* first. I think both *McQueen* and *Mackenzie* were present then. Subsequently an insurance was effected in the *Phœnix* for $2,000.00. Mr. *Mackenzie* said to me, when the *Western* would not take the whole, to fill up the application for the *Phœnix* and he would send Mr. *McQueen* up for it. I think it was Mr. *Mackenzie* who said they were going to run off the goods. I think Mr. *McQueen* was present then. I asked them why they did not take it for a longer period, and they told me they were going to run off the goods to pay the creditors; then they would insure for a longer period for a smaller amount. I do not know that any reason was given why they were making it payable to the creditors. Both these men told me to make it so. I do not remember that they gave any particular reason. Some time after Mr. *Mackenzie* had been away, and he came back and told me he had been appointed manager or assignee of *McQueen's* or something like that, and he asked me if that would make any difference. I think this was before I got the policy from the head office. I am not sure what answer I gave to him, but my impression is I said to him that it would not make any difference, as the loss was made payable to the creditors. I really cannot say whether Mr. *Mackenzie* asked me to notify the Company; I do not remember whether he did or not. I do not think he said anything further about manager or assignee. I think he was there after he told me this. I think that was the only time this matter was spoken of. I do not know

that I recollect anything being said about drawing up an assignment. I have a kind of a recollection of his being at *Goderich*, but I am not sure. I do not recollect his asking me to draw up an assignment. After he had been away in some place, he came and told me he had been made assignee or manager. I do not recollect where he had been. I do not recollect recommending him to go to your (Mr. *Cameron's*) office to get the papers prepared, but it is very likely I would. In the application I took from *Mackenzie* the loss is payable to *Mackenzie* and *McMaster*. The loss in the policy is made payable to *McQueen*, *McMaster* and others. I do not know why that went in there; the policy is generally made the same as the application. I cannot say that I ever knew it to differ. I do not know whether in this case it differs or not. I never read the policy. I may have written them for *Mackenzie* as assignee or manager, but I have no recollection of it. I have no recollection of writing the company after getting the notice from the company, and before the fire. I do not remember writing any between the application for the insurance and the fire itself. I wrote them once after the fire. I do not remember what was in the letter exactly, but I remember saying I was sorry they were not settling up the claim. I do not remember saying anything in that letter about notice being given to me of the assignment. I sent one letter with the application, and, after the fire, this other letter that I have just told you of. I do not recollect of any but these two letters. There may have been a third letter written some time after, advising them to pay the loss. That is the letter I am referring to now. I am not sure whether I wrote that the day after the fire. I wrote, some considerable time after the fire, this letter I am telling you of. It is quite likely I would write to them, telling them the fire occurred. I cannot tell you the date. I do not know if I said anything in that letter about the assignment. I told them it was an honest claim and that they ought to pay it. That is all I remember.

Cross-examined—My powers were to take applications and to forward them to *Toronto*, and to give interim receipts. I was agent, and had whatever powers that gave me.

Re-examined—There might be other agents there for anything I knew. I do not remember of giving any notice of any change in the risk. The Company has not been in operation very long, I think, over a year. I do not recollect of any change being made in the risk I took. I never took many risks for this Company.

Examination of plaintiff under order :—

By virtue of an order of this Honourable Court, made herein

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under "The Administration of Justice Act," bearing date the 26th day of September, A.D., 1878, and hereunto annexed, directing the examination, on oath, of said plaintiff before me under said Act, at such time and place as should be appointed by me in writing endorsed on said order, I did in pursuance of said order appoint Tuesday, the eighth day of October, A. D., 1878, at ten o'clock in the forenoon at my chambers in the court house, in the town of *Goderich*, for such examination, at which time and place the said plaintiff did attend, and having been duly sworn said as follows: I am the plaintiff. I had been in business before. I effected this insurance a little over a year. I came to *Wingham* 4th October, 1876. I bought out *McKenzie's* stock and rented his store. The stock was taken by me, *McKenzie* and his son before I bought. It was valued at something over $6,000. I paid $5,560 for the stock. We took stock again about 1st November, 1877. Mr. *McKenzie* assisted me in this. I entered it in the stock book then. It was burnt I suppose. There was a safe there at the time of the fire. At the time of the fire there was nothing but the lost stock book and the cash book in the safe. I had finished stock-taking at time I made this insurance. At the time I made the insurance, 19th November, 1877, I was considerably in debt. *McKenzie* and I had not at that time any condition as to going out of business. Mr. *Holmes* took my application. It was some time before I received any policy. He gave me a receipt for the money I paid at the time of the application. I had it up to the time of the fire. I read it through. It wasn't a printed form. I believe it is destroyed by fire now. I paid *Holmes* the cash he asked. At that time we were doing a nice business. I think *Holmes* went over the premises when he took the application. He asked me some questions, but I can't say what. I knew the kind of business carried on next door. After I made the application, I made an agreement with Mr. *McKenzie*, now produced marked "A." I remember all about the agreement. There had been no condition between us as to such an agreement before I made the application. It was at the time of the agreement the condition occurred. He went on selling off. He was taken in to take care of the cash. The business went on in that way up to 15th January. The stock was then reduced. I intended leaving the place as soon as I got everything sold off, and my creditors paid off. The arrangement was made to secure *McKenzie* and the other creditors. Most of our sales were cash sales, but there were not many credit sales. The books shewing the credit sales were destroyed by fire. We bought no stock after this arrangement was made. I don't know how the fire took place. It occurred between one and two o'clock. The first

notice I had of it was when I got up to attend to my little girl and I saw some smoke in the room, and I then went to the room where we kept a stove and saw the fire was out there, and then I got hold of my wife and child and carried them out. There was then no fire in my place. I went out by the back of my house and saw the fire coming out of the hardware store next door. They kept some coal oil next door. I couldn't tell how much. There was a place back in the yard where they kept coal oil. I couldn't say in what part of the hardware store they kept coal oil. Mr. *McKenzie* carried on the business with me at the time of the fire. His son had been with me all along, and was with me when the fire occurred. Mr. *Holmes* handed me my policy. I had no connection with *Holmes* from the time I made the application till I got the policy. From the time I got the policy and the fire *Holmes* and I had no conversation about it. At the time he gave me the policy nothing was said. He just handed it to me. I didn't write to *Holmes* at any time. I never sent any letter to the company before the fire. The signature to the proof of loss, now produced marked B, is mine. The signature to the paper produced marked "C," is Mr. *McKenzie's*. I can't say, I am sure, why I didn't tell the company of the arrangement with Mr. *McKenzie* when I made the application. I thought there was plenty there to pay every man. After I made the arrangement with *McKenzie* I began to reduce the stock, and had no intention of increasing it. I intended to sell off. I gave no notice to *Holmes* of my arrangement with *McKenzie*, nor did I authorize any one to do so, nor have I any reason to believe any other person gave such notice. At the time of the fire I suppose my liabilities were somewhere between $2,000 and $3,000. We arrived at the credit sales, after the loss, from what we knew of them in round figures. The cash sales were something over $700. The stock book we last used was not the same one that we used when I purchased. It's a new stock book. The old one was destroyed by the fire. At the last stock-taking we put down the goods at less than invoice price. Some of the stock destroyed had been in hand since the purchase. I was also insured in the *Western*. I valued stock at the time of fire, at $4,354.91. It was because he was there to look after things, that I stated in my application that I was the *bona fide* owner.

Cross-examined—The valuation of stock at time of fire was based on the last stock-taking. Because the stock was taken at a reduced figure the amount at the time of the fire would be much larger. We add usually more than 20 per cent. to actual cost price to cover profits, carriage, &c. When I made this valuation I honest-

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ly believe it was correct. Our sales were mostly cash, and very little credit from the beginning. I believe the amount of debt due me from beginning to time of fire was $288. There might have been a few dollars of this incurred after the last stock-taking. I think in the cash book no distinction was made between cash received on sales and cash received on debts due from the beginning. The cash received for sales made before last stock-taking would be about the same as the amount of credit sales after last stock-taking. We arrived at amount of stock at the time of fire by deducting from the amount at last stock-taking the cash sales, less 10 per cent., and the value of goods saved. I never saw the policy before the fire. When I made the application I told *Holmes* that *McKenzie* and *McMaster & Co.* had a claim against me. I told him the insurance was for the benefit of my creditors. The agreement marked "A" was subsequently made to carry out the intention I expressed to *Holmes*. *Thomas Holmes* filled out this application for me; I did nothing but sign it. He read it over to me. I applied to *Holmes* first for an insurance on the whole, and he put the half in the *Phœnix* of his own notion. It was read over to see if it was right for the benefit of my creditors. [Mr. *Cameron* proposed to ask, "when you stated in application the average value of your stock at $6,000 did you mean before the application?" and I refuse to admit it.] The reason why I did not afterwards mention the agreement marked "A" was because I thought it was sufficiently mentioned in the application. I don't know whether I ever saw the inspector before now. The papers for proof of loss were first sent to Mr. *McKenzie*. I remember getting papers from the inspector to have proof made in my name at the time of the application and after I was really owner of the goods, subject to the claims of *McKenzie* and others. I never ceased carrying on the business up to the time of the fire. I had the general management of the business all the time. *McKenzie* was helping me to sell. There was no change in the books, or accounts. I took home the goods that were saved. At the time of the agreement I was indebted, but I had enough to pay everybody in full, but I wanted *Mackenzie* in to help me. *Holmes* lives near me.

Re-Cross-Examined—According to the way it was done the *Western* would only take $2,000 on the stock. Mr. *Holmes* didn't tell me why application was made in the *Phœnix*. I gave Mr. *Holmes* the information contained in the application. I mean the answers to the questions. I mentioned to *Holmes* that loss was to be payable to my creditors. Up to that time I had not spoken to *McKenzie* about it. At the time of the application my creditors had been pressing me. Mr. *McKenzie* was pressing me. I myself suggested

the agreement with *McKenzie*, and the agreement was drawn up by a lawyer. I didn't explain any of my business difficulties to *Holmes*. I only told *Holmes*, *McKenzie* and others were creditors.

JAMES McQUEEN.

Taken and signed before me this 8th October, 1878.

W. R. SQUIER, EXR.

A fire occurred which destroyed the property insured on the 15th January, 1878; the policy, which was dated the 12th December, 1877, was not delivered until the morning after the fire. After the loss on the 30th of January, 1878, the inspector of the defendants wrote *McKenzie* as follows:—

POST CARD.

Geo. McKenzie, Esq., *Wingham, Ont.*

Toronto, Jan. 30th, 1878.

DEAR SIR,—Yours of the 24th inst. to hand, and in reply would say Mr. *McQueen* has been sent claim papers to be filled in, and as the policy has not been assigned to any one, he is the only one that can make out such papers; of course when the amount of damage is settled, the parties named in the application have a right to receive the same.

I am, yours, &c.,

OGLE R. PECK,
Inspector.

And on the 13th January, 1878, he agrees with *McKenzie* as follows:—

LETTER.

Geo. McKenzie, Esq.

Toronto, 13th February, 1878.

DEAR SIR,—I would like to have all the information possible to lay before the Board at its next meeting in reference to the *McQueen* claim. Will you kindly let me know who were *McQueen's* creditors at the time the fire occurred, and what was the amount of their respective claims. As vouchers for correctness of prices at stock-taking, the Board will probably require duplicate invoices of stock, which you had better have ready.

Respectfully yours,

OGLE R. PECK,
Inspector.

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The manager says: "I presume that was written by my authority."

It is now claimed that the loss cannot be recovered on account of the transfer to *McKenzie*, and because it is alleged no notice was given of it to the company; and if entitled to recover, the plaintiff is only entitled to recover to the extent of his own interest.

As to the first, the interim receipt was granted with full knowledge by the agent of defendants that the insurance was for the security of plaintiff's creditors as well as himself. He was informed and consulted as to the transfer and the notification thereof to the company, and *McKenzie* says: "When he wished the agent to write to the company and tell them what had been done, he told him (*McKenzie*) there was no necessity, as the policy was payable to the creditors and I being one it was not necessary," and after the fire, from the letters of the inspector, the liability, if not in express terms admitted, certainly was inferentially recognized.

It is not at all to be wondered at that the agent treated the information as immaterial to be communicated, for in substance and reality there was no change in the position of matters, as between the plaintiff and defendants, and no new parties were introduced into the transaction. Had the plaintiff made an assignment whereby he had parted with his interest in the property, the case would have been very different. Though he transferred the legal title in the goods to *McKenzie*, the real pecuniary interest of neither him nor *McKenzie* was altered. As insured by the interim receipt, if the goods were destroyed by fire the creditors would receive their payment, and plaintiff so be relieved from his indebtedness, and plaintiff would receive the surplus; if the goods had not been insured the whole loss would fall on plaintiff, as he would lose his goods and still have to discharge his indebtedness to his creditors; so, though

the assignment was made to *McKenzie*, if the goods were destroyed without insurance, plaintiff would be in the same position, and if destroyed, as they were, the result is just the same as if destroyed after interim receipt given and before assignment, for *McKenzie* and creditors will be entitled to receive only what is due them, and plaintiff will get the surplus. So that, as plaintiff was at the time of the making of the interim receipt interested to the whole value of the property and to the full amount assured in case of loss, so was he interested after the assignment and at the time of the loss. And so the creditors were in like manner interested in the insurance under the interim receipt in case of loss, and under the assignment and policy, but not to any other or greater or less extent, the only change in the position of the parties being that the legal title of the property was, after the assignment, in *McKenzie* in trust for the creditors and plaintiff, instead of the legal title being in plaintiff for the benefit of the creditors and himself, the equitable and beneficial interests of both plaintiff and creditors being at time of interim receipt and continuing till time of loss the same. I think it is not open to defendants, after what took place between plaintiff, *McKenzie* and the defendants, by and through their agent, and after having, after the loss, handed over the policy, and subsequently, through their inspector, after knowledge of the assignment, recognized the claim as valid and apparently only desired to be satisfied as to the amount, now to dispute it; and as to plaintiff only recovering what may after payment of the creditors be coming to him, what I have already said shows he had an insurable interest in the whole value of the goods. All matters connected with the transaction, both before the interim receipt and after, and before the date and issuing of the policy and its delivery as a valid and binding instrument, were fully and truthfully com-

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municated to the agent authorized by the company to effect the insurance. In fact, all was done under his advice and subject to his directions. He was the party, as agent for defendants, in immediate communication with the assured, and the assured through him with the defendants. I think he must be assumed to have been furnished by his principals with all necessary information to enable him to deal in a proper manner with the parties who the company, through him, sought to get to insure with them.

To him the assured most naturally would and did apply, and on the information furnished by him the assured acted, and he well knowing that in fact the interest of the parties remained the same, and that there was no substantial change in the position of the property or the parties in reference thereto, the change being, in truth, merely to keep the property in the position it was, so that it might not be seized by any one creditor, but be held for the benefit of all, and they get the benefit of the insurance money in case of loss, as was contemplated when the original application was made. in other words, simply to secure the continuance of the arrangement as to the insurance for the benefit alike of the creditors and the assured, and without in any way increasing the liability of the insurers. The company, through him, their agent, did not treat the transfer in this case as an "alienation by sale, insolvency or otherwise," and, therefore, not such a transfer as was contemplated by the conditions of the statute, and so not in this case a transfer of a character to affect their position as insurers, or in anyway to change the risk or increase their liability, and, therefore, not necessary to be communicated in writing to the company or endorsed on the policy, which, in fact, could not be done. Therefore in view of what took place between the assured and the company thro' their agent,

and the delivery of the policy after the loss without objection, and the conduct of the company, thro' their officers, in inferentially recognizing and admitting their liability after the loss and after knowledge of the assignment, desiring only to be satisfied as to the amount, was a full ratification of all that had been done by the agent, I think, now to permit the company to ignore the knowledge and conduct of their agent and officers (all which I think we must assume was within the scope of their authority) and to repudiate all they wrote and said and did, and so to deny successfully their liability under such circumstances, would be, in my opinion, to allow them, with the sanction of a court of justice, to evade payment of what their agent, cognizant of all the circumstances and who acted for them throughout, says is an honest claim, and would be thereby to assist them in perpetrating a gross fraud on an innocent party, who dealt with them through their agent and officers in a frank, truthful and straightforward manner.

The appeal must be allowed with costs in this court and in the Court of Appeal, and the judgment of the Court of Common Pleas affirmed, except so much requiring the plaintiff to produce and file the releases by said judgment required to be produced by the plaintiff.

STRONG, J.:—

I concur with Mr. Justice *Gwynne*.

FOURNIER, J., concurred.

HENRY, J.:—

The discussion of the points in this case took a wider range than, in my opinion, was necessary to determine the rights of the parties to be affected by our judgment.

The action was brought to recover two thousand

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dollars, insured upon goods of the appellant by a policy issued by the respondent's company, dated the twelfth of December, 1877, but not delivered to the appellant till after the loss, which occurred by fire on the fifteenth of January, 1878. The declaration sets out the policy with the statutory conditions applicable to the points in issue, and "variations in conditions applicable to mutual insurances" and "additional conditions." In it the appellant avers that after making application for this insurance, and some time before the fire, he made an assignment in trust to one *George McKenzie* of the goods insured (he having then a contract of insurance upon them in the shape of what is called an interim receipt) to sell the goods to pay:—1st, the costs of the execution of the trust; 2nd, to pay himself and the other creditors of the appellant the amounts due to them, or if insufficient for that purpose, to divide the trust fund amongst them in proportion to their respective claims; and, in the third place, to pay the balance of the trust fund, if any, to the appellant; that at the time of the loss the property assigned was more than sufficient to pay his creditors, and a surplus was afterwards coming to him out of the property so insured; that at the time of the making of the policy the respondents were aware of the assignment in trust; and that the creditors were interested in the insured property, of which, at the time, the respondents had due notice; that the plaintiff and the creditors were so interested when the loss occurred; and assigned a breach for non-payment of the amount insured either to the appellant or the creditors referred to in the policy, and to whom the loss, if any, was made payable.

To this declaration seven pleas were put in.

The first one requiring notice is the third. It alleges that the appellant "was not, at the time of the alleged

loss, interested in the said dry goods, groceries, boots and shoes, as alleged."

That plea is put in as an answer to the whole claim of the appellant. It must be sufficient to defeat the whole claim, or it is not an answer at all. If, therefore, the appellant at the time of the loss had any insurable interest in the goods covered by the policy, our judgment must be for him. The evidence shows that the appellant was the owner of the goods in question, which formed the stock of a business then being carried on by him. Being in solvent circumstances, but behind hand in meeting promptly the bills of some of his creditors, and to secure them, he made, on the 28th of November (some days after his application for the insurance), the assignment in trust referred to and in part recited in the declaration. It would be, I think, an unnecessary waste of language to prove, that by such an assignment the appellant did not part with his whole interest; but afterwards had, as *cestui-que-trust*, a valid insurable interest. I will have occasion hereafter to refer more particularly to this subject when dealing with the defence under other pleas, and feel it quite enough to say at present that the third plea is not an answer to the appellant's claim or the declaration setting it out.

There is not the slighest pretence that there is any evidence to sustain the fourth plea, that the appellant made a false and fraudulent account of the loss.

The 5th plea alleges the making of the application, and that the appellant therein represented, amongst other things, that the goods were not encumbered by mortgage or otherwise; that the value of his average stock was six thousand dollars; that the appellant therein declared the statements in the application were a just and true exposition of all the facts, &c., in regard to the condition, situation, value and risk of the property to be insured,

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so far as the same was known to him; and agreed that the same should be held to form the basis of the liabilities of the respondents; that the policy was effected upon those representations; that after the application, and before the making of the policy, to wit, on the 28th of November, the appellant assigned the insured property to one *George McKenzie*, in trust to sell the same and apply the moneys to arise from such sale in the manner set forth in the declaration, and put *McKenzie* in possession of the goods; that the plaintiff then ceased to carry on business or keep his stock in trade up to an average value of six thousand dollars; that it was material to be made known to them (the insurers) that the appellant had so assigned and transferred the property and had ceased to cary on business or keep his average stock up to the value of six thousand dollars, in order to enable them to estimate the risk, but (and here is the gravamen of the charge and upon which the defence is rested.)

That the plaintiff, *fraudulently* and *deceitfully*, and with intent to induce the defendants to effect the said policy, concealed from the defendants the fact that he had so assigned, transferred and set over the said property to the said *George McKenzie*, and delivered possession thereof, and had ceased to carry on business, or to keep up the general average value of his stock, and did not give the defendants, *or their local agent*, any notice thereof, by reason of which concealment the defendants aver the said policy was and is void.

I have had no little difficulty in determining whether the alleged concealment is by the plea made applicable to the time of the application, or to a concealment of the transfer between the time of the application and the making of the policy, and I cannot even now congratulate myself upon having arrived at a proper conclusion as to what was intended. Some parts of the plea could only apply to a concealment at the time of the application, but that again is wholly inconsistent with other parts of it, and

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with the acknowledged facts, and is in its nature impossible, for there could be no concealment at time of the application of what had not then taken place. If applicable at all, it can only be an alleged concealment of the subsequent assignment between the time of its execution and the making of the policy. How the failure to give notice of the assignment (if such were the case) can be called a fraudulent or deceitful concealment, I am wholly at a loss to discover. The plea shows that there is no ground for imputing any concealment when the application was made. The application being then correct and unassailable, the policy might be avoided for other reasons, but certainly not for those set out in the plea. But the plea rests the defence under it on the further ground that the appellant "did not give to the defendants or *their local agent*" any notice of the assignment and other things therein mentioned, but the evidence shows the local agent knew all about it. He was consulted before it was made, and agreed to it, and knew of it several days before the policy was issued.

I will conclude my remarks as to that plea briefly thus: In the first place, it raises no material issue, nor does it contain a sufficient answer. 2nd. It is untrue, when charging the appellant with any fraudulent or deceitful concealment, and it is equally untrue in the statement that he did not give the respondents *or their local agent* notice of the assignment when made. The evidence shows the very opposite. 3rd. I think the plea is bad for the reason that the assignment was not of that nature, that in this case rendered any notice of it necessary. The appellant, it is true, by the assigment changed the nature of his interest, but he still retained such an interest as would be considered an insurable one for the whole value of the property; and if his application had

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been made after the assignment, his right to insure and recover on a policy would have been in law the same as it had been previous to it. If, indeed, the appellant stated in his application that he was the *sole owner, so as to negative the fact of a trust assignment*, the case might be different, and the assignment *and a change of posession*, if shown, might be reasonably considered as circumstances necessary to be communicated in the application, and if made after the issue of the policy to the applicant, it might require the written assent of the Company. I have, however, looked carefully at the application and, strange to say, although apparently stated, in reality it is not, that the appellant was the owner of the goods. The first question to be answered by the applicant relates to landed property, and is so answered. The 2nd, "Is applicant owner of property insured? If not, give owner's name." The answer is: "The owner, *Geo. McKenzie*,—applicant is tenant." The 3rd question, "Name of tenant or occupant?" Answer "*James McQueen.*" These are the only questions and answers in any way relating to the *ownership* of the goods, if even they do, which I think is not the case. The three questions read seriatim are calculated to impress the idea that the second did not refer to landed property. It is seldom, if ever, such a question would be asked as to goods; but owing to mortgages, &c., it is more necessary to ask such about landed property. The question is followed by the direction "If not, give owner's name," and that immediately followed by requiring the "name of tenant or occupant," shows clearly that question number two was originally, at all events, intended to enquire as to landed property. The application was filled in by *Holmes*, the local agent of the respondents, and he, as their agent, and acting for them, wrote an answer to question number two as applicable to landed property. The result is, that if the question

was intended to ascertain the owner of the goods, it failed in its object; and under the circumstances the appellant cannot be said to have represented himself as the owner of goods wholly unencumbered. If a mistake in this respect was really made in the filling up of the application by the respondents through their agent, the appellant is not answerable. The agent, in his evidence, says: "My powers were to take applications and to forward them to *Toronto*, and give interim receipts. I was agent, and had whatever powers that gave me." Some fire insurance companies provide against their liability through the mistake or wrongful act of any of their local agents, and the policies provide that if an application be filled up by such agent it will be deemed the act of the applicant. There is no such provision in this policy, and in such a case I must look at the act of the agent here as that of his principal. He had authority over the whole subject-matter up to the receipt of the premium and the granting of the interim receipt, and, as I hold, he was the proper recipient of a requisite notice of any change up to the making of the policy. Under the circumstances, I think no notice of the change was necessary, but if it were, I think that given to the agent was sufficient. If the manager of the company looked carefully, as it was his duty to do, at the answers given to the printed questions, he could not have failed to discover the mistake (if it was one) of the agent in filling up that to question number two. By not doing so, and by not seeking for further information as to the ownership of the goods before issuing the policy, the company is now estopped from saying that the appellant made any false representation whatever as to such ownership.

The sixth plea alleges the application and payment of the premium and the issue of the interim receipt which it recites: that the receipt constituted an insur-

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ance for thirty days unless sooner cancelled, "subject to all the conditions, rules and regulations in and endorsed upon the printed form of policy in use by the defendants at the date thereof;" that the receipt was not cancelled, but the same was in force, to wit, on the 12th of December, 1877, "when the defendants executed and delivered the policy in the declaration mentioned"; that the conditions, rules and regulations set out in the declaration are the same as those referred to in the interim receipt; that the appellant, at the time of the application, was the legal and equitable owner of the insured property; but that, while the same was covered by the interim receipt, he made the assignment referred to in the declaration,

Without the written permission endorsed on the policy by an agent of the defendants duly authorized for that purpose, as required by the condition endorsed on the said policy, and without the knowledge and consent of the defendants.

Had the appellant's right of action been founded on an insurance contract, which at one time existed, under the interim receipt and no policy issued, I could understand a contention that a transfer of the property which would have left no interest in the insured at the time of the loss would prevent the recovery of the amount covered by it; and the same principle is equally applicable when the insurance was by a policy. We are, however, not called upon to say anything as to the effect of the conditions as applicable to an interim receipt. By the terms of it and by the tacit and understood agreement of the parties, that was only to be in force till a policy should be issued, and that when issued the parties were to be governed by it alone. The interim receipt was only for an insurance in the meantime. The policy by express words related back to the time of the application, and was in all respects a substitution for the interim receipt.

The question then is not, whether the appellant forfeited his insurance under the interim receipt, for that is not the issue, but did he forfeit it under the subsequent policy? To plead to the action on the policy what is stated to be a defence under the interim receipt would be a departure, would raise an immaterial issue and be therefore no defence. How then does the condition (No. 4) operate in regard to the interim receipt, is a question that may be asked; and my answer is that in consequence of the pecular wording of it it may, as I think it is, be wholy inapplicable. The condition is that license to assign must be "endorsed hereon." Until a policy exists it is impossible to endorse anything upon it. The condition is therefore only inapplicable to an interim receipt; and if no policy issued, and an action were brought on an interim receipt, I should have great difficulty in deciding that the condition formed a part of the contract. The undertaking of the insured amounts to this, "should a policy be hereafter issued on my application, I hereby agree to make no assignment of the property without a written permission endorsed thereon." The defence therefore, as I think, could not be set up to an action on the interim receipt. It may be considered inequitable to rule so, but it must be remembered this is but a technical objection to a large extent, and where such are raised they should be clearly provided for, and companies should either make contracts of their own drawing plain, or take the consequences of all ambiguities or defects. I think that condition No. 4 refers to an assignment subsequent to the policy, and not to one subsequent to the application and before the making of the policy which is the case here.

The seventh and only remaining plea alleges, that at the time of the sealing and delivery of the policy and loss, the property was owned by one *George McKenzie*,

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As set out in the plaintiff's declaration, and the interest of the plaintiff in the said property was not stated in or upon the said policy as required by the said statutory condition in that behalf endorsed on the said policy as required.

The answer to the defence set up by the latter plea is, first, that the property was not owned by *McKenzie*, as evidenced by the declaration and the assignment therein recited, at any time up to the loss, so as denude the assured of his insurable interest; and secondly, that by the wording of the condition it does not apply to an assignment previous to the policy.

The 4th statutory condition, respecting which we have heard so much, is after all to a great extent the same as the law otherwise prescribes. By the latter no one can recover on a fire insurance policy unless he has an interest at the time of the loss. If a party insured property and subsequently assigned it, but got it back before the loss, he could recover. The conditions generally annexed to policies and the statutory conditions provide otherwise. They, however, provide that, if the company in a particular manner manifest their assent, the insurance still remains notwithstanding the assignment, and, in case of loss, the interested party will be indemnified up to the amount insured. In some cases this is secured by an assignment of the policy with the assent of the company. Such an arrangement dispenses with the necessity of a new policy and enables the purchaser to appropriate for his own benefit, what he otherwise would not have, the policy of the seller. Where the whole interest in insured property is assigned, a case arises wherein it is necessary, for the object just mentioned, to obtain the assent of the company, the object being, as the seller's interest in the policy will be terminable by a sale and transfer, to enable the purchaser to get the benefit of the unexpired term, and in case of loss to recover the insurance. Such then I take to be the object and intention of the condition in question

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annexed to policies. The assignment contemplated I take to be one by which the assignor divests himself of all title and interest. The words are: "If the property is assigned,"—which means wholly transferred. It is not prohibitory of the assignment of an interest as security by way of a chattel mortgage or otherwise, where the resulting beneficial interest remains; or to a conveyance made to enable a party to sell and convey property for the use and benefit of the party making it. It is admittedly good law that an equitable interest is sufficient, and this court unanimously lately so held in the case of *Clark* v. *The Scottish Imperial Insurance Company* (1). In that case the plaintiff had but an equitable lien without any possession of the subject-matter, but the authorities justified our judgment. In this case the appellant always retained an insurable interest to the extent of the whole value of the property, and also the possession in the same building. He, it is true, made an assignment to *McKenzie*, but it was for special objects—first to sell the property, then to apply proceeds to pay the creditors of the appellant and to pay any remaining balance to him, the appellant. That assignment was not irrevocable. The assignor, by paying otherwise his creditors, or, in certain events, without doing so, might call for a re-assignment. None of the creditors, except *McKenzie*, had any vested interest, for there is nothing to shew their acceptance of the assignment or agreement to be bound by it, and the latter was under no obligation to them to execute the trust. They were not bound in any way to agree to the assignment or to the terms contained in it. If *McKenzie* executed the trust they might of course adopt the assignment so far as to claim from him payment according to their several interests, but up to the loss the assignment was one to a great extent between the appellant and *McKenzie* only (2). The

(1) 4 Can. S. C. R. 192.

(2) Dart on Vendors and Pur., 902.

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appellant was interested throughout. He was not insolvent, and is shown to be entitled to $900 after providing for the payment of all his creditors' demands, if he recovers in this suit. Nothing could more pointedly show his continuing interest in the insured property.

I regret to have been obliged to go so much into detail in this matter, but as differences of opinion have been expressed by several of the learned judges of the courts in *Ontario* in regard to some of the points in issue in this and other cases, I have thought it but right to give my views at length in regard to those involved in our decision. According to my best judgment the appellant is legally entitled to succeed, and I think the appeal should be allowed, the judgment of the Court of Appeal of *Ontario* reversed, and that of the Court of Common Pleas affirmed with costs.

TASCHEREAU, J., concurred.

GWYNNE, J.:—

In the view which I take of this case, it raises no question, whether the *Ontario* Statute, known as "The Fire Insurance Policy Act of 1876," is or not *ultra vires* of the Provincial Legislature; nor whether the provisions of that statute, assuming it not to be *ult a vires*, apply to an insurance effected through the medium of what is known as an "interim receipt;" nor can the fact, that the plaintiff had been temporarily insured through the medium of such an "interim receipt," before the execution by the defendants of the policy which is declared upon, be at all invoked to the prejudice of the plaintiff's right to recover upon the policy declared upon, which is duly executed under the common seal of the defendants.

The case went down for trial before a judge without a jury, under the provisions on that behalf contained in ch. 50 of the Revised Statutes of *Ontario*. The learned

judge who tried the cause, after hearing all the evidence on both sides, entered a formal verdict for the defendants, reserving to the plaintiff leave to move the court in which the action was pending to enter a verdict for him for the sum of $2050, if the court should be of opinion that, *upon the whole evidence*, the plaintiff ought to recover; and it was agreed that to give effect to this reservation all amendments that might be necessary should be made. This reservation was plainly made in view of the provisions contained in sections 7 and 8 of ch. 49 of the Revised Statutes of *Ontario*, which enacted that no proceeding at law or equity should be defeated by any formal objection, but that *at any time* during the progress of any action, suit, or other proceeding at law or in equity, the court or a judge may, upon the application of any of the parties, or *without any such application*, make all such amendments as may seem necessary for the advancement of justice, the prevention and redress of fraud, the determining of the rights and interests of the respective *parties and of the real question in controversy between them*, and best calculated to secure the giving of judgment according to the very right and justice of the case.

Now, the effect of this reservation accompanying the verdict was to impose upon the Court in which the action was pending the duty of determining the rights of the parties upon the real question in controversy between them, *upon a view of the evidence alone*, and to say whether or not, upon such view of the evidence, the plaintiff was entitled to recover, with this provision added, that his right should not be defeated by any formal objection, but that if the issues joined were not such, having regard to the evidence, as sufficiently to raise the very point in controversy, the Court should amend the pleadings, *nunc pro tunc*, so as to make them conform to the evidence, or might render such judgment

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as the evidence warranted, irrespective of the issues as joined, in case there should prove to be any defect or informality in those issues, or that these were not appropriately framed, having regard to the evidence.

The short material substance of the plaintiff's declaration is, that before effecting the insurance of the goods mentioned in the policy declared upon, which is dated the 12th day of Dec., 1877, to wit on the 28th Nov., 1877, he assigned the goods to one *George McKenzie* in trust to sell, and out of the proceeds thereof in the first place to pay all expenses, &c., attending the trust, and in the second place to pay the creditors of the plaintiff, and among others the said *George McKenzie, McMaster & Co.*, and others, who were then creditors of the plaintiff, the amounts due to them, and in case the said trust fund should not be enough to pay the said creditors in full, then to pay them such trust fund in proportion to their respective claims; and, in the third place, to pay the balance of such trust fund to the plaintiff; and the plaintiff averred that at the time of the making by the said defendants of the said policy the defendants were aware of the said trust assignment as aforesaid, and that the said *George McKenzie*, the said *McMaster & Company* and others, the creditors of the plaintiff, were interested in the said property so insured as aforesaid, and the said defendants at the time aforesaid had due notice thereof. And further, that the plaintiff and the said *George McKenzie*, the said *McMaster & Company* and others, the creditors of the plaintiff, continued interested in the property so insured by the defendants until the loss by fire stated in the declaration. Yet the defendants did not make good the said loss or damage so sustained or any part thereof, and did not pay to the plaintiff, nor to the said *George McKenzie, McMaster and Company* and others, or either of them, the said loss or any part thereof, to the plaintiff's damage of $3,000.

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The real point in controversy between the parties appears to have been, was it or not true, as alleged in the declaration, that at the time of the making of the policy declared upon the defendants were aware of the trust assignment stated in the declaration? The defendants, however, pleaded several pleas in bar of the plaintiff's action.

1st. *Non est factum*—this plea was disproved.

2nd. That the goods insured were not destroyed by fire as alleged, this was also disproved.

3rd. That the plaintiff was not at the time of the loss interested in the said goods, as alleged in his declaration. This plea was also disproved, for it appeared that the plaintiff's interest at the time of the loss was just the same as it was at the date of the policy.

4th. That after the loss the plaintiff delivered to the defendants a *false and fraudulent account of the alleged loss and damage*, in which (among other things) he stated that he was the *bonâ fide* owner of the property stated to be destroyed, holding the same as stated in the policy, and that no other person or person had any interest legal or equitable in the said property, excepting as mentioned in the said policy, whereas the plaintiff before the happening of the said loss without the knowledge or permission of the defendants had assigned, transferred and set over to one *George McKenzie* the said property in the said policy mentioned, in trust to sell the same and to apply the monies arising from such sale in the manner mentioned in the plaintiff's declaration.

The defendants could scarcely have expected to have succeeded in establishing a statement to be false and fraudulent, which, assuming it to have been made, was made in the belief, which the evidence warrants the conclusion that the plaintiff entertained, that the words in the policy whereby the defendants covenanted with

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the plaintiff: "*That the loss, if any, should be payable* "*to George McKenzie, of Wingham, and McMaster &* "*Co., and others as creditors, as their interest may ap-* "*pear*," were inserted therein for the purpose of expressing the true nature of the plaintiff's interest in the property, especially if, as is alleged by the plaintiff in his declaration, the precise nature of the plaintiff's interest, and the fact of the execution of the trust assignment, by which alone *McKenzie, McMaster & Co.*, and others, the creditors of plaintiff, acquired any interest, was communicated to the defendants before they granted the policy sued upon, in which case, if the policy did not sufficiently express plaintiff's interest according to the fact, it was the defendants own fault: however, a verdict upon this issue had necessarily to be rendered in favour of the plaintiff, for the defendants do not appear to have offered any evidence in support of this plea, or to have relied upon any such false or fraudulent account of loss as is alleged in the plea.

The 5th plea, after averring that on the 19th Nov., 1877, the plaintiff made a written application for insurance, which he agreed should form the basis of the defendants' liability, in which he represented the goods to be unincumbered and that the value of his average stock was $6,000, and that the defendants executed the policy sued upon on the faith of the representations contained in the said application, alleges, by way of defence to the action, that on the 28th Nov., 1877, the plaintiff executed the trust assignment in the declaration mentioned and ceased to carry on business and to keep his stock up to an average value of $6,000, *and the defendants say that the plaintiff fraudulently and deceitfully, and with intent to induce the defendants to effect the policy, concealed* from the defendants the fact that he had so assigned the said property to *McKenzie* and had delivered possession thereof, and had ceased to

carry on business, or to keep up the general average value of his stock as aforesaid, and did not give the defendants, or their local agent, any notice thereof, by reason of which concealment the defendants aver that the policy is void.

As to this plea, it is to be observed, in the first place, that the policy does not import into it anything contained in the written application referred to in this plea. If the insurers desire to make the contents of the application, or any part thereof, part of the policy, such part should be introduced into the policy; they may elect to make such part of the application as they please part of the policy by introducing it into the policy; or they may exclude the whole from the policy by omitting to introduce any part into it (1).

There was nothing then in this policy which required the plaintiff to keep up the average value of his stock to $6,000. The gist of this plea, however, is that the plaintiff *fraudulently and deceitfully, and with intent to induce the* defendants to grant the policy, concealed from the defendants, and did not communicate to their local agent, the fact of the execution of the trust assignment of the 28th November, or give him any notice thereof. In this it joins issue directly with the allegation in the plaintiff's declaration upon what is the real substantial point in controversy between the parties. Now the evidence upon this point establishes beyond all doubt that the local agent of the defendants, at the time of receiving the application set out in the plea of the date of the 19th November, was informed that the plaintiff had called a meeting of his creditors, and that it was they who insisted that the goods should be insured, and that in reply to a question put by him enquiring why the application was not for a longer period than three

(1) *Scanlan* v. *Seals*, 5 I. L. Rep. 154, which appears to have been followed by the Court of C. P., *Ont.*, in *Brogan* v. *Manufacturers Insurance Co.*, 29 U. C. C. P., 414,

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months, he was informed both by the plaintiff and *Mackenzie*, to whom the trust assignment was subquently made, that they were going to run off the goods to pay the creditors; that subsequently, and just before the 28th Nov., the local agent was also informed that the plantiff was about to execute an assignment for the benefit of his creditors to *Mackenzie*, and the defendants local agent was asked to prepare the document, but that he advised Mr. *Mackenzie* to go to a lawyer, a Mr. *Cameron*, for that purpose; that Mr. *Mackenzie* asked him to notify the company, the defendants, of the proposed assignment; that upon the trust assignment being executed the said local agent of the defendants was informed thereof, and was requested to write to the defendants and to tell them what had been done, and that he said there was no necessity, as by the application then already sent forward the policy was asked to be made payable to the creditors, and as *McKenzie* was one of the creditors it was not necessary.

Now at this time the policy had not been granted, nor was it executed for a fortnight afterwards; there can be no doubt that upon the 28th of Nov. Mr. *Holmes*, the respondents' local agent, to whom the application was originally made, was as much the agent of the defendants to receive information and notice of any matter which might influence the defendants in determining to grant the policy, or to decline assuming the risk, as he was their local agent to receive the application in the first instance, and notice to him of the intention to execute the trust assignment and of the fact of its having been executed when executed was notice to the respondents. There is nothing that I know of that requires that notice to him of these matters should of necessity be in writing. The plaintiff seems to have done every thing necessary for him to do, to enable the

defendants deliberately to determine whether they would incur the risk or not, when he communicated these facts to the local agent through whom the application had been made. These facts were so communicated before the defendants granted the policy which is sued upon, and although it may be true that the local agent of the defendants neglected to convey to the defendants the information communicated to him for the purpose, still the defendants, when they executed the policy upon the 12th of December, must be held to have had knowledge of the facts so communicated to their agent, and to have executed the policy with the knowledge of those facts. There is, however, a piece of internal evidence in the policy which is not explained, and from which the reasonable and rational inference can be drawn, that in fact these officers of the company who prepared and executed the policy were aware of the execution of the trust assignment; for the policy provides that loss, if any, should be paid to plaintiff's creditors, precisely as is provided in the trust assignment, "*as their interest may appear.*" The issue therefore upon this plea, which raises the real point in controversy between the parties, could only have been found for the plaintiff.

The sixth plea, after averring the application made upon the 19th Nov., 1877, to defendants' agent for a policy for $2,000.00 for 3 months, and the granting by such agent of an interim receipt, which the plea avers to have operated as an insurance for 30 days, unless cancelled within that period, subject to all the conditions, rules and regulations contained in and endorsed upon the printed form of policy in use by the defendants at the date thereof, proceeds to say, that while such interim receipt insurance was in full force, the defendants executed and delivered the policy in the declaration mentioned, and the defendants further say that at the

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time of the making of the said application, and while the said property was so insured as aforesaid under the said receipt, subject to the conditions, rules and regulations contained in and endorsed upon the printed form of policy in use by the defendants, which are those set out in the declaration as endorsed upon the policy declared upon, the plaintiff on 28th Nov., without the written permission endorsed on the said policy by an agent of the defendants' duly authorized for such purpose, as required by the condition in that behalf, endorsed on the said policy, and *without the knowledge and consent of the defendants*, executed and delivered to *George McKenzie*, the deed of assignment mentioned in the declaration, by reason of which the said policy and the insurance so effected with defendants became void.

The issue offered by this plea is substantially the same as that offered by the 5th plea, although the form of the plea has created some confusion.

The declaration had already alleged the execution of the trust assignment of the 27th Nov. and the subsequent execution by the defendants of the policy of the 12th Dec., with full knowledge and notice given to them of the execution of the trust assignment in favor of plaintiff's creditors.

The gist of the plea is in its closing paragraph: It alleges the application for insurance on the 19th Nov., the granting then of an interim receipt, the execution of the trust assignment of the 28th Nov., the subsequent execution of the policy of the 12th Dec., which the plea insists is avoided for the reason that, as the plea alleges, it was granted without any knowledge of the execution of the trust deed, and without the consent of the defendants.

Now, if it be true, as alleged in the declaration, and as established by the evidence, as I have already point-

ed out when considering the 5th plea, that at the time of the trust assignment being contemplated the intention to execute it was communicated to the defendants' agent who had received the application, and that immediately upon its execution the fact of such execution and its purport were in like manner communicated, and that the defendants did not execute the policy for a fortnight afterwards, and that under the circumstances the defendants must be held to have consented to the assignment and to have executed the policy with full knowledge of it, it can make no possible difference that at the time of the execution of the trust assignment, and of the communication to the defendants, through their agent, of the fact of its execution, there was an insurance existing upon an interim receipt.

When the information was so communicated the defendants might, if they had pleased, have avoided the insurance upon the interim receipt and have refused to grant a policy under seal; not having done so, but on the contrary having issued the policy under their seal, whereby they consented with the plaintiff that in case of loss the amount should be payable to *George McKenzie* and *McMaster* and Company, and others *as creditors* of the plaintiff as *their interest* might appear, the defendants must be held to have consented to the trust assignment, so that the only point in controversy in reality was, as was raised on the 5th plea: had the defendants, directly or through their agent, knowledge of the execution of the trust assignment before the policy declared upon was granted?

The condition relied upon in the plea is a condition which, in terms of the endorsement on the policy, is restricted in its application to "Mutual Insurances." The condition is verbatim taken from the Act relating to Mutual Insurances, and its provisions relate to a

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policy granted upon the Mutual Insurance principle, whereas the policy declared upon appears to have been granted for a cash premium paid once for all, and not at all upon the mutual insurance principle; but assuming for the sake of argument, a temporary insurance, effected by payment of premium and an interim receipt pending the determination of the company upon an application for a policy under seal for a definite term extending beyond the period covered by the interim receipt, to be subject to the 4th condition endorsed on the policy, unaffected by the variation which is declared to be applicable to mutual insurances; and, indeed, assuming the interim receipt insurance to be subject to the condition as varied (points which are not necessary to be determined in this case), still it is apparent that the assignment there contemplated is an assignment made subsequently to the granting of the policy under which the property assigned, is, at the time of assignment, insured. The condition is that if the *property insured* is assigned, &c., &c., without written permission endorsed *hereon*—that is on the policy whereby it is insured—the policy in existence shall *become* void *thereby*—that is by such assignment. Now, granting for the sake of argument it to be necessary in the case of an interim receipt insurance, that an assignment made pending the existence of the insurance upon the interim receipt should be endorsed upon the interim receipt at the peril, in default, of forfeiture of the insurance existing under the interim receipt, it is plain that *the condition* does not require such an assignment to be endorsed upon a policy subsequently granted under the seal of the company, containing the covenant of the company and extending the period of insurance beyond that covered by the interim receipt. The assignment when made could not be endorsed on a policy not in existence, nor could a policy not in existence *become* void. The

insurance existing under the interim receipt might *become* void by reason of such an assignment not being endorsed upon the interim receipt; but if the company with full knowledge of the assignment should recognize it by issuing their policy under seal for a term extending beyond the period to which the interim receipt applied, such an assignment so recognized cannot, it is plain, be within the scope of the condition against assignment endorsed upon the subsequently issued policy. There is no sense or reason in the contention that it should be, for if the assignment was made known to the Company before they granted the policy under seal, it is but reasonable that they should be bound by the covenant contained in the policy, which was made with full knowledge of the assignment; and if the assignment made an alteration in the condition of the property different from that in which it was when they insured, and upon the faith of which they did insure, and which it was material should have been made known to them, and was not made known to them, in that case the policy so granted might be avoided, not for a breach of the condition endorsed on the policy, but upon plea averring, as has been here averred by the defendants expressly in their 5th plea, and substantially also as it appears to me in the 6th plea, that the plaintiff fraudulently withheld from the defendants all knowledge and notice of a fact material to be made known to them, and so by fraud and deceit procured the policy. This, as I have already said, is the real point in controversy between the parties here, and upon the evidence could not properly have been decided otherwise than against the defendants.

The Court of Common Pleas, on the argument of the case reserved, and in pursuance of the terms of the agreement entered into at the trial, allowed a replication to be filed to this 6th plea, but, as it appears to me,

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the issue which had already been joined between the parties, and which put in issue the material part of the 6th plea, which, in my opinion, consisted in the allegation that the assignment of the 28th November had been made "without the knowledge and consent of the defendants," that is at the time of their executing the policy on the 12th December, was quite sufficient. However, the material part of the replication as allowed was, upon the evidence, properly found in favor of the plaintiff; it would have been better and more conformable to the evidence if the replication, instead of alleging that notice of the assignment had been given as therein stated "before the loss," had alleged, as the evidence established that it had been given before the defendants granted and executed the policy declared upon. The case, when analysed and its facts are thoroughly understood, seems to me to be free from all difficulty, the whole point being, whether or not an agent of an insurance company authorized to receive applications for insurance, and who had received such an application, is the proper person, (while the application is still under the consideration of the company who have not yet agreed to grant the policy) to whom any alteration in the subject of the insurance, affecting such application, and material to be communicated to enable the company to determine whether they will or not grant the policy, may be communicated so as to affect the company with notice thereof.

I cannot entertain a doubt that he is, and that he is was never doubted or disputed, but on the contrary was assumed as clear law upon all sides, and by this court in *Liverpool, London & Globe Insurance Co.* v. *Wyld* (1).

Nothing was said in argument upon the 7th plea, nor do I think could be, because the evidence, I think, shows that the interest of *McKenzie* in the property was known

(1) 1 Can. S. C. R. 604.

to the defendants when they granted the policy, and also the interest of the plaintiff, and the reference to *McKenzie* in the policy as a creditor of the plaintiff does, I think, sufficiently comply with the condition referred to in the 7th plea, but assuming it not to do so, still, as the defendants are held to be affected with knowledge of all the facts of the case when they executed the policy, it is wholly their fault if the interest of the plaintiff is not sufficiently stated in the policy, and as by the reservation at the trial, the rights of the parties are to be determined by the evidence, the defendants could not be allowed to prevail upon this plea if there were anything in it.

The Court of Common Pleas, in the rule which is the subject of this appeal, has ordered that a verdict be entered for the plaintiff for $2,050.00, upon the plaintiff producing to and filing with the master a release from all necessary parties of their claim to the insurance monies, proof of necessary parties to be given by affidavit to the satisfaction of the master, such release to be handed over by the master to the defendants by their attorney. I confess I cannot see the necessity or propriety of this condition so attached to the entry of a verdict in favor of the plaintiff. The policy, although having in it the words "loss if any payable," &c., &c., is granted to the plaintiff. He is the person named therein as the insured, he is the person with whom the defendants contract, with whom the defendants covenant to make good all loss or damage to be sustained by the peril insured against, and the words "loss if any payable," &c., &c., operate to enable the defendants, in fulfilment of that covenant, to pay the parties named, and to set up such payment to an action by the plaintiff against them for breach of this covenant, but if they do not pay them or any one, then, if loss has been incurred within the terms of the policy, a breach of their covenant is committed, and

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the plaintiff is the person in whom the right of action for such breach is vested—he is the proper person to sue.

In *McCallum* v. *The Ætna Insurance Co.* (1), the Court of Common Pleas held, and I think rightly, that, even in a marine policy which had not in it the words "for "or in the name of all parties interested," nor "for "whom it may concern," but stated that the policy entered into "on account of *A. C.*"—"loss if any pay-"able to *L. McC.*," the contract was with *A. C.*, who only could sue for a breach of the contract. *A fortiori* in this case, which is not a marine policy, and where the policy expressly states the plaintiff to be the person with whom the contract is made and with whom the defendants' covenant is made, he should sue alone for a breach of that covenant.

I cannot see upon what principle the Court should have interposed its authority to impose a condition affecting the plaintiff's verdict, in the interest of the defendants who have committed a breach of their covenant sued upon, and which condition was of a nature that the defendants, not only had not set up any claim to be entitled to the benefit of, but could not have put the claim upon the record in the shape of a plea in excuse of the breach of covenant for which the action is brought, or in bar of the action.

Although the plaintiff is not a party objecting under rule 61 of this Court to the rule against which the defendants have appealed, still, lest this case should be regarded as a precedent approving of the restriction imposed by the Court upon the entry of a verdict in plaintiff's favor, and lest these conditions should be found embarrassing in the particular case, I think that under the rule we may with propriety order the rule of the Court of Common Pleas to be amended by *omit-*

(1) 20 U. C. C. P. 289.

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ting the condition imposed as to filing releases, and leave the assignee *McKenzie* to protect the interest of the creditors, which he can easily do if there be any necessity for his interfering for that purpose.

The defendants have no right that I can see to claim the interference of the Court to protect them against the legal consequences of the breach of their covenant with the plaintiff, and to suspend the recovery of a verdict against them until all plaintiff's creditors shall release the defendants from all claim they may have to the money recoverable by the plaintiff from the defendants for such breach. If the defendants had paid *McKenzie*, the assignee in trust, they could have pleaded that payment as a fulfilment of their covenant, and by this conditional verdict they are given a benefit, not only not asserted on the record, but which could not be, and which in fact operates as a premium to them for committing the breach of covenant for which they are sued.

Appeal allowed with costs.

Solicitor for appellant: *Malcolm C. Cameron.*

Solicitors for respondents: *Foster & Clarke.*

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*June 2.
*Dec. 12.

APPENDIX.

CLARK *vs.* SCOTTISH IMPERIAL INSURANCE COMPANY.

JUDGMENT OF STRONG, J. (1).

The facts material to the decision of this appeal are not in dispute, and may be very shortly stated.

In 1872, *John Bishop*, who proposed to build a schooner at *Hopewell* in *New Brunswick*, applied to the appellant, a merchant in *St. John*, to make him advances to enable him to complete the vessel. This the appellant agreed to do upon certain terms as to security for what he should advance, which the plaintiff, in his evidence, states as follows:—

The arrangement was that I was to supply him to build this vessel and hold the vessel as security for my advances. I was to dispose of the vessel in shares or the whole, as I saw proper, and when the vessel was disposed of, whatever remained after I got my pay was to go to *Bishop*. That was the arrangement. In pursuance of that arrangement, I made advances to him to over $2,000.

The testimony of *Bishop* is to the same effect. He says in his re-examination:—

I wanted to build a vessel and I wanted plaintiff to supply her, and I told him he should have the vessel as security for what he supplied me with. That I would put in all I could myself. I said I could not tell how much I could put in. That was about all that passed. He was to sell her, or make any bargain he could with her, and then to pay me the balance of what was paid him.

On the 10th of August, 1874, whilst the vessel was still in course of construction, the plaintiff obtained from the respondents the policy of insurance against

(1) See page 212.

loss by fire, which is the subject of this action. The policy covered a period of six months from its date. The amount insured was $3,000, and the property was described as "a schooner in course of construction by *John Bishop*, in his ship-building yard at *Hopewell, Albert Co., N. B.*"

In October, 1874, the vessel was burnt whilst still on the stocks. The respondents having disputed their liability, this action was brought to recover the amount of the loss.

The pleadings are not set out in the case as they should have been, but it sufficiently appears that the respondents by their first plea denied that the appellant had any insurable interest at the time of the loss. At the trial a verdict for the plaintiff was taken by consent for $3,318, and leave was reserved to the defendants to move to enter a non-suit, should the court be of opinion that the plaintiff had no insurable interest. A rule *nisi* to enter a non-suit was afterwards granted and made absolute. The judgment of the court, which was delivered by the Chief Justice, proceeds entirely upon the ground that the appellant had no insurable interest in the vessel.

It was contended on the argument of this appeal, as well as in the Court below, that under the law of *New Brunswick* an interest in the assured was not requisite to the validity of an insurance against fire, inasmuch as the Stat. 14 *Geo.* 3 did not apply to that province.

I am against this objection. The contract of insurance against fire is one of indemnity, and at Common Law, upon obvious principles of public policy, such a contract cannot be effected by one having no interest in the property insured.

The law has for many years been so settled in *New Brunswick*, by decisions which are in entire accord with the higest English authorities. The decision of this

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appeal therefore involves only the consideration of the question: Had the appellant, under the arrangement stated in the evidence of himself and *Bishop*, an insurable interest in the vessel? That the interest need not be such a right of property as a Court of Law would recognise, but is sufficient if it would be recognised and enforced in equity, is settled beyond dispute by numerous authorities (1).

Then, did the appellant acquire any interest, either legal or equitable in the vessel, under the agreement with *Bishop*?

I need scarcely say, that a legal mortgage of an existing chattel is unaffected by any provision of the Statute of Frauds requiring written evidence. On the contrary, such a security depends altogether on the Common Law, and may be constituted without delivery by a writing not under seal, or even by an oral agreement. This was determined in the case of *Flory* v. *Denny* (2). which was decided on the authority of a passage in *Littleton's* Tenures (3), cited in the judgment, which so states the law. In *Flory* v. *Denny* there was an informal written agreement not under seal, but I take it to be a well settled principle of the Common Law that when a deed is not requisite to pass an estate or interest an oral agreement is, in the absence of all statutory regulations, as effectual as an unsealed writing. Then, an incomplete chattel may be the subject of legal security, and if there is a contract to complete it and assign it when finished, the property in the completed chattel will be bound at law (4). This is founded on the principle that although a legal mortgage cannot be made of a non-existing chattel, yet personal property

(1) *Lucena* v. *Craufurd*, 3 B. & P. 75; *Exp. Yallop*, 15, Ves. 60; *Exp. Houghton*, 17 Ves. 253.

(2) 7 Exch. 581. See also *Reeves* v. *Capper*, 5 Bing. N. C. 136.

(3) Sec. 365.

(4) *Reid* v. *Fairbanks*, 1 C. L. R. 787; *Woods* v. *Russell*, 5 B. & Ald. 942; Fisher on Mortgages, 3rd Ed. p. 23.

not in existence, but in which the mortgagor has what is called a potential interest, may be made the subject of such a security, as in the case of a mortgage by the owner of land of the fruits or crops to grow upon it, a contract which is effectual at law (1). The learned Chief Justice seems to assume the fact to be that the construction of the vessel insured had been begun, and that some portion of it was actually in existence before the agreement between *Bishop* and the plaintiff, for, in his judgment, I find this passage:

> From the evidence of the *Bishops* it appeared that the keel of another vessel was laid immediately after the "Minnie" was launched, and that about two months afterwards *Bishop* applied to the plaintiff for advances on her.

The plaintiff, in his cross-examination, says he commenced advancing on the vessel now in question in the fall of 1872. *Bishop* says the advances commenced in July, 1872. *John Bishop Jr.* says: "She was commenced in 1872, just after we got the 'Minnie' off."

If we could safely infer from this evidence that any part of the vessel had been actually constructed at the time of the agreement between *Bishop* and *Clark* for securing the advances, there might, on the authorities cited, be a good legal mortgage. It is not, however, essential to the determination of the case that we should proceed on any such ground, for it is clear that the agreement stated in the testimony of both *Bishop* and *Clark* constituted a good equitable assignment of the vessel in favor of the plaintiff.

It is a well established principle in Courts of Equity, that an agreement to assign, by way of security, property not in existence, or in which the assignor has no interest at the date of the agreement, will operate as an equitable assignment by way of equitable mortgage, lien, or charge, which will take effect upon the property

(1) *Grantham* v. *Hawley*, Hob. 132; *Petch* v. *Tutin*, 15 M. & W. 110.

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when subsequently brought into existence, or acquired by the assignor. This doctrine springs from the jurisdiction of Courts of Equity to decree specific performance. In the present case, if the vessel had been completed and *Bishop* had refused to carry out the agreement to deliver her to *Clark*, a Court of Equity would have decreed specific performance, by compelling *Bishop* to put the plaintiff in possession in order that he might sell and retain his advances out of the proceeds. Again, had *Bishop* attempted to sell the vessel himself such a sale would have been restrained in equity at the instance of *Clark*.

In the case of *Holroyd* v. *Marshall* (1) there is a very full exposition of the law as to equitable mortgages and assignments of chattels to be subsequently acquired by the mortgagor or assignor, in which all these principles I have stated are laid down by Lord *Westbury*. No higher authority than this could be quoted, and it establishes all that the plaintiff contends for—that he had an equitable interest in the burnt vessel. It is sometimes said by text writers that specific performance of agreement as to chattels will not be decreed, but that parties will be left to seek a remedy at law in respect of the breach of a contract relating to such property. This, however, is incorrect as regards specific and ascertained chattels, as is explained by Lord *Westbury* in his judgment in *Holroyd* v. *Marshall*, and the rule as to such property as the schooner in question here is that which I have already propounded. The agreement, as stated by the plaintiff and *Bishop*, though it does not in terms provide that the plaintiff shall have any property in the vessel, but was in form only a stipulation by the plaintiff and a promise by *Bishop* that the possession of the vessel should be delivered to the former with power to sell and to pay himself out of the pro-

(1) 10 H. L. 191.

ceeds of the sale, is clearly sufficient in equity to create a lien. In the case of land, authority to a creditor to sell and retain his debt out of the proceeds, evidenced by an informal written memorandum (writing being, of course, required in the case of land by the 4th sect. of the Stat. of Frauds), has been held to constitute a good equitable mortgage or charge (1).

The agreement here was precisely similar to that just mentioned, the only difference being that there was no writing and that the property was not existent when the agreement was made, distinctions which, for reasons already stated, can have no effect. I have forborne to refer to the case of *Davies* v. *The Home Insurance Co.* (2), for the reason that it was not an authority which in any way bound the Supreme Court of *New Brunswick*, but I may say that I consider it as establishing the conclusions contended for by the plaintiff.

I am therefore of opinion that the appellant had an insurable interest in the subject of insurance, both at the date of the policy and at the time of the loss, in respect of which he is entitled to recover against the respondents.

The judgment of the Court below should be reversed and the rule *nisi* to enter a non-suit should be discharged with costs.

The appellant is, of course, entitled to his costs of this appeal.

(1) Exp. *Hodgson*, re *Cook*, 1 Gl. & J. 13; Fisher on mortgages, (Ed. 3) p. 33.

(2) 3 Grant, Er. & App. 269.

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