REPORTS

— OF THE —

SUPREME COURT

— OF —

CANADA

REPORTER

GEORGE DUVAL Q. C.

ASSISTANT REPORTER

C. H. MASTERS, BARRISTER AT LAW.

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1895.

JUDGES

OF THE

SUPREME COURT OF CANADA

DURING THE PERIOD OF THESE REPORTS.

The Honourable Sir Henry Strong, Knight C. J.

" " Télesphore Fournier J.

" " Henri Elzéar Taschereau J.

" " John Wellington Gwynne J.

" " Robert Sedgewick J.

" " George Edwin King J.

ATTORNEY-GENERAL OF THE DOMINION OF CANADA:

The Honourable Sir Charles Hibbert Tupper, K. C. M. G., Q. C., &c.

SOLICITOR-GENERAL OF THE DOMINION OF CANADA:

The Honourable John Joseph Curran, Q. C., LL. D.

MEMORANDA.

On the 12th day of September, 1895, the Honourable Télesphore Fournier resigned his position as one of the puisné judges of the Supreme Court of Canada.

On the 28th day of September, 1895, Désiré Girouard, of the city of Montreal, in the province of Quebec, Esquire, one of Her Majesty's counsel learned in the law, was appointed a puisné judge of the Supreme Court of Canada.

A TABLE

OF THE

NAMES OF THE CASES REPORTED

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TABLE OF CASES CITED.

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CASES

DETERMINED BY THE

SUPREME COURT OF CANADA

ON APPEAL

FROM

DOMINION AND PROVINCIAL COURTS

AND FROM

THE SUPREME COURT OF THE NORTH-WEST TERRITORIES.

THE HEREFORD RAILWAY CO .....APPELLANT; 1894

*May 14.

VS. *Oct. 9.

HER MAJESTY THE QUEEN ..... RESPONDENT.

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

51 & 52 *Vic. ch.* 91. *secs.* 9, 14 *(P. Q.)—Interpretation Act sec.* 19 *R. S. Q. —Railway subsidy—Discretionary power of Lieutenant Governor in Council—Petition of right—Misappropriation of subsidy moneys by order in council.*

Where money is granted by the legislature and its application is prescribed in such a way as to confer a discretion upon the Crown no trust is imposed enforceable against the Crown by petition of right.

The appellant railway company alleged by petition of right that by virtue of 51 & 52 Vic. ch. 91, the lieutenant governor in council was authorized to grant 4,000 acres of land per mile for 30 miles of the Hereford Railway; that by an order in council dated 6th August, 1888, the land subsidy was converted into a money subsidy, the 9th section of said ch. 91, 51 & 52 Vic., enacting that "it

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

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shall be lawful," &c., to convert; that the company completed the construction of their line of railway, relying upon the said subsidy and order in council, and built the railway in accordance with the act 51 & 52 Vic. ch. 91 and the provisions of the Railway Act of Canada 51 Vic. ch. 29, and they claimed to be entitled to the sum of $49,000, balance due on said subsidy. The Crown demurred on the ground that the statute was permissive only, and by exception pleaded *inter alia*, that the money had been paid by order in council to the sub-contractors for work necessary for the construction of the road; that the president had by letter agreed to accept an additional subsidy on an extension of their line of railway to settle difficulties and signed a receipt for the balance of $6,500 due on account of the first subsidy. The petition of right was dismissed.

Held, that the statute and documents relied on did not create a liability on the part of the Crown to pay the money voted to the appellant company enforceable by petition of right; Taschereau and Sedgewick JJ. dissenting; but assuming it did the letter and receipt signed by the president of the company did not discharge the Crown from such obligation to pay the subsidy, and payment by the Crown of the sub-contractors' claim out of the subsidy money, without the consent of the company, was a misappropriation of the subsidy.

APPEAL from a judgment of the Court of Queen's Bench for Lower Canada (appeal side) confirming a judgment of the Superior Court at Quebec, dismissing a petition of right brought by the Hereford Railway Company, whereby a sum of $42,500, balance of a subsidy voted by the legislature, was claimed.

This was a petition of right against Her Majesty the Queen (province of Quebec) concluding for a declaration by the Superior Court of the province of Quebec that the suppliants (appellants) are entitled to receive the sum of $42,500 as a part of a money subsidy due for constructing thirty miles of the Hereford Railway.

The facts and pleadings and the sections of the statutes and orders in council upon which the claim is

based, are fully stated in the judgments hereinafter given.

Brown Q.C. and *Stuart* Q.C. for appellants. The statute granting the subsidy in this case couples with the power to pay the duty to exercise that power so soon as the railway company has fulfilled its obligation, and there is no pretense here that the company has not earned the grant but simply that the lieutenant governor can exercise a capricious discretion. We take it to be a well established rule that no statute, which requires the action of the Crown, is written in imperative terms, but that none the less is the obligation imposed upon the Crown to act on every occasion when the public interest or the rights of a private individual require it. *Lapierre* v. *Rodier* (1); Cooley's Constitutional Limitations (2); Sedgewick on Statutory and Constitutional Law (3); Potter's Dwarris on Statutes (4); *Julius* v. *The Bishop of Oxford* (5).

The judgment of the Superior Court asserts the right of the company to the subsidy claimed, but holds it to have been determined by payment and subrogation by release and compromise. There was no authority given by the company to the payment by the Crown out of their subsidy of any moneys due to the sub-contractors for work of construction. No subrogations were produced from these sub-contractors against the company and the Crown cannot in law claim the benefit of any of these payments. Arts. 1155-1156 C.C.

Then again, the money was in the hands of the lieutenant governor in trust for the company, and we claim we are now entitled to the money, (which right has been recognized by the order in council of 16th August, 1888,) and can recover it by petition of right.

(1) Q.R. 1 Q. B. 515.
(2) P. 284.
(3) P. 438.
(4) P. 220, no. 27.
(5) 5 App. Cas. 244.

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This right is also impliedly recognized by 54 Vic. c. 88 (P.Q.) The lieutenant governor in council exercised his discretion, for warrants were issued and the money instead of coming into the hands of the company went into the hands of third parties to be used for debts for which there is no legal evidence that the company were liable. Then as to the ratification by the president we say he was not authorized to write such a letter by the board and he cannot bind the company in such a matter without a resolution of the board of directors, and his letter was not even acknowledged or acted on. See Art. 360 C.C.; *D'Arcy* v. *The Tanear, &c., Railway Co.* (1); *Kirk* v. *Bell* (2); Morawetz on Private Corporations (3).

If there was a liability on the part of the government for the payment of the subsidy now proceeded for that liability was not extinguished by an unauthorized offer of compromise, unaccepted by the Government and the terms of which have not been fulfilled.

Drouin Q.C. for respondent. The principal question to be decided on this appeal is whether a binding contract was entered into between the government of the province of Quebec and the suppliant company.

We submit first the following proposition: The words "is authorized to grant" used in the statutes 45 Vic. cap. 23, and 49 & 50 Vic. cap. 77 and others by which they were amended, are permissive and not imperative.

Article 19 of the R. S. P. Q. and the 4 s.-s. of section 7 of the Interpretation Act are too absolute in their meaning for any one to presume that the legislature intended that the courts should not be bound by the strict grammatical interpretation.

The grant of a railway subsidy in this case was a mere permission given to the lieutenant governor in

(1) L. R. 2 Ex. 158. (2) 16 Q.B. 290.
(3) Sec. 537.

council to apply for the building of that railway the lands or the money intrusted to him for that purpose. See 45 Vic. cap. 23, sec. 2.

And if a company is obliged to demand a subsidy it has no right to it; if the lieutenant governor in council can consider and declare that he is satisfied or not satisfied he has the discretionary power to do so; the right to receive, and the corresponding obligation to give this subsidy, are only created by the order in council asked for and passed after deliberation according to section 10 of 45 Vic. ch. 77, and to the act to which it refers 45 Vic. ch. 23.

So far there cannot be any doubt; the will to allow, to authorize, is exactly what the words express it; that conviction is forced upon one's mind.

The fact that the law does not specify who are the persons that are to profit by the subsidy and from the comparative quotations from the statutes cited by the appellant and other similar statutes; from the well understood intention of the legislator; from a sound consideration of the public interest; from the important distinction to be made between a statute admitting a vested right and a statute which creates one; it follows, that in the present case not only is there the doubt which, according to the learned Chief Justice of the Court of Appeal in the case *In re the Medical College and Palidès*, makes it a duty to adopt the natural meaning of the terms; but there is moreover absolute certainty on the parity of the grammatical and the legal senses.

Then we submit that 49 & 50 Vic. ch. 76, is only an act making it optional for the railway companies to ask for money in lieu of lands if the subsidies are granted to them. The proof of it is found in the fact that the legislation requires the companies to make two separate demands, one by which they ask the subsidy,

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and the second by which they apply for the conversion of the land subsidy into a money subsidy. Section 10, 49 & 50 Vic. ch. 77, previously quoted, enacts that:

> In the event of any company, having within the delay prescribed in subsection 1 of section 2 of the Act 45 Victoria, chapter 23, *applied for* any subsidy mentioned in the said act and furnished proof of its resources to construct its road, *the Order in Council may issue* at any time thereafter if the Lieutenant-Governor *is satisfied with the proof furnished.*

Neither this section nor the clause to which it refers has been repealed. To acquire a final right to a subsidy it is not sufficient for a company to apply for the conversion, and even after an order in council has acknowledged the application the company has no more right than previously. It is clearly seen that even after that another company with greater resources might come forward to which it would be in the public interest to grant the subsidy. According to the law, even after that conversion, the company must ask and obtain an order in council by which the lieutenant governor in council grants the subsidy to said company. Alone that order in council creates the right of a company to a subsidy.

It is a well known principle that the sovereign, like private individuals, is bound by the common law and according to common law there must be a fixed consideration for every contract. Now, as seen previously, the order in council upon which the claim of the appellant is based declares that the company has made the option, according to section 14, 51 & 52 Vic. ch. 91, and that section says:

> It shall be lawful for the Lieutenant Governor in Council to convert any subsidy in land * * by paying a sum not exceeding thirty-five cents per acre.

Is that a fixed measure? A real contract? Evidently no; for the Crown was limited to a maximum which

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was not to be exceeded; it could not pay more than thirty-five cents an acre but it could pay less. Where then is the operation which has fixed and determined this measure, and which would have finally created the right of the appellant? Nowhere, for it has never asked the order in council required by the clauses of the law above quoted. It would be a useless attempt to supply that missing link by the contention that 35 cents is the price inscribed in the books of the provincial treasurer. We would answer that the lieutenant governor in council has the right to fix that price, and that it is a well known principle that the Crown cannot be bound by the laches and the acknowledgments of the public officers, or even of the ministers. If again it was argued that there has been a defined practice of thus acting in the application of similar provisions we would reply that this practice, if it exists, resulting only from individual action, has no legal character and cannot bind the Crown. Morawetz on Corporations (1); Bryce on Ultra Vires (2).

THE CHIEF JUSTICE.—This petition of right has been presented for the purpose of obtaining from the Crown, as representing the province of Quebec, the payment of a subsidy granted by the legislature of that province in aid of the construction of the suppliants' railway.

The Crown insists that the subsidy in question, having been granted by the legislature in such terms as made the payment of it optional and discretionary with the lieutenant governor of the province, is not money recoverable by means of a petition of right. It is further set up on behalf of the Crown that so much of the money granted as was not paid over to the sup-

(1) Sec. 588. (2) P. 368.

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pliants was duly applied by the government in payment of certain claims against the contractors for the railway. And lastly, that by a certain receipt signed on behalf of the suppliants and by the terms of a certain application by the president of the railway company to the first minister of the province of Quebec, the suppliants renounced their present claim.

By the statute of Quebec 45 Vic. cap. 23, sec. 1 (a general subsidy Act), it is enacted as follows:

The Lieutenant Governor in Council is authorized to grant the following subsidies in and for the construction of the railways hereinafter designated.

And subsection *o* of the same section is as follows:

A quantity of four thousand acres of land per mile for a railway starting from a point on the frontier of the Province of Quebec, to effect a junction with the Boston, Concord and Montreal Railway to a point ten miles from Hall's stream, provided the length of such road does not exceed thirty miles.

51 & 52 Vic. cap 91, sec. 9, is as follows:

It shall be lawful for the Lieutenant Governor in Council to grant a subsidy of four thousand acres of land per mile to the Hereford Railway Company, for a railway starting from a junction with the Boston, Concord and Montreal Railway, or other railway on the frontier of the Province of Quebec, within ten miles of Hall's stream, thence to a junction with the International Railway, in the Township of Eaton, provided the length of such railway does not exceed thirty-five miles.

The 10th section of the same Act is in these words:

Paragraph *o* of section 1 of the act 45 Vic. cap. 23, is hereby repealed, the International Railway Company having by an instrument in writing passed in June last transferred to the Hereford Railway Company all its rights to the land subsidy granted by the said statute to the railway described in said paragraph *o*.

The 14th section of this Act is as follows:

It shall be lawful for the Lieutenant Governor in Council to convert in whole or in part any subsidy in land to which any company may be entitled in virtue of this act into a money subsidy by paying a sum not exceeding thirty-five cents per acre at the time the said subsidy becomes due, and another sum not exceeding thirty-five cents per acre when the lands allotted to the said company under this act shall

have been sold and paid for pursuant to the rules and regulations of the Department of Crown Lands and subject to such conditions to secure the construction of the road to which the said subsidy shall apply, as the Lieutenant Governor in Council may establish; provided that the Company entitled to any land subsidy under this act shall declare its option within the delay of two years after the passing of this act in favour of the said conversion of the said subsidy by a resolution of its board of directors duly communicated to the Government through the Commissioner of Public Works.

On the 2nd of August, 1888, an order in council was passed which is printed in the case, and which (after many long recitals which need not be set forth, and including one to the effect that the suppliants had declared their option for a conversion of the subsidy into money, and recognizing that the International Railway Company, which had become entitled to the subsidy granted by 45 Vic. ch. 23, had transferred its rights to the suppliants) proceeded as follows :—

L'Honorable Commissaire recommande qu'il soit donné acte à la dite Compagnie du chemin de fer de Hereford tant en son nom propre que comme étant aux droits et actions de la dite Compagnie de l'International des conversions en argent par elle ainsi effectuées, de la subvention en terres de 4,000 acres par mille ainsi accordée et mentionnée dans et par les dites clauses 9 et 10 pour la ligne de chemin de fer y décrite et que les dites conversions en argent soient ratifiées et confirmées en faveur de la dite Compagnie du chemin de fer de Hereford, pour toutes fins que de droit, sous l'autorité et en conformité de la clause 14 de l'Acte des subventions en premier lieu cité.

Certain persons who had contracted with the suppliants' principal contractor for the construction of their line of railway having absconded, leaving subcontractors under them and workmen unpaid, the government of the province of Quebec on the 17th of April, 1889, appointed John P. Noyes as a commissioner to inquire into and investigate the claims of the persons thus remaining unpaid. On the 28th August, 1889, Noyes made his report. Pursuant to the report the government paid the sum of $42,500, but a very

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small portion of which appears to have been applied for the benefit of the suppliants, or in discharge of debts or claims for which they were liable, this money having been paid to persons to whom the absconding contractors were indebted, debts for which the suppliants were in no way responsible.

The residue of the subsidy remaining after the payments out of it made under Noyes's report amountedto $6,500. This amount was on the 8th of August, 1890, paid over to the suppliants pursuant to the warrant of the lieutenant governor, dated the 7th of August, 1890, when the suppliants by the agency of their president signed the receipt below. As the judgment of the Court of Queen's Bench is founded on this warrant and receipt I set it out *in extenso*. These documents are as follows:—

By His Honour

The Honourable Auguste-Réal Angers,

Lieutenant Governor of the Province of Quebec.

No. 511 on No. 1010, $6,500.

To the Honourable the Treasurer of the Province of Quebec.

You are hereby authorized and required, out of such monies as are in, or shall come to your hands, for defraying the expenses of the Civil Government of the Province of Quebec, to pay or cause to be paid unto The Hereford Railway Company, or to their assigns, the sum of six thousand five hundred dollars being on account of the balance of the first thirty-five cents per acre of converted land subsidy of 4,000 acres per mile, on 35 miles under O. C. No. 340 of July 31st, 1890, and chargeable to

Consolidated Railway Fund.

Railway subsidies, to be taken from 40 Victoria, chapter 2.

And for so doing this, with acquittance of the said Railway Co., or their assigns, shall be to you a sufficient warrant and discharge.

Quebec, this 7th day of August, 1890.

GUSTAVE GRENIER,

Deputy Lieutenant Governor.

Received this 8th day of August, 1890, from the Honourable Treasurer, the above mentioned sum.

THE HEREFORD RAILWAY CO.,

p. pro. W. B. IVES,

President.

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The suppliants went on and completed the construction of their line of railway, and on January, 1890, the same was duly inspected by the railway engineer of the Quebec government, and that officer, by his report in writing dated the 8th of January, 1890, certified to the commissioner of public works that the railway had been satisfactorily completed.

In a letter dated January 20th, 1890, written by the Hon. William B. Ives, president of the suppliants' company, to the Hon. Mr. Mercier, then minister at the head of the government for the province of Quebec, allusion is made to an additional subsidy for eighteen miles of the line of the suppliants' railway other than the thirty-five miles for which the first subsidy had been granted. The following extract from the letter referred to contains all that is material to the present question:

> I have to add that a subsidy of say $3,000 per mile upon this eighteen miles voted on condition that the Government retained and paid out of it the claims against Messrs. Shirley, Corbett & Company as established by Mr. John P. Noyes, would be acceptable to this company, and would put at rest all the difficulties that have arisen with regard to these claims.

This letter does not appear by the evidence to have been answered, but a grant of the amount mentioned for the eighteen miles referred to was subsequently made by the legislature of the province of Quebec to the suppliants, no reference, however, being made in the act granting the subsidy to the application or to the terms indicated in the president's letter.

Mr. Justice Caron, before whom the cause was heard in the Superior Court, dismissed the petition of right upon three grounds; first, because the payment under Noyes's report was a due application of the subsidy *pro tanto*; secondly, because the $54,000 granted as a subsidy for the eighteen miles must be presumed to have been so granted on the terms of the president's letter, and was thus in satisfaction of all claims arising

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out of the misappropriation of the first subsidy; and thirdly, because the receipt appended at the foot of the warrant was an express renunciation of all claims to any further payment on account of the grant.

The Court of Queen's Bench adopted as the reasons of its judgment the second and third only of these grounds.

I am of opinion that the Court of Queen's Bench were right in rejecting the first "considérant" of the Superior Court. If there was any legal obligation binding on the Crown to pay this money to the suppliants that obligation could not possibly be discharged by payments made without the assent of the railway company in liquidation of demands against Shirley, Corbett & Company, the absconding contractors, to whom it does not appear that the railway company were in any way indebted.

In favour of the two other grounds of the first judgment which were adopted by the Court of Queen's Bench more may be said, though I cannot agree in either of them. The receipt at the foot of the warrant does not, as it seems to me, amount to a renunciation. It does, it is true, refer to the $6,500 as being a balance of the subsidy, but I cannot say that it shows that it was the intention of the company to waive all further demand for the rest of the subsidy. The letter of the president, and the subsequent grant of the amount suggested by him, without more, cannot bind the company. No resolution of the board of directors authorized the writing of this letter, and the president had therefore no authority to bind the company. It cannot be pretended that the company in accepting the subsidy must be taken to have implicitly ratified the terms proposed by Mr. Ives, for it is not shown that these terms and conditions were ever brought to the notice of the directors, either when the letter was writ-

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ten or when they accepted the second subsidy. It must therefore be taken as proved that the company had no knowledge whatever, at any time, of Mr. Ives's letter, or of the proposal which he therein made to the government. This, therefore, also appears to me to be an insufficient ground for refusing relief to the suppliants.

I am, however, of opinion that on a broader ground, that principally insisted on by the Attorney General, the petition of right was properly dismissed.

It is argued on the part of the appellants that by taking the order in council converting the subsidy from the land into money the Crown entered into a contract with the suppliants to pay them the subsidy.

I cannot accede to this proposition. I see nothing in the terms of the order in council itself indicating that the Crown intended thereby to do more than the statute under which it was passed authorized, namely, to provide for substitution of money for land in such a way that the government should be in the same position, and bound by no greater obligation as regarded the money than it was originally bound by as regarded the land.

Then, the suppliants' right to this money must depend altogether on the statute (1) granting the subsidy, and if this did not create a liability on the part of the government to pay the money no statutory liability in respect of this money ever existed.

The language of the act is permissive and facultative; it makes no direct grant to the railway company, but in using the words "it shall be lawful for the lieutenant governor to grant" it imports that the Crown is to exercise its discretion in paying over or withholding the money as it may think fit. In the case of *The Queen* v. *The Lords Commissioners of the Treasury* (2) Lord Blackburn says:

(1) 51 & 52 Vic. cap. 91. (2) L. R. 7 Q. B. 387.

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When the money has been voted and an appropriation act passed this act must be construed, when it comes before us, like any other act. The Appropriation Act regulates so far as it goes what is to be done with the money.

In the well known case of *Julius* v. *The Bishop of Oxford* (1), Lord Cairns speaking of the act in question there (which was not, it is true, a money act) says:

> And the words "it shall be lawful" being according to their natural meaning permissive or enabling words only it lies upon those, as it seems to me, who contend that an obligation exists to exercise this power to show in the circumstances of the case something which according to the principles I have mentioned creates this obligation.

Section 19 of the Revised Statutes of Quebec (the Interpretation Act) is also directly applicable and so absolute in its terms as to preclude the possibility of interpreting these words as implying any obligation enforceable by petition of right or otherwise.

This section 19 is in these words:

> Whenever it is provided that a thing "shall" be done or "must" be done, the obligation is imperative, but if it is provided that a thing "may" be done, its accomplishment is permissive.

Then, there is no reason here why the words should be read in any other than their primary meaning. The grant of the subsidy was pure bounty on the part of the legislature. No advantages, privileges or benefits in the case of the railway to be constructed were stipulated for in favour of the government, and there was no reason why the control of the money by the lieutenant governor should not be retained down to the last moment before payment. It is said that the suppliants relied on receiving the money and were thus induced to construct their railway at a great expenditure of their own moneys, but they had no right to rely on the act any further than its terms warranted them in doing so. Then, no statutory obligation was cast upon the Crown either as regards the money or

(1) 5 App. Cas. at p. 223.

the land. I cannot read section 4 of 49 & 50 Vic. cap. 76 as imposing an absolute obligation to pay when a railway shall be completed; this is apparent from the 5th section which authorizes the lieutenant governor to impose terms. The words we have to look at are the words of the 51 & 52 Vic. cap. 91, for the 4th section of 49 & 50 Vic. cap. 76, does not apply to grants under the subsequent act, and these words, as I have shown, are not obligatory. Therefore, neither on the ground of contract nor on that of statutory obligation are the suppliants entitled to succeed. There remains the ground of trust. Can it be said that the Crown is by the statute made a trustee or *quasi* trustee of this money to hold it until the railway should be completed and then pay it over to the company? Several cases have been before the English courts where moneys have come into the hands of the Crown for the purpose of being distributed amongst a certain class of persons. Such were the cases of *Kinloch* v. *The Queen* (1), and *Rustomjee* v. *The Queen* (2), in both of which it was determined that money so held by the Crown could not be considered as subject to a trust enforceable by means of a petition of right. I see no reason why the principle of these cases should not apply here. If no enforcible trust is to be considered as imposed when money to be applied to a particular designated purpose is placed in the hands of the Crown under treaty or otherwise than by act of parliament, why should the conclusion be different where the money is granted by the legislature and its application is prescribed in such a way as to confer a discretion upon the Crown? No reason can be suggested for such a difference.

I am of opinion that the appeal must be dismissed.

(1) Weekly Notes 1882, p. 164; Ibid. 1884, p. 80. Not elsewhere reported.

(2) 1 Q.B.D. 487; 2 Q.B.D. 69.

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Taschereau J.

FOURNIER J. concurred.

TASCHEREAU J.—I agree with my brother Sedgewick, whose notes I have read, that this appeal should be allowed.

On the only question that can, it seems to me, give rise to any controversy in the case, and the only one upon which we do not agree, that is to say the question whether the appellant company has a right of action or not, the appellant has, in its favour, the judgment of Mr. Justice Routhier upon the demurrer, and, though not in express terms, the judgments of both the Superior Court and of the court of appeal, which, as I read them, both concede his right of action. I take it for granted now that the payment to the contractors' men cannot be invoked against the appellant, and that Mr. Ives's letter cannot in any way militate against them. It is clear that a payment to B. of what is due to A. cannot prejudice A. and as to Mr. Ives's letter there is not a word of evidence, leaving aside the want of authorization proved by himself in the case, that it was ever acted upon, or taken into consideration, or even given communication of to the legislature. Then the subsidy granted in 1890, 54 Vic. c. 88, is for an extension line of this railway and not for the same line subsidized previously. We are unanimous in rejecting that part of the defence based on these two facts, and upon which the two courts below came to a conclusion adverse to the appellant. So that, if I mistake not, on each question raised in the case the appellant has in its favour the majority of the judges who in the different courts have had to adjudicate upon it, though they lose their case. This subsidy, I may preliminarily remark, is not to be considered as a gratuity. It is a grant for consideration. The government desiring to see a railway in

that locality, and, it must be assumed, no company being willing to build such a railway, in a comparatively new and unsettled part of the country, without the assistance generally given by the government to such enterprises under such circumstances, gets from the legislature the power to subsidize any company that will come forward to build it. The increase which must result from the construction of such a railway in the value of the government's own lands in that vicinity, for it appears to be township lands, is, undoubtedly, also a consideration that induces the government to take that step.

Now, upon the consideration of this subsidy so offered to the world at large, and only because they are offered this subsidy, this company is formed and comes forward, disburses a large capital, constructs a road in a manner which the government's own engineer reports as "très satisfaisante," yet the government would now say that they never contracted an obligation to pay them a single cent. And this after sanctioning by an order in council the conversion of this land subsidy into a cash subsidy, (which, I take it, is, by itself, an admission of liability and a promise to pay) after admitting in so many words in an order in council of 19th December, 1883, that this company had performed all the conditions precedent required by the statutes, and that it consequently had then the right to demand from the government that the land it was then entitled to as a subsidy be located and set apart, as required by section 2 of 45 Vic. ch. 23. I cite the very words of this order in council (as recited in the order in council of 1888 as found in the case) to show that there is no ambiguity in its terms, and that the Quebec government's advisers of that date did not dispute in any way this company's claim :

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Considérant * * * que la dite Compagnie avait fourni des preuves suffisantes des ressources à sa disposition pour la construction du dit embranchement et qu'en conséquence elle avait droit de demander la location des terres ainsi accordées par le statut plus haut cité.

Now, if the company had then, in 1883, a right to the lands, as this order in council admits, they have now a right to the cash subsidy. By admitting that the company had a right the government admitted an obligation on its part, a contract to pay; and if the company have a right they have an action to claim it. And this very order in council of 1888 admits that they have the same right to the cash subsidy that they had to the land subsidy. It admits that the International Company has ceded to the appellant company "tous ses droits et actions," all its rights and actions in the said subsidy, and recognizes it as substituted to the International Company. Then, an order in council of September, 1889, authorizes the payment of Noyes's expenses "out of the $49,000, being the subsidy at 35 cents per mile granted to this company," and the orders in council, one of March, 1890, and two of June, 1890, also admit that the payments thereby authorized are to be taken from the subsidy payable to the said company "*afférente à la dite compagnie.*" The very order in council of April, 1889, appointing Noyes as commissioner, had in the same terms decreed that his fees were to be paid out of the "subvention afférente à la compagnie"; and in the order in council of 3rd September, 1890, is another admission that the company had a right to $49,000,

Total de la subvention de $4,000 par mille, à laquelle la dite Compagnie *avait droit.*

In fact this right of the company would only be forfeited according to section 2 of 49 & 50 Vic. ch. 77, upon their not performing the works required by them, which event, it is conceded, has not happened.

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By sec. 6, 49 & 50 Vic. ch. 76, every railway company to which a subsidy of 35 cents per mile is granted, and which accepts the same, falls *ipso facto* under the government's control and *surveillance*. Here is a railway which by the law is under the government control, because it is subsidized, but to which, however, the government will not pay the amount of the subsidy, and which, though it actually receives no subsidy, is nevertheless under government control.

(Secs. 9, 10 and 14 of 51 & 52 Vic. ch. 91, recognize the present suppliant's title in lieu of the International Company, and a revote of the subsidy, extending it to 35 miles instead of 30 miles.)

On the 16th July, 1888, four days after the coming into force of the 51 & 52 Vic. ch. 91, the department of railways in Quebec wrote a letter to this company saying that as soon as the department would receive the company's option of a money subsidy instead of lands, the government engineer would be ordered to make the inspection required by law of any completed portion of the road, and that upon such report the proportion of the money subsidized accrued in virtue of the statute, would be paid by the treasurer of the province.

Immediately, on the 19th, the company's option is declared, and sent to the government, as acknowledged in the order in council of the 2nd August following. This order in council approves and grants the demand of these companies, ratifies and confirms, "pour toutes fins que de droit," in favour of the suppliants the said conversion of a land subsidy into a cash subsidy in conformity with sec. 14 of 51 & 52 Vic. ch. 91, and this sec. 14 enacts that this money shall be paid when the subsidy becomes due. Is not that again a legislative declaration that this money is due when the railway is built to the satisfaction of the lieutenant governor

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in council? And further, why was the government engineer sent to inspect the railway, as it appears he was, by his evidence and by his report of January 8th, 1890, filed in the case? Did not the government thereby submit again, or admit *de novo* its obligation, to pay this subsidy if its engineer reported that the company had performed its duties? When this engineer reports that the company had fulfilled all its obligations can the government repudiate its own acts, and be allowed to contend that it is not bound to pay this subsidy? I would call this a breach of faith and nothing else if such a contention, under similar circumstances, was enunciated in a court of justice by any private corporation.

The contention that the company has, by receiving $6,500 on account, discharged the government of this liability for the balance is untenable, and, on this point we are also, I believe, unanimous. A payment on account is not a payment in full satisfaction. It is, if anything at all, an admission of liability as specially pleaded in suppliant's replication? Then, there is no plea to that effect, not a word in the defendant's pleas of this payment of $6,500. The only allegation of ratification, could any question of ratification have arisen, is in paragraph 12 of the pleas, which is and remains struck out by the court by the judgment of May 20th, 1892, and, as to the amended pleas, of March 6th, 1893. The order in council itself, of July 21st, 1890, upon which these $6,500 were paid, says that this sum is paid " en déduction d'autant sur la balance lui afférant sur la montant de la dite subvention." To contend that by accepting these $6,500 the company renounced all its rights to the balance of the subsidy would be equivalent to contending that the government's officers surreptitiously or smartly obtained from the company a discharge of the govern-

ment's obligations. But, as I have said, no contention on this head is open to the respondent on this record, as there is no plea to support it.

The respondent's contention based upon the fact that the statutes authorized a money subsidy without mentioning any amount besides saying that it should not exceed 35 cents per acre is, on the evidence, untenable. All the documents, their very payment sheets to the contractors, all the orders in council, show that it was mutually always understood that the full amount of 35 cents per acre was the amount this company was entitled to when they optioned for the cash subsidy.

If this receipt for $6,500 I have alluded to establishes anything, it is that the government acknowledges that it had fixed at 35 cents per mile the cash subsidy authorized by the statutes, besides admitting its liability therefor.

SEDGEWICK J.—In my view the principal question involved in this appeal is as to the existence of a contract between the company and the Crown. If a contractual relationship existed between them the suppliants are entitled to their demand, and if not the appeal must fail.

It is clear that when an Act of Parliament by a supply bill or otherwise authorizes the Crown to appropriate public money or lands for any specific purpose, or to any particular individual or company, such an Act is facultative or permissive only. It of itself imposes no obligation on the Crown to make the appropriation, much less does it give to any one a legal right to demand it. To create such right there must be a subsequent actual appropriation by the Crown communicated to the person for whom it is intended and acceptance by him of the appropriation. There must, in short, be a contract. Nor is it absolutely

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necessary that the contract be under seal, or even in writing. It may be created without writing, without spoken words even, its existence being sometimes conclusively proved solely by the acts or dealings of the parties involved.

Now in the present case there was no formal contract executed between the government and the company by which the company became bound to build the railway and the government to pay the subsidy. It was admitted at the argument that at that time such was not the practice in the province of Quebec; formal contracts were never entered into in reference to the payment of provincial railway subsidies, although an express statute on the subject has since been passed. But notwithstanding the want of it in the present case, I have come to the conclusion that as a matter of fact there was an actual contract, a contract completely performed by the company and capable of being enforced against the Crown. The salient facts which have led me to this conclusion are as follows: By 51 & 52 Vic. cap. 91, sec. 9, the lieutenant governor was authorized to grant a subsidy of 4,000 acres of land to the Hereford Railway Company for the purpose of aiding the construction of its railway, the length not to exceed 35 miles. By the same Act it was provided, in effect, that the governor and council might upon application of the company convert the land subsidy into a money subsidy, by paying a sum not exceeding 35 cents per acre when the subsidy should become due, and a like further subsidy when the lands were sold, the company to declare its option in favour of conversion within two years from the passing of the Act. This Act was passed in July, 1888, and afterwards on the 16th of July the following letter was sent from the public works department, the department charged by statute with the

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administration of railway subsidies, to the president of the company:

DEPARTMENT OF PUBLIC WORKS, PARLIAMENT BUILDINGS,
GOVERNMENT RAILWAY OFFICE,
QUEBEC, 16th July, 1888.

To W. B. IVES, Esq., Q.C. & M.P., Sherbrooke.

SIR,—In reply to your favour of the 13th instant, I beg to enclose you, at your request, a copy of the railway subsidies act passed at the last session of the Quebec legislature, and sanctioned on the 12th instant.

In answer to your question: "Whether it will be necessary for the directors of the Hereford Railway Company to pass a resolution declaring their option to take money instead of land, and notify the commissioner, or if the former declaration will suffice;" I beg to state that such additional resolution will not be required *in toto*, and that the one actually in my hands coming from the International Railway Company, and declaring their option in favour of the conversion into money of the land subsidy granted to the Hereford branch, under the act 45 Vic. chap. 23, section 1, paragraph 0, for a distance of 30 miles, will be sufficient to enable me to operate such conversion in favour of your company for that distance only. But it will be necessary that you should send me a certified copy of a resolution passed by the board of directors of your company, declaring their option in favour of the conversion of the additional land subsidy granted you by section 9 of the railway subsidies act, passed at the last session (bill 192) for the additional length of 5 miles in excess of the 30 miles already subsidized. As soon as I shall be in possession of this last copy of resolution, I will get an order in council passed for the purpose of approving the declarations of option so made, as well by the International Railway Company as by your own, in such a way as to entitle your company to receive the full converted land subsidy according to law.

As I have told you in my office, in the course of last week, I will be ready to issue instructions to the government engineer to get his inspection and report on any completed section of the Hereford Railway, as soon as the honourable the commissioner of public works shall have received due communication therefor from the president, or secretary of your company. When such a report is made by the engineer, an order in council will be passed to authorize your company to receive from the treasurer here, the proportion of said converted land subsidy, which your company may be entitled to, under such report and in virtue of the laws in force.

I have the honour to be, sir,

Your obedient servant,

E. MOREAU,

Director of Railways.

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As suggested in that letter, in the same month the following resolution was passed by the company's directors:

Moved by director Pope, seconded by director Learned, and resolved: "That whereas by an act passed at the session of the legislature of the Province of Quebec held in the present year of our Lord 1888, a subsidy of four thousand acres of land per mile was voted to the Hereford Railway Company, for their railway, for a distance not exceeding thirty-five miles, and provision was made in the same Act for the conversion of such subsidy into a money subsidy, and whereas, under the said Act it is necessary that the option of the Hereford Railway Company in favour of such conversion should be declared by resolution of the board of directors, the directors hereby declare their option and that of the Hereford Railway Company in favour of the conversion of the said subsidy into a money subsidy under the provisions of and in accordance with the said act.

This resolution being communicated to the government of Quebec, an order in council was passed of which the following is a copy:

L'honorable commissaire des travaux publics, dans un rapport en date du vingt-six juillet dernier 1883, expose: qu'il est décrété par les clauses 9 et 10 de l'acte relatif aux subventions des chemins de fer, sanctionné à la dernière session de la législature.

Qu'il est loisible au lieutenant gouverneur en conseil d'accorder à la Compagnie du chemin de fer de Hereford, une subvention de quatre mille acres de terre par mille, pour une ligne de chemin de fer partant d'une jonction avec le chemin de fer de Boston, Concord et Montréal, ou tout autre chemin de fer sur la frontière de la province de Quebec, à dix milles du ruisseau Hall, et se prolongeant à une jonction avec le chemin de fer International, dans le canton d'Eaton, pourvu que la longeur de ce chemin de fer n'excède pas trente-cinq milles; le paragraphe *o* de la sec. 1 de l'acte 45 Victoria, chap. 23, étant par les présent abregé la Compagnie du chemin de fer International ayant par écrit daté du mois de juin dernier, transferé ses droits aux actrois de terre accordés par le dit statut au chemin de fer désigné dans le dit paragraphe.

Considérant que par l'ordre en conseil no. 59, du 19 Décembre, 1883, il a été déclaré que la Compagnie du chemin de fer International avait été autorisé par l'acte 45 Victoria, chap. 23, clause 1, par. *o*, à construire un embranchement à sa ligne principale devant relier celle-ci au chemin de fer de Boston, Concord et Montréal, à ou près de la

frontière provinciale, le dit embranchement ayant nom "The Hereford Branch" ne devant pas excéder trente milles en longueur, et que la dite compagnie avait fourni des preuves suffisantes des ressources à sa disposition pour la construction du dit embranchement, et qu'en conséquence elle avait droit de demander la location des terres ainsi accordé par le statut plus haut cité.

Considérant que la dite compagnie a communiqué une copie certifié d'une résolution adoptée par son bureau de direction, le 19 octobre, 1887, à l'effet de demander et de déclarer son option en faveur de la conversion en argent de la subvention en terres accordées au dit embranchement Hereford, et ce sous l'autorité de l'acte 49 & 50 Vict., chap. 76, clause 1 ;

Considérant que le parlement fédéral, par deux actes adoptés durant les deux dernières sessions, a constitué en corporation distincte, la Compagnie du chemin de fer Hereford, et amendé sa charte dans ce sens, pour la construction du susdit embranchement ;

Considérant que le dite compagnie d'International a passé une résolution à une séance de son bureau de direction tenue à Montréal, le 7 de juin dernier, à l'effet d'autoriser ses présidents et secrétaires à signer et exécuter, en faveur de la dite Compagnie du chemin de fer Hereford. un acte par lequel la première compagnie céderait transporterait tous les droits, actions et intérêts qu'elle, la dite Compagnie de l'International, avait et possédait dans la susdite subvention en terres, et dans sa conversion en argent par elle deffectuée le dit jour, le 19 octobre, 1887 ;

Considérant que sous l'autorité de la dite résolution en dernier lieu mentionnée il a été fait et signé le 12 juin dernier, un acte ou instrument, aux termes dequel le président et le secrétaire de la dite Compagnie de l'International ont fait cession et transport à la dite Compagnie de Hereford de tous les droits et actions acquis et possédés par la première compagnie dans la subvention en terres susdite, et dans sa conversion en argent, en conformité des résolutions precitées, ce transport ayant été fait pour valeur recue, suivant qu' établi dans la résolution en dernier lieu mentionnée ;

Considérant que la dite Compagnie de Hereford a communiqué une copie certifiée d'une résolution adoptée par son bureau de direction, le 19 juillet dernier à l'effet de demander et déclarer son option en faveur de la conversion en argent de la subvention en terres à elle ainsi accordée et mentionée dans les clauses 9 et 10 de l'acte relatif aux subventions des chemins de fer, en premier lieu cité ; et

Considérant qu'il est opportun d'accorder les demandes de ces deux compagnies, l'honorable commissaire recommande qu' il soit donné acte à la dite Compagnie du chemin de fer de Hereford, tant en son

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nom propre que comme étant aux droits et actions de la dite Compagnie de l'International des conversions en argent par elle ainsi effectuées, de la subvention en terres de 4,000 acres par mille ainsi accordée et mentionnée, dans et par les dites clauses 9 et 10 pour la ligne de chemin de fer y décrite et que les dites conversions en argent soient ratifiés et confirmées en faveur de la dite Compagnie du chemin de fer de Hereford, pour toutes fins que de droit sous l'autorité et en conformité de la clause 14 de l'Acte des subventions en premier lieu cité.

Certifié,

GUSTAVE GRENIER,
Greffier, Conseil Exécutif.

On the 6th August the department of public works sent this order in council to the company accompanied by the following letter :—

DEPARTMENT OF PUBLIC WORKS,
PARLIAMENT BUILDINGS,
QUEBEC, 6th August, 1888.

To W. B. IVES, Esq., Q.C., M.P.,
Sherbrooke.

SIR,—Agreeably to your request I beg to enclose you herewith copy of an order in council, sanctioned under no. 481 by his honour the lieutenant governor, on the 2nd of August instant, and by which the declaration of the option made by the International and the Hereford Railway Companies in favour of the conversions into money of the land subsidy granted by the act 45 Vic., chap. 23, section 1, paragraph *o*, and subsequently by the railway subsidies act of 1888, section 6, to the railway therein described, for a distance not exceeding 35 miles, have been ratified and confirmed by the executive council to all intents and purposes. It remains now with the Hereford Company to deposit into this department (railway office) a duplicate plan and book of reference of the constructed as well as of the projected line of their railway, as described in the above last mentioned statute, the whole in accordance with section 8 of the Quebec consolidated railway act of 1880; said plan and book of reference will be examined here, and if found correct and identical one with the other they will be duly certified and a copy thereof will be sent back to the president or secretary of the company, to be deposited in the registry office of the county traversed by said railway. According to law a similar certified copy of said plan and book of reference must be made at the cost of the company, and deposited by them in each county through which passes the railway. When such deposit shall have been so made

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we will be ready at the request of the president or secretary of the company to send our engineer on the spot to inspect and report upon the extent and value of the works already done on said railway, provided the length of the completed portion thereof should not be less than 10 miles.

I have the honour to be, sir,
Your obedient servant,
E. MOREAU,
Director of Railways.

So far there may not be sufficient evidence of a contract, but there is surely a near approach to it. There is an act of the Crown subsequent to the act of the legislature indicating an intention on the part of the governor in council to act upon his statutory authority and to give a money subsidy, and to give it to this company. There is a written statement communicated to the company by the properly qualified government department to the effect that the order in council would "entitle the company to receive the full converted land subsidy according to law" and that upon inspection and approval of the work by the government engineer an order in council would be passed authorizing payment of such portions of the subsidy as might from time to time be earned. There is a further statement from the same public department suggesting to the company to prepare a plan and book of reference under the provisions of the railway Act of 1880, and that subsequently government officers would perform their statutory duties in the matter of inspection, and that too for the purpose, the only purpose, of enabling the company to receive its subsidy. So far there was no suggestion, not the scintilla of a suggestion, that a written contract was necessary, that a formal order in council should be passed authorizing the minister of public works to enter into a formal contract providing for the construction of the works or the payment of the subsidy. Had the question been

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raised, had this course been deemed necessary, doubtless it would have been done, but it never had been done; it had never been imagined in the administration of Quebec affairs that it was necessary to be done. What was done, so far, amounted at least to this: an invitation by the government that the company should proceed with its work, and a promise that it should eventually obtain (all conditions being performed) the statutory subsidy.

Acting upon the belief that nothing further remained to be done in the matter of legal instruments, or formal contracts, the company made its surveys, prepared and duly filed its plan and books of reference of the line of railway, had these plans and books approved in the usual way by the public works department, expended its money (exceeding I doubt not a hundred thousand dollars) in the construction and completion of the work, thoroughly finished it, had it finally inspected, examined and approved by the proper officer of the Quebec government, and, as stated by Mr. Moreau, director of railways, in his evidence, complied with all the conditions of the law in order to entitle itself to the subsidy ("La compagnie s'est-elle conformée à toutes les conditions de la loi pour se mettre en droit de recevoir sa subvention?") and it was so declared in the order of the governor in council of the 31st of July, 1890.

During the progress of the work, however, serious difficulty arose. The contractors who at an early stage were engaged upon it after receiving some $30,000 from the company, following several notable precedents in other parts of Canada, absconded without paying the labourers and other persons having dealings with them. There was of course great public dissatisfaction and the usual application to government for redress. A commissioner was thereupon appointed by the gov-

ernment, Mr. J. P. Noyes, who made a report as to the actual amount due to the contractors' creditors, that indebtedness being determined by him to amount to the sum of $39,297.05. That indebtedness, it must be observed, was in no way a liability of the company. So far as the evidence goes there was no legal or even moral claim against the company. But some scheme must be devised to meet the difficulty, and settle discontent in the eastern townships. The scheme was an easy one—pay the labourers from the public exchequer, and charge the money, as well as all the expenses of the commission, against the company's subsidy. That was the mode adopted and put in execution. And it is for us to determine whether, as between the government and the company, that payment was legal.

These payments were all made under orders in council from time to time, the order for the payment of the principal sum being that of the 24th of December, 1889. the warrant therefor being as follows:—

By His Honour
The Honorable Auguste-Réal Angers,
Lieutenant Governor of the Province of Quebec.

No. 1675. $36,208.34.

To the Honourable the Treasurer of the Province of Quebec.

You are hereby authorized and required, out of such moneys as are in or shall come to your hands for defraying the expenses of the civil government of the Province of Quebec, to pay or cause to be paid unto

The Hereford Railway Company, represented by the hon. commissioner of public works or to their assigns, the sum of thirty-six thousand two hundred and eight dollars and thirty-four cents, being to carry out the provisions of O. C. no. 651, of December 24th, 1889, and being on account of converted land subsidy on 35 miles under 51 & 52 Vic. cap. 91, out of the said sum of $36,208.34, the sum of $16.85 to be paid to L. A. Vallée, engineer, and $60 to the treasurer for engineers' fees.

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Railway subsidies, 40 Victoria, chapter 2.

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And for so doing, this, with acquittance of the said railway company, or their assigns, shall be to you a sufficient warrant and discharge.

GUSTAVE GRENIER,
Deputy Lieutenant Governor.

Quebec, this 27th day of December, 1889.

Received this 16th day of January, 1890, from the honourable the treasurer, the above mentioned sum by three cheques, viz., $36,131.49, favour Honourable P. Garneau, comm. of public works, $16.85 favour L. A. Vallée, and $60 favour assistant treasurer.

P. GARNEAU,
Commissioner Public Works.

It will be noted that in this warrant, as in most of the other ones, it is stated that the payment is to the company, but the company represented by the commissioner of public works. Now, it must be admitted that the honourable commissioner was *not* the representative or agent of the company. The company never authorized this payment, it always repudiated the charging of the money in question against its subsidy, and the commissioner had no semblance of right to take the money as the agent of the company. The orders in council, too, contain words intimating that the payments are *to the company*. They further indicate the amount of the subsidy, that it is to be upon the basis of 35 cents per mile of the original land grant. Look at this warrant under which the sum of $6,500 was paid direct to the company, and see what admissions are contained in it.

By His Honour
The Honourable Auguste-Réal Angers,
Lieutenant Governor of the Province of Quebec.

No. 511 on No. 1010. $6,500.

To the Honourable the Treasurer of the Province of Quebec :—

You are hereby authorized and required, out of such moneys as are in, or shall come to your hands, for defraying the expenses of the civil government of Quebec, to pay or cause to be paid unto

The Hereford Railway Company, or to their assigns the sum of six thousand five hundred dollars, being on account of the balance of the

first 35 cents per acre of converted land subsidy of 4,000 acres per mile on 35 miles, under O. C. no. 340 of July 31st, 1890, and chargeable to consolidated railway fund.

Railway subsidies, to be taken from 40 Victoria, chap. 2.

And for so doing this, with the acquittance of the said Railway Co., or their assigns, shall be to you a sufficient warrant and discharge.

Quebec, this 7th day of August, 1890.

GUSTAVE GRENIER,
Deputy Lieutenant Governor.

Received this 8th day of August, 1890, from the honourable treasurer the above mentioned sum.

THE HEREFORD RAILWAY CO.,
p. pro. W. B. IVES,
President.

It is there, I think, unquestionably admitted by the lieutenant governor himself, the immediate and direct representative of the sovereign in all purely provincial affairs, as decided by the Privy Council in the *Maritime Bank Case* (1), that the company is entitled to a railway subsidy, that this subsidy has been converted from land to money, that it was to be calculated at the rate of 35 cents per acre (a question perhaps debatable until then) and that the whole 35 cents per acre had been fully earned. Reading the warrant with the order in council upon which it was based and these conclusions become inevitable. I may here, in a word, dispose at once of the contention that the receipt above set out, given by the president of the company, is a full and final acquittance of the government's liability. It is the very reverse. It is an admission that there is a "balance" still due and that the $6,500 is paid on account of that balance.

In my judgment the facts set out, and I have not gone into the details as fully as I might, lead to the conclusion that there was what in law must be deemed to be a contract between the government and the com-

(1) [1892] A. C. 437.

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pany. As already suggested, agreement or no agreement is a question of evidence. Speaking generally no rule as to mode of proof can be laid down. Each case must depend upon its own facts. In this case the evidence has satisfied me of the existence of the agreement and the consequent liability of the Crown.

It has been put forward that the orders in council and warrants to which I have referred, if they are to be considered in any way as evidence of an existing contract, must be taken with all qualifications or limitations therein expressed; that these instruments, if they are evidence of a contract between the government and the company at all, must be deemed at the same time to be a declaration on the part of the government that it had a right to make payment as therein expressed. I do not so understand the law of evidence. That may be the case where the only evidence of the facts in issue are the documents produced, but where, for example, in an action for work done and materials for the same provided, the plaintiff brings evidence to prove that the work was done and the materials were provided all of which the defendant in his evidence denies, but at the same time the defendant's letter is put in evidence, a letter in which he admits the doing of the work and the providing of the materials, but at the same time asserting that he had paid what was due, a jury would be justified in accepting his statement on the first point and rejecting it on the other. That is common sense as well as common law. The human mind is so constituted that it cannot help believing the truth of an admission against interest, although rejecting at the same time some exculpatory or other asseveration coupled with it.

Another point has been urged, viz., that the suppliants while admitting there was no contract contend

that the government by its conduct is estopped from disputing it; and that there is no estoppel against the Crown. I do not propose to inquire whether in matters of contract there may not be estoppel against the Crown. That here is not the question. The question, as already pointed out, is a matter of contract or no contract. Has the existence of a contract been proved? I have come to the conclusion that the course of dealing between the parties as shown in evidence has indubitably proved that it did exist. See Pollock on Contracts (1).

There is one other ground upon which the Crown succeeded in the courts below, viz., that the company by its president has exonerated the government under the following circumstances. On 20th January, 1890, after the subsidy in question had been earned (if earned at all), and the company had been pressing for its payment, Mr. Ives, the president, wrote to the Hon. Mr. Mercier, as "premier" of Quebec asking for a subsidy of $3,000 per mile upon 18 miles of road recently constructed, concluding his letter as follows:

I have to add that a subsidy of, say, three thousand dollars per mile upon this eighteen miles, voted on condition that the Government retained and paid out of it the claims against Messrs. Shirley, Corbett & Co., as established by Mr. John P. Noyes, would be acceptable to this company, and would put at rest all the difficulties that have arisen with regard to those claims.

This, of course, without prejudice to the claims and pretensions of the company, should this petition not be granted.

The legislature was then in session, closing on the 2nd of April following. Nothing was done at that session. In the following session, however, an Act was passed by which it was made lawful to grant a subsidy.

Sec. 1. To the Hereford Railway Company, as assistance in the cost of building the extension of its line from its junction at Cookshire, to the

(1) 3 ed. p. 9.

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place known as "Lime Ridge," in the county of Wolfe, on a length not exceeding 18 miles, a subsidy of $3,000 per mile, and not exceeding in all $54,000.

This subsidy the company was subsequently paid without reference to the letter of Mr. Ives, of the 20th January, 1890. Now, there is no evidence on the part of the Crown that the subsidy was voted in consequence or by reason of the letter; there is no evidence that the legislature knew anything of it. Evidence (if admissible) might have been given; Mr. Mercier, or some official seized of the facts, might have been examined as to whether at all, and if so in what way, the letter was acted upon. Mr. Ives himself, a witness for the Crown, testified that his proposition was not accepted or acted upon, or made a condition to the granting of the subsidy, and there is not a word of testimony the other way unless what may be gathered from the subsidy Act itself and it, I think, points to the opposite conclusion. I do not adopt the argument that Mr. Ives acted without authority in writing the letter. If, after having written it, the legislature had acted upon it, granted the subsidy subject to the conditions mentioned in it, and the company had afterwards received the money, then it would be out of the question for the company to set up want of authority on his part. But the statute itself shows that it was not granted on the conditions stated by Mr. Ives. Absolute power in the matter was left with the executive; they could grant or withhold as they thought fit. If Mr. Ives's letter was considered binding it was their duty to see that the condition was inserted in the order in council, or agreement under which the company obtained the second subsidy. Besides, as I understand it, the rules of legal draughtsmanship require that if there are conditions under which a statutory power of granting money is to

be exercised these conditions must be expressed in the statute itself, not left to be afterwards found out by oral or other testimony. And therefore, as a general rule, evidence is properly inadmissible upon grounds of public policy, for the purpose of showing the reasons or conditions or influences that moved parliament or members of parliament in passing particular enactments. The statute itself must speak.

I conclude, therefore, that the defence in the case has wholly failed, and that the suppliant company is entitled to be paid the balance of the subsidy, together with interest from the date of the last order in council mentioned, with costs of the appeal in the courts below.

KING J. concurred with the Chief Justice that the appeal should be dismissed.

Appeal dismissed with costs.

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

Solicitor for respondent: *F. X. Drouin.*

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*Mar. 1.
*Oct. 4.

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**Jan. 15.

MANSON E. HUNT *et al. es qualité*, AND THE CANADA CONGREGATIONAL MISSIONARY SOCIETY (DEFENDANTS AND *Mis en cause*)..... } APPELLANTS;

AND

JOHNSON TAPLIN (PLAINTIFF) ..... RESPONDENT.

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

Appeal—Amount in controversy—Pecuniary interest—R. S. C. c. 135, s. 29—Contract of sale—Contre lettre—Principal and agent—Construction of contract.

The plaintiff who had acted as agent for the late J. B. S., brought an action for $1,471.07 for a balance of account as *negotiorum gestor* of J.B.S., against the defendants, executors of J.B.S. The defendants, in addition to a general denial, pleaded compensation for $3,416 and interest. The plaintiff replied that this sum was paid by a *dation en paiement* of certain immovables. The defendants answered that the transaction was not a giving in payment but a giving of a security. The Court of Queen's Bench reversing the judgment of the Superior Court held that the defendants had been paid by the *dation en paiement* of the immovables, and that the defendants owed a balance of $1,154 to the plaintiff.

Held, that the pecuniary interest of the defendants affected by the judgment appealed from was more than $2,000 over and above the plaintiff's claim and therefore the case was appealable under R. S. C. c. 135, s. 29.

The sale of property in this case was controlled by a writing in the nature of a *contre lettre*, by which it was agreed as follows: "the

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* PRESENT:—Fournier, Taschereau, Gwynne, Sedgewick and King JJ.

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

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vendor in consideration of the sum of $2,940 makes and executes this day a clear and valid deed in favour of the purchaser of certain property (therein described), and the purchaser for the term of three years is to let the vendor have control of the said deeded property, to manage as well, safely and properly as he would if the said property was his own, and bargain and sell the said property for the best price that can be had for the same, and pay the rent, interest and purchase money when sold, and all the avails of the said property to the purchaser to the amount of $2,940, and interest at the rate of eight per cent per annum from the date of these presents, and then the said purchaser shall re-deed to the vendor any part of the said property that may remain unsold after receiving the aforesaid amount and interest."

The vendor was at the time indebted to the purchaser in the sum of $2,941. The two documents were registered. The vendor had other properties and gave the purchaser a power of attorney to convey all his real estate in the same locality. The term of three years mentioned in the *contre lettre* was continued by mutual consent. The vendor subsequently paid amounts on account of his general indebtedness to the purchaser. It was only after the purchaser's death that the vendor claimed from the heirs of the purchaser the balance, above mentioned, of $1,470 as owing to him for the management of his properties.

Held, reversing the judgment of the Court of Queen's Bench, and restoring the judgment of the Superior Court, that the proper construction of the contract was to be gathered from both documents and dealings of the parties, and that the property having been deeded merely as security it was not an absolute sale and that plaintiff was not M. S.'s agent in respect of this property.

Held also, that the only action plaintiff had was the *actio mandata contraria* with a tender of his *reddition de compte*.

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

The action was brought by the respondent against the appellants executors of and residuary legatee under the last will of J. B. Shurtleff to pay him the sum of $1,471.07 balance of amount due him as agent or mandatory of the said J. B. Shurtleff. A statement

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of the facts and pleadings appears in the judgment of Mr. Justice Taschereau hereinafter given.

On the 27th February 1894, a motion was made by *Butler* Q.C. to quash the appeal for want of jurisdiction on the ground that the amount in controversy was under $2,000 and Mr. *Buchan* was heard for the appellants.

On the 1st May the following judgment was delivered on the motion :

TASCHEREAU J.—This case comes up on a motion by the respondent to quash the appeal. The plaintiff's action was for $1,470 for a balance of account as mandatary or *negotiorum gestor* of the defendant. The plea amounts to, besides the general issue, a plea of compensation for $3,416, with interest at 8 per cent from October, 1888, on $2,941, to which the plaintiff, Taplin, replied that the $3,416 were paid by a *dation en paiement* called a sale of certain immovables. The defendant, Hunt, answered that these immovables were not given to him by the plaintiff *en paiement*, but merely as a pledge. The Court of Queen's Bench dismissed this contention of the defendant and his plea of compensation, holding that he had been paid by the *dation en paiement* of the immovables in question, and that he owed plaintiff a balance of $1,154, accrued since, as his agent. The defendant now appeals. I think it clear that we have jurisdiction. The amount in controversy is clearly over $2,000. The defendant claims more than $2,000 over and above the plaintiff's claim, assuming that he owes plaintiff all that is claimed by the action. *Reus excipiendo fit actor ;* he became plaintiff by his plea for an amount exceeding $2,000. It is true that he did not become plaintiff *incident* for the balance of his account over the plaintiff's, but the amount in controversy, nevertheless, is for the whole of his claim.

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The whole of it stands dismissed by the judgment appealed from. As long as that judgment stands he has no action against the plaintiff for the balance of his claim. His pecuniary interest in this appeal amounts, therefore, to a sum exceeding $2,000. The motion to quash is dismissed with costs. I refer to *Macfarlane* v. *Leclaire* (1); *Buntin* v. *Hibbard* (2); *Gould* v. *Sweet* (3); *Gauffre* v. *Philippe* (4).

On the merits *Geoffrion* Q.C. and *Buchan* for the appellants, contended:

That the deed of sale from respondent, to J. B. Shurtleff, of the four properties in question, and the *contre-lettre*, which were passed at the same time, must be interpreted as one contract, the effect of which was that the properties in question were merely transferred by Taplin to said Shurtleff as security for the debt of $2,941 due by him, and that the only interest which the said Shurtleff had in the said properties was the said sum of $2,941.

That the right of redemption stipulated by the *contre-lettre* of 23rd December, 1880, accepted by Taplin, had been extended by Shurtleff beyond the three years, and had been acted upon by both parties thereafter up to the time of Shurtleff's death and treated as a continued obligation, the last payment on account of Taplin's original indebtedness, and in the exercise of the right of redemption, having been made by Taplin and accepted by Shurtleff, and credited on that account only a few weeks before the latter's death. That the résumé of the evidence as to the credits in Shurtleff's book clearly establishes this point, and in corroboration, if any is required, are the other facts and circumstances disclosed by the record.

(1) 15 Moo. P. C. 181.
(2) 1 L.C.L.J. 60; 10 L.C.Jur. 1.
(3) 4 L.C. Jur. 18.
(4) Dal. 84, 1, 359.

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Bearing on the question of the extension of the time for redemption by Shurtleff, the acceptance of it by Taplin, and the consequent valid and binding contract, the following authorities were cited :—

Parsons on Contracts (1) ; *Dignard* v. *Robitaille* (2) ; *Demers* v. *Lynch* (3) ; *Dorion* v. *St. Germain* (4) ; Laurent (5).

H. B. Brown Q.C., for the respondent.

Was the real agreement between the parties, as contended for by the appellant, a sale with right of redemption, or a contract or pledge ?

If Mr. Shurtleff was taking, or thought he was taking, the property in pledge he would not have surrendered the titles of his claim. The surrender of the original titles of obligation is a legal presumption of release or discharge of indebtedness. (C. C. 1181) The presumption may be rebutted but no attempt has been made to rebut it. It is not even pretended that these notes were surrendered through any error, nor is the legal presumption of payment explained away.

No renewals of the notes were ever given, no new acknowledgment of indebtedness was ever made, and the appellants do not produce any evidence of the pretended claim of $3,416.07, which they offer in compensation.

The original promissory notes, had they remained in the possession of Mr. Shurtleff, would have been discharged by limitation of time years before his death, and yet plaintiff never was called upon to give any renewals or any new acknowledgment.

It is quite manifest that these notes were discharged and paid by the sale, and were intended to be so discharged by both parties.

Where, then, is the evidence of any indebtedness for which the real estate could be held in pledge ; and if

(1) 5 ed 2nd Vol. p. 503.
(2) 15 Q.L.R. 316
(3) 1 Dor. Q. B. 341.
(4) 15 L. C. Jur. 316.
(5) Vol. 24 App. 385.

there is no principal debt or obligation there can be no collateral security.

Again, if the two deeds really embody a contract of pledge the ownership must have remained in plaintiff.

But the one deed is an absolute deed of sale, and there is nothing in the other deed to show that the parties intended it in any other sense.

It is claimed that this contract is in reality, not what the parties to it have called it, and what on its face it appears to be, but that it is rather a giving in payment (C. C. 1592), as the vendor (plaintiff) was owing Shurtleff at the time the sum of $2,941, the amount of promissory notes held by Shurtleff against him.

The only distinction the code makes between a giving in payment and a sale is that the *dation en paiement* is perfected only by actual delivery. Delivery, however, is not necessary to pass the property to the creditor (C. C. 1025, 1472), but the debt is not extinguished until the actual delivery of the thing given in payment.

Drouin v. *Provencher* (1); *Dignard* v. *Robitaille* (2).

The question whether this contract is to be regarded as a sale or a giving in payment, is immaterial, as it *was* followed by delivery, that is to say, by such delivery as can be made of real estate (C. C. 1492, 1493). See also the remarks of the commissioners who prepared the code on article 1493 (article 16 of the *projet* of the code). *Cod. Reports* (3).

It is true that plaintiff continued to manage these properties, as he did other properties of Shurtleff, under power of attorney, collected the rents, paid the taxes and negotiated the sale, as an ordinary mandatary

(1) 9 Q. L. R. 179.
(2) 15 Q. L. R. 316.
(3) Vol. 2, p. 10.

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would do, but possession was in the mandator. (C. C. 2192).

As to the effect of the *contre-lettre* the learned counsel cited and commented on Laurent (1).

In support of his action the learned counsel also cited Civil Code (2); *Joseph* v. *Phillips* (3).

The judgment of the court was delivered by

TASCHEREAU J.—I would allow this appeal and restore the judgment of the Superior Court. The plaintiff, now respondent, claims from the defendants, as legal representatives of one Shurtleff, deceased, a sum of $1,471, which he alleges was due to him by the said Shurtleff, for services rendered as his agent and mandatary in connection with certain properties in the town of Coaticook, and disbursements by him made in the administration of the said properties. The plea denies that the plaintiff ever acted as Shurtleff's agent and sets forth that on the 23rd December, 1880, he, the plaintiff, being indebted to Shurtleff in the sum of $2,941 transferred to him under colour of a sale, certain real estate in the town of Coaticook; that the said real estate was transferred to Shurtleff in accordance with well established usage, merely as security for the aforesaid amount of $2,941 due by plaintiff to him, and that it was understood and agreed that the property should be managed and administered by plaintiff as his own; that on the same date as the execution of the said deed a *contre-lettre* was executed between the same parties by which it was agreed that the plaintiff should have this right at any time within three years to redeem the real estate on repayment to Shurtleff of the said sum of $2,941 with interest at eight per cent and that this *contre-lettre* had been registered by the

(1) Vol. 24, nos. 379-380, 385. (2) Arts. 1722, 1713 C.C. Art. 1549 C.C.
(3) 19 L. C. Jur. 162.

plaintiff who had retained the original in his possession; that the said plaintiff from the date thereof accepted the said right of redemption, and availed himself thereof, and the same became between the said parties equivalent to and in fact was a contract in the nature of a promise of sale from Shurtleff accepted by the plaintiff, by which Shurtleff agreed to sell the property to the plaintiff, and the plaintiff agreed to buy the same for the said price of twenty-nine hundred and forty-one dollars, with interest thereon at the rate of eight per centum per annum; that this promise and agreement had been accepted by plaintiff, who had thus promised and agreed to repay to Shurtleff the said sum of twenty-nine hundred and forty-one dollars with interest at the rate of eight per cent per annum; and from the day of the date of the execution of said deed and said *contre-lettre* the plaintiff had always been and remained in possession of the said parcels of real estate, and had controlled and possessed the same under said promise of sale as the owner and proprietor thereof, and had kept the same in repair, paid the taxes thereon, and kept the same insured for his own benefit, and had always managed, administered and disposed of the same as his own property, for his own benefit, with the obligation on his part to apply the rents and revenues and proceeds thereof on account of the amount due by him as aforesaid to Shurtleff; that the term for redemption mentioned in the *contre lettre* was stipulated for the benefit of Shurtleff who had on his part the right to waive and extend the same as he might see fit, and that he did waive and extend the same and the said contract was existing between the parties at the date of Shurtleff's death; that all the moneys paid, laid out and expended by plaintiff in connection with said property and which he sought by his action to recover from the estate of Shurtleff, were paid and

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expended for his own benefit and that during the lifetime of Shurtleff plaintiff never pretended to any claim whatsoever against Shurtleff, but on the contrary at all times recognized his relation to Shurtleff as that of a debtor; that during the lifetime of the said Shurtleff the said plaintiff never made any claim for any pretended services and was in fraud and bad faith in seeking so to do by his action; that all the real estate described in said deed is on the valuation roll in the name of the plaintiff, and the plaintiff continued to pay the taxes thereon and to act as owner, and never in any way repudiated his ownership until after the death of Shurtleff; that on the 3rd September, 1884, after the expiry of the term of three years allowed for the redemption on the property, the plaintiff redeemed lot number 778, paying the sum of $400.00; that plaintiff at the death of Shurtleff on October 31st, 1888, was indebted to him in the sum of $3,416.07, being a balance of the original debt of $2,941.00 and interest at eight per cent; and the defendants declared their willingness to retransfer the remaining properties to plaintiff on payment of the said balance.

The replication is equivalent to a general one.

After a long and rather complicated enquête, consisting of numerous documents a great part of which might well have been dispensed with, and a comparatively large amount of verbal evidence, the Superior Court dismissed the plaintiff's action on the ground that he never acted as agent of Shurtleff in the management of those properties, and that the said properties had in fact been administered by him as procurator *in rem suam*, vested with a power coupled with an interest. That judgment was reversed by the Court of Queen's Bench and judgment given for the plaintiff for a part of his claim, $1,154.

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The following are the facts as found by the Superior Court :—

On the 23rd December, 1880, the plaintiff being indebted unto the said Shurtleff in a sum of $2,941, amount of plaintiff's different promissory notes, conveyed to him, under the colour of a sale, certain properties, the consideration in the deed being expressed to be $2,941 "paid at and before the execution of these presents, the receipt whereof is hereby acknowledged by the said John Taplin." The promissory notes were thereupon surrendered by Shurtleff to plaintiff. At the same time a writing, in the nature of a *contre lettre*, though not strictly speaking one, was executed between the same parties, as follows :—

This agreement made and entered into by and between Johnson Taplin, of the first part, and Jonathan B. Shurtleff, of the second part, under the penalty of damages by the said party of the first part, and also by the said party of the second part, said agreement is as follows : that is to say, the said Johnson Taplin for and in consideration of the sum of twenty-nine hundred and forty-one dollars, makes and executes this day a clear and valid deed in favour of the said Jonathan B. Shurtleff of property situate, lying and being in the said village of Coaticook, being described in the same deed from the said Johnson Taplin to the said Jonathan B. Shurtleff. And also the said Jonathan B. Shurtleff, for the term of three years, is to let the said Johnson Taplin have control of the said deeded property, to manage as well, safely and properly, as he would if the said property was his own, and bargain and sell the said property for the best price that can be had for the same, and pay the rents, interest and purchase money when sold, and all the avails of said property to the said Jonathan B. Shurtleff to the amount of twenty-nine hundred and forty-one dollars, and interest at the rate of eight per cent per annum from the date of these presents, then the said Jonathan B. Shurtleff shall re-deed to the said Johnson Taplin any part of the said property that may remain unsold after receiving the aforesaid amount and interest.

These two documents were registered by plaintiff on the day following their execution.

A power of attorney to convey all his real estate in Coaticook was afterwards given, in 1881, by Shurtleff

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to the plaintiff, to further facilitate, I take it as evident, the execution of the powers given to the plaintiff in the *contre lettre*. The Superior Court also found the following facts: The plaintiff had charge for Shurtleff of certain other properties in Coaticook, the Mead houses and Vaughan houses, and he looked after certain investments, collected interest for Shurtleff, receiving and paying out moneys till Shurtleff's death, October 31st, 1888. He rendered no account to Mr. Shurtleff during his life. Two of these properties, 778, the Putney house, and 906, the Hackett house, remained on the valuation roll in plaintiff's name, as did 1587, Avling house, till sold, but 766, the Baldwin property, sold to the Pioneer Beet Root Sugar Co., was sold at sheriff's sale on said company, and Shurtleff was obliged to buy in at the sheriff's sale, which he did, and the deed was given to him by the sheriff. Plaintiff had the management of all these properties under his *contre lettre*, presumably collected rents, but with the exception of one charge, $27, April 6th, 1882 "rents collected accounted for none till after 1884," *i.e.*, he kept in his own hands any rents which he may have collected, but during that period he paid taxes and insurance on all the properties, as well as on the properties the Mead and Vaughan houses, in which he had no interest personally, but in the management of which he acted for Shurtleff.

In 1884, Sept. 3rd, he obtained a deed of the Putney house, 778, from Shurtleff for $400 and in 1886, Jany. 15th, of 35 ft. of the Baldwin property for $35. Both these deeds are *sous seing privé*, and contain the ordinary conditions of sale.

It is to be observed that in 1881 he obtained a power of attorney from Shurtleff to give a deed to the Pioneer Beet Root Sugar Co. In 1886, Sept. 8th, he wrote to Shurtleff, "I send you by Mr. Gustin for Wm. Brigham

$472 which you will endorse on their notes and give me credit for $38 ($37 instead of $38). I meant to send more but have got disappointed, but shall have it soon, it is hard to get money here. I meant to send you $100."

On Oct. 18, 1887, "I have got about $100 (one hundred dollars) to send you on our deal. I sold a house and have a long pay day $5 per month. Property is looking up a little better here."

March 12, 1888, "I am going to pay you some money. I have got $100 for you now on my own account;" and on March 24, 1888, "I expect Levi Gustin over here every day, when he comes I will send you some money on my own account."

All these letters were written at a time when he now claims the late Shurtleff was largely indebted to him for the causes for which he has brought the present action.

Is it conceivable that the plaintiff would then have written those letters if Shurtleff had been his debtor, as he now would claim him to have been? And how can he now contend that the $100 he sent to Shurtleff, in 1887, were moneys collected as his agent when, in his letter sending it he says, it is $100 *on our deal* (1).

The two deeds of December 1880, having been passed at the same time, between the same parties, in relation to the same property, in consideration of the same specific sum, must be construed together. "The contract (it is said in Parsons on Contracts, 2nd Vol. p. 503) may be contained in several instruments, which, if made at the same time, between the same parties, and in relation to the same subject, will be held to constitute but one contract." Now, that rule of the English law is also a rule of the French law. As laid down by the Privy Council, in *McConnel* v. *Murphy* (2) the rule on the subject is the same, under both systems.

(1) S. V. 74, 1, 72; Merlin rept. vo. contrat Troplong, priv. & hyp. no. 861.

(2) L. R. 5 P. C. 203. 2 Pont petits contrats nos. 1216, 1225, 1233, 1248.

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It is impossible not to consider the *contre-lettre* here as part of the contract between the parties. To give effect to the deed of sale without reference to the *contre-lettre*, would be setting at naught the intention of the parties. They must have intended that the sale should be controlled by the *contre-lettre*.

The very fact that the plaintiff himself registered the *contre-lettre* is an additional proof, were any necessary, that he did not intend to convey the property to Shurtleff absolutely and without reserve.

If a boom had struck Coaticook during these three years, and had largely increased the value of this property, the plaintiff would have had the right to force Shurtleff, upon payment of the $2,941, to a retrocession thereof; or, if he had been enabled to sell the property, say, for $10,000, he would have satisfied all of Shurtleff's rights by paying him $2,941, the difference going into his pocket. At the end of the three years both consented not to exercise their rights, Shurtleff, the right to force the plaintiff to deliver him up the possession of the property, and the plaintiff the right to get, then, a retrocession thereof. And the relation between the parties continued up to Shurtleff's death to be on the same footing. There was, by mutual consent, no interversion, no change whatever in their relative positions as to the property. Shurtleff continued to have the title thereto; the plaintiff continued to have the possession thereof, and manage it as his own, with power to sell it, but the price to go to Shurtleff up to the amount sufficient to satisfy his claim, Shurtleff being obliged to re-deed to plaintiff any of the property remaining unsold, upon he, Shurtleff, being repaid in full the $2,941, and interest accrued. I fail to see how, under such a state of things, the plaintiff can seriously contend that, in his management of this property, he acted as mandatary of Shurt-

leff. His own interest in the property was, at least, co-extensive with the interest of Shurtleff, if not larger.

His contention is entirely inconsistent with his payments on account, his repeated promises to pay more, and his excuses for delaying his payments.

He and Shurtleff continued by mutual tacit agreement to stand after the 23rd December, 1883, in exactly the same position as if the words " for the term of three years " were struck out of the *contre-lettre*. If he was not a mandatary during the three years after the deeds, and I cannot conceive how he could contend that he was, he never became a mandatary afterwards.

Shurtleff always considered the plaintiff as a debtor to whom he extended delay and facilitated payments and the plaintiff never did or said anything to give to Shurtleff the least suspicion that such were not their relations as to this property. Had he, Shurtleff, at any time been aware that the plaintiff claimed to be his agent, and one as costly as he now claims to have been, I rather think that his agency would have pretty soon been put an end to.

As to third parties the title was no doubt in Shurtleff but between him and the plaintiff the sale was only colourable. And even as to third parties no purchaser could have been found during the first three years who would have accepted a title from Shurtleff alone, in view of the fact that the *contre lettre* was registered.

I cannot but view with suspicion the plaintiff's claim. As long as Shurtleff lived he never demanded anything from him but, on the contrary, acknowledged him constantly as his creditor. But within a few days after Shurtleff's death he suddenly discovers that instead of being his debtor he was his creditor, and makes this claim against his estate. And he does not

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claim to be paid for his services solely since 1883 but even during the three years originally fixed by the *contre lettre*. The "mystery" he confided to George Robinson is now explained to my entire satisfaction.

His action was, in my opinion, rightly dismissed by the judgment of the Superior Court.

His Lordship the Chief Justice refers me two cases exactly in point. The first is *Hurlimann* v. *Comptoir d'escompte de Mascara* (1) and the second *Bonnival* v. *Barnoud* (2).

The reservation made in that judgment appears to me to amply protect whatever rights, if any, the plaintiff might have against Shurtleff's legal representatives, and I would simply restore the said judgment in its entirety.

By the notes of the learned judge who gave that judgment I gather that he was of opinion that even assuming that the plaintiff has acted as mandatary for Shurtleff his action of assumpsit, as brought, did not lie. On this ground alone, perhaps, which is clearly open to him on the general issue, the plaintiff's action fails. Guillouard, du Mandat (3). His only remedy, assuming his allegations of fact to be true, was the *actio mandata contraria*, with a tender of his *reddition de compte.*

Any one who has acted as agent for another has an action to force his principal to receive a *reddition de compte.* A *comptable* has the same right to exact from his unwilling principal a settlement of their accounts that a principal has from an unwilling *comptable.* Bioche, proc. vo. Compte (4). *Ferland* v. *Fréchette* (5); Rolland de Villargues vo. Compte (6); Dalloz Rep. vo. Mandat (7). The case of *Joseph* v. *Philipps* (8) invoked

(1) S. V. 86, 2, 132.
(2) Dal. 92, 2, 310.
(3) Nos. 143, 145, 158, 171.
(4) No. 2.
(5) 9 Rev. Leg. 403.
(6) Par. 9.
(7) Nos. 71, 72, 335, 336.
(8) 19 L. C. Jur. 162.

by the plaintiff on this point, does not help him. I refer to what we said of that case in *Dorion* v. *Dorion* (1).

As held by the Cour de Cassation *in re* Cardon :—

En cas de contestation entre un débiteur et un créancier sur le produit de la gestion donnée à l'antichrèse, il y a obligation pour les tribunaux d'examiner les comptes présentant les recettes et dépenses effectives, de calculer la recette et la dépense, et de fixer le reliquat d'après cet examen et les débats de compte. Favard vo. Nantissement (2).

Now this ruling, though not on a precisely similar state of things, is entirely applicable to the present case.

However, I rest my conclusions on the fact that, in my opinion, the plaintiff never was Shurtleff's agent in respect of this property.

Appeal allowed with costs.

Solicitors for appellants: *Taylor & Buchan.*

Solicitors for respondent: *Brown & MacDonald.*

(1) 20 Can. S.C.R. 445.

(2) Par. 2, no. 2.

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*Oct. 2.

*Oct. 4.

W. R. WEBSTER *et al*.....APPELLANTS;

AND

THE CITY OF SHERBROOKE.....RESPONDENTS.

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

Appeal—Right of—Petition to quash by-law under sec. 4,389 *R.S.P.Q.—R.S.C. ch.* 135, *sec.* 24 (*g*).

Proceedings were commenced in the Superior Court by petition to quash a by-law passed by the corporation of the city of Sherbrooke under sec. 4,389 R.S.P.Q. which gives the right to petition the Superior Court to annul a municipal by-law. The judgment appealed from, reversing the judgment of the Superior Court, held that the by-law was *intra vires*. On motion to quash an appeal to the Supreme Court of Canada:

Held, that the proceedings, being in the interest of the public, are equivalent to the motion or rule to quash of the English practice, and therefore the court had jurisdiction to entertain the appeal, under subsec. (*g*), of sec. 24, ch. 135 R.S.C. *Sherbrooke* v. *McManamy* (18 Can. S.C.R. 594) and *Verchères* v. *Varennes* (19 Can. S.C.R. 356) distinguished.

MOTION to quash appeal for want of jurisdiction.

The proceedings in this case were commenced in the Superior Court by a petition to annul a municipal by-law taken under section 4,389 of the Revised Statutes of Quebec.

By the judgment of the first court one section only of the by-law, viz., section 3, which imposes a special tax of $200 a year on hotel-keepers, &c., was declared *ultra vires* and illegal, and was set aside and annulled.

The judgment of the Queen's Bench reversed this judgment and declared the said section and the tax thereby imposed to be *intra vires* of the municipal council.

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Brown Q.C. for the motion, cited and relied on *The Corporation of the City of Sherbrooke* v. *McManamy* (1); *County of Verchères* v. *Varennes* (2); *Bell Telephone Co.* v. *City of Quebec* (3); *Bourdon* v. *Benard* (4); *Molson* v. *Mayor of Montreal* (5). Art. 13 C.C.P.

Panneton Q.C. for appellant cited and relied on art. 4,389 R.S.P.Q.; R.S.C. ch. 135, sec. 24 (*g*).

THE CHIEF JUSTICE (Oral).—In this case the jurisdiction of the court depends upon sec. 24 subsec. (*g*) of the Supreme and Exchequer Courts Act, which is as follows:

24. An appeal shall lie to the Supreme Court *(g)* from the judgment in any case in which a by-law of a municipal corporation has been quashed by rule or order of court, or the rule or order to quash it has been refused after argument.

This was an application to quash a by-law and not a case like the cases referred to and decided, of *Verchères* v. *Varennes* (2); *Sherbrooke* v. *McManamy* (1); and others decided in this court, as in all those cases it was in a private action that the by-laws were impugned, and the proceedings were not to quash or annul the by-laws.

This case comes clearly within the statute. The motion to quash must be refused with costs.

TASCHEREAU J.—I concur fully in the opinion that we have jurisdiction in this case. The different views expressed by this court in the cases relied on by the respondent are not at all in point. It has been expressly said in those cases that where such proceedings are taken in the interest of the public, so that the proceedings would be equivalent to the motion or rule

(1) 18 Can. S.C.R. 594.
(2) 19 Can. S.C.R. 365.
(3) 20 Can. S.C.R. 230.
(4) 15 L.C. Jur. 60.
(5) 23 L.C. Jur. 169.

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to quash of the English practice, this court would have jurisdiction in cases from the province of Quebec as it has in similar cases from the other provinces, under subsec. (*g*) of sec. 24, of the Supreme Court Act. Here it is an application to quash a by-law under sec. 4,389 of R.S.P.Q. applicable to municipal councils of cities and town, which gives the right to petition the Superior Court to annul a municipal by-law.

The application in this case was made to a judge of the Superior Court under that article and I am clear that we have jurisdiction. It is the first time that an appeal on a similar petition comes before this court, and none of the cases which have been cited are therefore applicable. Our present decision will guide us in the future.

GWYNNE, SEDGEWICK and KING JJ. concurred.

Motion refused with costs.

Solicitors for appellant: *Panneton, Mulvena & Leblanc.*

Solicitors for respondents: *Brown & Macdonald.*

ALEXANDER McKAY (PLAINTIFF).....APPELLANT; 1894

AND *Oct. 5, 6.

THE CORPORATION OF THE TOWNSHIP OF HINCHINBROOKE (DEFENDANT) ..... } RESPONDENT.

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

Appeal—Supreme and Exchequer Courts Act, R.S.C. ch. 135, secs. 24 and 29—Costs.

Held, that a judgment in an action by a ratepayer contesting the validity of an homologated valuation roll is not a judgment appealable to the Supreme Court of Canada under section 24 *(g)* of the Supreme and Exchequer Courts Act, and does not relate to future rights within the meaning of subsection *(b)* of section 29, of the Supreme and Exchequer Courts Act.

Held, also, that as the valuation roll sought to be set aside in this case had been duly homologated and not appealed against within the delay provided in art. 1061 (M.C.) the only matter in dispute between the parties was a mere question of costs, and therefore the court would not entertain the appeal. *Moir* v. *Corporation of the Village of Huntingdon* (19 Can. S.C.R. 363) followed; *Webster* v. *Sherbrooke* (24 Can. S. C. R. 52) distinguished.

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

This was an action brought by the appellant, a ratepayer of the municipality of the township of Hinchinbrooke, asking the Superior Court to have the valuation roll of the municipality for the year 1890, which had been homologated and not appealed against, as provided in article 1061 (M.C.), and which was in force for local and county purposes, set aside and

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declared null and void, because the valuators appointed by the lieutenant governor, who were paid a sum of $118 for their services, had been illegally appointed, and that a roll of valuation previously made should have been homologated by the municipal council. The Superior Court maintained the appellant's action and declared the valuation roll null and void. The Court of Queen's Bench, reversing the judgment of the Superior Court, dismissed the plaintiff's action and held that the court had no jurisdiction to grant the appellant's prayer, the delay for appealing having elapsed since the last roll came into force for local and county purposes. On appeal to the Supreme Court of Canada.

McLaren Q. C. and *Laurendeau* moved to quash the appeal on the ground that the matter in controversy was for less than $2,000, and the case did not come within secs. 24 or 29 of ch. 135 R.S.C., and that it was now a mere matter of costs.

Geoffrion Q.C. and *Brossoit* Q.C. for appellant contra.

THE CHIEF JUSTICE.—(Oral). I am of opinion that this court has no jurisdiction to entertain this appeal. It is not within the provisions of the Supreme and Exchequer Courts Act sec. 24 (*g*) R.S.C. ch. 135, which gives jurisdiction in the case of an application to quash a by-law, and that for two reasons. The present case is a proceeding not in the nature of a public action, as in the case of *Webster* v. *Sherbrooke* (1), decided yesterday by this court, but an action taken in the interest of a private ratepayer; and in the next place, it is not a proceeding to annul the by-law of the corporation. All that is sought is to set up the validity of a valuation roll which the municipal council itself has refused to homologate.

(1) 24 Can. S. C. R. 52.

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Then again, it does not refer to future rights. The cases coming under that head in subsec. (*b*) of sec. 29 of the Supreme and Exchequer Courts Act, are cases which relate to annual rents, or annuities, or periodical payments of an analogous character. In such cases a judgment in an action relating to arrears would be binding in future actions. There is nothing of that kind here.

I also agree with my learned brothers that the appeal should be dismissed for the reasons given in the case of *Moir* v. *Corporation of Huntingdon* (1). The question in the present action is now merely one of costs. The appeal should be quashed with costs.

TASCHEREAU J.—(Oral). I agree, but especially upon the ground taken by this court in *Fraser* v. *Tupper* (2) and *Moir* v. *Corporation of Huntingdon* (1). In addition to this case I may also add the following:—*Levien* v. *The Queen* (3); *Crédit Foncier of Mauritius* v. *Paturau* (4); *Cowen* v. *Evans* (5); *Attenborough* v. *Kemp* (6); *Richards* v. *Birley* (7).

The cases of *Inglis* v. *Mansfield* (8) and *Yeo* v. *Tatem* (9) have no application. Here the court might have refused to the appellant his prayer for costs even if it had granted him the setting aside of this valuation roll. Under colour of an appeal on the merits this is virtually but an appeal for costs. The judgment of this court, should the appellant succeed, would have no effect but on costs and be executory only as to costs.

In a late case of *Martley* v. *Carson* (10) the Privy Council, upon this principle, dismissed an appeal without

(1) 19 Can. S.C.R. 363.
(2) Cass. Dig. 2 ed. 421.
(3) L.R. 1 P.C. 536.
(4) 35 L.T.N.S. 859.
(5) 22 Can. S.C.R. 328.
(6) 14 Moo. P.C. 351.
(7) 2 Moo. P.C. (N.S.) 96.
(8) 3 Cl. & F. 371.
(9) L.R. 3 P.C. 696.
(10) 20 Can. S.C.R. 634.

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entering upon the merits, upon the ground that it was made to appear before them by affidavit that during the progress of the case in the British Columbia courts the appellant had sold the property in question in the case to his wife. This sale appeared to have been made immediately after the judgment of the Supreme Court of British Columbia but had not been brought to our notice when the case was before this court.

GWYNNE, SEDGEWICK and KING JJ. concurred.

Appeal quashed with costs.

Solicitors for appellant: *Brossoit & Mercier.*

Solicitors for respondents: *Seers & Laurendeau.*

LOUIS LABERGE (PLAINTIFF).....APPELLANT; 1894

AND *Oct. 2,
*Nov. 8.

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES (DEFENDANTS) } RESPONDENTS.

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

Appeal—Amount in dispute—54 & 55 V. c. 25, s. 3, s.s. 4.

By virtue of s-s. 4 of s. 3 of c. 25 of 54 & 55 V., in determining the amount in dispute in cases in appeal to the Supreme Court of Canada, the proper course is to look at the amount demanded by the statement of claim, even though the actual amount in controversy in the court appealed from was for less than $2,000. Thus where the plaintiff obtained a judgment in the court of original jurisdiction for less than $2,000 and did not take a cross appeal upon the defendants appealing to the intermediate court of appeal where such judgment was reversed, he was entitled to appeal to this court. *Levi* v. *Reid* (6 Can. S. C. R. 482) affirmed and followed. Gwynne J. dissenting.

MOTION to quash appeal from a judgment of the Court of Queen's Bench for Lower Canada (appeal side) reversing the judgment of the Superior Court in favour of the plaintiff for the sum of $285 in an action for $10,000 damages.

The action was one for $10,000 damages for alleged violation of contract.

The Superior Court gave judgment in favour of the plaintiff for $285. The defendant appealed to the Court of Queen's Bench for Lower Canada (appeal side) and that court allowed the appeal and the plaintiff's action was dismissed.

There was no cross appeal to the Court of Queen's Bench by the plaintiff.

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On an appeal to the Supreme Court of Canada, by the plaintiff.

Macmaster Q.C. moved to quash the appeal for want of jurisdiction, the amount in dispute being under $2,000.

Laflamme contra.

THE CHIEF JUSTICE.—I am of opinion that this appeal is within our jurisdiction. The statute 54 & 55 Vic. ch. 25 enacts that where the right to appeal is dependent upon the amount in dispute such amount shall be understood to be that demanded and not that recovered if they are different. In the present case the amount recovered in the court of first instance was, it is true, only $285, but the appellant's right to appeal is not dependent in any way upon that. The statute makes the amount demanded, which was $10,000, the absolute criterion of the jurisdiction of this court, and without distorting the plain meaning of the language used by Parliament it is impossible to give it any other construction than that I have indicated. The motion to quash must be dismissed.

TASCHEREAU J.—There is undoubtedly room for the objection taken by Mr. Macmaster to our jurisdiction in this case, and I am free to say that I was rather inclined at the hearing of the motion to think that we would have to allow it. But after consideration I have come to the opposite conclusion. We have, in my opinion, jurisdiction to entertain the appeal. It does certainly look strange that though, generally, we have no jurisdiction in cases under $2,000 where the pecuniary value is to rule, yet we should have to entertain appeals where the amount in controversy before us amounts perhaps only to $10, $15, or $25, simply because, at one time, by the plaintiff's demand

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the Superior Court had before it an action for an amount exceeding $2,000. Yet that is what Parliament has decreed. The words "the amount demanded" in the statute of 1891, mean the amount demanded by the action, as they do in art. 2311 of the Revised Statutes of Quebec. And though the present appellant asked the Court of Appeal to confirm a judgment given in his favour for $285 only, though he cannot here ask anything more than to restore that judgment of the Superior Court for these $285, (1), yet we have jurisdiction according to this last statute of 1891. This statute was passed for the very purpose of giving us jurisdiction in such a case. To admit the respondent's contention would be to declare in effect, that it is now, as it was before this statute, the amount in controversy on the appeal before this court that is to guide in such cases, and to hold, in fact, that this statute has not changed the law, or has changed it only in the case of an appeal by a defendant. This is a limitation in the construction of the statute that is not borne out by its terms. If the words "the amount demanded" mean, in the case of an appeal by the defendant, the amount demanded in the action, as they necessarily must do, I cannot see how in the case of an appeal by the plaintiff they are susceptible of a different construction.

If the judgment of the Court of Queen's Bench had, adversely to the company, defendant, confirmed the judgment of the Superior Court, the company would clearly then have had a right to appeal to this court. Yet the amount in controversy before this court in such a case would have been only for $285. This, it seems to me, demonstrates that in such a case it was the intention of Parliament to confer, by way of ex-

(1) *Monette* v. *Lefebvre* 16 Can. S.C.R. 387; *Stephens* v. *Chausse* 15 Can. S. C. R. 379

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ception, upon this court, jurisdiction in cases wherein the matter in controversy on the appeal is less than $2,000, whether the appeal is by the plaintiff or by the defendant.

The only case present to my mind of an appeal by a plaintiff under circumstances precisely similar to those of the present case is *Levi* v. *Reed* (1). That case, which we had to overrule in accordance with the judgment of the Privy Council in *Allan* v. *Pratt* (2), is now restored as law by the amending statute in question.

GWYNNE J.—The question upon this motion is as to the construction and effect of the 4th subsection of sec. 3 of the Dominion statute 54 & 55 Vic. ch. 25 upon the facts of the present case. That section enacts that "whenever the right to appeal is dependent upon the amount in dispute, such amount shall be understood to be that demanded and not that recovered, if they are different."

Since the decision of this court in *Monette* v. *Lefebvre* (3) following *Allan* v. *Pratt* (2) I feel myself at liberty to express my judgment in the present case unfettered by the decision in *Levi* v. *Reed* (1).

The effect of the above section of 54 & 55 Vic. ch. 25 was, in my opinion, to give to a defendant against whom a judgment should be recovered for a less sum than $2,000 in an action in which the plaintiff demands in his statement of claim an amount exceeding $2,000, the same right of appeal as the plaintiff himself would have in such a case, whose right independently of this enactment, was never questioned in such a case, thus placing plaintiff and defendant in

(1) 6 Can. S. C. R. 482. (2) 13 App. Cas. 780.
(3) 16 Can. S. C. R. 387.

the same position in like cases. But where a plaintiff making a demand in his statement of claim for a sum exceeding $2,000, recovers a judgment against the defendant for a sum less than $2,000 with which judgment he rests content and does not appeal from it, but the defendant availing himself of this provision in 54 & 55 Vic. ch. 25, does appeal, and the plaintiff does not then even avail himself of his right to enter a cross appeal, the matter submitted to the court by such an appeal would be simply, upon the part of the defendant, a demand to reverse the judgment, and upon the part of the plaintiff a demand to maintain it intact, and nothing more. In that case the demand which the plaintiff had made in his statement of claim is gone for ever, and is utterly abandoned and is no longer a demand of the plaintiff. When then, as in the present case, the defendant was successful in his appeal and obtained judgment in his favour and the plaintiff desires to appeal from that judgment, the sole demand which he makes by such appeal is to have his judgment, for the amount less than $2,000 which had been so reversed, restored. This is the only demand which he could make, or the court entertain in such case. They could not entertain a demand for the amount demanded in the statement of claim, nor for anything in excess of the amount for which the judgment he asks to be restored was rendered. Between the amount so demanded and the amount recovered by the judgment which is asked to be restored there is no difference, and so the case does not come within the purview of the enactment in question. Under these circumstances I can see no reason whatever why we should deem ourselves to be under a statutory obligation to hold that to be true which we know to be false, namely, that the amount demanded by the plaintiff is, for the purposes of his proposed

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appeal, to be understood to be that which was demanded in his statement of claim, when in truth and in fact it is for no such amount, but simply for the restoration of the judgment in his favour for less than $2,000, and which had been so reversed. For my part I cannot construe the section as imposing upon me any such obligation, and as the plaintiff's demand is for an amount less than $2,000 I can come to no other conclusion than that there is under the circumstances no appeal to this court, and the appeal therefore should be quashed with costs.

SEDGEWICK and KING JJ. concurred with TASCHEREAU J. that the motion to quash should be refused.

Motion to quash refused with costs.

Attorneys for appellant: *Greenshields & Greenshields.*

Attorneys for respondents: *MacMaster & McLennan.*

PATRICK DOYLE (DEFENDANT).....APPELLANT; 1894

AND *Nov. 5

ALEXANDER G. McPHEE AND HENRY F. DONALDSON (PLAINTIFFS).....RESPONDENTS. 1895 *Jan. 15.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Deed—Description of land—Extent—Terminal point—Number of rods—Railway Co.

A specific lot of land was conveyed by deed and also : "A strip of land twenty-five links wide, running from the eastern side of the aforesaid lot along the northern side of the railway station about twelve rods unto the western end of the railway station ground, the said lot and strip together containing one acre, more or less."

Held, reversing the decision of the Supreme Court of Nova Scotia, Taschereau J. dissenting, that the strip conveyed was not limited to twelve rods in length, but extended to the western end of the station, which was more than twelve rods from the starting point.

APPEAL from a decision of the Supreme Court of Nova Scotia affirming the verdict for plaintiffs at the trial.

The nature of the question to be decided is sufficiently stated in the above head-note.

Ross Q.C. for appellant.

McInnis for respondents.

The judgment of the majority of the court was delivered by

GWYNNE J.—The case turns wholly upon the question whether a piece of land granted by one Henry Donaldson to one James Sims, by deed bearing date the 22nd day of November, 1867, under which the

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defendant claims, is to be limited by the number of rods stated in the deed from an undisputed starting point, or by the point indicated in the description as that intended to be reached, and in my opinion there can be no doubt that the latter must govern. It was probably not known at the time how much land the railway company would acquire at the station in question. The deed grants a piece of land near the Enfield station of the Intercolonial Railway, in the province of Nova Scotia. As to the limits of this piece of land there is no dispute. The deed then proceeds to grant a further piece by the following description:

> Also a strip of land twenty-five links wide, running from the eastern side of the aforesaid lot along the northern side of the railway eastward about twelve rods unto the western end of the railway station ground, the said lot and strip together containing one acre, more or less.

There is no dispute as to the site of the eastern side of the piece of land first granted by the deed. The question is merely whether the piece secondly described is to be limited by the precise distance of twelve rods from the eastern limit of the piece first granted, or to be continued until the western end of the railway station ground at Enfield is reached. As to what is the western end of the station ground mentioned in this description, the evidence admits of no doubt that it is a line bounding on the west a greater width of land taken at the station for station grounds, and which crosses the piece of land 25 links in width granted by the deed if, in the words of the deed, the land granted reaches the west end of the station grounds. What is granted is plainly a piece of land 25 links in width, the southerly limit of which is the northerly limit of 100 feet in width taken outside of the station grounds for the roadway, which northerly limit of the railway the piece granted goes "along"

until it reaches the western limit of the station grounds, which must therefore be a line along the west end of the station ground and crossing the space 25 links in width and so terminating the piece intended to be granted, and which is, as I think, plainly expressed in the deed. This view is confirmed by the description contained in the deed under which the plaintiff claims, which, while it shows that the plaintiff had not conveyed to him the piece in dispute, affirms that it had been conveyed to Sims.

The plaintiff claimed under a deed from one Henry F. Donaldson, who claimed under the said Henry Donaldson, bearing date the 14th day of October, 1878, in which the piece of land thereby conveyed is described as follows:

> Beginning at the northern side of the railway ground at a point situate ten links from the south-east angle of the saloon occupied on the 1st of September, 1868, by the said Henry F. Donaldson, from thence to run north sixteen degrees west one chain and seventy-five links, thence south twenty-three degrees west four chains and thirteen links to James Sims' lot, thence by the said James Sims' lot south two degrees west one chain and sixty-five links to the north side of the said James Sims' road, thence by the said James Sims' road and the railway ground eastward four chains and ninety links to the place of beginning.

The point of commencement of this description is, by the plan in evidence, plainly shown to be in the northern limit, not of the space of 100 feet in width occupied by the railway outside of the station grounds, but the northern limit of a space of much greater width occupied as station ground at Enfield and north of the northern limit of the Sims's road produced eastward, and such point is shown to be ten links only distant from the south-east angle of the building mentioned and shown on the plan. Then the point reached in the description and spoken of as "the northern side of the said James Sims's road," is the precise point of

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commencement and northern limit of the piece of land 25 links in width granted to Sims by the deed of November, 1867; from that point in the northern limit of said James Sims's land, the description of the land conveyd to the plaintiff proceeds "thence by," (that is, along) "the said James Sims's road eastward four chains and ninety links to the place of beginning," which being a point in the northern limit of the station ground and north of the northern limit of said James Sims's road, the description plainly indicates that the course eastward from the point reached in the northern side of the said James Sims's road is along such northern side of the said road, that is, of the piece of 25 links in width granted by the deed of November, until the northern limit of that road or piece of land so granted intersects the western limit of the station ground, and thence along such limit until the place of beginning is reached.

This appears to be the plain intention of both of the deeds, and the appeal therefore must be allowed with costs, and judgment be ordered to be entered for the defendant in the court below.

TASCHEREAU J.—I am not very clear as to this case. However, the appellant has failed to convince me that there is error in the judgment. I would dismiss the appeal.

Appeal allowed with costs.

Solicitor for appellant: *W. A. Lyons.*

Solicitor for respondents: *W. R. Foster.*

EDWARD M. REID AND AUBREY D. COFFILL (PLAINTIFFS)..... } APPELLANTS;

AND

JOSEPH CREIGHTON (DEFENDANT)...RESPONDENT.

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*Jan. 15.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Chattel mortgage—Affidavit of bona fides—Compliance with statutory forms —Change of possession—Levy under execution—Abandonment.

N. executed a chattel mortgage of his effects and shortly afterwards made an assignment to one of the mortgagees, in trust for the benefit of his creditors. The assignee took possession under the assignment.

Held, affirming the decision of the Supreme Court of Nova Scotia, that there was no delivery to the mortgagees under the mortgage which transferred to them the possession of the goods.

The Bills of Sale Act, Nova Scotia, R.S.N.S. 5th ser. c. 92, by s. 4 requires a mortgage given to secure an existing indebtedness to be accompanied by an affidavit in the form prescribed in a schedule to the act, and by s. 5 if the mortgage is to secure a debt not matured the affidavit must follow another form. By s. 11 either affidavit must be, "as nearly as may be," in the forms prescribed. A mortgage was given to secure both a present and future indebtedness, and was accompanied by a single affidavit combining the main features of both forms.

Held, affirming the decision of the court below, Gwynne J. dissenting, that this affidavit was not "as nearly as may be" in the form prescribed; that there would have been no difficulty in complying strictly with the requirements of the act; and though the legal effect might have been the same the mortgage was void for want of such compliance.

APPEAL from a decision of the Supreme Court of Nova Scotia reversing the judgment for plaintiffs at the trial.

The material facts governing the decision of the appeal are as follows:—

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The plaintiffs (appellants) were merchants doing business at Bridgewater, in the county of Lunenburg, under the name of Reid, Coffill & Co. The defendant (respondent) is the sheriff of the county of Lunenburg, and as such sheriff seized certain goods under an execution issued against one Alexander Nelson, who at one time also did business as a merchant at Bridgewater. The goods were the property of the said Alexander Nelson, who gave a chattel mortgage to the plaintiffs of the property in question previously to the seizure by the defendant as sheriff. It was claimed by the defendant that the chattel mortgage did not set out the agreement between the parties, as required by the Bills of Sale Act. and that the affidavit accompanying the chattel mortgage was not in compliance with the statute, chap. 92, Revised Statutes of Nova Scotia, fifth series, and that the chattel mortgage for these reasons was inoperative against the defendant seizing the goods as sheriff under the said execution. The plaintiff's contention was that the chattel mortgage and affidavit were in compliance with the statute; that if not, the plaintiffs were in possession of the goods at the time of seizure from the grantor in the chattel mortgage, and in such case the statute had no application; or that the sheriff had abandoned the levy made by him on the goods under the said execution, and was a trespasser in selling them.

The mortgage was given to secure an existing indebtedness and also to secure the mortgagees as indorsers of notes of the mortgagor not matured. As to the first section 4 of the Nova Scotia Bills of Sale Act, R.S N.S. 5th ser. ch. 92, requires the mortgage to be accompanied by an affidavit in the form given in schedule A of the act, by which form the mortgagor makes oath that:

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"The amount set forth therein as being the consideration thereof is justly and honestly due and owing by the grantor to the grantee, and the chattel mortgage was executed in good faith and not for the purpose of protecting the property mentioned therein against the creditors of the mortgagor or of preventing the creditors of such mortgagor from obtaining payment of any claims against him."

Section 5 of the act requires a mortgage given to secure future advances or to secure the mortgagee against indorsements of bills or notes, to be accompanied by an affidavit in the form given in schedule B, the material part of said form being as follows:

"The mortgage hereto annexed truly sets forth the agreement entered into between the parties, and truly states the extent of the liability intended to be created and covered by said mortgagor, and that such mortgage was executed in good faith and for the express purpose of securing the mortgagee against the payment of the amount of the liability of the mortgagor and not for the purpose of securing the goods and chattels mentioned therein against the creditors of the mortgagor, nor to prevent such creditors from recovering any claims they may have against such mortgagor."

Sec. 11 of the act is as follows:

"11. The affidavits mentioned in sections four and five of this chapter, shall be *as nearly as may be* in the forms in schedules A and B respectively."

In this case the mortgage, as stated above, was to secure both an existing debt and liability against indorsements, and the affidavit of the mortgagor was as follows, omitting the formal portions:

"2. The amount of $625.32 set forth therein as being part of the consideration thereof is justly and honestly due and owing by me the grantor to the said grantees

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or mortgagees, and the said mortgage truly sets forth the agreement entered into between the said parties thereto and truly states the extent of the liability intended to be covered by me in respect of the notes therein mentioned, upon which the said firm of Reid, Coffill & Co. are liable for me as accommodation indorsers."

"3. The said mortgage was executed by me in good faith and for the express purpose of securing to the said mortgagees the said amount owing by me to them and of securing said mortgagees against the payments of the amounts of their liability for me as aforesaid, and not for the purpose of securing the goods and chattels mentioned therein against my creditors, nor to prevent such creditors from recovering any claim they may have against me."

There was no delivery of the goods to the mortgagees as such, but the mortgagee Coffill took possession of the effects of the mortgagor under the assignment to him as trustee executed after the mortgage. This was claimed to be a possession of the goods by the mortgagees which made the statute of no application.

It was also contended by the plaintiff that the sheriff, after seizing under the execution, abandoned the levy by leaving the goods on the premises with no one in charge of them. The defendants contended that under the facts proved there was no abandonment in law, and also that there was evidence of a man having been left by the sheriff to watch the goods.

At the trial a verdict was given for the plaintiffs, the trial judge holding that the affidavit was substantially in the form required by the act and that the mortgagees had possession of the goods. The verdict was set aside by the court *en banc* on the grounds that there was no possession under the mortgage; that the affidavit was not "as nearly as may be" in the prescribed form; and

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that the sheriff had not abandoned the levy. The plaintiffs appealed.

Russell Q.C. for the appellants. The words "as nearly as may be" in the act do not mean as nearly as possible, but only that there shall be no unnecessary deviation. *Parsons* v. *Brand* (1); *Bird* v. *Davey* (2); *Thomas* v. *Kelly* (3).

The act did not contemplate a mortgage to secure the two kinds of indebtedness mentioned in sections 4 and 5. The affidavit here covers the essential parts of both forms.

Possession by the assignee takes the case out of the statute. *McLean* v. *Bell* (4); *McMullin* v. *Buchanan* (5).

Borden Q.C. and *Roscoe* for the respondent. As to the defect in the affidavit see *Archibald* v. *Hubley* (6); *Morse* v. *Phinney* (7).

There is nothing in the act to show that possession does away with the necessity for an affidavit.

THE CHIEF JUSTICE.—I am of opinion that this appeal must be dismissed with costs for the reasons stated in the judgment of my brother Sedgewick.

TASCHEREAU J.—On the appellant rested the *onus* to convince us that the form he has to make good in this case is *as nearly as may be* in the form prescribed by the statute. His task was an arduous one. He has not succeeded, and could not succeed. I am of opinion that the appeal should be dismissed. I adopt Mr. Justice Graham's reasoning.

GWYNNE J.—This case, in my opinion, turns wholly upon the question whether the affidavit annexed to the

(1) 25 Q.B.D. 110.
(2) [1891] 1 Q.B. 29.
(3) 13 App. Cas. 506.
(4) 5 R. & G. 128.
(5) 26 N.S. Rep. 146.
(6) 18 Can. S.C.R. 116.
(7) 22 Can. S.C.R. 563.

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chattel mortgage under which the plaintiffs claim was a sufficient compliance with ch. 92 of the 5th series of the Revised Statutes of Nova Scotia; and reading that statute, as I am of opinion it always must be read, in the light of sec. 11 of ch. 1 of the same series I am of opinion that it was, and that, therefore, the appeal should be allowed with costs and judgment be ordered to be entered for the plaintiffs in the court below, in accordance with the decision of Mr. Justice Henry, the learned trial judge.

SEDGEWICK J.—Three questions were raised at the argument of this appeal, viz.: (1). Were the plaintiffs entitled to succeed by virtue of the alleged delivery to them of the goods referred to in their chattel mortgage? (2). Were the levy and sale under execution of the goods regular? And (3). Was the chattel mortgage invalid by reason of non-compliance with the statutory provisions of the Bills of Sale Act?

The first two questions were practically disposed of at the argument. The evidence showed that there never had been any possession of the goods by the plaintiffs *under their chattel mortgage*, even although the plaintiff Coffill may have had possession under another instrument, and further that there was no intentional or actual abandonment of the levy so as to render the sheriff's sale ineffectual.

The sole question remaining is as to the validity of the chattel mortgage.

This instrument was executed by Alexander Nelson in favour of the plaintiffs for the purpose of securing an existing indebtedness of $625.32 and for the further purpose of securing them against loss in respect of two promissory notes, amounting in the aggregate to $500, which they had indorsed for his accommodation.

Section 4 of the Bills of Sale Act refers to the case of a chattel mortgage executed for the first purpose, and specifies the character of the affidavit that must accompany it in order to make it valid as against creditors.

Section 5 refers to the case of a chattel mortgage executed for the second purpose, likewise specifying the character of the affidavit that must accompany it.

Section 11 enacts that the affidavits mentioned in sections 4 and 5 shall be *as nearly as may be* in the forms in schedules A and B respectively, and in the schedules the forms are given.

These forms are not in words identical and it is open to much argument to say that they are substantially identical in effect.

The affidavit accompanying the chattel mortgage in question did not comply with either form but rather attempted to combine the two, selecting some words from the one and others from the other, doubtless with a view of giving effect to the statutory requirements.

The question then is: Is this affidavit *as nearly as may be* in the forms in schedules A and B?

In my view it is not. There would in my judgment have been no obstacle (so far as the evidence goes) in the way of the mortgagor swearing to an affidavit in which the first form might be used in relation to the existing debt and the second form in relation to the accommodation notes. It was not the function of the gentlemen who drafted this instrument to assume the responsibility of using language in a statutory affidavit differing in words (whether or not differing in substance) from the prescribed form, in the hope that identity of meaning in the words used would secure validity for it. The affidavit was not as nearly as it might have been in the statutory form. There was a clear, manifest and altogether needless departure

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from it, and when that is the case it is not proper that we should be astute in inquiring the extent to which the volunteered form is equivalent to the statutory one.

In my view this case is a much stronger one against the instrument than *Hubley* v. *Archibald* (1) or *Morse* v. *Phinney* (2).

Even if it be admitted that the legal effect is the same it does not necessarily follow that the affidavit is valid. If a form might have been followed but is knowingly and unnecessarily departed from, even although there is no alteration in the legal effect of the document, I know of no principle of construction which makes that a compliance with the statute. *Thomas* v. *Kelly* (3).

On the whole I am of opinion the appeal should be dismissed with costs.

KING J. concurred.

Appeal dismissed with costs.

Solicitor for appellants: *H. T. Ross.*

Solicitor for respondent: *W. E. Roscoe*

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(1) 18 Can. S. C. R. 116 (2) 22 Can. S. C. R. 563.
(3) 13 App. Cas. 506.

GEORGE BURY (DEFENDANT)..... APPELLANT; 1894

AND *May 16, 17.
*Oct. 9.

GEORGE MURRAY (PLAINTIFF)..... RESPONDENT.

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

Absolute transfer—Commencement of proof by writing—Oral evidence—Arts. 1233, 1234, *C.C.—Prête-nom—Compensation—Defence—Taking advantage of one's own wrong.*

Verbal evidence is inadmissible to contradict an absolute notarial transfer even where there is a commencement of proof by writing. Art. 1234 C.C.

A defendant cannot set up by way of compensation to a claim due to plaintiff a judgment (purchased subsequent to the date of the action) against one who is not a party to the cause, and for whom the plaintiff is alleged to be a *prête-nom*.

In an action to recover an amount received by the defendant for the plaintiff the defendant pleaded *inter alia* that the action was premature inasmuch as he had got the money irregularly from the treasurer of the province of Quebec on a report of distribution of the prothonotary before all the contestations to the report of collocation had been decided.

Held, affirming the judgment of the court below, that this defence was not open to the defendant, as it would be giving him the benefit of his own improper and illegal proceedings.

APPEAL from a judgment of the Court of Queen's Bench for Lower Canada (appeal side) confirming the judgment of the Superior Court, which condemned the appellant to pay the respondent Murray the sum of three thousand seven hundred and twelve dollars and ninety-two cents, with interest thereon from the thirtieth day of November eighteen hundred and eighty-eight, less the sum of one hundred and fifty dollars which Murray was condemned to pay Bury for damages.

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

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The circumstances which have given rise to the present litigation are briefly as follows:—

On the 14th August, 1883, the appellant, declaring himself to be the proprietor of seven undivided thirty-sixths of the island of Anticosti which was to be sold by public licitation, executed before Leclerc, notary public, a formal transfer and assignment to the respondent of two-sevenths of whatever the said seven thirty-sixths might realize after the deduction of law costs and the appellant's personal expenses, and a sum of five hundred and sixty-two dollars for which the respondent was indebted to him, with fifteen per cent interest computed on said deductions from the dates when the sums were originally advanced. The appellant acknowledged in the notarial assignment that the said transfer was made to respondent "for good and valuable consideration previously received by him," appellant.

The licitation sale took place on the 17th of June, 1884, and realized $101,000 and the appellant was collocated as proprietor of the seven thirty-sixths of the said island and withdrew the amount of the said collocation, but refused to pay over to respondent the two sevenths of said price as provided by said agreement and transfer.

Appellant was collocated for $2,886 as representing one thirty-sixth share, and $16,578 as representing six thirty-sixths, these shares having been acquired through different channels. Appellant's collocation to the six thirty-sixths was contested by one Mrs. Torre who had a claim against the property, but by the final judgment of the Supreme Court of Canada the appellant's rights to the amounts collocated to him for such six thirty-sixths were maintained, and he was thereby enabled to, and did, secure payment to himself of said amount.

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The sum claimed by respondent in this action was two-sevenths of seven thirty-sixths of such price of sale after allowing certain deductions provided for in the deed of agreement between the parties.

The terms of this agreement were somewhat modified by a letter written by the appellant to respondent on the twelfth day of June, 1885, in which he says:—

MONTREAL, 12th June, 1885.

"GEORGE MURRAY, ESQ.,

DEAR SIR,—As soon as the present contestation shall have closed and I declared to be the owner of two-twelfths of the Island of Anticosti, I shall give you an order on Mr Duberger, prothonotary of Murray Bay, for the portion of money coming to you according to the terms of a certain deed made by Leclerc, notary public, as between yourself and the undersigned,

Yours truly,

GEORGE BURY.

P. S.—It is also agreed that the whole amount for expenses will only be reckoned as five hundred dollars, although the sum expended was considerably in advance of that sum. The amount due for interest referred to in the deed of agreement shall be fixed at a sum of not more than two hundred dollars.

GEORGE BURY."

The appellant neglecting to comply with the agreement the respondent's attorneys made a formal demand upon him for such order, and then instituted legal proceedings against him.

The plaintiff was examined in order to establish a *commencement de preuve* that he was merely a *prête-nom* for one W. L. Forsyth, and other witnesses were also heard subject to objection to prove that the written transfer was not an absolute transfer, but only consented to as a method of security for some indebtedness

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due to respondent by said W. L. Forsyth. At the trial it was established that the judgment which one Cadieux a creditor of Forsyth's had against Forsyth was acquired by appellant two months after the date of respondent's action.

Barnard Q.C. and *Lafleur*, for appellant. The present appeal rests on two grounds, as practically the appeal to the Court of Queen's Bench did also. The first is that Mr. Forsyth was the real plaintiff in the case and that his claim was extinguished by compensation. The second that the action should, at all events, have been dismissed on the general issue, for want of proof.

It is submitted on the evidence that it is clear that the question in both its parts must be answered in the affirmative. If the courts below have reached a different conclusion it is owing to very serious and manifest misapprehensions both as to the law and the facts of the matter.

In the Queen's Bench the question was treated as if the sole issue were whether the respondent was a *prête nom* at the time of the transfer, while it is sufficient for us to show he was at the time of the action, when the debt due by Forsyth had been paid.

[The learned counsel then reviewed the evidence, contending that nothing was due to respondent and that he was a mere *prête-nom*, and cited Bedarride on Dol. & Fraude (1); Laurent (2).]

Then as to the plea of compensation we contend we had a right to acquire the judgments even *pendente lite*. Art. 1187, C. C.; *Froste* v. *Esson* (3); *Williams* v. *Rousseau* (4); *Roy* v. *McShane* (5); *Thibodeau* v. *Girouard* (6).

(1) Nos. 1271 & 1272.
(2) 18 vol. no. 420.
(3) 3 Rev. de Leg. 475.
(4) 12 Q. L. R. 116.
(5) 17 Rev. Leg. 667.
(6) 12 Legal News 186.

Finally we submit that under the agreement the respondent could not claim his share until the whole contestation of the dividend sheet was closed and settled effectually.

The contestation of the dividend sheet is not closed and settled as alleged, and the appellant has not received the whole $17,880.22½, as also alleged, but $14,159.58⅓ only, if even he can be said to have received that amount regularly.

Martin for respondent. Appellant admitted in his examination that by a final judgment of the Supreme Court rendered in June, 1888, his right to the amount collocated to him in the disputed item in the report of the distribution had been established, and by means of said judgment he had been enabled to secure and had secured the payment to himself of said amount.

No proof was adduced to destroy the effect of appellant's letter of the twelfth of June, 1885.

And clearly it does not lie in the mouth of appellant to attack a deed granted by himself for a consideration known to himself and judged sufficient, by suggesting frauds between himself, appellant and Forsyth, and of which he has not adduced one word of proof, and oral evidence cannot be given to vary an absolute deed of transfer. Art. 1234, C.C.

If plaintiff was not a *prête-nom* for Mr. W. L. Forsyth then the plea of compensation cannot be relied on, and, moreover, there is another reason which disposes of this plea; it is, as the courts below have held, that it rests on a judgment acquired since the action was taken.

THE CHIEF JUSTICE—The appellant alleges that the notarial deed of the 14th August, 1883, whereby he transferred to the respondent two-sevenths of the price

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of the Island of Anticosti, was not what on its face it purports to be, namely, an absolute transfer. It is asserted by the appellant that the respondent was originally a mere *prête-nom* for one William Langan Forsyth, or that the deed in question, if not made altogether for the behoof of Forsyth, was passed for the purpose, in the first place, of securing the payment to the respondent of certain moneys in which Forsyth then stood indebted to him and then to be for the benefit of Forsyth, and that these moneys having been long since paid the respondent now holds the share in the sale moneys transferred by the deed for the benefit of Forsyth absolutely; and further, that in either of the alternatives mentioned the appellant is entitled to compensate the respondent's demand, which it is alleged is really the demand of Forsyth, by a certain judgment recovered by one Cadieux against Forsyth, and by Cadieux transferred to the appellant.

I am of opinion that the appellant has entirely failed in proof of his allegations. It has been determined, first by Mr. Justice Davidson, and then by the Court of Appeals, that there was no sufficient commencement of proof in writing to be found in the deposition of the respondent to let in the testimony of witnesses. Whether this is so or not can, in the view which I take, make no difference, for even assuming that there was a perfectly good commencement of proof in writing verbal evidence would still be inadmissible. Article 1234 of the Civil Code says:

> Testimony cannot in any case be received to contradict or vary the terms of a valid written instrument.

The deed of transfer of the 14th August, 1883, being in terms an absolute transfer to the respondent, the attempt to alter it by the evidence of witnesses so as to make it conformable to the appellant's contention, namely, that it was a transfer to the respondent as a

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prête-nom for Forsyth, or as a mere security to the respondent for a debt since paid, and now held for the benefit of Forsyth, is of course an attempt to contradict or vary its terms by testimony in contravention of article 1234. Then is it permissible, notwithstanding this article 1234, to receive verbal testimony to alter or contradict a deed or other writing on the ground that there is a commencement of proof in writing? By article 1233 seven cases are enumerated in which testimonial proof is admissible; one of them is the case where there is a commencement of proof by writing. Then as article 1234 says that oral proof shall not in any case be received it must be interpreted as excluding all the cases mentioned in the next preceding article. It is not to the purpose to show that the French authorities are against this, for the French code makes different provisions for such a case. Art. 1341 of that code which says that oral proof shall not be received against *actes* is followed by article 1347, which introduces an express exception in favour of the admission of such proof when there exists a commencement of proof by writing. This question is ably treated in a work on the law of evidence in the province of Quebec (1) lately published; and in the absence of judicial decisions to the contrary I adopt the learned author's conclusions, inasmuch as they appear to be founded on unanswerable arguments.

Had there been a full admission by the respondent that there was such a collateral agreement as the appellant alleges such admission would, no doubt, be sufficient to support his case, but I am unable to find such an admission though I have read the respondent's deposition several times. This evidence is not clear; in some respects it is quite incoherent; but the effect

(1) Langelier de la Preuve, arts. 584-640.

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of what the respondent says, so far as I can gather it, is that the deed was intended to be what in its terms it purports to be, and that he (the respondent) considered himself under some honorary, but not under any legal, obligation to give something to Forsyth out of any surplus. This is, of course, insufficient. The deed according to the respondent's account, and according to the evidence of Forsyth, appears to have been made at the instance of Forsyth and under pressure by the appellant for the payment of the $562 note, and Forsyth swears very positively that the respondent was not in any way a *prête-nom* for him (Forsyth) and that he was not to have any legal benefit from the transfer. I think, therefore, the case entirely fails upon the evidence. Further, I am at a loss to see how, even if that which the appellant desired to prove was established, it would be possible to have the benefit of a compensation of the judgment transferred by Cadieux when Forsyth is not a party in cause. Then, as to the other objection that the action is premature for the reason that the contestation of the collocation had not been decided, as it appears by the prothonotary's certificate dated 6th November, 1889, that it had not been, I think that defence also fails. The appellant, by means of certain representations made by him to the treasurer of the province of Quebec, obtained the amount which he was set down as entitled to receive in the prothonotary's report of collocation ; this fact is admitted by the appellant in his deposition when called as a witness by the respondent. In the face of this admission that he has actually got the money into his own hands it does not lie in the mouth of the appellant to say he got it irregularly, that by untrue representations he procured it to be paid to him when he was not entitled to receive it. I think the rule that no one can take advantage of his own wrong applies, and if

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we were to admit the sufficiency of this reason of appeal we should be doing nothing less than giving the appellant the benefit of his own improper and illegal proceeding by means of which he induced the provincial treasurer to pay this money to him when, as he well knew, he had no right to receive it.

I do not make the figures given in the judgment of the Superior Court tally with the amount admitted to have been received by the appellant, but I do not remember that any point was made of this at the hearing of the appeal, nor do I find it referred to in the appellant's factum. If it appears in drawing up the judgment that there has been any mistake in this respect it may be rectified, but that will not of course affect the costs for the appeal must in any event be dismissed with costs subject to the alteration mentioned if any should be required to be made.

FOURNIER J.—I concur.

TASCHEREAU J.—For the reasons given by the Superior Court, in its formal judgment, I am of opinion that this appeal should be dismissed with costs.

I express no opinion, one way or the other, on the point determined by the majority of the court as to the admissibility of verbal evidence under arts. 1233, 1234, 1235 of the code where there is a *commencement de preuve par écrit.* The solution of this question is not necessary to determine the case and it was not argued before us nor determined by the courts below.

SEDGEWICK and KING JJ. concurred with the Chief Justice.

Appeal dismissed with costs.

Solicitors for appellant: *Barnard & Barnard.*

Solicitor for respondent: *George G. Foster.*

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*Oct. 4, 5.
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*Jan 15.

JAMES FERRIER *et al. es-qualité* (DEFENDANTS)..... } APPELLANTS;

AND

DAME A. TRÉPANNIER (PLAINTIFF)....RESPONDENT.

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

Building—Want of repair—Damages—Art. 1055 *C.C.—Trustees—Personal liability of—Executors—Arts.* 921, 981*a* *C.C.—Procedure—Appeal.*

The owner of property abutting on a highway is under a positive duty to keep it from being a cause of danger to the public by reason of any defect, either in structure, repair, or use and management, which reasonable care can guard against.

Dame A. T. sued J. F. and M. W. F. personally as well as in their quality of testamentary executors and trustees of the will of the late J. F. claiming $4,000 damages for the death of her husband who was killed by a window falling on him from the third story of a building, which formed part of the general estate of the late J. F., but which had been specifically bequeathed to one G. F. and his children for whom the said J. F. and M. W. F. were also trustees. The judgment of the courts below held the appellants liable in their capacity of executors of the general estate and trustees under the will.

Held, that the appellants were responsible for the damages resulting from their negligence in not keeping the building in repair as well personally as in their quality of trustees (*d'héritiers fiduciares*) for the benefit of G. F.'s children; but were not liable as executors of the general estate.

Where parties are before the court *quâ* executors and the same parties should also be summoned *quâ* trustees an amendment to that effect is sufficient and a new writ of summons is not necessary.

Decisions of provincial courts resting upon mere questions of procedure will not be interfered with on appeal to the Supreme Court of Canada except under special circumstances.

APPEAL from a judgment of the Court of Queen's Bench for Lower Canada (appeal side) confirming a judgment of the Superior Court, condemning the appellants in their quality of testamentary executors and

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

trustees of and under the will of the late Honourable James Ferrier, to pay to the respondent $4,000 as damages.

The action was brought to recover the sum of $10,000 as damages from appellants personally as well as in their quality of testamentary executors of the late Honourable James Ferrier and trustees under his will for the death of plaintiff's husband, Patrick Byrne, alleged to have been caused on the 5th of February, 1890, through the negligence of appellants by allowing a ventilator or part of a window to fall on the said Byrne while he was passing a building on Notre Dame Street, in the city of Montreal, the plaintiff alleging that the building belonged to the estate of the late Honourable James Ferrier, and was in the care and under the control and charge of appellants. The facts and pleadings are given in the judgment hereinafter given.

Saint-Pierre Q.C. for appellants and *Taylor* for the respondent.

The points of argument relied on and authorities cited by the learned counsel are reviewed in the judgment.

THE CHIEF JUSTICE.—I concur in the judgment of Mr. Justice Taschereau, except as to the question of costs. I am of opinion that there is no reason why the respondent should not have her costs. The appellants were sued personally as well as in quality and it is in my opinion a matter of indifference to the respondent whether she had a judgment against the trustees in quality or against them personally, and to the latter she is strictly entitled.

TASCHEREAU J.—This is an appeal from a judgment of the Court of Queen's Bench, confirming a judgment of the Superior Court by which the appellants were con-

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demned under art. 1056 of the Civil Code to pay to the respondent $4,000 damages for the death of her husband, under the following circumstances:

On the 5th February, 1890, Patrick Byrne, the deceased, was walking along the sidewalk on Notre Dame Street, in Montreal, when, on reaching the spot opposite a large building known as the Ferrier block, he was killed by a window which fell on him from the third story of the building. The respondent alleges by her action "that the defendants were then in possession of the said building in their quality of executors and trustees (administrateurs par fiducie,) (1), under the will of the late Honourable James Ferrier, who died on the 30th of May, 1888; that, by the said will, the powers of the said appellants as executors were extended over the year and a day prescribed by law; that the hinges which supported the said window were previously broken or cracked, and not strong enough to support it; that the said appellants were therefore guilty of negligence in not seeing that this window was firmly secured; that Patrick Byrne's death was due to the negligence and culpable imprudence of the appellants; that the respondent, under these circumstances, has right to be indemnified by the appellants for the damages amounting to $10,000, resulting to her from his death caused by the said accident, of which the appellants are answerable in law."

By the writ, as amended, the appellants were summoned "as well personally, as in their quality of testamentary executors and trustees of the late Hon. James Ferrier, in virtue of his will."

An objection taken by the appellants to an amendment made on the 10th September, 1891, by the

(1) Henrys, Tome 1, p. 736; Tome 4, p. 20. Merlin Rep. vo. fiduciaire.

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respondent, with leave of the Superior Court, should be considered *in limine*.

By the writ and declaration the appellants were originally impleaded only personally and in their quality of executors. The amendment in question consisted in adding them to the case in their quality of trustees. Their objection to this proceeding cannot prevail. It rests upon a mere question of procedure, and upon such questions the decisions of the provincial courts, according to a well established jurisprudence of this court, are not to be interfered with, except under special circumstances, none of which appear in this case: *Gladwin* v. *Cummings*; *Dawson* v. *Union Bank* (1); *Mayor of Montreal* v. *Brown* (2); *Boston* v. *Lelièvre* (3). The Court of Queen's Bench has sanctioned the act of the Superior Court in the matter, and we cannot be asked to reverse the concurrent decisions of the two courts on a question of this nature, even were we inclined to doubt its legality. In this case, however, the appellants have no ground of complaint against this granting of leave to amend by the Superior Court, in the exercise of its discretion. It was argued that if the executors and the trustees had not been the same persons, as in this case, the trustees, if not summoned with the executors in first instance, could not have been *mis en cause* by simply amending the writ, and consequently that the appellants here, having by the original writ been summoned only in their quality of executors, could not be brought in the case in their quality of trustees by a simple amendment, when prescription against the action had been acquired. Now, it is true, I presume, that if the trustees had been different persons from the executors a new writ of summons would have been necessary to bring them in the case.

(1) Cass. Dig. 427-429. (2) 2 App. Cas. 184.
(3) L. R. 3 P. C. 157.

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But why? Because then, they would not have been before the court at all on a writ against the executors only. But, when, as here, the trustees and the executors are the same persons, there was no necessity, as pointed out by the learned Chief Justice of the Queen's Bench, as they were before the court *quâ* executors to issue a new writ to bring them in, *nunc pro tunc quâ* trustees. *Connolly* v. *Bonneville* (1); *The Ontario Bank* v. *Chaplin* (2); *Lefebvre* v. *Seath* (3).

They were, therefore, rightly held to be parties to the case in the Superior Court in their quality of trustees, as well as personally and in their quality of executors.

I will go on with the consideration of the appeal by the trustees, as argued before us, assuming for the present that there is such an appeal, as distinct from the appeal by the appellants personally, or in their quality of executors. The appellants' contention on this branch of the case is more one in the nature of an *exception à la forme*, than of an objection to the merits. They argue that the judgment against them as trustees for the whole estate (as they assume it to be) cannot stand, because, under the will of the late James Ferrier, they were at the time of this accident in possession of the building in question exclusively as trustees for the children of his son, George Ferrier, and not at all as trustees for the estate generally. That contention is founded in law; a judgment against them as trustees for the whole estate, so as to be executory against the whole estate, could not be supported. But as I read the writ, with the declaration and the will together, it is only as trustees in possession of this particular building, for George's children, that the appellants are sued as trustees at all, and in that quality

(1) 11 L. C. Jur. 192.
(2) 20 Can. S. C. R. 152.
(3) Q. R. 1 S. C. 336.

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only that they could be condemned. Then they are summoned as trustees, *as provided for by the will*, which the word trustees under the will, or in virtue of the will, unquestionably mean, and when the will provides that as to this building the appellants are trustees for George's children exclusively, I do not see how it could ever be possible for the respondent to contend that the judgment she has obtained against the appellants, as trustees, is against them as trustees of the whole estate. However, all difficulty on this point will be set at rest by our ordering, as the whole record is before us (1), that to the judgment against the appellants as trustees, be added the words: "as trustees for the benefit of the children of George Davies Ferrier." That is the judgment which the Superior Court must have intended to give, and which the learned Chief Justice of the Court of Queen's Bench evidently also took it for granted had been rendered on this issue by the Superior Court.

The next question that arises on this part of the case, is as to the liability of the owners of this building for the damages arising from the accident in question. On this point there is no difficulty that I can see. The respondent's right to recover is plain. The accident was due to a want of repairs, or a *vice de construction*, or perhaps both, and that is conclusive as to the owners' liability. Art. 1055 C. C.; 2 Sourdat no. 1169.

The case is just the same as if Byrne had been killed by a stone falling from the wall of the house, or by the crumbling of the wall itself.

The owner of property abutting on a highway is under a positive duty to keep it from being a cause of danger to the public by reason of any defect, either in structure, repair or use and management, which reasonable care can guard against. Demolombe des Contrats

(1) Secs. 63, 64 Sup. C. Act.

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(1); *Rancour* v. *Hunt* (2); Laurent (3); Pollock on Torts (4). And he is responsible for all the damages which may result from any neglect of that duty.

The owners here might also, perhaps, be held liable under the rule *respondeat superior*, contained in art. 1054 of the Civil Code. Laurent (5); *Sérandat* v. *Saïsse* (6); *Morlera* v. *Roques* (7); *Ville de la Tour du Pin* v. *Collomb* (8); *Schumberger* v. *Sébastien* (9); *Goulet* v. *Stafford* (10).

However, their liability under art. 1055 is so clear that it is unnecessary to determine here whether they would also fall, under the circumstances of the case, under art. 1054. How far they are affected by a judgment against the trustees does not arise in this case. The question has not been raised at the bar, and is not passed upon by the courts below.

I would hold, then, that the condemnation against the appellants *quâ* trustees, or *héritiers fiduciaires*, for George's children is unimpeachable. Arts. 869, 981*a*, et seq. C.C.; Montvalon des Succession (11); Laurent (12); *Succession of Franklin* (13).

It has not been impeached, however. The appellants in their quality of trustees were not parties to the appeal to the Court of Queen's Bench, and they, in that quality, are therefore not before this court whereto no appeal lies but from the Court of Queen's Bench. We could not consequently, in any case, have interfered with the judgment against them in that quality. It stands as rendered by the Superior Court. The fact that both parties assumed before us and in the Queen's

(1) Vol. 8 no. 658.
(2) Q. R. 1 S. C. 74.
(3) Vol. 20 nos. 640, 644.
(4) 246.
(5) Vol. 20 nos. 571, 573, 579, 580, 583, 584.
(6) L. R. 1 P. C. 152.
(7) S. V. 92-2-221.
(8) S. V. 93-2-205.
(9) S. V. 93-2-215.
(10) 4 Legal News 357.
(11) Vol. 1 p. 242.
(12) Vol. 14 p. 440.
(13) 7 La. An. 395.

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Bench that the trustees, as well as the appellants personally and as executors, were parties to the appeal cannot give us jurisdiction. However, as the case was fully argued on their part I deemed it better to satisfy them that they had lost nothing by not joining in the appeal, though my remarks on this part of the case must, of course, remain *obiter dicta*.

I will now consider the appeal of that part of the judgment which holds the appellants liable for the consequences of the accident in their quality of executors of the will of the late James Ferrier generally. The respondent on this branch of the case contends that the whole corpus of the estate of the late James Ferrier is liable for the damages accruing to her from the death of her husband, and that her action is therefore rightly directed against the appellants in their quality of executors. The court *a quo* has maintained this contention. This judgment cannot, in my opinion, be supported. The respondent's action does not lie against the estate, and did it lie against the estate it could not have been brought against the executors alone. It is undoubtedly true, as remarked by the learned Chief Justice of the Court of Queen's Bench, that the seisin of the executor overrides the seisin of the legatee, whenever a conflict arises between them. *Archambault* v. *The Citizens' Ins. Co.* (1); *Normandeau* v. *McDonnell* (2). But it is only as a depositary that the executor is seized (3). And his possession is the possession of the legatee (4). Pothier, Introd. à Cour d'Orleans (5); Pothier Donat & Test. (6); Delvincourt (7); Laurent (8). "Pendant qu'une chose est en dépôt" says Domat (9); "le maître en con-

(1) 24 L.C.Jur. 293.
(2) 30 L.C.Jur. 120.
(3) Arts. 918-921 C.C.
(4) See 2 Bourjor, page 375, par. XIV.
(5) Notes 1 et seq. sous art. 290.
(6) Page 360-364.
(7) Vol. 2 p. 373.
(8) Vol. 14 p. nos. 339, 350, 351, 361, et seq.
(9) Lois civiles, liv. 1er, titr. 7, sec. 4, par. IV.

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serve la possession, et son dépositaire possède pour lui. The executor represents the deceased it has been argued. That is so in a limited sense. But the accident in question has not been caused by the deceased James Ferrier; and the respondent's claim is not one that originated in the late James Ferrier's life time, one which he left at his death, attached to his succession. And the executor does not represent the legatees. Nor can he "exercer les actions de la succession, et les actions contre la succession, qui ne sont pas du chef du testateur, ne peuvent pas non plus être exercées contre lui." *Roux* v. *Crochet* (1); *Chalupt* v. *Bernard* (2); Coin-Delisle (3); Domolombe Donation (4); Marcadé (5); Dal. Rep. Suppl. vo. Dispositions (6). By art. 919 of the code it is enacted, it is true, that the executor may be sued for whatever falls within the scope of his duties, and it has been held in *de Léry* v. *Campbell* (7), and that class of cases, though that seems to be a controvertible point, that as the payment of the testator's debts falls within the scope of his duties, he might be sued for them (though a judgment against him does not bind the heirs or universal legatees). But those cases have no application; this is not an action for a debt or an obligation of the testator, or one which concerns in any way the execution of the will. It is against the executor, it has been argued for the respondent, that third parties must look to for redress in the event of their having any claim against the estate. But this argument rests on a fallacy. It is *petitio principii*. It assumes that the respondent has a claim against the whole estate for an accident caused by the negligence of those in charge of a house exclusively bequeathed to George's sons. But that is the very

(1) S. V. 55, 2, 424.
(2) S. V. 66, 2, 29.
(3) Donat. et Test. p. 486.
(4) Vol. 5 no. 5.
(5) Vol. 4. pp. 103 109.
(6) No. 998,
(7) 16 L. C. R. 54.

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point to be determined, and which, in my view of the question, must be determined adversely to the respondent. Why the whole estate should be responsible for her damages I entirely fail to see. If damages had been caused to this particular house, in 1890, it has been further argued on her part, "it is the executors, as such, who would have been entitled to sue to recover the damages done to the estate, and reversing the proposition, it must likewise be the executors who are liable to be sued for damages caused to a third party by something belonging to the estate, which was used by them for its benefit." But here again the respondent's reasoning is faulty. If any damage had been done to this house in 1890, it is not the whole estate which would have suffered thereby, but only George's representatives, the owners of the house. And the damages claimed here by the respondent are not "damages caused by something belonging to the estate which was used by them for its benefit," to quote the respondent's own words; this house does not belong to the estate, and it was not, in 1890, used by the executors for the benefit of the estate. It belongs to and is the legal possession of George's children, to whom exclusively it has been bequeathed, and who became seized with it as owners immediately at the testator's death. *Arguendo*, *Woolrich* v. *Bank of Montreal* (1); Dall. Rep. Suppl. vo. Dispositions (2). There has been no *partage*, it has been further said for the respondent. But this building has not been bequeathed *par indivis*, but directly and exclusively to George's children, whose ownership the appellants, as executors, do not represent. Duplessi sur Cout. de Paris (3); Laurent (4).

(1) 28 L. C. Jur. 314.
(2) No. 10006.
(3) Tome 1er p. 592.
(4) Vol. 14 p. 323.

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A judgment against an executor alone is, as to the legatees, *res inter alios acta*, and is not executory against the estate, as held by this court in *Lionais* v. *The Molsons Bank* (1). And an action against him would not interrupt a prescription that has begun to run in favour of the legatees.

It has been also said for the respondent that the administration of the succession as to third parties is indivisible, and that consequently a claim against the estate is well brought against the executor. But this again is unsound reasoning. First, she has no claim against the estate, and secondly, an action upon a claim against the estate not arising from the *de cujus* or the execution of the will, is not well brought against the executor alone.

Then, in 1890, the appellants' functions as executors had lapsed, so far at least as concerns this building. The administration of George's share in their hands is as distinct and separate from the administration of the other shares, bequeathed by the late James Ferrier, as if different persons were administrators of each of those shares. This shows that it is as trustees that they were in possession of this building and not as executors. If the will had named one person executor, and another person trustee, it is clearly the trustee who would have been in possession of this building for George's children when the accident happened. And if this accident had been caused by the building bequeathed to the appellant, James Ferrier, personally, the respondent, I am sure, would have instituted her action against him personally, and not against him as executor of the estate. Now, the building in question in this case belongs to George's representatives, exclusively, just as much as the building bequeathed to

(1) 10 Can. S.C.R. 526 ; 14 Laurent, nos. 361, 362.

James Ferrier, the appellant, now belongs to him and not to the estate.

And by the express terms of the will itself, whether the appellants be considered as administrators under art. 921 of the civil code, or whether as trustees under art. 981*a*, their powers as executors had come to an end when this accident happened. The will does certainly give them as executors the seizing of the real estate as well as of the personal estate, but there is an express limitation put upon this extension of their powers by the testator: "And the powers of my executors shall, so far as it is necessary for the fulfilment of this my will, extend not only over all my personal, but also over all my real estate," says the will. Now, so far as it was necessary for the execution of the will the duties of the executors, as executors, had been all fulfilled when this accident happened. They had duly registered the will, with a certificate of the testator's death, as required by art. 2098 of the code, and their functions were effete. *Guichard* v. *Laneuville* (1). If the respondent's contention were to prevail the appellants would never be trustees or would never have possession of this building as trustees. They would continue to be merely executors, and in possession merely in that quality, up to the time when George's children will all be of age. Now that cannot be; the will says the contrary. The appellants, it is true, appear to have given leases of the house in question in 1890, and since, in their quality of executors. But they were wrong in doing so. Though this is of no consequence whatever, it is as trustees that they should have been described in the leases.

Then, the respondent is now estopped from contending that it was as executors that the appellants were in possession of this building in 1890. She has, on this

(1) S.V. 59, 1, 411.

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record, upon the issue between herself and the appellants *quâ* trustees, a judgment which I have already commented upon, declaring them to have been in possession *quâ* trustees. The direct and necessary result of that judgment is that they were not in possession *quâ* executors. This, it seems to me, is conclusive against her on this part of the case. She cannot be allowed to take such incompatible positions.

However, this is quite immaterial in my view of the question. Assuming that it was as executors that they were in possession in 1890, and that it is now open to the respondent to so contend, her action, in my opinion, does not lie against them in that quality so as to bind the estate.

My conclusions, therefore, on this part of the appeal, are: 1st. It is *res judicata* against the respondent upon this record, that it is not as executors that the appellants, were at the time of this accident, in possession of the building in question.

2nd. Even if the executors had been in possession the corpus of the estate is not liable for the respondent's damages.

3rd. Even if the executors had been in possession, and assuming that the whole estate might be liable, this action does not lie against the executors alone.

The appeal by the executors should therefore be allowed, and the action, as to them, dismissed.

I now come to the consideration of the action as against the appellants personally.

Neither the Superior Court nor the Court of Queen's Bench seem to have passed on this issue. Although by the judgment the condemnation would seem to be against the appellants *quâ* executors and trustees only, yet the action as to them, personally, is not dismissed. How that happened there is nothing in the record to show. It seems impossible to attribute it to anything

else than to an oversight, for which, undoubtedly, the parties themselves are mainly responsible. I would not feel justified in presuming that they, on one side or the other, have paid more attention to the case in the courts below than they have in this court. That there is, on the record, such an issue between the appellants and the respondent personally is unquestionable. The writ summons them personally, in no ambiguous terms. The respondent, by her declaration, "se plaint des défendeurs tels que désignés au dit bref." She then charges them with the negligence that caused the accident. The conclusions, I notice, are not in clear terms against them personally, but they cannot but be taken, when read with the preceding allegations, as conclusions against all the parties described in the writ of summons. And they have so been taken by the appellants themselves. They appeared and pleaded jointly as summoned, that is to say personally as well as in their quality of executors and in their quality of trustees.

By the general issue they allege that they are not indebted either personally or in their quality of executors and trustees. By a second plea they allege that they were not personally in possession of the building in question when this accident happened, or in any way personally responsible for the said building or the said accident, and that they could in no case be held responsible for it, or in any way be held personally responsible for this accident.

And that the case was treated all along, on both sides, as involving the appellants' personal liability, further appears, if more were necessary, at the trial, when James Ferrier, one of the appellants, was called as a witness on behalf of the defence. The respondent, immediately upon the said James Ferrier being sworn, objected to his examination, "inasmuch as he was one

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of the defendants, the issue being common to all the defendants." Then the appeal to the Queen's Bench was taken, as appears by the inscription itself, by the defendants "personally for any rights they may have." These last words are not in the writ of summons, but they may be treated as *ex abundanti cautelâ;* they are meaningless; any party to a case appears to defend any rights he may have. It is evident that they considered the action still pending against them, for if the judgment of the Superior Court had put them personally out of the case they would not have had to appear as appellants in the Queen's Bench.

After joining issue with the respondent in the Superior Court, after going to trial on that issue, after having been parties to the appeal in the Court of Queen's Bench, the appellants cannot but be yet considered, for all intents and purposes, as parties to the case in their individual capacity. They were in the case by the writ of summons, and they have never since ceased to be parties to it, either by a judgment or by any act of procedure that I can see on the record, either here or in the court below. They are therefore parties to this appeal. So that we have to consider this issue, and render upon it the judgment that, in our opinion, the court below should have given.

Now, are the appellants personally liable for the damages resulting to the respondent from the said accident? To this question there is, to my mind, room for but one answer. They are the parties primarily liable; they are the guilty parties in the first degree; they are the parties responsible above and before any others (1). It is their personal fault and negligence which is the immediate cause of this accident. They were, at the time, in actual possession of this building; it was under their exclusive control and superintendence, whether as trustees or executors, as depositaires

(1) Art. 1053 C.C.

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or sequestrators, or in any other fiduciary capacity whatever, does not make the least difference, or lessen in any way their own personal liability for tortious negligence whereby a third party suffered damages.

Culpa tenet suos auctores. They are tort-feasors. It was their duty to keep this building in repair, and it is to a breach of that duty that Patrick Byrne's death is due. Aubry & Rau (1); Addison on Torts (2); Sherman & Redfield on Negligence (3); Beven on Negligence (4); *Roberts* v. *Mitchell* (5).

In a case of this kind there may sometimes be a doubt as to the liability of the cestui que trust, or the principal, but upon the liability of the wrongdoer himself there is no room for controversy. He cannot use his fiduciary quality as a shield, and claim immunity because he was in possession in the name of others. Pollock on Torts (6).

This fundamental principle of what Demolombe calls "*la personnalité de la peine*," (7) governs as to third parties, all mandataries, trustees, depositaries, or bailees, of whatever species, and therefore rules this case; for, under the express provision of art. 891*a* of the code, it is as depositaries or sequestrators that the appellants, at the time of this accident, were in possession of this building. The following authorities have therefore their full application. *Beauguillot* v. *Caillemer* (8):

Le gérant d'une propriété peut être condamné personnellement à des dommages interêts, à raison d'un fait commis par lui en sa qualité, lorsque ce fait a le caractère de délit ou quasi-délit; en ce cas le gérant ne peut opposer l'exception de mandat.

(1) Vol. 4 p. 767.
(2) P. 393.
(3) Pars. 112, 115.
(4) Pp. 369, 434, 451, 845.
(5) 21 Ont. App. R. 433.
(6) P. 67.
(7) Des Contrats Vol. 8 nos. 558, 634, 635.
(8) S.V. 33, 1, 321.

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A driver by his negligence caused an accident. He and his master were condemned *solidairement*. *L'Etat* v. *Berthet* (1).

Dans tous les cas, il va de soi que le mandataire est personnellement responsable envers les tiers de délit ou quasi-délits qu'il a commis dans l'accomplissement du mandat (2).

Celui qui a commis un délit ou quasi-délit, n'est pas recevable à soutenir pour échapper à toute responsabilité qu'il n'a agi que par les ordres ou pour le compte d'autrui (3).

Guillouard, Mandat (4); *Hood* v. *Stewart* (5); *Camp* v. *Church of St. Louis* (6). *Mer* v. *Broussais* (7).

La règle que le mandataire représente le mandant à l'égard des tiers, n'est pas applicable en cas de quasi-délits, le mandataire est alors tenu de réparer le dommage qu'il a causé par sa faute.

L'exécuteur testamentaire est un mandataire, et comme tel, passible des dommages causés par sa négligence.

Gertran v. *Dehaulme* (8); *Perignon* v. *Syndic du chemin de fer de Gisors* (9).

Le mandant peut suivant les circonstances être déclaré responsable du quasi-délit commis par son mandataire, dans l'exercice de son mandat. Mais sa responsabilité ne fait point obstacle à celle du mandataire, qui, en prenant part au quasi-délit, encourt les conséquences du fait illicite auquel il a participé.

As to the findings of fact of the Superior Court, concurred in as they have been by the Court of Queen's Bench, the appellants cannot expect us to reverse. We could not do so without disregarding a well settled jurisprudence as to appeals on questions of fact. Moreover the evidence, though not all one way, is in my opinion very strong against the appellants, so much so that it would, to my mind, have justified an indictment for manslaughter. An action as this one, in the express terms of art. 1056 of the code under which it is brought, does not prejudice the criminal proceedings to which

(1) Dal. 71, 3, 23.
(2) Dal. 84, 2, 123.
(3) Sourdat, Vol. 2 no. 908.
(4) No. 200; 20 Laurent, Vol. 2 nos. 449, 621, 622.
(5) 2 La. An. 219.
(6) 7 La. An. 321.
(7) Dal. 90, 1, 151.
(8) Dal. 55, 1, 371.
(9) Dal. 90, 1, 243.

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the parties may be subject. Neither can the appellants expect us to interfere upon the amount of damages and they rightly refrained from pressing this part of their appeal.

We could not very well hold that the courts below erred in estimating the loss of a husband at $4,000, when we ourselves have estimated at $3,000 the loss of a finger. *Gingras* v. *Desilets* (1).

The result is 1st, that the appeal of the defendants in their quality of executors is allowed, and the action dismissed as against them in that quality; no costs. 2nd. As to the action against the appellants in their quality of trustees, there being no appeal on that issue, the judgment of the Superior Court stands as rendered for $4,000 and interest from May 27th, 1893, and costs in Superior Court distraits, and with the addition of the words after as trustees: "for the benefit of the children of George Davies Ferrier."

As to the action against them personally, judgment will be entered for $4,000 and interest from May 27th, 1893, date of judgment in the Superior Court, with costs, in the Superior Court distraits. Each party paying his costs of the appeals in the Queen's Bench and in this court; appeal allowed; no costs. The judgment will therefore thus end:

Condamne les défendeurs tant personnellement qu'en leur qualité d'héritiers fiduciaires (trustees) pour le bénéfice des enfants de George Davies Ferrier, à payer à la demanderesse la somme de $4,000 avec intérêt du 27 mai 1893, et les dépens de la Cour Supérieure distraits à.....

Et sur l'issue entre la demanderesse et les défendeurs en leur qualité d'exécuteurs testamentaires, met les parties hors de cour. Chaque personne paiera ses frais sur le présent appel, ainsi que sur l'appel devant la cour du Banc de la Reine.

GWYNNE, SEDGEWICK and KING JJ. concurred.

Appeal allowed without costs.

Solicitors for appellants: *Taylor & Buchan.*

Solicitors for respondent: *Saint Pierre & Pelissier.*

(1) Cass. Dig. 2 ed. 212.

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*Oct. 5.
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*Jan. 15.

WILLIAM ANGUS AND FRANK B. HOWARD (DEFENDANTS) ..... } APPELLANTS;

AND

THE UNION GAS AND OIL STOVE CO. (PLAINTIFFS) ..... } RESPONDENTS.

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

Patent of invention—Business agreement to manufacture under—Letter of guarantee—Failure of scheme—Liability of guarantor.

The chief object of an agreement between A. and B. was the profitable manufacture and sale of wares under a patent of invention issued to A., and in consideration of advances by B. to an amount not exceeding $6,000, C. by a letter of guarantee "agreed to become a surety to B. for the repayment of the $6,000 within 12 months from the date of the agreement if it should transpire that, for the reasons incorporated in said agreement, it should not be carried out." On an action brought by B. against C. for $6,000 it was proved at the trial that the manufacturing scheme broke down through defects of the invention.

Held, affirming the judgment of the court below, that C. was liable for the amount guaranteed by his letter.

APPEAL from a judgment of the Court of Queen's Bench for the province of Quebec, confirming a judgment of the Superior Court under which judgment the appellant William Angus was condemned to pay a sum of $6,000 jointly with the appellant Frank B. Howard, and the appellant Frank B. Howard condemned for the further sum of $2,264, and interest, individually.

The causes of action as set up in the declaration, and the pleas, are fully stated in the judgments hereinafter given.

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

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v.
THE UNION GAS AND OIL STOVE CO.

Martin and Gilman for appellants.

Greenshields Q C. for respondent.

THE CHIEF JUSTICE.—I am of opinion that this appeal must be dismissed with costs.

Taschereau J.

TASCHEREAU J.—The respondents, a New York company, the plaintiffs in this case, claim from the appellants, Angus & Howard, a sum of $8,864 upon the following state of facts. Howard, on the 18th of April, 1889, being the owner of a United States patent for improvements in apparatus for manufacturing hollow ware from pulp, entered into an agreement with the company, respondent, by which he agreed to assign and execute to the company an exclusive license to manufacture and sell in the United States cans for holding kerosene oil under the said patent. This agreement, which is contained in a writing *sous seing privé*, is a clumsily drawn document, and one that requires a close examination before being perfectly understood. However, the parties themselves do not substantially differ about the conditions of their contract. The controversy is as to what happened subsequently and as to the legal result of the failure of what I may term their joint enterprise.

Howard, by a separate instrument of the same date, duly executed a license or transfer of his patent to the company, as he had agreed to do, but the company claim that this patent was worthless, and that a merchantable and useful can for holding kerosene oil could not be manufactured under it, as he had covenanted to do; that the article he manufactured was worthless and rejected by the trade; that Howard, under a subsequent agreement, dated the 24th April, 1889, was obliged to refund to the company the sums they advanced to him at different times, amounting to $18,000, of which

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$8,864 are due; that Angus, the other defendant, agreed on the 24th April, to become surety to the company for the repayment of those advances up to $6,000.

The defendants pleaded separately, alleging that Howard had duly fulfilled all his part of the agreement, and that, if the article manufactured is worthless, he is not responsible for it. It results from the evidence, as found by the Superior Court and the Court of Appeal, that the company's allegations of fact are fully borne out. It would be useless for me here to give the details of an *enquête*, a great part of which is itself utterly useless. Of the one hundred and twelve documents filed and the nineteen witnesses examined, more than half might well have been left out. One fact is clear. It is that the cans manufactured by Howard are altogether unsalable, and why he should not refund to the company the advances they made to him under their agreement is what he has, to my mind, altogether failed to establish.

The company has certainly disbursed these sums, and has as certainly received no consideration whatever for them. The judgment in their favour against Howard for $8,864 is, in my opinion, unassailable.

As to Angus, he was not Howard's partner in this matter, as found in the court below, and consequently the judgment against him can only be, as it is, for the amount of his guarantee, $6,000.

It was argued by the appellants that the respondents should have exercised the option given them under the contract, to have taken out a license for the manufacture of other pulp ware goods, under other patents owned by Howard, and that, had they done so, they might have saved the loss that they are now seeking to recover. This point, however, is not in any way raised by the pleadings, and cannot avail the appellants. The respondents would perhaps have been able to

prove that these other patents were as valueless as the one in question, had they had the opportunity. The appellants' contention that the judgment of the Superior Court does not set aside the contract, as prayed for by the declaration, though founded in fact, does not help them in law. If any one can complain that the judgment does not grant all the relief demanded by the declaration it is not the appellants. They also argued that, under this judgment, the company will get back their money, and still retain Howard's patent for the whole of the United States. Here again, there is no issue of the kind raised by the pleadings. Had the appellants asked for it the company would undoubtedly have filed immediately a re-transfer of the patent. The appellants are entitled to it, however, and an order will be added to the judgment, if desired, that the patent is to be re-transferred to them, and all the company's rights to it under the agreement in question put an end to, said re-transfer, however, to operate and have effect only upon payment of the amount of the judgment.

GWYNNE and SEDGEWICK JJ. concurred.

KING J.—This is an appeal from a judgment of the Queen's Bench of Quebec, affirming a judgment of Mr. Justice Mathieu condemning the appellants, *inter alia*, to pay to the respondents the sum of $6,000, with interest from 13th May, 1891.

On 18th April, 1889, an agreement was entered into between the company and Howard, by which Howard agreed to execute an exclusive license to the company (subject to conditions of agreement) to manufacture and sell in the United States cans for holding kerosene oil to replace those then sold in the market, which were made from glass, tin and other materials, also all arti-

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cles then manufactured by the company that could be made from pulp under a patent owned by Howard.

Howard also agreed to do all acts, to the best of his ability, necessary to maintain and protect the validity of the patent, to furnish drawings and specifications necessary to build and erect machinery and fixtures for the manufacturing of said articles, to give his time and all necessary information for the building and erecting and starting of said machinery and fixtures free of charge, upon expenses paid, to discount drafts in certain banks, and to grant to the company a new license to manufacture and sell in the United States some other lines of goods that could be manufactured from pulp under his patents, in case it should be found that within two months from the company receiving cans then being made by the Howard Pulp Co., that the trade would not accept and buy them.

The company, on their part, agreed to proceed with due diligence to build and erect buildings, machinery and fixtures necessary and suitable to manufacture at least 1,500 one gallon oil cans (or its equivalent in large cans) per day and thereafter to manufacture all the said cans or goods that could be sold in the United States at a fair business profit, provided that the trade accept and buy the cans then being made for the company by the Howard Pulp Ware Company.

There were other agreements by the company, relating to the mode of making up accounts, keeping books, opening the factories to Howard, &c., and for the manufacturing near Chicago if a larger profit could be realized.

Then there follows this agreement:

Said party of second part further agrees to advance from time to time in amounts as may be needed by said party of first part, any amounts, the total of which shall not exceed $6,000 by accepting time drafts drawn by said party of 1st part on said party of 2nd part, and

by accepting renewal time drafts drawn, &c., from time to time as may be needed to carry said advance of $6,000 or any part thereof until such time as the profit accruing to the party of the first part under this agreement shall be sufficient to pay said drafts.

It was also agreed that Howard's share of the net profits should be retained by the company and applied to the payment of the advance and renewal drafts until same are paid in full.

By another agreement of same date referring to that already mentioned it was agreed that in case "Angus will not sign an agreement to repay the company any amount that may be advanced Howard (under said agreement) within 12 months from this date, then the said agreement shall be null and void and a new agreement shall be entered into between Howard and the company."

On the 24th April, 1889, Howard addressed to the company a letter saying:

I hereby agree that if from the cause set forth in my agreement with you, dated April 18th, 1889, it should occur that you were unable to carry out your part of said agreement, that then, and in such case I will repay you on or before the 18th day of April, 1890, the total amount that you may have advanced to me under said agreement of 18th April, 1889.

It is understood that this agreement shall form a part of said agreement of 18th April, 1889.

On the same day, viz., April 24th, 1889, Angus signed the following guarantee:

Whereas F. B. Howard has entered into an agreement dated April 18th, 1889, with Union Gas and Oil Stove Company of New York, for the manufacture and sale of articles from pulp under Howard's Patent by the conditions of said agreement Howard is to obtain from said company an advance loan up to the amount of $6,000 by his drafts on them on time. The undersigned being fully aware of all the conditions of the agreement between the said Howard and the company above referred to, hereby agrees to become surety to the said company for the repayment of said drafts within 12 months from date of said agreement, in case it should transpire that if (*sic*) from the reasons incorporated in said agreement, it should not be carried out.

(Signed) WM. ANGUS.

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The advance of $6,000 was duly made by drafts which after certain renewals the company were obliged to pay.

The cans made for the company by the Howard Pulp Ware Company were supplied to the respondent company between the date of the agreement and August of the same year, and were sold by the company to their customers, wholesale jobbers, by whom they were sold to the retail dealer, through whom they got into the hands of the consumers. Presently large numbers of them came back to the respondent company, being returned by the buyers who found that they would not hold oil. In the process of making them the pulp can was subjected to an indurating or hardening process by a coating of oxydized linseed oil. But it was found that after a while the kerosene oil stored in them found its way through the indurated surface and soaking into the pulpy substance destroyed their efficiency. The consequence was that the goods were thrown back upon the hands of the company and became worthless. In the meantime the company having proceeded to build and having built and filled a factory for the manufacture of the cans in Connecticut, and having manufactured a large number of the cans found themselves with a useless factory and useless stock on their hands. The evidence clearly shows that the venture was a business failure entirely through the inutility of Howard's patent for the induration of pulp oil cans.

The want of mercantile value in the oil cans manufactured under Howard's patent and license disabled the company in a mercantile sense from carrying out their undertaking to manufacture and sell the goods, and this is from "a cause set forth in the agreement" within the meaning of those words as used in Howard's letter to the company of April 24th, 1889. Consequently

under the terms of that letter Howard became bound to repay to the company on or before 18th April, 1890, the total amount advanced to him under the agreement of 18th April, 1889. The amount so advanced to Howard exceeded the $6,000 named in the agreement. It was in fact $8,000 and upwards and for that sum he is indebted to the company and liable to make to them payment in accordance with the terms of his letter.

Then as to the guarantee of Angus. It recites the fact of the agreement of April 18th, 1889, for the manufacture and sale of articles made from pulp under Howard's patent, and Angus, having knowledge of all the conditions of the agreement "agrees to become surety to the said company for the repayment of said drafts within 12 months from date of said agreement in case it should transpire that (if) from the reasons incorporated in said agreement it should not be carried out."

Was the agreement not "carried out," and if so, was this "from the reasons incorporated in it?"

What was the contemplated failure of the agreement? and what were the reasons incorporated in the agreement as being likely to cause the contemplated failure to carry out the agreement. Manifestly the profitable manufacture and sale of the wares was the chief object of the agreement. It was through this that both parties sought the business advantage they contemplated, and it was through this that Howard was able to obtain the advance, and that the company was willing to make the advance, relying upon Howard's share of the profits as a further security.

The contingency of the cans not being acceptable to the trade was in terms expressed, and is made the subject of certain stipulations. I think therefore that the only thing intended by the clause referred to in Angus's

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guarantee was a possible failure to manufacture and sell the wares by reason of the trade not taking to them. The object of the guarantee apparently was to protect the company in case the manufacturing scheme broke down from the inutility of Howard's patent or invention.

This result has happened, and therefore Angus as surety is bound to indemnify the company against the advance.

It was argued that under clause 13 the only recourse of the company was to apply for another license to manufacture other pulp goods under Howard's patent. But this clause is one giving an option to the company and binding Howard to performance if the option is exercised, but it in no way deprives the company of the right to repayment of the advance.

Then it was argued that under clause 20 the debt was to be paid out of a fund viz., the profits. The answer is twofold. 1st, that the fund is not made in exclusion of personal liability and responsibility, but is an additional security, and 2ndly, if the fund is prevented from being formed by reason of Howard's patent turning out worthless, for the purpose intended, it is not for him or his surety to say that the fund is the only way through which the advance is to be repaid. Then it is said that as within two months next after the company received the cans from the Howard Co., the cans had been purchased and had not been returned, therefore the plaintiff could not insist upon the guarantee. But the 20th clause only seems to apply to the exercise of the option referred to.

Upon a broad and useful reading of the agreement I think that the facts of the case as proved and as found by the court below are within its terms and that "from the reasons incorporated in the agreement it was not

carried out." The scheme of manufacturing failed through the defects of Howard's invention.

I therefore think that the company are entitled to recover.

Appeal dismissed with costs.

Solicitors for the appellants: *Girouard, Foster, Martin & Girouard.*

Solicitors for respondent: *Greenshields & Greenshields.*

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*Jan. 15.

JOHN DE KUYPER & SON (PLAINTIFFS)..... } APPELLANTS;

AND

VAN DULKEN, WEILAND & CO. (DEFENDANTS)..... } RESPONDENTS.

VAN DULKEN WEILAND & Co. (DEFENDANTS)..... } APPELLANTS;

AND

JOHN DE KUYPER & SON (PLAINTIFFS)..... } RESPONDENTS.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Trade mark—Jurisdiction of court to restrain infringement—Effect of—Rectification of register.

In the certificate of registration the plaintiffs' trade mark was described as consisting of "the representation of an anchor, with the letters 'J. D.K. & Z.' or the words 'John DeKuyper & Son, Rotterdam, & Co.' as per the annexed drawings and application," In the application the trade mark was claimed to consist of a device or representation of an anchor inclined from right to left in combination with the letters "J.D.K. & Z." or the words "John DeKuyper &c., Rotterdam," which, it was stated, might be branded or stamped upon barrels, kegs, cases, boxes, capsules, casks, labels and other packages containing geneva sold by plaintiffs. It was also stated in the application that on bottles was to be affixed a printed label, a copy or *facsimile* of which was attached to the application, but there was no express claim of the label itself as a trade-mark. This label was white and in the shape of a heart with an ornamental border of the same shape, and on the label was printed the device or representation of the anchor with the letters "J. D. K. & Z." and the words "John De Kuyper & Son, Rotterdam," and also the words "Genuine Hollands Geneva" which it was admitted were common to the trade.

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

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The defendants' trade mark was, in the certificate of registration, described as consisting of an eagle having at the feet "V. D. W. & Co." above the eagle being written the words "Finest Hollands Geneva;" on each side are the two faces of a medal, underneath on a scroll the name of the firm "Van Dulken Weiland & Co." and the word "Schiedam," and lastly at the bottom the two faces of a third medal, the whole on a label in the shape of a heart (le tout sur une étiquette en forme de cœur). The colour of the label was white.

Held, affirming the judgment of the Exchequer Court, that the label did not form an essential feature of the plaintiffs' trade mark as registered but that, in view of the plaintiffs' prior use of the white heart-shaped label in Canada, the defendants had no exclusive right to the use of the said label, and that the entry of registration of their trade mark should be so rectified as to make it clear that the heart shaped label formed no part of such trade mark. Taschereau and Gwynne JJ. dissenting on the ground that the white heart shaped label with the scroll and its constituents was the trade mark which was protected by registration and that the defendants' trade mark was an infringement of such trade mark.

APPEALS from a decision of the Exchequer Court of Canada (1) by John'De Kuyper & Son, the plaintiffs in the action, and by Van Dulken, Weiland & Company, the defendants.

The action was begun in the Exchequer Court by statement of claim, on 19th January, 1892, after the coming into force of the Acts chaptered 26 and 35 of the Parliament of Canada, passed in 1891.

The plaintiffs complain in their action that the defendants' registered trade mark is an infringement and an imitation of that of the plaintiffs, and that the registration of the defendants' trade mark was improvidently allowed to be made, and they ask for a declaration and judgment accordingly, as well as for the cancellation of defendants' trade mark and for an injunction and for damages, and also for a declaration of ownership in favour of plaintiffs, apart from the registered title.

The pleadings are fully stated in the report of the case in the Exchequer Court Reports (1.)

(1) 4 Ex. C. R. 71.

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In 1875 plaintiffs applied for the registration of their trade mark under the Act then in force, viz., the Trade Mark Act of 1868.

The application was as follows:—

To the Minister of Agriculture,
Ottawa.

SIR,—I, John De Kuyper for and on behalf of the firm of John De Kuyper & Son, carrying on business as distillers in Rotterdam, Kingdom of the Netherlands, hereby furnish a duplicate copy of a trade-mark, which I verily believe is the property of our firm on account of having been the first to make use of the same.

The said trade-mark consists of a device or representation of:

On the casks containing our Geneva is marked near or under bung,

hot iron brand

J. D. K. & Z.

and on one head is painted in black letters

JOHN DEKUYPER AND SON.

ROTTERDAM.

On the cases and boxes on the fore-side right hand is painted, in white letters,

and amid at the foot, in an unpainted spot, in hot iron brand

J. D. K. & Z.

On the bottles is affixed a printed label,

and the corks green waxed and sealed with the seal

J. D. K. & Z.

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The whole or any part thereof forming our trade-mark. The said device may be branded or stamped upon barrels, kegs, cases, boxes, capsules, corks, labels and other packages containing Geneva sold by us, and I hereby request the said trade-mark to be registered in accordance with the law.

In testimony thereof I have signed in the presence of the two undersigned witnesses at the place and date hereunder mentioned.

Witnesses:

(Sgd.) Charles De Kuyper. (Sgd.)
" Jacob Van der Plas. JOHN DE KUYPER.

ROTTERDAM, 3rd March, 1875.

The trade mark was duly registered and the Minister through his deputy forwarded to plaintiffs the following certificate of registration:—

This is to certify that the trade-mark which consists of the representation of an anchor with the letters J. D. K. & Z or the words John de Kuyper, Rotterdam, &c., &c., as per the annexed drawings and application has been registered in

"The Trade Mark Register No. 4, Folio 666,"

in accordance with the "Trade-Mark and Design Act of 1868." By John de Kuyper, one, and on behalf of the firm

JOHN DE KUYPER & SON,

of Rotterdam, Kingdom of the Netherlands, on the 21st day of April, 1875.

Department of Agriculture, Ottawa, Canada, this 21st day of April, A.D. 1875. (Sgd.) J. C. TACHÉ, *Deputy Min. of Agr.*

The defendants applied for registration of their trade-mark, under the Act of 1879, as follows:

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Au Ministre de l'Agriculture,
Branche des marques de Commerce et des droits d'Auteurs,
Ottawa.

Je, Damase Masson, de la Cité de Montreal, Comté d'Hochelage, un des représentants au Canada de la maison Van Dulken Weiland & Co. de Rotterdam, Hollande, et autorisé par eux, transmets ci-joints copies en double d'une Marque de Commerce Spéciale (conformément aux clauses 9 et 10 de l'Acte des Marques de Commerce et des Dessins de Fabrique de 1879) dont je réclame la propriété parce que je crois sincèrement qu'ils en sont les véritables propriétaires.

Cette marque de Commerce Spéciale consiste en un Aigle ayant à ses pieds VD W. & Co. au-dessus de l'aigle sont écrits les mots "Finest Hollands Geneva;" de chaque côté sont les deux faces d'une médaille; en dessous sur une guirlande le nom de le maison "Van Dulken, Weiland & Co." puis le mot "Schiedam" et enfin au bas les deux faces d'une troisième médaille. Le tout sur une étiquette en forme de cœur.

Je demande par ces présents l'enrégistrement de cette marque de commerce spéciale conformément à la loi.

J'inclus un Mandat de Poste No. 7852, montant de la taxe de $25 requise par la clause 12 de l'Acte précité.

En foi de quoi j'ai signé en présence de deux témoins, soussigné aux lieu et date ci-dessous mentionnés.

Montréal, 27 Mars, 1884.

Témoins:

(Sgé.) L. P. PELLETIER.
H. P. BRUYÈRE.

(Sgé.) D. MASSON,

Ottawa, 7th January, 1893.

Attested,
J. LOWE,
Dep. of the Min. of Agr.

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Attested J. LOWE,
Deputy Min. of Agr.

This also was duly registered, and the following certificate of registration forwarded to defendants :—

" CANADA : }
}

Les présentes sont à l'effet de certifier que la Marque de Commerce (Spéciale) laquelle consiste en un aigle ayant à ses pieds VD. W. & Co., au-dessus de l'aigle sont écrits les mots 'Finest Hollands Geneva'; de chaque côté sont les deux faces d'une médaille; en-dessous, sur une guirlande, le nom de la maison 'Van Dulken Weiland & Co.,' puis le mot 'Schiedam,' et enfin au bas les deux faces d'une troisième médaille, le tout sur une étiquette en forme de cœur tel qu'il appert par l'étiquette et la demande ci-contre.

A été enrégisté au 'Régistre des Marques de Commerce No 10, Folio, 2242.' Conformément à 'l'Acte des Marques de Commerce et Dessins de Fabrique de 1879,' par Van Dulken, Weiland & Co., de Rotterdam, Hollande, ce 2ème jour d'avril A.D. 1884.

Ministère de l'Agriculture, (Branche des Marques de Commerce et Droits d'Auteurs. }
}

J. LOWE,
Deputy of the Minister of Agriculture.

Ottawa, Canada, ce 7ème jour de janvier A.D. 1893.

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The Exchequer Court held that the heart-shaped label was not an essential part and feature of plaintiffs' registered trade mark, and that defendants were not entitled to claim or to register a heart-shaped label as an essential feature of their trade mark (which the judgment declared they had done); and ordered that the registration of their trade mark should be varied by striking out therefrom the words "en forme de cœur"; and further ordered the defendants to pay the general costs of the action and of the issue upon which the variation of defendants' registration was directed; but giving no other relief to the plaintiffs.

The plaintiffs appealed from the whole judgment, and the defendants from that portion of it which directs the registration of their trade mark to be amended, and which orders them to pay the general costs of the action; and they also appealed from the judgment on the question raised by the demurrer in the first instance and again at the trial as to the jurisdiction of the court and the insufficiency in law of the case as alleged by the plaintiffs.

The two appeals were argued together.

Abbott Q.C., *Campbell* with him, for the plaintiffs.

We appeal from that part of the judgment of the Exchequer Court which holds that the plaintiffs' trade mark cannot be protected except so far as registered, and that all that was registered was the anchor and the name of the firm; and we also claim that more of the defendants' label should have been cancelled.

In the first place, the most striking feature in the whole device is the shape and arrangement. The heart-shaped scroll is of itself unusual, whether upon a label cut of that shape or not. Then the scroll-work, it will be observed, is parallel to the cut border of the label, and therefore accentuates its effect. In the second place, the scroll work itself is constructed in a peculiar

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and identical way in the two labels, that is to say, it consists of a similar alternation of one oval and two round links. The next point of similarity is the way in which in one case the words "Genuine Hollands," and in the other the words "Finest Hollands" are placed in a curve in the upper portion of the label in identical type and with a scroll beneath. Then the printing of the word "Geneva" is in similar type, and the type itself is of an unusual character, that is to say, whilst the letters are in black, there is a line of shading drawn around the margin of each letter at a certain distance from it, which undoubtedly has the effect of catching the eye. Then the name of the makers is affixed on a curved scroll or ribbon similarly arranged and in the same position in each label. In fact, all the constituent parts of the labels occupy the same relative positions in each with the result that the *tout ensemble* or general appearance of the two labels constitutes a striking resemblance with part differences in the details which would not be noticed by an ordinary purchaser. To sum up, the defendants' label is of the same shape, the same colour, the same size and the same general design as the plaintiffs' and contains similar words and devices, which, though differing in detail, are combined in such a manner as to give the same appearance.

An examination of the two labels will show the marked similarity, not only in general effect but in detailed work, between them.

The statute authorized the plaintiffs to register a label and in the present case they did actually produce a label.

The label is far more explicit than any descriptive words. The actual drawings and written description, however, to-day stand registered in the books of the department, as appears by the evidence of the custo-

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dian of the original. This evidence is sufficient to clear away the ambiguity of the deputy minister's certificate relied on by the court below, if any there be, for if the minister register, as he was bound to do under the statute, and as this certificate shows he did in this case, neither he nor his deputy, by limiting the form of the certificate, could take away the rights of the parties. Nothing could give to any person examining the books a better idea as to what the plaintiffs' label really was than the label itself, and this was actually attached to and formed part of the description and is the best drawing possible. It is therefore erroneous to say that the certificate limits them to their name or initials and the anchor, or that they have accepted any such limitation, if by acceptance is meant that they have acquiesced and are in some way estopped now from rejecting it. See Fouillet on trade marks, No. 37 (1).

Further, upon a strict application of the rules of pleading as enforced under the Judicature Acts, which are the rules in force in the Exchequer Court, the issue raised by the defendants did not go to the question of the actual registration of the label, and it must be held to be admitted that all they say is that we are not entitled to the exclusive right of issuing this white heart shaped label.

Under the circumstances, looking at both labels which are in evidence, we cannot come to any other conclusion than that any ordinary incautious person would be deceived; that we are "an aggrieved person" and entitled to contend that the defendants' label was wrongly on the register and that a judgment should be entered ordering the cancellation of the defendants' trade mark (2).

(1) Pinto *v.* Badman 8 Cutler's Pat. Cas. 181.

(2) *Edleston* v. *Vick* 18 Jur. 7. *Seixo* v. *Provezende* 12 Jur. N.S. 215.

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Powell v. *Birmingham Vinegar Co.* (1).

Ferguson Q.C. and *Merrill* for defendants.

Our first point is that the heart-shaped label of the plaintiffs was not registered, and that issue has been clearly raised by our defence. This point has been found in our favour, but the court went further and held that under the Exchequer Amendment Act of 1891 our trade mark should be corrected, as the heart-shape was in public and common use, and that part of the judgment we object to by our appeal. The jurisdiction of the Exchequer Court is confined to causes of action arising out of registered trade marks or with regard to trade marks which it is sought to register or to amend the registration of.

Infringement or imitation by defendants of the plaintiffs' trade mark must, in order to create a cause of action over which this court would have jurisdiction, be an infringement or imitation of plaintiffs' registered trade mark. The only imitation or infringement in reality complained of by the plaintiffs is the adoption by the defendants of a heart-shaped label as part of their registered trade mark and the use of it by them in their business.

There is no statement by any witness that the plaintiffs were the owners, or were the first to use the heart-shaped label. No member of plaintiffs' firm gave any evidence at all in the case; and the declaration filed on their application to register their trade mark does not state that they were the sole owners of the right to use this shape of label as a trade mark, or as a part thereof, or that they had first used it; whilst, on the other hand, there is ample evidence to show that such a shaped label had been used by other manufacturers of gin for years, without question or objection on plaintiffs' part.

(1) [1894] A. C. 8. See also cases cited in 4 Ex. C. R. pp. 81-82.

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The court should not by implication or inference read into the claim for, or record of the registration of, a trade mark elements or features not expressly claimed in the application for registration as a part of the mark, or not expressly mentioned in the certificate of registration as being a part of the trade mark.

There is not the slightest reference in the certificate granted by the department to a label of any kind as being a part of the trade mark. but the mark is referred to as consisting of "the representation of an anchor," with certain letters and words. The anchor is apparently the essential and really the only distinctive device in the trade mark, the words or letters being merely descriptive and used in connection with the anchor, the only reference to a label being the same as is made to stamping or branding, that is to indicate how the trade mark may be put upon bottles to take the place of branding or stamping in applying it to other packages.

Apart from the heart-shape of the label the plaintiffs do not seriously pretend that the defendants' registered trade mark is an imitation or infringement in any respect of the plaintiffs' trade mark.

The learned counsel referred to R.S.C. ch. 63, sec. 19.

The judgment of the majority of the court, the Chief Justice and Sedgewick and King JJ., was delivered by:

KING J.—This is an action in the Exchequer Court to restrain defendants from infringing plaintiffs' trade mark. Both parties reside in Holland and are distillers of gin.

In 1875 plaintiffs applied for the registration of their trade mark under the Act then in force (1).

(1) See page 116.

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In 1884 the defendants applied for registration of their trade-mark under the Act then in force (1).

What is in contest in this action is the label as used by the respective parties upon the bottles containing their gin.

The plaintiffs contend that their registered trade mark, as applied to bottles, consists in a heart-shaped label "upon which, around and parallel to the border is printed a scroll, also heart-shaped, with at the top, in the semi-circle at each side of the heart, the word "genuine" on the one side, and "Hollands" on the other, with a slight scroll underneath each word; across the top of the centre of the label the word "Geneva," in large letters, beneath which are the anchor and letters as in the hot iron brand with a flourish on each side of the anchor, and on the bottom part of the centre of the label the words "John De Kuyper & Son," below which is the word "Rotterdam," and below that a leaf pattern.

They complain that defendants' label is in its essential particulars the same as the said trade mark of plaintiffs, and is an infringement on and an imitation of the registered brands and trade marks of the plaintiffs, and so resembles the same as to be likely or calculated to deceive and to mislead the public, both by reason of its shape and colour (white), and the scroll, garland and words upon it, and its general appearance, and because that the registration of it conflicts with the registration of the brands and trade marks of plaintiffs, and was made without sufficient cause.

The defendants deny that the plaintiffs are entitled to the exclusive right to use a heart-shaped label either by virtue of the registration of their trade mark or by prior ownership, and allege that heart-shaped labels were in common and general use in the spirit trade

(1) See page 118.

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long prior to plaintiffs' registration. They also allege that the essential features of plaintiffs' trade mark, and those by which plaintiffs' Holland gin was known, are the design of the anchor and the name "De Kuyper," while the essential and distinctive features of defendants' trade mark are the design of the eagle and the name "Weiland," and that neither the heart-shape of the label or the scroll, either separately or together, are essential features by which either plaintiffs' or defendants' gin is known or asked for in the market. They allege that the essential features of the trade marks are different, and that defendants' trade mark is in no respect calculated to mislead or deceive the public, &c.

The learned judge of the Exchequer Court was of opinion that the essential particular of plaintiffs' trade mark is the anchor in combination with the letters J. D. K. & Z., or with the words, John De Kuyper & Son, Rotterdam, and that the plaintiffs had not claimed to register a label, or claimed the form of the label as part of the trade mark.

He also thought that the differences between the labels were such as to prevent persons of reasonable care and caution from mistaking one for the other, while at the same time holding that "the fair inference from the facts and circumstances disclosed by the case is that the defendants, while not perhaps attempting to sell their Geneva as that of the plaintiffs, thought to gain a trade advantage by adopting and using a label which in shape and colour resembled that used by the plaintiffs, though otherwise distinguishable from it."

The learned judge therefore declined to give plaintiffs the relief asked for, but at the same time declared that the defendants were not entitled to claim or to register as an essential feature of their trade mark a

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heart shaped label, as they had done in their application, and ordered that the entry of the registration of defendants' trade mark be varied by striking therefrom the words "en forme de cœur." Ordering also that defendants pay the general costs of the action and of the particular issue involved in the paragraph respecting the form of defendants' trade mark.

Both parties have appealed, each from so much of the order as is against them respectively.

First as to plaintiffs' appeal. What is plaintiffs' registered trade mark? And has it been infringed by defendants? A label is a vehicle for a common law trade mark rather than a common law trade mark of itself. But by 31 Vic. c. 55, the Trade Mark Act of 1868, it is enacted that "for the purposes of the Act all marks, names, brands, labels, packages or other business devices which may be adopted for use by any person in his trade, &c., for the purpose of distinguishing any manufacture, product or article by him manufactured, produced, &c., packed or offered for sale, no matter how applied, whether to such manufacture, product or article or to any package, parcel, case, box or other vessel or receptacle containing the same shall be considered and known as a trade mark and may be registered, &c."

The conditions and mode of registration are defined in sec. 1. The minister of agriculture, it is enacted, shall keep a trade mark register in which any proprietor of a trade mark may have the same registered by depositing with the minister a drawing and description in duplicate of such trade mark together with a declaration that the same was not in use to his knowledge by any other person than himself at the time of his adoption thereof, and the minister on receipt of the fee thereinafter provided shall cause the trade mark to be examined to ascertain whether it resembles any other

trade mark already registered; and if he finds that such trade mark is not identical with, or does not so closely resemble as to be confounded with, any other trade mark already registered, he shall register the same and shall return to the proprietor thereof one copy of the drawing and description with a certificate signed by the minister or his deputy to the effect that the trade mark has been duly registered in accordance with the provisions of the act, &c."

The fee referred to is provided by sec. 28, and is the sum of $5 on every application to register a (design or) trade mark including certificate.

The Act seems to contemplate that but one trade mark shall form the subject of any single application. The plaintiffs' contention is that at least two distinct trade marks formed the subject of their application, that consisting of the anchor with name or initials, and that consisting of the label.

As already stated, the Act authorizes the registration of a label as a trade mark. In such case it would appear requisite that the label should, in analogy with the general law of trade marks, have a distinctive character. It would be only thus that the person could be said to be proprietor of it.

In the case of a label registered as a trade mark the trade mark does not lie in each particular part of the label, per Lord Esher in *Pinto* v. *Badman* (1), but in the combination of them all.

In the case before us, if the plaintiffs have registered their label they are to be protected against any imitation with mere colourable variations of the label as a whole. If it is registered and if it has been imitated in a way calculated to deceive ordinary purchasers of the article, the rights of the plaintiffs as the holders of the registered trade mark are to be protected.

(1) 8 Cutler Pat. Cas. 181.

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I must say that from looking at the two labels I am inclined to go further than the learned judge, and to hold that defendants' label is calculated to deceive persons into thinking that they are purchasing the goods of the plaintiffs. Upon the evidence I think that the defendants' label was prepared for the purpose of coming as closely as defendants thought they could salely come to that of the plaintiffs. Although Anderson's evidence was broken down to some extent, the fact that defendants sought and obtained a commission for the express purpose of contradicting it, and then did not follow it up, leads me to place some reliance upon it. The learned judge has himself said that defendants sought to get a trade advantage by using a label which in shape and colour resembled that used by plaintiffs. What trade advantage would there be in it unless the shape and colour were associated in the minds of the ordinary purchasers with goods of the plaintiffs?

In my opinion courts ought not to hesitate to defeat tricks of trade whenever brought in question.

But then comes the most serious question in the case, viz., whether the plaintiffs' label was registered as a trade-mark.

That they intended to register the anchor with name or initials there can be no question. Did they also intend to register another trade mark, *i.e.* the label? And if so, did they meet the requirements of the Act in reference thereto?

The application wherever it uses definite language points to a single trade mark as its subject. Thus the applicant, one of the plaintiff firm, says: "I hereby furnish a duplicate copy of a trade mark which I verily believe is the property of our firm on account of having been the first to make use of the same."

Then it is said in the application that "the said trade mark consists of a device or representation." I omit for the present a reference to what is so shown as a device or representation, merely drawing attention to what is stated in plain language. Then it is added that "the whole or any part thereof forms our said trade mark," and that "the said device may be branded or stamped upon barrels, kegs, cases, boxes, capsules, corks, labels, and other packages containing Geneva sold by us, and I hereby request the said trade mark to be registered in accordance with law." All this points to a single device, a single representation, a single trade mark; and the affirmation required by the statute is of the firm's ownership and first use of *a* trade mark, not of two or more trade marks. It is true that a representation is given of the label, which is heart-shaped, and has certain words and scrolls arranged in a certain way upon it, and it is not entirely easy to see why this should have been represented at all if it was not intended to register the label. But, on the other hand, the label has shown upon it the distinctive device of the anchor, with initials and name, which form the essential feature of the trade mark indisputably intended to be registered for use at least on casks, cases, boxes, &c., and it may be that the label was shown as indicating the way in which the anchor trade mark was accustomed to be, and was proposed to be, used upon bottles, just as the colour of the wax on the corks is mentioned: "and the corks green waxed and sealed with the seal

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At all events, the applicant has left the matter in some doubt as to what he intended. This being so let us see how it was treated by others and by himself. The minister gave a certificate of registration, treating

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the application as one for the registration of a single trade mark, describing it as an anchor with the name or initials, and the plaintiffs acquiesced in this for years. This has a clear bearing on the question of intention.

But further, the Act requires as a condition of registration that the applicant shall deposit with the minister a drawing and description, in duplicate, of such trade mark. Two things are required, a drawing and a description. The section speaks twice of both a drawing and a description. Here there is a drawing but no description, for the word description, as distinguished from drawing, means a verbal description. It is true that in many cases a drawing would be self-explanatory and of itself quite as plain as a verbal description, but in other cases this might not be so, and the statute in all cases requires both drawing and description.

It is true, as I mentioned to counsel on argument, that such objection would appear to lie against the anchor as a trade mark as well as the label. But really this is no answer. It was sufficient for Mr. Ferguson to say that he was not attacking the anchor as a trade mark. The objection is one of substance, for it is an objection that the Act has not been complied with. And further, if the proposed trade mark or trade marks had been described there would have been no doubt as to what was intended, and if the label as a proposed trade mark had been described we should have seen that, notwithstanding the apparent intention to claim one trade mark what was sought to be registered was not a single trade mark but two trade marks.

But this was not done. The omission to give a description was apparent at once in the certificate of the minister. He took it that what was intended to be registered was the anchor and name or initials, and

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again, I beg leave to repeat, the plaintiffs have for years acquiesced in this departmental view of it. I conclude, therefore, that the label as a trade mark was never duly registered, and that plaintiffs' appeal should be dismissed.

Next, as to the cross-appeal by defendants. The case of *Powell* v. *Birmingham Vinegar Co.* (1), cited by Mr. Abbott, shows that the plaintiffs are within the proper meaning of the term *aggrieved parties*. As to the other points involved in the cross-appeal, I am upon the whole inclined to think that the order should not be disturbed.

By reason of its merely colourable variation from a known, though not registered, label of plaintiffs I think that the defendants were not really proprietors of it.

In the result both appeals should, in my opinion, be dismissed.

TASCHEREAU J.—This case comes up upon appeals by the plaintiffs and defendants respectively.

The parties are both gin manufacturers in Holland and large exporters to Canada. The matter in dispute between them is the question of the right to a trade mark. Since the year 1865, the plaintiffs have used upon the ordinary square black bottle, in which Holland gin is sold in this country, a white, heart shaped label which is undoubtedly a striking label used in the way in which it is. On the 21st April, 1875, they registered this label under the Act of 1868. The defendants at one time used an entirely different shaped label, but on the 2nd April, 1884, they registered under the Act of 1879 a white, heart shaped label which the plaintiffs say is an infringement upon their trade marks.

The two labels are as follows (2) :—

(1) [1894] A. C. 8.

(2) See pages 117, 120.

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The plaintiffs set forth in their statement of claim the deposit by them in duplicate with the minister of agriculture, in the usual way, of the drawings and description in duplicate of their trade mark, and allege that they were the sole proprietors of the mark for years previously, and acquired by the registration a further exclusive statutory right to the same, and that the label was well known and of great advantage to them in their business, that in 1884 the defendants registered their mark, which plaintiffs say is in its essential features the same, and so resembles the plaintiffs' mark as to be likely or calculated to deceive and mislead the public, both by reason of its shape and colour, and the work upon it and its general appearance, and they allege that the registration of it was made, in the words of the statute, without sufficient cause. They ask to be declared the owners, that the defendants' label be declared an infringement, that an injunction issue against them, that the judgment order the cancellation of the defendants' trade mark, and that they have such other relief as may seem just.

The defendants answer that the plaintiffs have not got an exclusive right to the heart shaped label by virtue of the registration of their said trade mark, or by prior ownership of such heart shaped label, alleging that heart shaped labels were in common and general use in the spirit trade long prior to the alleged registration by the plaintiffs of their trade mark. They go on to say that only in respect of the shape of the label and the words "Hollands" and "Geneva" do the marks resemble each other, and that those words are descriptive; that the essential features of the trade mark of the plaintiffs is really the design of the anchor and the name of De Kuyper, whilst the distinctive features of their trade mark are the design of the eagle and the name "Weiland," and that neither the heart

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shape of the label, the colour of the label or the scroll are essential features; and they deny that their mark is calculated to deceive. They allege that they are entitled to the full enjoyment of their mark, which they have enjoyed, they say, for more than twenty-five years, and they allege knowledge on the part of the plaintiffs, and laches and delay in seeking relief.

By their reply the plaintiffs say that they are entitled to the exclusive use of the heart shape, as set forth in their claim, and deny that labels of that shape were in common and general use in the spirit trade prior to the registration. They further say that the whole label, as described by them, is essential, and that their gin was and is particularly known by the shape of its label, but that the essential and distinguishing feature by which the defendants' gin is known was the design of the eagle and the name, but say that by the adoption of the white heart shape with the scroll, in the plaintiffs' statement of claim referred to, the same has become liable to be sold in the place of the plaintiffs' Holland gin, and the public thereby deceived and misled.

I may here incidentally remark that no attempt has been made by the defendants to prove their allegation that heart-shaped labels were in common and general use in the spirit trade prior to the registration by the plaintiffs of their trade mark, or that they themselves have used the heart-shaped label for upwards of twenty-five years.

These two allegations must, therefore, be dropped out of consideration.

By the evidence, it appears that the way this gin trade is carried on and how the plaintiffs suffer from the defendants' dealing, is as follows:—

The gin is shipped out from Holland in wooden cases containing a dozen or more bottles. On the out-

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side of these cases there is nothing to show what sort of label is on the bottles. The cases are generally branded with initials and some kind of mark, the plaintiffs branding one of their registered brands on their boxes, and the defendants an eagle on theirs. In the wholesale trade, therefore, attention is not called to the labels. The different qualities of the gin are distinguished by the colours of the boxes, and the goods are known by their names. It is not contended by the plaintiffs that the wholesale trade are liable to be deceived. What they say is, that the goods, when taken out of the cases and exposed for sale are liable to be mistaken one for the other. A given number of bottles of their gin are more expensive than a similar number of bottles of the defendants' gin, and contain more gin, leaving aside the question of quality. The gin is sold by the retailers in two ways, first, by the whole bottle, and secondly by the glass. When sold by the glass it is usual to hand down the bottle to the customer. Sometimes gin from casks is put into bottles with the labels affixed and handed down in that shape. The retailers have two distinct interests in passing off the defendants' gin instead of the plaintiffs'; in the first place, if they sell it by the bottle, they have paid less for the bottle than they would for similar bottles of the plaintiffs' gin. The bottles look as if they contain the same quantity but as a fact, the defendants' bottles contain less, and therefore, the retailer makes more money by the transaction than he otherwise would do; secondly, if the goods are sold by the glass, over the counter, the cheaper quality of the defendants' gin gives him a greater profit, if he can get the same price for it per glass, and as long as he sells the defendants' gin in the defendants' bottles, under their label, he avoids committing an offence which he

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would commit, were he to sell the defendants' gin in the plaintiffs' bottles.

The judgment of the Exchequer Court finds that there might be, and probably was, a number of the purchasers of gin who would be likely to be misled and deceived, by the general resemblance of the two labels; that the plaintiffs' was well-known and had acquired a reputation throughout the province, and was known in some sections and amongst some classes by the heart-shaped label; and that the fair inference from the facts and circumstances disclosed by the case, is, that the defendants, while not perhaps attempting to sell their Geneva as that of the plaintiffs', thought to gain a trade advantage by adopting and using a label which in shape and colour resembles that used by the plaintiffs, though otherwise distinguishable from it. The court, however, concluded that it had no jurisdiction to restrain the defendants unless the use of the labels or devices constituted an infringement of a registered trade mark, and upon a consideration of the registered documents, determined that the shape had not been claimed by the plaintiffs as a part of their marks. The injunction was therefore refused, but a rectification in the entry of the defendants' trade mark was ordered by striking out therefrom the words *en forme de cœur*. Is the heart shape of the label a registered part of the plaintiffs' trade mark? is the question raised by them on their appeal. I am of opinion that it is; that the heart shape is an essential feature of it and that there is error in that part of the judgment of the Exchequer Court, which holds that nothing was registered by the plaintiffs but the anchor and the names or initials of their firm. The most striking feature in the whole device of the plaintiffs' trade mark, it seems to me is the shape and arrangement (1). The heart shaped

(1) Pouillet des Marques de Fabrique 45.

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scroll of itself is unusual whether upon a label cut of that shape or not. Then the scroll work is parallel to the cut border of the label, and therefore accentuates its effect. And the scroll work itself is constructed in a peculiar and identical way in the two labels, that is to say it consists of a similar alternation of one oval and two round links.

The next point of similarity is the way in which in one case the words "Genuine Hollands" and in the other the words "Finest Hollands" are placed in a curve in the upper portion of the label in identical type and with a scroll beneath. Then the printing of the word "Geneva" is in a similar type, and the type itself is of an unusual character, that is to say, whilst the letters are in black there is a line of shading drawn around the margin of each letter, at a certain distance from it, which undoubtedly has the effect of catching the eye, Then the name of the makers is affixed on a curved scroll or ribbon similarly arranged and in the same position in each label. In fact, all the constituent parts of the labels occupy the same relative positions in each, with the result that the *ensemble* or general appearance of the two labels constitutes a striking resemblance, with part differences in the details which would not be noticed by an ordinary purchaser. To sum up, the defendants' label is of the same shape, the same colour, the same size, and the same general design as the plaintiffs', and contains similar words and devices, which, though differing in detail, are combined in such a manner as to give the same appearance.

An examination of the two labels will show the marked similarity, not only in general effect but in detailed work, between them.

Now, when the plaintiffs deposited that heart-shaped label to register a trade mark, they clearly, it seems to me, claimed the shape as a part of their trade mark.

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The Act 31 Vic. ch. 55, under which the plaintiffs proceeded, provides that the proprietor of a trade mark might have the same registered by depositing with the minister a drawing and description, in duplicate, of such trade mark, together with a declaration that the same was not in use to his knowledge by any other person than himself at the time of his adoption thereof. The minister was to cause the trade mark to be examined, to ascertain whether it resembled any other trade mark already registered, and if he found that the same was not identical with and did not so closely resemble as to be confounded with any other mark already registered, he should register the same. By section two, he had power to make regulations and adopt forms for the purposes of the Act, and all documents executed according to the same and accepted by the minister were to be held valid so far as relates to the official proceedings under the Act. By section three, for the purposes of the Act, marks, names, brands, labels, packages or other business devices which might be adopted for use by any person in his trade * * * for the purpose of distinguishing any manufacture * * * should be considered and known as trade marks, and might be registered for the exclusive use of the party registering the same, and thereafter he was to have the exclusive right to use the same. It is to be noted that the depositing of the drawing and description is the only act required of the party effecting registration, except the declaration that the same was not used by any one else It is a condition precedent apparently that the party registering is to be the proprietor of the mark. The minister's duties are to examine the trade mark, and if he finds that it is not identical with, and does not closely resemble, any other he is bound to register it. No provision is made for his altering

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or modifying it in any way. In the present instance the defendants sought to make an argument out of the words of the deputy minister's certificate. It is true that the deputy minister certified to the registration of this mark in terms that at first sight appear to be ambiguous. It reads as follows:—"This is to certify that this mark which consists of the representation of an anchor with the letters J. D. K. & Z. or the words John De Kuyper & Son, Rotterdam, &c., &c., as per annexed drawings and application, has been registered, &c., &c." The actual drawings and written description however to-day stand registered in the books of the department, as appears by the evidence of the custodian of the original. This evidence is sufficient to clear away the ambiguity of the deputy minister's certificate, if any there be, for if the minister register, as he was bound to do under the statute, and as this certificate shows he did in this case, neither he nor his deputy, by limiting the form of the certificate, could take away the rights of the parties. Nothing could give to any person examining the books a better idea as to what the plaintiffs' label really was than the label itself, and this was actually attached to and formed part of the description and is the best drawing possible. An examination of the drawings and description and of the certificate, however, show that there is no ambiguity.

The certificate, in fact, says that all the trade mark as it appears by the drawings is registered and that, in my opinion, includes the shape of it. By the very fact of presenting the unusual shape of a heart the plaintiffs gave notice that they claimed that shape as a part of their trade mark. In the case of the *Leather Companies* (1), great stress was laid in the House of Lords on the fact that the shape of the trade mark

(1) 11 Jur. N.S. 513.

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there impeached was different from the shape of the plaintifis' trade mark. The case of *Wotherspoon* v. *Currie* (1) is no authority for the proposition that the shape of a mark may not be registered as a part thereof.

In my opinion the plaintiffs have made a clear case. The defendants have used and registered a mark so nearly resembling the mark of the plaintiffs as registered as to deceive unwary purchasers. *Barsalou* v. *Darling* (2). They should be restrained from doing so, and the rectification in the registration of their trade mark ordered by the judgment appealed from should also of course be maintained.

GWYNNE J.—I entirely concur in this judgment.

Appeals dismissed with costs.

Solicitors for DeKuyper & Son: *Abbotts, Campbell, & Meredith.*

Solicitors for Van Dulken, Weiland & Co.: *Duhamel & Merrill.*

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(1) L. R. 5 H. L. 508.

(2) 9 Can. S. C. R. 677.

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*Mar. 1.

CHARLES ARPIN (CONTESTANT).....APPELLANT ;

AND

THE MERCHANTS BANK OF CANADA (PETITIONER)..... ..... } RESPONDENT.

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

Appeal in matter of Procedure—Art. 188 *C. C. P.*

A judgment of the Court of Queen's Bench for Lower Canada (appeal side) held that a *venditioni exponas* issued by the Superior Court of Montreal, to which court the record in a contestation of an opposition had been removed from the Superior Court of the district of Iberville, under art. 188 C. C. P., was regular. On an appeal to the Supreme Court of Canada :

Held, that on a question of practice such as this the court would not interfere. *Mayor of Montreal* v. *Brown* (2 App. Cas. 184) followed.

APPEAL from a judgment of the Court of Queen's Bench for Lower Canada (appeal side) confirming a judgment of the Superior Court for the district of Montreal maintaining respondent's petition to be put in possession of an immovable property purchased at a sheriff's sale.

The facts can be briefly stated as follows :

Charles Arpin the present appellant, Telesphore St. Cyr and one Meunier, were condemned by judgment of the Superior Court of the district of Iberville to pay to the Union Bank of Canada a sum of about $1,300 and costs. To satisfy the judgment the bank issued a writ of execution in the district of Iberville against the lands and tenements of Charles Arpin.

Edouard Arpin, a third party, who up to that time had not been a party to the suit, filed an opposition to the seizure. His attorney of record was the Honourable A. N. Charland, then an advocate, and who was since appointed a judge of the Superior Court.

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

The opposition of Edouard Arpin was contested by the plaintiffs the Union Bank of Canada, and when it came up for proof and hearing the Honourable Judge Charland, who was holding the court, made a written declaration of the ground of recusation which existed against him, and in consequence it was ordered that the record in that suit be sent to the Superior Court of the district of Montreal.

At Montreal Edouard Arpin's opposition was heard and dismissed.

It then became necessary for the plaintiffs to issue a writ of *venditioni exponas*. This was done but the writ was not issued by the Superior Court of Iberville, where the judgment had been rendered and remained of record, but by the Superior Court at Montreal.

The sale took place and the property was adjudged to the respondents in the present case.

Appellant having refused to deliver up the property respondent made a petition to obtain possession thereof, which petition was contested by appellant.

Lajoie for appellant proceeded to argue that the question which arose on this appeal was as to the proper construction to be put on art. 188 C. C. P. and that the sheriff's sale under a writ of *venditioni exponas* issued by the Superior Court for the district of Montreal was an absolute nullity, when the court stated they would not call upon *Mr. Campbell*, counsel for the respondent, but would proceed to deliver judgment.

THE CHIEF JUSTICE.—This is a mere point of practice. An opposition having been filed to a sale of lands under execution upon a judgment in the Superior Court, recovered in the district of Iberville, the judge of that district, Mr. Justice Charland, was recused, and the action and contestation of the opposition was thereupon removed to Montreal, where the opposition

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was dismissed. Then a writ of *venditioni exponas* was issued by the Superior Court in the district of Montreal. This was held to be regular by the Superior Court. (Gill J.) and the Court of Appeal (Bossé J. dissenting,) affirmed the Superior Court.

We have always said that on points of practice like this we will follow the course of the Privy Council, as laid down in the *Mayor of Montreal* v. *Brown* and *Springle* (1), and we have already acted on that principle in the cases of *Gladwin* v. *Cummings* (2), *Dawson* v. *Union Bank* (3), and *Scammell* v. *James* (4).

I am of opinion that this case, in which there is a *consensus* of decision in the two courts below, is eminently one for the application of the same rule. Therefore the appeal should be dismissed with costs.

Had I to enter upon the merits of the question raised I should unhesitatingly agree with the learned chief justice of the Queen's Bench in the interpretation which he has placed on the 188th article of the code of procedure. By the provision contained in that article the court to which the proceedings have been remitted is to remain seised of the cause. This, in my opinion, means that the whole record shall be considered as remaining in that court, and not that it shall be seised merely of the record limited to the incidental proceeding for the purpose of deciding which the removal had been made. But I do not enter on the merits. Without saying we have no jurisdiction we decline to interfere with the successive adjudications in the two courts below.

FOURNIER, TASCHEREAU, SEDGEWICK and KING. JJ. concurred.

Appeal dismissed with costs.

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

Solicitors for respondent: *Abbotts, Campbell & Meredith.*

(1) 2 App. Cas. 184.
(2) Cass. Dig. 2 ed. 426.
(3) Cass. Dig. 2 ed. 428.
(4) Cass. Dig. 2 ed. 441.

WILLIAM HUSON (PLAINTIFF).....APPELLANT; 1893

AND *May 9, 10.

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THE MUNICIPAL COUNCIL OF THE CORPORATION OF THE TOWNSHIP OF SOUTH NORWICH (DEFENDANTS)..... } RESPONDENTS. *Jan. 15.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Local Option Act—53 *Vic. ch.* 56 *sec.* 18 *(O.)*—54 *Vic. ch.* 46 *(O.)*—*Constitutionality—Prohibition by retail—Powers of local legislatures.*

The statute 53 Vic. ch. 56 sec. 18 (O) allowing, under certain conditions, municipalities to pass by-laws for prohibiting the sale of spirituous liquors is *intra vires* the Ontario legislature, as is also sec. 1 of 54 Vic. ch. 46, which explains it, but the prohibition can only extend to sale by retail. *In re Local Option Act* (18 Ont. App. R. 572) approved. Gwynne and Sedgewick JJ. dissenting.

APPEAL from a decision of the Court of Appeal for Ontario (1) reversing the judgment of Galt C.J., who quashed a by-law of the township of South Norwich as being *ultra vires*. The appeal was first argued as to the validity of the by-law under the Municipal Act (2), and the court held, affirming the decision of the Court of Appeal, that the objections were insufficient to quash the by-law in question (3).

The question as to the constitutionality of sec. 18 of 53 Vic. ch. 56 (O.), as explained by sec. 1 of 54 Vic. ch. 46, also having been raised on this appeal, was by order of the court subsequently argued.

Duvernet and *Galt*, for appellant.

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

(1) 19 Ont. App. R. 343. (2) R.S.O. [1887] c. 184 sec. 293.

(3) See 21 Can. S.C.R. 669.

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Maclaren Q.C. and *Titus*, for respondent.

The court reserved judgment until after the argument of the special case submitted by the Governor General in Council in the matter of prohibition of the trade in intoxicating liquors, in which the same question as was involved in this case came under consideration (1).

THE CHIEF JUSTICE.—All questions involved in this appeal, save that relating to the constitutional validity of the 18th section of the Ontario statute, 53 Vic. ch. 56, entitled: "An Act to improve the Liquor License Laws," as explained and limited by the Ontario statute, 54 Vic. ch. 46, sec. 1, have been already disposed of (2). This remaining point we have now to determine.

I am of opinion that these enactments were *intra vires* of the provincial legislature. The learned judges of the Court of Appeal, in the case of *The Local Option Act* (3), have dealt fully with this identical question, and I so entirely agree with both their reasons and conclusions that I might well have contented myself with a reference to that case without adding to the mass of judicial decisions already accumulated on the subject. There appear to me, however, to be some additional reasons, which I will state as succinctly as possible.

We are precluded, by the decision of the Privy Council in the case of *Russell* v. *The Queen* (4), and by that of this court in *The City of Fredericton* v. *The Queen* (5), from holding that under subsection 8 of section 92 of the British North America Act the exclusive power of prohibiting the sale of liquor by

(1) See next case.
(2) See *Huson* v. *South Norwich* 21 Can. S.C.R. 669.
(3) 18 Ont. App. R. 572.
(4) 7 App. Cas. 829.
(5) 3 Can. S.C.R. 505.

retail, including the enactment of what are called local option laws, was given to the provinces as an incident of the police power conferred by the words "municipal institutions." That those words do confer a police power to the extent of licensing and regulating was decided by the Privy Council in the case of *Hodge* v. *The Queen* (1). The question then is narrowed to this: Have the provinces, under this subsection 8, a power concurrent with that of the Dominion to enact prohibitory legislation to be carried into effect through the instrumentality of the municipalities or otherwise, either generally or to the extent of the power of prohibiting which had been conferred on municipal bodies by legislation enacted prior to confederation and in force at that date?

It is established by *Russell* v. *The Queen* (2) that the Dominion, being invested with authority by section 91 to make laws for the peace, order and good government of Canada, may pass what are denominated local option laws. But, as I understand that decision, such Dominion laws must be general laws, not limited to any particular province. It is not competent to parliament to draw to itself the right to legislate on any subject which, by section 92, is assigned to the provinces by legislating on that subject generally for the whole Dominion, but this is of course not done where, in the execution of a power expressly given to it by section 91, the federal legislature makes laws similar to those which a provincial legislature may make in executing other powers expressly given to the provinces by section 92. Therefore it appears to me that there are in the Dominion and the provinces respectively several and distinct powers authorizing each, within its own sphere, to enact the same legislation on this subject of prohibitory liquor laws restraining sale by retail, that

(1) 9 App. Cas. 117. (2) 7 App. Cas. 829.

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is to say, the Dominion may, as has already been conclusively decided, enact a prohibitory law for the whole Dominion, whilst the provincial legislatures may also enact similar laws, restricted of course to their own jurisdictions. Such provincial legislation cannot, however, be extended so as to prohibit importation or manufacture, for the reason that these subjects belong exclusively to the Dominion under the head of trade and commerce, and also for the additional reason that the revenue of the Dominion derived from customs and excise duties would be thereby affected. That there may be, in respect of other subjects, such concurrent powers of legislation has already been decided by the Privy Council in the case of *Attorney General of Ontario* v. *Attorney General of Canada* (1), where this question arose with reference to insolvency legislation. I venture to think the present even a stronger case for the application of such a construction than that referred to. To neither of the legislatures is the subject of prohibitory liquor laws in terms assigned. Then what reason is there why a local legislature in execution of the police power conferred by subsection 8 of sec. 92 may not, so long as it does not come in conflict with the legislation of the Dominion, adopt any appropriate means of executing that power, merely because the same means may be adopted by the Dominion Parliament under the authority of section 91 in executing a power specifically given to it? It has been decided by the highest authority that there are no reasons against such a construction. This is indeed even a stronger case for recognizing such a concurrent power than the case of the *Attorney General of Ontario* v. *Attorney General of Canada* (1), because bankruptcy and insolvency laws are by section 91 expressly attributed to the exclusive jurisdiction of the Dominion. In the

(1) [1894] A. C. 189.

event of legislation providing for prohibition enacted by the Dominion and by a province coming into conflict the legislation of the province would no doubt have to give way. This was pointed out by the Privy Council in the *Attorney General of Ontario* v. *The Attorney General of Canada* (1), and although the British North America Act contains no provision declaring that the legislation of the Dominion shall be supreme, as is the case in the constitution of the United States, the same principle is necessarily implied in our constitutional act, and is to be applied whenever, in the many cases which may arise, the federal and provincial legislatures adopt the same means to carry into effect distinct powers.

That a general police power sufficient to include the right of legislating to the extent of the prohibition of retail traffic or local option laws, not exclusive of but concurrent with a similar power in the Dominion, is vested in the provinces by the words "Municipal Institutions in the Province" in subsection 8 of chapter 92 is, I think, a proposition which derives support from the case of *Hodge* v. *The Queen* (2). It is true that the subject of prohibition was not in question in that case, but there would seem to be no reason why prohibitory laws as well as those regulating and limiting the traffic in liquors should not be included in the police power which under the words "Municipal Institutions" it was held in *Hodge* v. *The Queen* (2), to the extent of licensing, the provinces possessed. The difference between regulating and licensing and prohibiting is one of degree only.

As regards the objection that to recognize any such right of legislation in a province not extending to the prohibition of importation and manufacture would be

(1) [1894] A. C. 189. (2) 9 App. Cas. 117.

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an infringement of the power of the Dominion to regulate trade and commerce, I am not impressed by it. The retail liquor traffic can scarcely be regarded as coming directly under the head of trade and commerce as used in the British North America Act, but as the subjects enumerated in section 92 are exceptions out of those mentioned in section 91 it follows that if a police power is included in subsection 8 of the former section, the power itself and all appropriate means of carrying it out are to be treated as uncontrolled by anything in section 91. Moreover, *Hodge* v. *The Queen* (1) also applies here for, although in a lesser degree, yet to some extent, the restriction of the liquor trade by a licensing system would affect trade and commerce. On the whole I am of opinion that the provincial legislatures have power to enact prohibitory legislation to the extent I have mentioned, though this power is in no way exclusive of that of the Dominion but concurrent with it.

If I am wrong in this conclusion it is sufficient for the decision of this appeal to hold, as I do, that the legislature of Ontario had power to repeal and re-enact the legislation in force at the date of the Confederation Act, which gave municipal councils the right to pass by-laws absolutely prohibiting the sale of liquor by retail within certain local limits. Having regard to the history and objects of confederation I can scarcely think it possible that it could have been intended by the framers of the British North America Act to detract in any way from the jurisdiction of the provinces over their own several systems of municipal government. If the words "Municipal Institutions" in subsection 8 are to have any meaning attributed to them they must surely be taken as giving authority to repeal, re-enact and remodel the laws relating to all

(1) 9 App. Cas. 117.

municipal legislation then in force. In *Re Slavin and Orillia* (1) this was the view of the Ontario Court of Queen's Bench, and Chief Justice Richards, in his judgment on that case, puts forward powerful arguments in support of that conclusion. These reasons, as well as those given for the judgment of the Court of Appeal in the Local Option Case, have convinced me that at least to the extent last mentioned (even if I am wrong in my first proposition) the provinces have the power to legislate. As the enactments now in question are reproductions of those in force at the date of confederation they were therefore *intra vires* of the Ontario legislature. In the case of *Severn* v. *The Queen* (2) I expressed some doubt as to the decision in *Re Slavin and Orillia* (3), upon the ground that the effect of that case would be to make the law vary in the different provinces. These observations were not material to the judgment I then gave, which was founded entirely on the 9th subsection of section 92, and I have now come to the conclusion that they were not well founded.

The appeal must be dismissed with costs.

FOURNIER J.—I concur.

TASCHEREAU J.—In view of the declaratory Act of 1891, 54 V. c. 46, Ont., the appellant's contentions that the by-law in question prohibits entirely the sale of intoxicating liquors in South Norwich, and that sec. 18 of 53 V. c. 56 empowers the municipal councils to enact a total prohibition of the liquor traffic within their territorial limits, have to be considered as abandoned. The only question therefore now to be determined here is as to the power of municipalities, in

(1) 36 U.C.Q.B. 159. (2) 2 Can. S.C.R. 70.

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Ontario, to prohibit the retail traffic of liquors within their respective limits, as it was vested in them before confederation.

In my opinion the answer to the question thus limited is correctly given by the Court of Appeal in this case and in *Re Local Option Act* (1). The powers which the provincial legislatures and the municipal authorities have exercised in the matter since the coming into force of the British North America Act, now over 26 years, with the acquiescence of the federal authority, a power expressly sanctioned in numerous instances in Ontario and Quebec by judicial authority, might be curtailed or affected more or less by a federal prohibitive law if parliament has the power to pass one, but that is not the question here, and it will be time enough to consider it when parliament shall have legislated in that sense, if it ever does.

Suffice it for me to say, for the purposes of this case, that, in my opinion, under subsec. 8 of sec. 92 of the British North America Act, the legislation in question and the by-law assailed by the appellant are *intra vires*. As said in *The Queen* v. *Taylor* (2) by Wilson J., whose language I cannot do better than to borrow :

> The act of the Ontario legislature in imposing a tax for a license on shop-keepers, and tavern-keepers and others of the like class for selling by retail, or for continuing the power to municipalities to prohibit the retail of spirituous liquors, is not in excess of the provincial power, although I conceive it to be partly a regulation of trade and commerce, because before and at the time of the confederation of the provinces the different municipalities in this province possessed that power and privilege, and it was not taken away or qualified in any way by the Confederation Act. That act, too, was in fact passed, and must be presumed to have been passed by the Imperial Government with a full knowledge at the time of the state of our law which was affected by the Imperial Act then under consideration, and among other matters, that part of our law which related and relates to municipal institutions, as they existed at that time, because over " municipal institu-

(1) 18 Ont. App. R. 572. (2) 36 U.C.Q.B. 183.

tions in the province" exclusive power was then conferred by it upon the Provincial Legislature.* * And I am of opinion that the right to regulate the sale of such liquors by retail, and also the entire prohibition of their sale in any municipality, relates to a matter of a merely local or private nature in the province.* * It partakes largely of a police regulation.

These remarks of Mr. Justice Wilson are in no way affected by the decision of this court in *Severn* v. *The Queen* (1), where that case of *The Queen* v. *Taylor* (2) was under review.

A valuable opinion by Richards C.J., in the sense of Mr. Justice Wilson's aforesaid remarks, is to be found in *Re Slavin and Orillia* (3). And later, in this court, in *Sulte* v. *The Corporation of Three Rivers* (4), Mr. Justice Gwynne said:

I cannot doubt that by item no. 8 of sec. 92, which vests in the provincial legislatures the exclusive power of making laws in relation to municipal institutions, the authors of the scheme of confederation had in view municipal institutions as they had already been organized in some of the provinces, and that the term, as used in the British North America Act, unless there be some provision to the contrary in sec. 91 of the act, comprehends the powers with which municipal institutions as constituted by acts then in force in the respective provinces, were already invested for regulating the traffic in intoxicating liquors in shops, saloons, hotels and taverns, and the issue of licenses therefor, as being powers deemed necessary and proper for the beneficial working of a perfect system of self-government. Unless, then, there be some provisions in the British North America Act to the contrary, the legislature of the Province of Quebec had full power in any act passed by it creating a municipality, or in any act amending or consolidating the acts already in force incorporating the city of Three Rivers, to insert the provisions in question here, which are contained in the 74th, 75th and 101st sections of 38 Vic. ch. 76.

Now, the 75th section of the Act so referred to by the learned judge as being *intra vires* of the provincial legislation, enacts that:

(1) 2 Can. S. C. R. 70.
(2) 36 U.C.Q.B. 183,
(3) 36 U.C.Q.B. 159.
(4) 11 Can. S. C. R. 25.

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The said council shall have power to make by-laws for restraining and prohibiting the sale of any spirituous wines, alcoholic or intoxicating liquor.

Mr. Justice Henry, in the same case, said:

It has been argued that because a prohibitory act of the legislature of any of the provinces, would be an interference with trade and commerce * * such an act would be *ultra vires* * * I cannot adopt that proposition.....

The City of Fredericton v. *The Queen* (1) does not determine, as seems to be assumed by the appellant, that the Dominion Parliament has alone the power to prohibit the sale of liquor. The only point determined in that case is that the Temperance Act of 1878 is constitutional. Anything that was said outside of that question in that case, as well as in many others relied upon by the appellant, was *obiter dictum* and of no binding authority. And the reporter's summaries in some of those cases are misleading.

The case here is unfettered by any authority. In answer to the contention that by its decision in *Russell* v. *The Queen* (2), where *Fredericton* v. *The Queen* (1) was under review, the Privy Council had determined that the whole subject of the liquor traffic was given to Parliament, Sir Barnes Peacock in *Hodge* v. *The Queen* (3), said:

It appears to their Lordships however, that the decision of this tribunal in that case has not the effect supposed, and that, when properly considered, it should be taken rather as an authority in support of the judgment of the Court of Appeal.

And is it not evident that when holding, as they did, the Liquor License Act of 1883 to have been *ultra vires* of the Dominion Parliament, their Lordships cannot have been of opinion that the whole control over the liquor traffic was vested in the Dominion Parliament? The inference from their decision on that

(1) 3 Can. S. C. R. 505.
(2) 7 App. Cas. 829. (3) 9 App. Cas. 117.

license Act, I take it, is all the other way. And, in this court Mr. Justice Gwynne, in *Sulte* v. *The Corporation of Three Rivers* (1), said:

It seems to be supposed that the judgment of this court in the *City of Fredericton* v. *The Queen* (2), is an authority to the effect that since the passing of the British North America Act it is not competent for a provincial legislature to restrain or prohibit, in any manner, the sale of any spirituous liquors.*** But the *City of Fredericton* v. *The Queen* (2) raised no such question, nor is any such point professed to be decided by our judgment in that case.** What was decided was that the provincial legislatures had not jurisdiction to pass such an Act as the "Canada Temperance Act of 1878," and that the Dominion Parliament alone was competent to pass it; and of this opinion also, was the Judicial Committee in *Russell* v. *The Queen* (3).

And Mr. Justice Ramsay in Montreal must have shared in this opinion when he said in that same case in the Court of Appeal (4), in reference to the Privy Council's decision in the case of *Russell* v. *The Queen* (3): "It has not, either expressly or by implication, maintained that the Dominion Parliament can alone pass a prohibitory law."

The appellant's contentions have, it seems to me, been rendered the more untenable by the decision of the Privy Council of February last in the Ontario Insolvency case (5).

It results from that case, if I do not misunderstand it, that there are, under the British North America Act, subjects which may be dealt with by both legislative powers, and that the provincial field is not to be deemed limited by the possible range of unexercised power by the Dominion Parliament, so that a power conferred upon the latter, but not acted upon, may, in certain cases, be exercised by the provincial legislatures, if it fall within any of the classes of subjects enumerated in section 92.

(1) 11 Can. S. C. R. 25.
(2) 3 Can. S. C. R. 505.
(3) 7 App. Cas. 829.
(4) 5 Legal News 330; 2 Cartwright 280.
(5) *Attorney General of Ontario* v. *Attorney General of Canada* [1894] A. C. 189.

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In my opinion these propositions, which are now the law of the country, have here their full application.

And where would the provinces be on this question of the liquor traffic if it were not so? At the mercy of the federal power, that is to say, at the mercy of each other. Ontario, for instance, might desire to prohibit the liquor traffic through the municipal authorities, as they had the power to do before confederation, but Ontario would be unable to do so if the other provinces, either by directly refusing it in parliament or simply by not dealing at all with the question, refused to permit it.

That is surely not Canada's constitution.

The inaction of the Dominion law giver cannot have such consequences.

It cannot be that, simply because the Dominion authority will not prohibit all over the Dominion, the trade must be permitted everywhere in the provinces. It does not follow that because the provinces have the right to license they must license. Questions of power, as said by Marshall C.J., in *Brown* v. *State of Maryland* (1), cannot depend on the degree to which it may be exercised; if it may be exercised at all it must be exercised at the will of those in whose hands it is placed.

In cases of implied limitations or prohibitions of power it is not sufficient to show a possible or potential inconvenience; there must be a plain incompatibility, a direct repugnancy, or an extreme practical inconvenience, leading irresistibly to the same conclusion (2).

And I cannot see any such incompatibility or repugnancy in allowing one authority to prohibit when the other does not, though it might have the power to do

(1) 12 Wheaton 439.

(2) 1 Story on The Constitution 5 ed. sec. 447.

so. It has earnestly been urged on the part of the appellant that, as a consequence of the Dominion Temperance Act of 1878, the provinces are now deprived of any power that they might previously have had of prohibiting or empowering the municipalities to prohibit the liquor trade.

But I fail to see such a consequence attached to that Act. There is it seems to me no incompatibility between the two, between that Act and the power of the municipalities to prohibit.

How can that Act of 1878 be deemed to be more incompatible with this power of the municipalities, than was the Temperance Act of 1864, with the same powers of the same municipalities? In the main, this Act of 1878 is but a reproduction of the Act of 1864; or, at least, both are based on the same principle. Now, in 1864, when the Temperance Act was enacted by the same legislature that had unlimited control as well over the municipalities as over the liquor traffic, the provisions of that Temperance Act were not deemed to be incompatible with the powers already possessed by the municipalities on the subject, which remained intact. And that they were not incompatible, I apprehend, will not be gainsaid. A statute, like the Dominion License Act of 1883 to license the trade or authorize the municipalities to license it, might be, and in fact would be, in the absence of the necessary provisions to avoid it, repugnant to or inconsistent with a prohibitory Act. But I fail to see that two prohibitory Acts, assuming the Temperance Act of 1878 to be a prohibitory Act, must necessarily be repugnant to one another, even where enacted by different authority, or even where the power to prohibit is conferred on two different bodies, specially where the jurisdiction of the two is not territorially the same, as is the case with this double legislation on this matter. For, by the federal Act of

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1878, it is only to county and city municipalities and federal electors that is granted the power to prohibit, whilst by the Ontario Act, it is in local municipalities and provincial electors that the power is vested. In Quebec it is the municipal electors, when a submission to the people is ordered.

The Privy Council in *Hodge* v. *The Queen* (1) considered that the Ontario License Act does not conflict with the federal Temperance Act of 1878. *A fortiori* would I say, two prohibitory Acts need not necessarily conflict with one another.

I do not lose sight of the fact that, as a local municipality forms part of a county municipality, where the federal Act of 1878 is put into operation in a county it necessarily follows that it is in operation in every one of the local municipalities included in it. The only consequence of this, however, is that the working of the provincial Act, or of a by-law under it, or the machinery by which it is put in operation, may be superseded or suspended in the municipalities where the Act of 1878 is in force, but I do not see in that any inconsistency with the power of the province to pass it, as long as the Act of 1878 is not acted upon, and revive it when the other one ceases to operate where it has been put in operation.

The federal Act cannot at all be considered as legislation over the powers of the municipalities. It does not purport to be anything of the kind. It has no connection whatever and could have none with the municipal system of the different provinces. It is controlled altogether by a majority of federal electors, but that, it is obvious, may not be at all the majority of municipal electors in a municipality, when that is required as in the province of Quebec and, in fact, cannot be under the statutes at present in force in some of the provinces

(1) 9 App. Cas. 117.

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whereby women, for instance, are entitled to vote at municipal but not at federal elections. Likewise, for the provincial electors, where as in Ontario these by-laws under the provincial Act depend on their votes. The majority of them may not be at all a majority of federal electors, or *vice versâ*.

And the respondents, I assume, would not have any objection to submit to the Temperance Act of 1878, if it was put into force in the county of which they form part. All that they claim is home rule, the right to put a stop to drinking and to taverns within their own territorial limits, even if the rest of the province, or all the other municipalities of their own county, choose to do otherwise for their own people. They should be as free to do so now as they were before Confederation, though the provinces of British Columbia, Prince Edward Island, Quebec, or all of them and all the other municipalities of Ontario, may favour, within their territorial limits, a different policy. Whenever the federal Parliament prohibits entirely the liquor traffic in the Dominion, assuming always for the purposes of this case that they have the power to do so, the respondents will not complain; the very object they are now contending for will be attained. What they ask is to be at liberty to do so for themselves till Parliament does so for the whole Dominion.

And again: By an express provision of the Temperance Act of 1878, if the Act is rejected by the federal electors it cannot be submitted to them again for a period of three years. Now, if within these three years, a local municipality, and a majority within it of the provincial or municipal electors where that is required, desire to prohibit the liquor traffic within its limits, is there anything, in allowing them to do so, inconsistent with the Temperance Act of 1878, or repugnant to it? It is all the other way, it seems to me. It perfects it:

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it aims at the same result; it provides for the promotion of temperance, where the Act of 1878 fails; it promotes temperance wherever the Act of 1878 cannot penetrate, it replaces it in any county, where a majority of the federal electors will not allow it to come in, or where no attempt is made to put it in operation. And is there, in that case, any inconsistency, or danger of a clashing of powers, in conceding to a local municipality the power to prohibit within its own limits though the rest of the county is in favour of licensing?

And can it not be said of the enactment now under consideration, what their Lordships said of the statute in *Hodge* v. *The Queen* (1), that it is "confined to municipalities in the Province of Ontario and is entirely local in its character and operation."

The federal Parliament has, for instance, the right, I presume, of prohibiting the sale of dynamite or opium or any other poison all through the Dominion. The appellant would contend that, if Parliament has not enacted such a law, the provincial legislature cannot authorize the municipalities to prohibit the sale of such articles within their limits. Such a contention cannot prevail. There are a large number of subjects which are generally accepted as falling under the denomination of police regulations over which the provincial legislatures have control within their territorial limits, which yet may be legislated upon by the federal Parliament for the Dominion at large. Take, for instance, the closing of stores and cessation of trade on Sundays. Parliament, I take it for granted, has the power to legislate on the subject for the Dominion, but, until it does so, the provinces have, each for itself, the same power.

This shows, it seems to me, that the word "exclusively" in section 92 of the British North America Act is not susceptible of the wide construction that the

(1) 9 App. Cas., 117.

appellant would put upon it. Then here, all that the respondent contends for is the municipal power to prohibit the liquor trade, or the power to prohibit as a part of the municipal institutions of the province, and that the power of the provincial legislatures over those institutions and the municipal system in general is exclusive. The federal parliament cannot in any way touch them.

On the appellant's contention that such a prohibition by the municipalities is a regulation of trade and commerce, and therefore *ultra vires* of the provincial legislature, I need not dwell.

It is settled that these words "regulation of trade and commerce" in the British North America Act do not bear the wide construction that the appellant would here contend for. *Citizens Ins. Co.* v. *Parsons* (1); *Hodge* v. *The Queen* (2); *Bank of Toronto* v. *Lambe* (3); *Bennett* v. *The Pharmaceutical Assoc. of Quebec* (4); *Pillow* v. *The City of Montreal* (5).

It was likewise held by the United States Supreme Court, in *Cooley* v. *The Board of Wardens* (6), that a state law, establishing certain pilotage regulations conceded to be regulations of commerce, was valid until superseded by the federal legislative power. And, as said by Mr. Justice Field, in *Sherlock* v. *Alling* (7):—

> Legislation, in a great variety of ways, may affect commerce and persons engaged in it, without constituting a regulation of it within the meaning of the constitution.

Cases to that same import are *Ex parte McNeil* (8); *Willson* v. *The Blackbird Creek Marsh Co.* (9), and *Gilman* v. *The City of Philadelphia* (10).

(1) 7 App. Cas. 96.
(2) 9 App. Cas. 117.
(3) 12 App. Cas. 575.
(4) 1 Dor. Q.B. 336.
(5) 30 L.C. Jur. 1.
(6) 12 Howard 319.
(7) 93 U.S. R. 99.
(8) 13 Wall. 240.
(9) 2 Peters 250.
(10) 3 Wall. 728.

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If the provinces were deprived of the right to all legislation whereby it might be said that trade and commerce are in some way regulated, or more or less affected, very shadowy indeed would be many of the powers conferred upon them in express terms by sec. 92 of the British North America Act.

To apply to this case what Mr. Justice Swayne, delivering the judgment of the United States Supreme Court in *Railroad Co.* v. *Fuller* (1), said of the United States constitution on the same subject, assuming that this statute in question constitutes, in a sense, a regulation of trade and commerce, it is a regulation of such a character as to be valid until superseded by the paramount action of the federal authority. And it may very well be, notwithstanding what was said in this court in *City of Fredericton* v. *The Queen* (2), that if Parliament has the power to prohibit the liquor trade for the whole Dominion, it is not at all under the words "regulation of trade and commerce" of section 91 of the British North America Act that it gets it. However, that is not the question here. I may, nevertheless, notice what Mr. Justice Harlan, of the United States Supreme Court, said before the Behring Sea Tribunal, on the question whether a power to regulate includes a power to prohibit:—

> The British counsel contended that it is beyond the power of the arbitrators to prescribe regulations of that character (to prohibit). They argued that the tribunal could not do indirectly what they could not do directly; that prohibition, in terms or by the necessary operation of regulations, is not regulation; that the power to regulate is not a power to prohibit.....When enforcing the view last stated, counsel asked us whether a power given by the legislative department to a municipal corporation to regulate, within its limits, the sale of ardent spirits would give to such corporation authority to prohibit all sales of such spirits. Perhaps not. But the case put does not meet the one before the tribunal.....It is mere play

(1) 17 Wall. 560. (2) 3 Can. S. C. R. 505.

upon words to say, in respect to this treaty, that prohibition is not legislation (1).

I now pass to the provincial statutory laws on the subject.

The learned judges of the Court of Appeal, in the Local Option Case (2), have said all that can be said upon the Ontario municipal law of any import on this question. Let us see now what light a Quebec candle, or a reference to the Quebec law of municipalities, might throw upon it.

In 1774, by the 14th Geo. III. c. 88, s. 5 (see 35 Geo. III. c. 88, of Lower Canada, and 13 & 14 Vic. c. 27, of the late province of Canada), a license fee was imposed by the Imperial Parliament upon the sale of liquors in the Province of Quebec as then constituted. That Act is still in force in Quebec, if not in Ontario. The revenues from these licenses were to fall into the provincial fund, but in 1845, by the 8 Vic. c. 72, the legislature of the late Province of Canada decreed that the revenues from houses of public entertainment and tavern licenses were thereafter to be appropriated for municipal purposes.

In 1847, by 10 & 11 Vic. c. 7, the municipalities were given *de novo* the power to increase the price for liquor licenses.

In 1851, by 14 & 15 Vic. c. 100, a larger control over the liquor traffic was assumed by the legislature, and a new system of tavern licenses was established. Its main feature consisted in this that traffic in liquor was prohibited everywhere, except when allowed by the discretionary powers of municipal councils and municipal electors. *Smart* v. *The Corporation of Hochelaga* (3). By section 21 the revenue from liquor licenses was again given to the municipalities.

(1) Mr. Justice Harlan's opinion before Behring Sea tribunal, page 31.

(2) *In re Local Option Act* 18 Ont. App. R. 572.

(3) 4 Legal News 255.

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In 1853, by 16 Vic. c. 214, an Act to the same effect, with certain modifications, was passed for the cities of Montreal and Quebec.

In these cities the power to grant or refuse licenses was by that Act vested in the police magistrates, but they had no power to license except upon the petition of a certain number of municipal electors. All the license Acts in the province have since, likewise, made the granting of licenses dependent upon the municipal councils or municipal electors.

I need only refer for this to the Consolidated Statutes of Lower Canada c. 6 s. 9, and to arts. 829-835, and following, of the Revised Statutes of 1888, in both of which these License Acts are all condensed. A provision is to be found in every one of them that no licenses are to be issued in the municipality wherein a prohibitory by-law is in force So much for the License Acts.

Now for the Municipal Acts. In 1855, by 18 Vic. c. 100, whereby the present municipal system of the province was inaugurated, local councils were empowered in express terms, section 23, sub-section 6, to prohibit absolutely the retail traffic in liquors within the territorial limits of the municipality. In 1856, by 19 & 20 Vic. c. 101, sec. 8, the county councils were authorized to prohibit entirely, in March of each year, the sale of spirituous liquors within the county. And by section 11 the local councils were authorized to pass such a by-law for their own municipalities whenever the county council had allowed the month of March to expire without having passed one for the county.

In 1860, by 23 Vic. ch. 61, the Municipal Act was consolidated, but the above provisions of the statute of 1856 were left intact. Also in the Consolidated Statutes of 1861, ch. 24, these enactments are re-enacted with-

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out any alterations; as secs. 26 sub-secs. 10 and 11, and sec. 27, sub-sec. 16, respectively.

The terms are unequivocal: "Every municipal, county (or local) council may make by-laws for prohibiting and preventing (to prevent or prohibit) the sale of any spirituous liquors." In 1866 (29 & 30 Vic. ch. 32), sec. 16 of sec. 27 of the Consolidated Municipal Act of 1861, ch. 24, above referred to, was repealed, and replaced by a provision giving to local councils, before the second Wednesday of March of each year, the power to prohibit the sale of any spirituous liquors.

This Act, passed only two years after the Temperance Act of 1864, must be taken as another unequivocal declaration of the legislature of the late province of Canada that the power of the municipal authorities had not been, in any way, diminished or restricted by the said Temperance Act, and that these powers were not inconsistent with or repugnant to those conferred by the said Act.

Such was, in the province of Quebec, the state of the statutory law, on the subject, at confederation.

I need hardly say that it results clearly from it, whatever its consequences may be on the question now under consideration, that the whole system of legislative supervision over the liquor traffic was so closely identified with the municipal system of the province and so blended with it that they formed only one. The "constitutional connection" between the two, to use Mr. Justice Burton's expression, was complete. And up to the present day the two are so worked and put in operation as one that every year, in a large number of the municipalities, the only, or at least the principal, question at the election for councillors is prohibition or no prohibition. This is a matter of public notoriety in the province. Now, not long after

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the coming into force of the British North America Act the Quebec Legislature, in 1870, enacted a municipal code and, in continuance of the policy that had theretofore prevailed in the Province of treating the control over the liquor traffic as a part of the municipal institutions, and leaving it to be as theretofore a marked feature of the power vested in the municipal authorities, it conferred upon each local council, by sec. 561 thereof, the power to prohibit and this, by extension of the power, "at any time" during the municipal year, the retail sale of intoxicating liquors. And that enactment, with slight amendments (art. 6118, Rev. Stat. of 1888), has remained in force up to the present day unchallenged by the federal authority and has been acted upon through the Province in a number of municipalities.

And at this very moment there are no less than 158 localities in the province, as I gather from official sources, where the retail sale of liquors is entirely prohibited under that statute. That has been in the province the average yearly number of such by-laws since 1867. And, as in Ontario, I may remark, the enforcement of all such regulations, restrictions and prohibitions is performed by the police force of the locality where such force exists, and forms a part of the police duties, under the control of the police courts and police commissioners. In fact, in many of the rural municipalities, the only annual police regulation is a prohibitory by-law.

If the appellant's contentions were to prevail all this legislation, all these hundreds of by-laws passed every year since 1867, were and are each and every one of them perfect nullities, not worth the paper they were written upon.

The legislature of Quebec, besides the statutes I have referred to, has since the municipal code, and after the

passing of the federal Temperance Act re-enacted, in 1888, as law enforced in the province, the Temperance Act of 1864, by art. 1095 of the Revised Statutes which reads as follows :—

The municipal council of every city, town, township, parish or incorporated village, shall have the power under the authority and for the enforcement of this section, and subject to the provisions and limitations, at any time, to pass a by-law prohibiting the sale of intoxicating liquors,

without submitting it to the electors. The legislature of Ontario, in 1887, by the Revised Statutes, likewise considered the Temperance Act of 1864 as still in force within that province.

Now, what is the jurisprudence on the question in the province of Quebec ?

I will refer, of course, only to the Court of Appeal.

I find only two cases, in that court, on the question, but they are both so express and clear that unreversed as they stand, they settle, beyond doubt, the jurisprudence, as far as the province goes.

In *Sulte* v. *The Corporation of Three Rivers* (1882) (1), the Court of Appeal, in Montreal, unanimously held that, at the time of confederation, the right to prohibit the sale of intoxicating liquors was possessed by the municipal authorities, and consequently is to be deemed included in the powers vested in the provincial legislatures, under the words "provincial institutions" of subsec. 8, sec. 92 of the British North America Act, and this in no equivocal terms.

We hold then, said Mr. Justice Ramsay for the court, that the right to pass a prohibitory liquor law for the purposes of municipal institutions has been reserved to the local legislatures by the British North America Act.

That case was affirmed in this court (2), though not upon the ground taken by the Montreal Court of Ap-

(1) 5 Legal News 330 ; 2 Cartwright, 280.

(2) 11 Can. S. C. R. 25.

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peal. The point was not dealt with one way or the other.

In 1891, in the case of the *Corporation of Huntingdon* v. *Moir and the Attorney General intervening party* upon the constitutional question (1), the Court of Queen's Bench again unanimously determined, reversing the judgment *a quo*, that art. 561 of the Municipal Code vesting the local councils with the right to prohibit the retail traffic in liquors within their territorial limits, is *intra vires* of the provincial legislature, and that a by-law passed under the provisions to prohibit such traffic is in all respects legal and binding.

It is impossible to get two decisions more directly in point.

This court has never had occasion to pass on the question, but in the case of *Bergeron* v. *Lassalle* (2) it may not be amiss to remark, the power of the legislature of Quebec to prohibit the sale of liquors in Three Rivers and other cities of that class, relied upon by the respondent, was not questioned either at bar or on the bench, and the court gave due effect to such a prohibition.

The appeal should, in my opinion, be dismissed with costs.

I have only to add that, in my view of the case, the appeal must fail even if the appellant's contentions as to the unconstitutionality of the Ontario legislation in the matter were to prevail.

For, if the province of Ontario had not the power to re-enact the sections in question of the Municipal Act, it cannot have had the power to repeal them expressly or impliedly; and consequently they are now in force as they stood at confederation in the Municipal Act of 1866. No reasons to quash the by-law of the municipality respondent as being against the provisions

(1) 20 R.L. 684.

(2) Cass. Dig. 2 ed. 495.

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of the statute as it then was, have been assigned by the appellant.

As I conclude this opinion, I am informed by the registrar that a reference to this court which will probably involve the question in issue in this case has been ordered by the federal authorities. I think, however, that the parties here should not be prejudiced by this action of the federal power, and that they are entitled to a judgment on the case they submitted to us.

GWYNNE J.—After the argument of this case upon the first of the questions involved in it, certain questions were submitted to us under an order in council of the 26th of October, 1893, in the matter of prohibition of the trade in intoxicating liquors under the provisions of the statute in that behalf, which questions contained one which raised the precise point in issue in this case and in consequence all further action in this case was deferred until the hearing and argument of the questions submitted by the order in Council. The argument therefore upon the questions so submitted, constituted in effect, in my opinion, a reconsideration and as it were, a rehearing of the questions involved in this case. I have entered fully in my judgment on the questions so submitted into my reasons for my conclusions upon the said questions which include that in this case which judgment contains the only judgment I have to deliver upon every one of the questions therein involved, namely, that they all must be answered in the negative (1).

Appeal dismissed with costs.

Solicitors for appellant: *Du Vernet & Jones.*

Solicitors for respondent: *O'Donohoe, Titus & Co.*

(1) See His Lordship's judgment in next case.

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*May 1, 2, 4.

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*Jan. 15.

In re PROVINCIAL JURISDICTION TO PASS PROHIBITORY LIQUOR LAWS.

SPECIAL CASE REFERRED BY THE GOVERNOR GENERAL IN COUNCIL.

Reference by Governor in Council—Constitutional law—Prohibitory laws—Intoxicating liquors—British North America Act, secs. 91 and 92—Provincial jurisdiction—53 Vic. chap. 56 sec. 18 (O.)—54 Vic. chap. 46 (O.)—Local option—Canada Temperance Act, 1878.

1. A provincial legislature has not jurisdiction to prohibit the sale, either by wholesale or retail, within the province, of spirituous, fermented or other intoxicating liquors.

Per the Chief Justice and Fournier J. dissenting: A provincial legislature has jurisdiction to prohibit the sale within the province of such liquors by retail, but not by wholesale; and if any statutory definition of the terms wholesale and retail be required, legislation for such purpose is vested in the Dominion as appertaining to the regulation of trade and commerce.

2. A provincial legislature has not jurisdiction to prohibit the manufacture of such liquors within, or their importation into, the province.

3. The Ontario legislature had not jurisdiction to enact the 18th section of the Act 53 Vic. ch. 56, as explained by 54 Vic. ch. 46. The Chief Justice and Fournier J. dissenting.

HIS EXCELLENCY THE GOVERNOR GENERAL IN COUNCIL, by order in council bearing date the twenty-sixth day of October, in the year of our Lord one thousand eight hundred and ninety-three, passed pursuant to the provisions of the Revised Statutes of Canada, chapter 135, and intituled: "The Supreme and Exchequer Courts Act," as amended by section 4 of the act passed in the 54th and 55th years of Her Majesty's reign, chaptered 25, referred to the Supreme Court of

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

Canada for hearing and consideration the following questions, namely :—

1. Has a provincial legislature jurisdiction to prohibit the sale within the province of spirituous, fermented or other intoxicating liquors?

2. Or has the legislature such jurisdiction regarding such portions of the province as to which the Canada Temperance Act is not in operation?

3. Has a provincial legislature jurisdiction to prohibit the manufacture of such liquors within the province?

4. Has a provincial legislature jurisdiction to prohibit the importation of such liquors into the province?

5. If a provincial legislature has not jurisdiction to prohibit sales of such liquors, irrespective of quantity, has such legislature jurisdiction to prohibit the sale, by retail, according to the definition of a sale by retail, either in statutes in force in the province at the time of confederation, or any other definition thereof?

6. If a provincial legislature has a limited jurisdiction only as regards the prohibition of sales, has the legislature jurisdiction to prohibit sales subject to the limits provided by the several subsections of the 99th section of "The Canada Temperance Act," or any of them (Revised Statutes of Canada, chapter 106, section 99)?

7. Had the Ontario Legislature jurisdiction to enact the 18th section of the Act passed by the legislature of Ontario in the 53rd year of Her Majesty's reign, and intituled: "An Act to improve the Liquor License Acts," as said section is explained by the act passed by said legislature in the 54th year of Her Majesty's reign, and intituled: "An Act respecting Local Option in the matter of Liquor selling"?

The court stated its opinion to the effect that all the said questions so referred as aforesaid should be an-

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swered in the negative, and the reasons therefor appear from the opinions delivered by their Lordships Mr. Justice Gwynne, Mr. Justice Sedgewick and Mr. Justice King, hereinafter given. His Lordship the Chief Justice, and his Lordship Mr. Justice Fournier, dissenting from the opinion of the majority of the court, were of opinion that the said questions should be answered in the affirmative, with the exception of questions three and four, which they were of opinion should be answered in the negative, and the reasons therefor appear from the opinions of the Chief Justice and Mr. Justice Fournier, also hereinafter given.

Curran Q.C., Solicitor-General of Canada for the Dominion.

Cartwright Q.C., Deputy Attorney General, and *Maclaren* Q.C., for Ontario.

Cannon Q.C., Assistant Attorney General, for Quebec.

Maclaren Q.C., for Manitoba.

Wallace Nesbitt and *Saunders*, for the Distillers and Brewers' Association by leave of the court under 54 & 55 Vict. ch. 25 sec. 4.

The Solicitor-General.—The main question to be decided upon this reference is, whether a provincial legislature has jurisdiction to prohibit within the province the sale, manufacture or importation of spirituous, fermented or other intoxicating liquors ?

It is hardly necessary to discuss whether the province has the right to prohibit the sale of liquor irrespective of quantity. By the British North America Act the regulation of trade and commerce is absolutely within the power and jurisdiction of the Dominion Parliament, and for a province so to prohibit would be an infringement upon the powers that have thus

been conferred in a distinct and positive manner upon that parliament.

It is true that the Dominion License Act, 1883, was held by the Privy Council to be *ultra vires*, and it has been contended that the judgment in that case was in conflict with *Russell* v. *The Queen* (1) which held the Canada Temperance Act to be *intra vires*, but that tribunal pointed out that there was no conflict, that in deciding the Canada Temperance Act case they proceeded upon a certain line, and in deciding the License Act case they were proceeding upon a different line. I wish to refer to a statement made by the Chief Justice in a case many years ago, one of the very first cases in this court, *Severn* v. *The Queen* (2), which I think is of some importance :

> Some arguments addressed to the court seem to have been intended to elicit opinions as to the locality of the power of prohibiting legislation with reference to the trade in spirituous liquors, wine and beer. This, so far as retail trade is concerned must depend upon the proper answer to two questions :—First, do the local legislatures possess what is called the police power ? Secondly, if they do, does it authorize them to legislate so as to prohibit or only to regulate the retail traffic in liquors ? The decision of this case does not call for any answer to either of these questions, and I therefore forbear from expressing any opinion upon them.

I quote this to show that this case presents a feature which comes up for the first time and I am satisfied that there will be found in the decisions of the Privy Council reasons why there should be, for the proper adjudication of this question and the determination of where the power to prohibit lies, a definition given, as I think a definition has already been given in the Canada Temperance Act (3), of what is wholesale and what is retail, and my first contention is that the power to determine that must lie in the authority having the regulation of trade and commerce, the superior power.

(1) 7 App. Cas. 829. (2) 2 Can. S.C.R. 70.
(3) Sec. 99, subsec. 8.

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In *Russell* v. *The Queen* (1), the Privy Council, in affirming the judgment which maintained the constitutionality of the Temperance Act, gave their concurrence and sanction to the definition which was given by the Dominion Parliament as to what is wholesale.

In the case of *Citizens Insurance Co.* v. *Parsons* (2), the Privy Council say that in construing the words "regulation of trade and commerce" they would include political arrangements in regard to trade requiring the sanction of parliament, the regulation of trade in matters of inter-provincial concern, and it may be that they would include the general regulation of trade affecting the whole Dominion.

The legislation with regard to trade and commerce, to my mind, gives to the Dominion the control of the importation and manufacture of intoxicating liquors. That is a branch of the subject which I think requires but very little elaboration. The definition which I have just read here stating that this would include political arrangements in regard to trade requiring the sanction of parliament, seems to be self-evident. If we wish to make a treaty of commerce with France with regard to wines, or with the United States with regard to our trade relations, the Dominion Parliament has in the past, without any question, made such arrangements, and there is no doubt that here the judgment of their Lordships comes directly into play when they speak of arrangements in regard to trade requiring the sanction of parliament, the commerce or trade in matters of inter-provincial concern; here we have the manufacture of liquors in our country, a very large industry, in which persons in the different provinces are engaged, and in our inter-provincial trade these commodities play a very important part. They say this would include the general regulation of trade

(1) 7 App. Cas. 829. (2) 7 App. Cas. 113.

affecting the whole Dominion. The wholesale traffic, at all events, is one which involves every province, and which needs to be regulated by a parliament having jurisdiction over the whole area of the country.

I may state here that we have also, in the classification of these subjects in the statutes of old Canada prior to confederation, something that may guide us, to some extent at all events, in arriving at our conclusion upon this point. If we take up the Consolidated Statutes of Canada of 1859, we find there that the subjects which fell under the general control, which affected the two provinces generally, were disposed of in the general consolidation of the statutes, including all the legislation regarding the importation and manufacture of liquors. The excise laws are side by side with the customs enactments showing that such importation and manufacture were subjects of general concern in which the trade and commerce of the united provinces were involved.

[The learned Solicitor General then referred at length to the case of *Sulte* v. *Three Rivers* (1); Lareau (2); Clements on the Canadian Constitution (3); and *In re Local Option Act* (4); contending that the power of prohibiting by retail was given to local legislatures under the words "municipal institutions" in section 92 British North America Act.]

All parties in discussing this question, the local legislature in legislating upon it, the Dominion in legislating upon it, have felt that there was an absolute necessity to draw a distinction between wholesale and retail.

The constitution will be utterly unworkable if you cannot draw a distinction between wholesale and retail. If, under municipal institutions, the legisla-

(1) 11 Can. S. C. R. 25.
(2) P. 387.
(3) P. 371.
(4) 18 Ont. App. R. 572.

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ture of a province could delegate to a municipality the power to prohibit, to absolutely prohibit by retail, I say that in logic, and common sense, it must have that power vested in itself. No doubt I am met by the argument that the Privy Council has decided that there is no distinction as to retail at all. The regulation of trade and commerce is vested in the Dominion Parliament, and there is no more important or essential element in the regulation of trade and commerce than the definition as to what is wholesale and what is retail. There must be some authority.

The sixth question is: "If a provincial legislature has a limited jurisdiction only, as regards the prohibition of sales, has the legislature jurisdiction to prohibit sales, subject to the limits provided by the several subsections of the 99th section of the Canada Temperance Act, or any of them?"

I have sought to point out that the 99th section of the Canada Temperance Act was the governing and the defining point. The answer to this must be in the affirmative.

My learned friends, who represent the distillers, say that this is an ambiguous question, and proceed to discuss it as though they were discussing the second question over again. Under this section 99 it will be noticed that the Dominion Parliament was very careful in all its subsections with regard to the rights which were dealt with. There was the question, for instance, of religious liberty, and there was the one exception made with regard to the manufacture or importation or sale of wine for sacramental purposes.

The Dominion Parliament having within its control the protection of the civil and religious liberty of the people in this Dominion, and the peace, order and good government of the people, no local legislature could prohibit, for instance, the sale of wine for sacra-

mental purposes, and thus deprive some of the largest bodies of christians in the Dominion of the right of exercising freely their religious ideas and convictions. So it would be, under trade and commerce, with regard to that subsection which states that intoxicating liquors or alcohol may be sold for the purpose of mechanical developments of various kinds. Alcohol may be necessary in the carrying on of a whole host of trades in the country and have none of the attributes of alcoholic beverages when manufactured. No local legislature could possibly have the power to prohibit the use of alcohol in carrying out those works which are necessary for the development of trade and commerce in the Dominion.

As to the last point I agree that the judgment of the Court of Appeal for Ontario is good and sound in every respect.

[The Chief Justice: I shall call upon counsel in the order of precedence of the lieutenant governors. I will call upon Ontario first.]

Maclaren Q.C. I appear for the province of Manitoba as well as Ontario. My learned friend Mr. Cartwright appears for Ontario with me. I appear for Manitoba alone. My instructions from the two Attorneys General are the same.

With regard to the position of this question, I submit, may it please your Lordships, that it is useful to look at the state of matters at the time of confederation. The British North America Act of 1867 was no doubt passed with a view to the existing state of things.

The phrases that are there used are largely taken from the headings of legislation that was then on the statute book of old Canada, among them being trade and commerce and "municipal institutions"—so that I would first ask your Lordships to interpret the ex-

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pression used in those sections of the British North America Act based on the Quebec resolutions not by an Imperial dictionary exclusively but by a Canadian dictionary, so to speak.

Looking then at the state of the law before confederation, which, I think, we may do, we find, for instance, the Consolidated Statutes of Lower Canada which have been referred to by the Solicitor General giving the power of prohibiting the sale of spirituous liquors to the municipal council. (Chap. 24.) The state of the law apparently in Upper Canada at this time was that a prohibitory law could be passed prohibiting shop and tavern licenses, but not the sale in original packages. I am not aware exactly where this importation in original packages came from, but you could not sell 100 gallons provided it was not in the original packages, in other words, if bulk was broken; it would then cease to be protected. With regard to the other two provinces of which the Dominion was originally composed I speak with less certainty and positiveness; but, so far as I am able to understand the statutes of those provinces, there were, for the rural parts at least, not the same kind of municipal institutions as had been adopted or adapted to Lower and Upper Canada.

So far as I can form an opinion from looking over the statutes of the provinces of Nova Scotia and New Brunswick, it seems to me that to this day, for instance in Nova Scotia, they deal directly with a good many matters relating to roads and the like which in the provinces of Ontario and Quebec were, even before confederation, left to municipal authorities. I notice money grants and the like. I infer from the state of legislation that some of the details of this legislation were not so fully or generally carried out as they

were in Upper and Lower Canada at the time of confederation.

The province of Manitoba has adopted in entirety the Ontario municipal system, but it has been created since the British North America Act, which it cannot therefore help to interpret.

So that my argument on that point is that when the legislatures of the provinces, and the British North America Act legislating respecting those provinces, used that title "municipal institutions," we may assume they used it giving to it the well established meaning it had in the country with regard to which they were legislating.

However, we have to admit this, that some of the enumerated subjects in section 91 were matters that were formerly under the head of "municipal institutions," and I could not pretend to argue that those subjects which are given by name to the Dominion, such as "weights and measures" in section 91, are not taken out of the respective categories in section 92 under which they might otherwise fall, but my argument is that that is limited to those subjects which are taken out by name.

Then, as to clause 9, it may have been inserted giving the legislature the license power for the purpose of revenue for this reason: the Dominion is given, under section 91, the right to raise a revenue by any system of taxation, and the only power given to the local to tax is by direct taxation within the province. The Privy Council has decided, in the insurance and other cases, that licenses are a sort of indirect taxation, so that if they had not put in that section (subsection 9) it might be presumed that the local legislatures were not authorised to raise a revenue by that indirect means of taxation, viz., licenses.

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Then with regard to this question of "municipal institutions," one of the clearest utterances of the doctrine is that laid down by the first Chief Justice of this court in an Ontario case, *Re Slavin* and *Orillia* (1), which puts this matter better than I could do.

I would also refer to the case mentioned by his Lordship the Chief Justice, *The Queen* v. *Taylor* (2) where there is a very thorough discussion of this branch of the subject. It is practically the same case as came before this court later in *Severn* v. *The Queen* (3). See also *Sulte* v. *Three Rivers* (4).

I have to admit that the regulations by "municipal institutions" before confederation were very largely of what might be considered retail, not exclusively, but in a general sense. In the province of Ontario, for instance, original packages were exempt from municipal supervision in case the original package contained a certain quantity. Prior to the decision in the License Act of 1883 it might have been open to argument, as the Solicitor General has argued, that there was a difference between wholesale and retail, but I respectfully submit that since the decision in the Liquor License Act case we are justified in assuming, for such purposes as we are arguing to-day, that there is really no difference between wholesale and retail, and that the two must stand or fall together. I am speaking now only of the sale. That I claim is the effect of the decision in the case of the License Act of 1883, the McCarthy Act, and the amending Act of 1884. When the matter was argued before this court the wholesale trade was referred to as properly coming under the matter of regulation of trade and commerce, but not shop or tavern licenses, or the retail trade; your Lordships were drawing a line of

(1) 36 U.C.Q.B. 176.
(2) 36 U.C.Q.B. pp. 212 to 214.
(3) 2 Can. S. C. R. 70.
(4) 11 Can. S. C. R. 25.

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distinction and demarcation which was swept away by the Privy Council; they said in effect, that not only was the retail trade to be licensed, and regulated at least, by the provinces, but the wholesale trade as well.

There is a case as to the difference between wholesale and retail which I would like to refer to as a part of my argument. It is the case of *Lepine* v. *Laurent* (1) decided in 1891.

The next point I would refer to is this, that in the case of *Russell* v. *The Queen* (2), which was cited by my learned friend, and which I think will be used by our friends on the other side to show that we have not the power of prohibiting, the case of "municipal institutions" was not considered; that appears from the report itself.

In this case we are not called upon to reconcile conflicting legislation. That may come up hereafter, but for the present your Lordships are only asked whether the provinces have such power, assuming that the Dominion has not exercised it. That, I think, is a fair way of putting the questions which have been submitted by His Excellency in the present case, and for that purpose I think it is useful to remember, in considering *Russell* v. *The Queen* (2), that what was in question there was a Dominion Act, and the expression used in *Hodge* v. *The Queen* (3) is particularly applicable, because I claim that prohibitory legislation is one of those very questions or subjects which, in one aspect and for one purpose, may well fall within section 92, and in another aspect, and for another purpose, may fall within section 91. In *Hodge* v. *The Queen* (3) the possible conflict is referred to and their Lordships base their decision on the ground that there is no conflict.

(1) 14 Legal News 369; 17 Q. L. R. 226.

(2) 7 App. Cas. 829.

(3) 9 App. Cas. 117.

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(The learned counsel then reviewed the argument of counsel and the effect of the decision of the Privy Council on the McCarthy Act.)

With regard to the question of regulation, I think this much can be said, that the decision in *Hodge* v. *The Queen* (1), and the decision on the McCarthy Act, at least have settled this, that the licensing and the regulation of the liquor traffic are in the provinces. That, I think, is the outcome of these discussions. I think they have decided that they have the regulation. My argument is that the power to prohibit is involved in the power of regulation, and I attach some importance to that principle. I do not know that I have ever seen that more tersely put than by his Lordship the late Chief Justice of this court in the case of *Fredericton* v. *The Queen* (2).

It is difficult to say that a provincial legislature can prohibit 499 people out of 500 from engaging in something, but that they cannot prohibit the 500th.

The powers which we are now claiming for the provincial government are the powers which all the provinces have since confederation exercised, almost without challenge, regarding the sale of poisons and such substances under the Pharmacy Acts that have been passed in the various provinces. For instance, in the Ontario Act, which is chapter 151 of the Revised Statutes of Ontario, section 26 makes provision as to the sale of these poisons. The only case of which I am aware where the validity of these acts came up, and where the constitutional question was raised, was in the province of Quebec, in the case of *Bennett* v. *The Pharmaceutical Association of the Province of Quebec* (3).

We claim provincial authority on this subject of prohibition under the head of "matters of a local and

(1) 9 App. Cas. 117. (2) 3 Can. S.C.R. p. 537.
(3) 1 Dor. Q. B. 336.

private nature" in subsection 16, as well as under "municipal institutions." If it should be objected to us on the other side that this is really an interference with the Canada Temperance Act, or with the authority of *Russell* v. *The Queen* (1), our answer to that is this, that we have the authority of the Privy Council not only for the principle laid down in *Hodge* v. *The Queen* (2), but also that this power of legislation may exist concurrently in the two bodies.

The first case in which, I think, that principle was clearly laid down, was *L'Union St. Jacques* v. *Bélisle* (3). Lord Selborne gave the judgment in that case. The next case in which the same doctrine was laid down, is *Cushing* v. *Dupuy* (4). I refer particularly to page 415.

We find this same rule laid down in the recent case regarding the Assignment Act of Ontario, 1894 (5). So that our argument on this ground is, that so long at least as the Dominion Parliament has not passed a prohibitory law, that it is competent for the local legislature to pass such a prohibitory law as is referred to in the questions before your Lordships.

Assuming then that the province might have the power, under one or other of those heads in section 92, to pass it, if it be not taken out of their hands by something that is found in section 91, the only one of the enumerated classes that have been suggested on the other side as interfering with it, is the regulation of trade and commerce. Now, I submit that such a law as your Lordships are now asked about does not properly come within the regulation of trade and commerce, within the meaning of section 91 of the British North America Act.

If we are looking for the origin of things, it is possible that the words "trade and commerce" may have

(1) 7 App. Cas. 829.
(2) 9 App. Cas. 117.
(3) L R 6 P.C. 31.
(4) 5 App. Cas. 409.
(5) [1894] A. C. 189.

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been taken from the Consolidated Statutes of Canada. There are 22 chapters of the Consolidated Statutes of Canada that are grouped together under the title of "trade and commerce." It is instructive to notice that, with I think two exceptions, all the subjects that are treated of in the Consolidated Statutes of Canada, under the head of "trade and commerce," are assigned to the Dominion. One is the protection of persons dealing with agents, and the other is as to limited partnerships.

As to the meaning of the words "regulation of trade and commerce," the first authoritative definition of the meaning of the words "trade and commerce" is that found in *Citizens' Ins. Co.* v. *Parsons* (1). There their Lordships laid down a definition which, I think, is very strongly in favour of the position taken by us to-day. I think the words were taken from this side of the Atlantic, and the key to the interpretation, if they are used in any technical sense, is rather to be sought on the continent of America than on the continent of Europe.

The only other discussion as to the meaning of trade and commerce, to which I will refer, is found in *Bank of Toronto* v. *Lambe* (2). On this question relating to the sale, there are a number of cases in our own courts, as *The Queen* v. *Taylor* (3); *Ex parte Cooey* (4); *Blouin* v. *Corporation of Quebec* (5); *Molson* v. *Lambe* (6); *Poulin* v. *Corporation of Quebec* (7); *Danaher* v. *Peters* (8).

So far I have spoken of the sale exclusively. Nearly all that has been said regarding the sale applies also to the manufacture, with this exception, I think, that

(1) 7 App. Cas. 112.
(2) 12 App. Cas. 586.
(3) 36 U.C.Q.B. 183.
(4) 21 L. C. Jur. 182.
(5) 7 Q.L.R. 18.
(6) M.L.R. 2 Q.B. 381.
(7) 9 Can. S.C.R. 185.
(8) 17 Can. S.C.R. 44.

manufacture is in a certain sense more local in its nature than even sale.

So far as it is a question of power, I think if the local legislature found it necessary, to effectually carry out the power of prohibiting the sale to prohibit the manufacture, it would so extend.

And the fact that the Dominion Parliament has the right to tax imports, or to put an excise tax upon manufactures, is no ground for withdrawing this from the local authority.

The only other remaining question which I think it necessary to refer to specially is the last, as to the validity of the Local Option Act, which I will do very briefly.

A great deal of that which I said with regard to the sale, in the earlier part of my argument, will apply to this seventh question; in fact, I found it impossible to separate the discussion of the first question submitted to your Lordships from the last question. I have put in the factum the principal points upon which I rely, in addition to those that were urged in the case of *Huson* v. *South Norwich*.

I refer especially of course to the reasons given by the Court of Appeal in the *Local Option Case* (1).

I would also refer to a decision of the Court of Queen's Bench of Quebec *Corporation of Huntingdon* v. *Moir* (2), on article 561 of the Municipal Code, corresponding to the Local Option Act, and to the analogous case in Nova Scotia of *Keefe* v. *McLennan* (3).

The other ground to which I would refer with regard to this local option matter, is that the Ontario local option law may be sustained as a license law. Briefly, I put it in this way. Under the Ontario license law there are three classes of licenses to be

(1) 18 Ont. App. R. 572. (2) M.L.R. 7 Q.B. 281.
(3) 2 R. & C. 5.

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given, wholesale, shop and tavern. Under the Local Option Law you may abolish shop, leaving wholesale and tavern, or you may pass a by-law abolishing tavern, leaving wholesale and shop; or you may pass a by-law or by-laws abolishing shop and tavern, leaving only wholesale. I submit that that is still a license law, and that under the authority to pass a license law the province of Ontario had power to pass the local option law, and that it may be sustained as a license law. That, briefly, is the ground upon which we claim the validity of the local option law of Ontario.

Under that Act wholesale licenses may issue, and cannot be prohibited, so that the point I am making is that this may be sustained as a license law inasmuch as wholesale licenses may issue in any event.

Cartwright Q.C.—My learned friend has gone so very fully into the matter that really there is very little with which I need trouble your Lordships. As I judge from the factums, we are all agreed that the important question is the question of sale; but, before passing to the question of sale, I would just make this observation with regard to the question of importation. It will, I think, be argued on behalf of the brewers and distillers that the right to import, if that be found to be in the Dominion, would necessarily include the right to sell. That, I submit, by no means follows. It is contrary altogether to the decisions in the United States, and I think it is contrary to the observations which have been made by the Privy Council. In two cases, *Citizens Insurance Co.* v. *Parsons* (1) and *Colonial Building and Investment Association* v. *Atty. Gen. of Quebec* (2), it has been suggested that while the Dominion may have the power to incorporate companies, with power to deal in lands and so forth,

(1) 7 App. Cas. 96. (2) 9 App. Cas. 167.

throughout the Dominion, it may still be quite possible that a company so incorporated could do no business in any province in consequence of the laws of the province with regard to land preventing them from so dealing. That, I submit to your Lordships, would be entirely analogous to the question of importation carrying with it the right to sell.

Then, it may be that those corporate bodies so constituted, and given, to some extent, life, have to go to the provinces to get further legislation in order to enable them to really fulfil the purposes for which they were principally incorporated.

Coming to the other question, as regards the right to sell, that of course would be claimed under the head of "municipal institutions," subsec. 8 of sec. 92, and what I suggest to your Lordships as the true view is, to look at "municipal institutions," if I may say so, historically, and see what "municipal institutions" included at the time the British North America Act was framed.

Looking at the British North America Act, there is no indication of anything to show that it was in any way intended to cut down or modify the powers that were then possessed by the various provinces with regard to their own affairs, but that all the powers that were then possessed with regard to the municipalities were intended to be continued. Then we find that in Ontario, Quebec and Nova Scotia these powers were found in the Municipal Acts, or the Acts relating to municipal affairs, and the highest courts of all those provinces have held that these powers remained in the provinces. That, I submit to your Lordships, is a strong argument in favour of the power, to the extent to which it is found in existence in 1867.

Then, if it is said that the question of trade and commerce in any way comes in conflict, I submit that

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"trade and commerce" must be modified, so far as may be necessary, in order to give full effect to what is covered by "municipal institutions." Because, looking at section 92, the particular phrase at the beginning of the section is, "that in each province the legislature may exclusively make laws in relation to matters coming within the classes of subjects next hereinafter enumerated." So that their power is to cover all those matters that necessarily, or for convenience, come within these purposes.

Then we find "municipal institutions" followed, in section 92, with the provision about licensing shops, and so on. That is really, I think, the only mention that there is of anything, in terms, which relates to liquor.

Then, turning to the decisions, I submit nobody can deny now that the whole question of regulation, by way of licensing and so forth, is entirely in the hands of the province in the most absolute form. The Dominion cannot interfere with it, and it would be strange if under the power to regulate concerning trade and commerce the Dominion could prohibit a traffic which it cannot regulate.

The mere fact that such an Act as the Canada Temperance Act was held to be valid and within the power of the Dominion Parliament does not of itself, looking at that decision, take away the prohibitory power of the province.

To a certain extent licensing Acts include prohibitory provisions. For instance, sales are not allowed on Sundays or on polling days, nor are sales allowed to be made to particular persons. Nobody disputes that such legislation by the provinces is perfectly valid, and yet, if you can prohibit selling on Sunday, why not on Monday? And if on a polling day, why not on some other day? Whether it be wholesale or retail,

there is nothing to show that that power was intended to be taken away, and that it comes in, reasonably and properly, under the term "municipal institutions."

As the points have been so fully gone over by my learned friend I do not think I need further occupy your Lordships' time.

Cannon Q. C.—Although the question in this case is a most important one to the province of Quebec, on account of the position taken by the Dominion Government in the factum filed in this court, and also the position taken by the learned Solicitor General of Canada in his argument, the remarks which I have to offer to this court on behalf of the province of Quebec will be very brief. The Dominion of Canada, and the Solicitor General, have admitted all the rights which the province of Quebec claim on this question; they have even admitted a little more, on one point, than the province of Quebec claims.

In the light of the different decisions rendered on these questions of prohibitory liquor laws, and of the different cases cited, the province of Quebec has interpreted the question now before the court in the following manner, or has assumed that it had, on this question of prohibitory liquor laws, the following power:—

First of all, the province of Quebec claims the right of licensing the wholesale and retail sale of liquor; and it does now, practically, under the laws in force in the province.

Secondly, the province claims the right of limiting the number of liquor licenses throughout the province, and does so through the medium of municipal councils. It does so throughout the province under the authority of the Municipal Code, and in the larger cities and towns through the medium of license commissioners, at least for Quebec and Montreal.

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Thirdly, the province claims the absolute right of prohibiting the retail sale of liquor.

Throughout the province of Quebec we claim the right to absolutely prohibit the retail sale of intoxicating liquors, and, practically, we have been doing so since confederation.

Then comes the question of the definition of wholesale and retail. Because of the arguments which have been presented to this court by the different learned counsel who have preceded me I think I should say a few words on behalf of the province of Quebec.

We have, to a certain extent, in the province of Quebec, defined retail sale. Our definition may be wrong but, of course, we will hold to it, until we are corrected by this court, or perhaps later on by the Privy Council. The definition of retail sale is found in the laws of the province of Quebec, article 561 of the Municipal Code. Under that article power is given to all municipal councils, by means of a by-law, to prohibit the sale of intoxicating liquors within its limits under a quantity of two imperial gallons, or twelve bottles of three half pints. That is the definition which the province of Quebec gives to wholesale and retail liquor selling; two gallons is wholesale and under that quantity is retail according to this provision of our Municipal Code.

In numerous instances municipalities have prohibited the retail sale of intoxicating liquors. And the law provides that when such a by-law has been passed a copy of it is forwarded to the collector of the provincial revenue of the district in which the municipality exists, and from the date of the receipt of this by-law, until its repeal, the collector of the provincial revenue is debarred from issuing licenses for the sale by retail of intoxicating liquors in that municipality.

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The only thing which the province claims in respect of sale by wholesale is to make the vendor take out a license for the purposes of revenue and that is what we have done for years past, under our license law which is now embodied in our Revised Statutes. Every wholesale vendor of intoxicating liquors is bound to take out a license; and now, the only preliminary for the taking out of that license is the payment of the fee fixed by the Quebec license law.

I would further add, that the government of the province of Quebec is of opinion that total prohibition is the cessation of trade and commerce in a certain article, intoxicating liquors for instance, and that the cessation of trade and commerce in that certain article must necessarily be regulating trade and commerce, and that, consequently, total prohibition by a provincial legislature is *ultra vires*. I cover by those words the prohibition of manufacture and importation.

The learned counsel for the province of Ontario claim that there is no difference between wholesale and retail as to licenses under municipal institutions. The government of the province of Quebec, in the past legislation which has been adopted, and which is still in force, has not adopted that view of the question. It being a matter of the regulation of trade and commerce the provincial legislature thinks it has no right to totally prohibit the manufacture or importation of intoxicating liquors. We do not claim that right before this court now, nor do we claim the right of prohibiting the wholesale sale of spirituous liquors, thinking that that also would be regulating trade and commerce, which is not within the purview of the powers of the local legislature.

We consider that the retail prohibition of the sale of spirituous liquors is rather in the nature of a municipal regulation, within the powers of the local legisla-

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ture. As I before stated, the power of prohibiting the retail sale of spirituous liquors we have claimed in the past, and have enacted legislative provisions to enforce such retail prohibition in whatever municipalities wish to do so. We still claim that we have the power to do so in the future.

Wallace Nesbitt for the Brewers and Distillers Association:—

As I understand the principle of construction that has been adopted, both by your Lordships' court and by the Privy Council it is, first to inquire whether the particular matter falls within the exclusive jurisdiction of the province because, if your Lordships find that it does not fall within any of the specially enumerated clauses of section 92, then, so far as these questions are concerned, the court is done with it. For that canon of construction I refer to *Russell* v. *The Queen* (1).

Then the next canon of construction to which I ask your Lordships' attention is this: If it fall within any of the classes enumerated in sec. 92, then the further question would arise, viz., whether the subject of the Act does not also fall within one of the enumerated classes of subjects in section 91, and so does not still belong to the Dominion Parliament.

A further canon of construction has been laid down in *Atty. Gen. of Ontario* v. *Atty. Gen. of Canada* (1), and in *Tennant* v. *Union Bank* (2). If it falls within section 91 and you find it legislated upon, then this follows:—That although it may be within section 92, if it has already been legislated upon by the Parliament of the Dominion, under section 91, then the local legislation is of no effect.

Now, I take the canons of construction, as laid down in the Privy Council up to date, to be these: First, you

(1) 7 App. Cas. 829.
(1) [1894] A. C. 189
(2) [1894] A. C. 31.

are to look at the character of the legislation and see if it comes within section 92. If it comes within section 92 you may legislate, subject to this, that if it is inconsistent in the slightest degree with ancillary legislation under section 91, then the legislation of the local must go. Lastly, until it conflicts, either with ancillary legislation, or direct legislation, it may be good under a certain aspect of section 92. If I am correct in that the following result is patent:—If this is really prohibitive legislation that you are asked to pass upon, and it does not fall within any one of the sections of 92, then my task is done; but, supposing your Lordships do not follow me to that extent, if I am able to demonstrate that it conflicts with legislation as to which the Dominion Parliament has a power to legislate, even ancillary legislation, if I may so describe it, and that the Dominion has already taken up the field, then again my task is accomplished, and all these questions must be answered in the negative.

My first proposition therefore, is, that this does not come within section 92 in any particular, under any one of the heads, that it is in fact prohibitive legislation that your Lordships are asked to say the provinces are entitled to pass. If I am right in that, and it does not come under section 92, as I say, I am through; but, I go a step further, and say, even if it could be said to be under sec. 92 it conflicts directly with a piece of legislation which has already been declared to be valid by the Privy Council, which is in force, viz., the Scott Act, and the two cannot consistently stand together.

Now, *Russell* v. *The Queen* (1) decides that prohibition belongs to the Dominion, *Hodge* v. *The Queen* (2) that licensing belongs to the province, and the McCarthy Act case that neither one conflicts with the other, but that the McCarthy Act was simply a piece of legislation

(1) 7 App. Cas. 821. (2) 9 App. Cas. 117.

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of the type and character, if I may so describe it, of a licensing Act, and was therefore *ultra vires*, because it conflicted with the exclusive power which was granted to the legislatures.

Then, if the provinces claim also a field of legislation as to that, we say it has already been taken up with the Scott Act.

Now, if the Privy Council has decided anything it has decided this, that there can be no line of demarcation drawn between wholesale and retail. Therefore what you are asked to decide here is: Can they pass a prohibitive law? Your Lordships are not asked to say whether they can pass a retail prohibitive law. That is not the question submitted. Dealing with question 1, it is a prohibitive law, as such, irrespective of quantity, and as such, we ask your Lordships' answer.

Then that brings me to the particular argument as to whether this in fact does come within any of the clauses of section 92.

Mr. Justice Burton, in the Local Option Case, said that the sub-head of "municipal institutions" had never been drawn to their Lordships' attention. All I can say in answer to that is, that in the McCarthy Act case their Lordships of the Privy Council say that they think the subject of "municipal institutions" has nothing whatever to do with the subject of prohibition.

For the purpose of this argument there can be no distinction between wholesale and retail. The provinces have not the power to prohibit retail traffic, and cannot create the power by saying it is part of "municipal institutions," because it only relates to a bottle. It must, in the same way, relate to fifty gallons or fifty barrels, if it is part of municipal power. I submit, therefore, that the effect of the British North

America Act upon that is simply this, that under the head of "municipal institutions," subsection 8 embraces everything which inherently belongs to municipal institutions, not inconsistent with the power assigned to the Federal Parliament under section 91.

Then when you find the Privy Council, in express words, saying in *Russell* v. *The Queen* (1) that this prohibition legislation does not fall within section 92, when you find their attention drawn expressly to subsection 8 in *Hodge* v. *The Queen* (2), and they again affirm *Russell* v. *The Queen* (1), and still again in the McCarthy Act Case, surely it cannot be said that in their Lordships' opinion, under "municipal institutions," anything in relation to prohibition of the liquor traffic could be said to come. Then, if it does not come under that head, I do not understand it is pretended it can come under any other head of section 92, and that of course would relieve me from following the discussion any further, as to the right of the local to pass a prohibitive law.

If a province can pass prohibition it can, in effect put a tax upon other provinces, because it destroys the ability to raise a revenue by the Dominion, and therefore it becomes interprovincial, as a matter of trade and commerce. Take, for instance, the illustration given by one of your Lordships this morning, supposing all the distilleries and breweries in this province were to be closed by prohibition, absolutely closed, they could neither manufacture nor sell, because it is that broad class of legislation that you are asked to deal with, if such a course were adopted the result would be, that the taxes or revenue would have to be raised in some other way, and the other provinces would, either directly or indirectly, have to contribute to the general deficit that would occur.

(1) 7 App. Cas. 829. (2) 9 App. Cas. 117.

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We can also invoke what is called the historical argument on the subject of the liquor traffic, and I submit that you find in that very section 92 the liquor case expressly dealt with by subsection 9. Therefore, it is only fair to assume that all that was delegated to the local legislatures was that which was expressly delegated by the very words, viz., the regulation of the traffic, by the licensing of shops, saloons, taverns and so on. Is that not a fair argument? If you find they give express power on the subject of liquor, is it fair to ask under some other term, as to which it cannot be said to be inherently connected, an implied power to be given beyond the express power of section 9?

I would refer to the cases of *Bennett* v. *Pharmaceutical Society* (1); *The Queen* v. *Justices of King's* (2); *Re Barclay* and *The Township of Darlington* (3); *Re Brodie* and *Bowmanville* (4); *Ex parte Cooey* (5).

[The learned counsel then argued that the right was with the Dominion as a "regulation of trade and commerce."]

Saunders follows on the same side:—I propose to deal in the brief argument which I shall address to your Lordships, solely with question no. 7, which has been before this court in the case of *Huson* v. *The Township of South Norwich*.

Question no. 7 purports on the face of it to deal with only retail trade, but, according to all the authorities that have been cited, there is no distinction between wholesale and retail as to this question. This must be so for it would be impossible to define what is wholesale and retail. There is no harmony on the matter in the legislation of the different provinces or even in different legislative acts of the same province.

(1) 1 Dor. Q. B. 336.
(2) 2 Pugs. 535.
(3) 12 U.C.Q.B. 91.
(4) 38 U.C. Q.B. 580.
(5) 21 L.C. Jur. 182.

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Therefore, although this question deals with retail, it is illusory, because in dealing with retail it deals with the whole question; and, however question seven is answered, question one must be answered in the same way. That I apprehend would be a sufficient answer perhaps to this point, but I am prepared to go further, and to submit that even if you were prepared to concede absolute prohibition to the province, and the right to control it, still I should be entitled to ask your Lordships to hold that the legislation referred to in question no. 7 was *ultra vires*, because it comes into conflict with the most important provision of the Canada Temperance Act.

[The learned counsel then dealt at some length with the Local Option Act pointing out that it was not in any way ancillary to the Canada Temperance Act but an independent piece of legislation, and the two could not stand together.]

My learned friend Mr. Maclaren, suggests that your Lordships can treat it as a License Act. That, of course, would be perfectly impossible. You cannot alter the character of it by tacking it on to a License Act. The character of this prohibition clause is prohibition. The question was gone over very fully in the McCarthy Act Case, and the Privy Council would not hear of it for a moment.

My learned friend Mr. Nesbitt has already referred to the Quebec cases, and I think it is shown that they do not constitute any sort of guide, because, according to the argument of my learned friend Mr. Cannon, they did what was clearly irregular. While the Dunkin Act was in existence they dealt with prohibition under statutes of their own. The Attorney General of Ontario, no mean authority upon constitutional law, did not do that. In 1874, so soon as he assumed the office of Attorney General, he had that altered. He has re-

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cognized all along the existence of the doubt, which within twelve months he has he has given expression to, as to whether the province of Ontario or any province has the right to pass any prohibition law whatever.

I wish for a moment to refer to the judgment of Mr. Justice Burton, who is perhaps, with the exception of the late lamented member of this court, Mr. Justice Henry, the strongest provincialist we have had upon the bench, and he also concurs in upholding this judgment, and, in the course of it, in order that he might not be misunderstood, he makes use of words, as he says, much against his will, to the effect that it would be utterly impossible to hold that prohibition is in the province.

I have only a few other observations to make in connection with the points that I have already suggested as to the conflict that arises, and it incidentally established another point which is important in this way:— During the course of this argument we have heard a great deal about the pre-confederation argument as to "municipal institutions." It is said that the powers that they exercised before confederation are powers they are still to continue to exercise, unless they are specially transferred to the Dominion Parliament. If there is a conflict, as I say there is, as to cities it follows of course that that contention is unsound. So soon as you begin to apply it, what follows? Why, a conflict of the clearest and most unequivocal kind. If that is not an answer to the pre-confederation argument it seems impossible that any answer can be made. The conflict is clear and distinct. If it produces a conflict it is unsound in principle; if unsound in principle, it cannot be supported.

Just one word with regard to the position taken by the learned Solicitor General. I submit, my Lord, that his position here is untenable. He has either gone too

far or not far enough. The concessions he makes here, and I consider that they are concessions, and nothing but concessions, should not affect this question. The question is, not what he is willing to concede to the provinces, but: What is the strict construction of the British North America Act? And that is particularly necessary in view of the fact that this question is very likely to be carried to the Privy Council. We ask for a strict construction of the British North America Act, because if they are merely concessions made these concessions could of course be withdrawn. Independent of these concessions we ask for a strict construction of the British North America Act. We think it is of the greatest importance not only respecting our client, but in the public interest. The concessions which the learned Solicitor General has thought fit to make, if they are concessions, should have nothing whatever to do with the matter.

The Solicitor-General.—I desire to say one word as to the very important statements made by my learned friend Mr. Nesbitt regarding the action or intention of the legislature of the province of Quebec, concerning the Dunkin Act, in which he has been entirely misled by the interpretation which he has given to the judgments referred to, amongst others the judgment in the case of *Ex parte Cooey* (1). The opposite is exactly the fact, and it is most important to note it.

The court in that case held that the provisions of the Temperance Act of 1864 had not been repealed or amended by the Municipal Act, or the subsequent legislation so as to prevent enactment of a by-law thereunder for the sale of intoxicating liquors, or to prevent prohibition, but pointed out that the legislature had shown its authority by interfering most directly and legislating most clearly upon very many of the most

(1) 21 L. C. Jur. 182.

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important sections of the Dunkin Act. There is another holding, that the regulation of the traffic in intoxicating liquors is within the jurisdiction of the Parliament of Canada. My learned friend in his main argument the other day went on to quote from the Canada Temperance Act to show that the Dominion Parliament had undertaken by that to say that sections 1 to 10, both inclusive, of the Temperance Act of 1864, were repealed as to every municipality, and so forth, and he argued that no exception having been taken it was a concession, on the part of all concerned, that the Dominion Parliament had the right.

But in 1870, two or three years after confederation, the province of Quebec had already enacted exactly the same thing, that is to say, by subsection 12 of section 197 of the License Act of the province of Quebec, it was decreed that the act 27 & 28 Vic. ch. 8, should be repealed. If your Lordships will refer to the Revised Statutes of the province of Quebec, you will find that statement made. I refer to vol. 2, appendix A, 27 & 28 Vic. sections 1, 10, 37, 38, 50, 51 and 53. These are all important sections of the Canada Temperance Act (the first Canada Temperance Act), which was the Act of 1864, known as the Dunkin Act, which were not only interfered with, but have actually been repealed, by the legislature of the province of Quebec, and it is the universal holding that our provincial authorities have all the powers that were granted under that Act, and they may either repeal them or leave them in force, or re-enact them if they have been repealed. I have just made that little digression, because I wished to correct what I thought was a false impression at the time made by my learned friend, no doubt, simply by taking the instructions from the statutes that he had quoted instead of referring directly to the repealing section of the statutes themselves.

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The province of Quebec is with the position assumed by the Dominion of Canada upon all points except one, that is to say, who shall have the right to determine what is wholesale and what is retail. My learned friends from Ontario, of course, differ from us on the point I have just mentioned. The question of wholesale and retail is one that has occupied the attention of the legislatures from the time the first Act was passed. From the very first Act that was passed until the last, which resumed pretty much all the former legislation, they all contained provisions defining the difference between wholesale and retail.

To sum up, I contend, first of all, that the Dominion has power to pass a general law for the peace, order, and good government of the Dominion, such as the Canada Temperance Act. That has been decided. The licensing power has been determined as being in the hands of the provinces. But the question of prohibition, either partial or total, has never come up yet; and the important point, I think, to be determined is that one point, as to where the power lies to fix the difference between wholesale and retail.

The Dunkin Act has been referred to here, and its bearing upon this question is extremely forcible. We can look at it to see what were the extraordinary powers exercised at that time by the municipalities of the province of Canada.

If the legislature of the province which had absolute power to pass a prohibitory by-law, in so far as the retail trade is concerned, were to pass legislation of that kind, and the Dominion Parliament, under its general power which has been granted to it for the peace, order and good government of this community, were to pass a general law, would that kill the local act? Supposing that a legislature had passed an Act within its power for prohibition, would that, as my

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learned friends here contend, render that law of the legislature a nullity? Not at all. It might cause it to be dormant. The superior power, having passed a law which necessarily would come into effect for the peace, order and good government of the country, according to the judgment rendered in *Russell* v. *The Queen* (1), that law would extend its influence, and its effect, over the whole Dominion. But supposing that two or three provinces of the Dominion, by concentrating the votes of their representatives in Parliament, were to secure the repeal of the whole of that legislation, would the province where the former legislation had passed be deprived of the expression of the will of the people, having perhaps, in the Dominion Parliament, through its representatives voted against a repeal of the law? Would not that law which already was on the statute-book, which remained dormant, just as the by-law I have referred to in the Dunkin Act, not revive again, in so far as the local matters of that province were concerned? I contend that it would, and that no logical reason can be advanced to the contrary.

Dealing now for one moment again with the question of concurrent jurisdiction, which my learned friends here scout, I think that looking not only at the British North America Act, but at the judgments that have been rendered, that over and over again it has been held, as it must be, that there are special powers confided to each, and concurrent powers, and that sometimes the exercise of one power must over-ride the other. I will just refer your lordship to a case of *Coté* v. *Paradis*, in the Court of Queen's Bench (Quebec) (2), in 1881, and what was there held.

Then what has happened in our own country? When the insolvency legislation which began under the Abbott Act was all swept away, some time about

(1) 7 App. Cas. 829. (2) 1 Dor. Q.B. 374.

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1878, I think, the provincial legislation revived, and has been in force ever since, and has been changed and modified from time to time by the province of Quebec and other provinces.

In conclusion, I will remark that the learned counsel for the brewers and distillers, whom I have listened to with a good deal of attention, and who have certainly put a great deal of learning into their arguments, have put this difficulty before the court:—They say, look at the effect upon the revenue; look at the provisions which were made by the British North America Act, and the obligations that were entered into upon one side and the other. Are they to be upset by prohibitory legislation, such as it is said the provinces have a right to pass? It would prohibit the right of the Dominion to levy money, and where are the funds to come from to meet these obligations they have contracted towards the provinces? All that, no doubt, presents a difficulty, but it is not one that can influence this court for one moment, because, if the Dominion were to exercise the power which these learned gentlemen say it undoubtedly has, of passing the general prohibitory law, which we all admit it has, to strike out the manufacture, the importation, and sale generally of intoxicating liquors, that would interfere with the right of the provinces to levy, by way of license, and so forth, direct taxation. But that would have simply to go by the board. New arrangements would have to be made by the legislatures and parliament. They would have to face a new state of affairs. That, I contend, is no argument at all, and cannot affect for one moment the principle that is at stake in this discussion. And if the legislature cripples to some extent the Dominion, the Dominion on the other hand, by exercising its still larger power, may destroy, to a very great extent, and perhaps entirely, the principal source of revenue of the

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province. That being the case, the people of Canada, through their representatives having exercised their indubitable right, those who are charged with the administration of public affairs as statesmen will have to face the new difficulty, and solve it, as they have other things in the past.

THE CHIEF JUSTICE.—My reasons for the foregoing answers will appear from my judgment in *Huson* v. *South Norwich* (1). I have only to add that I do not think any statutory definition of the terms "wholesale" and "retail" is requisite, but if legislation is required for such purpose it is vested in the Dominion as appertaining to the regulation of trade and commerce.

I answer the third and fourth questions in the negative, because the prohibition of manufacture and importation would affect trade and commerce, and so must belong to the Dominion; and further, for the reason that prohibition to that extent would affect the revenue of the Dominion derived from the customs and excise duties

FOURNIER J.—I concur in the conclusions arrived at by the Chief Justice of this court, and adopt his answers to the seven questions submitted.

GWYNNE J.—[After stating the questions submitted His Lordship proceeded as follows:]

In construing the language of the British North America Act of 1867 defining the jurisdiction of the Dominion Parliament and of the provincial legislatures we must never lose sight of the fact that this language is that of the resolutions adopted in 1864 by the provincial statesmen assembled in Quebec by the authority of

(1) See ante p. 145.

Her Most Gracious Majesty for the purpose of framing the provisions of a constitution for federally uniting the British North American provinces into one government under the British Crown and that the British North America Act was passed merely for the purpose of giving legislative form to the terms and provisions of a treaty of union between the respective provinces forming the confederation and the Imperial Government, as such terms and provisions are expressed in the resolutions adopted by the framers of the constitution and by the respective legislatures of the provinces of Canada, Nova Scotia and New Brunswick, and by the Imperial Government. So likewise must we keep ever present to our minds the fact that the main object of these provincial statesmen, who were the authors and founders of our new constitution, in framing their project of confederation, was to devise a scheme by which the best features of the constitution of the United States of America, rejecting the bad, should be grafted upon the British constitution; and to vest in the provincial legislatures exclusive jurisdiction over all matters of a purely provincial, local, municipal and domestic character, and in the general or central legislature exclusive jurisdiction over all matters in which, as being of a general, quasi-national and sovereign character, the inhabitants of the several provinces might be said to have a common interest distinct from the particular interest they would have in matters affecting the local, municipal and domestic affairs of the particular province in which each should reside.

That this was the main design of the scheme of confederation proposed by the framers of our constitution, and as intended by the resolutions adopted by them, is abundantly apparent from the speeches accompanying the submission of the resolutions to the legislatures of the provinces for their adoption. The late Sir John

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Macdonald, the chief of the provincial statesmen engaged in framing the resolutions, when presenting them to the legislature of the province of Canada for their adoption, says:

> We must consider the scheme in the light of a treaty; the whole scheme of confederation, as propounded by the conference, as agreed to and sanctioned by the Canadian government, and as now presented for the consideration of the people and the legislature, bears upon its face the marks of compromise.

And again:

> In the proposed constitution all matters of general interest are to be dealt with by the general legislature, while the local legislatures will deal with matters of local interest.

Again, referring to the constitution of the United Stes of America, he says:

> We can now take advantage of the experience of the last seventy-eight years during which the constitution of the United States has existed, and I am strongly of opinion that we have in a great measure avoided in this system which we propose for the adoption of the people of Canada the defects which time and events have shewn to exist in the American constitution.

And again:

> We have strengthened the general government, we have given the general legislature all the great subjects of legislation, we have conferred on them not only specifically and in detail all the powers which are incident to sovereignty but we have expressly declared that all subjects of general interest not distinctly and exclusively conferred upon the local government and local legislatures shall be conferred upon the general government and legislature.

And again:

> I shall not detain the House by entering into a consideration at any length of the different powers conferred upon the general Parliament as contra-distinguished from those reserved to the local legislatures, but any honorable member in examining the list of different subjects which are to be assigned to the general and local legislatures respectively will see that all the great questions which affect the general interests of the confederacy as a whole are confided to the Federal Parliament while the local interests and local laws of each section are entrusted to the care of the local legislatures.

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The late Mr. George Brown, then president of the executive council of the province of Canada, and also one of the delegates who framed the constitution, said:

All matters of trade and commerce, banking and currency and all questions common to the whole people we have vested fully and unrestrictedly in the general government.

And again:

The crown authorized us specially to make this compact and has heartily approved of what we did.

And he ascribed the terms of the scheme of confederation as embodied in the resolutions to Lord Durham's report wherein he suggested a union of the provinces

upon a plan of local government by elective bodies subordinate to the general legislature and exercising complete control over such local matters as do not come within the province of general legislation, and that a general executive upon an improved principle should be established, together with a supreme court of appeal for all the North American colonies.

And again he said that:

No higher eulogy could be pronounced upon the scheme produced than that which he had heard from one of the foremost of British statesmen, namely, that the system of government which we propose seemed to him a happy compound of the best features of the British and American constitutions.

Sir Geo. Etienne Cartier, then Attorney General of Canada East and another of the framers of the constitution for the proposed confederacy, said as to the proposed scheme in advocacy of its adoption by the Canadian legislature:

Questions of commerce, of international communication and all matters of general interest would be discussed and determined in the general legislature.

And again he said that in all their proceedings the framers of the constitution had the approbation of the Imperial Government, and in fine he said:

I have already declared in my own name and on behalf of the Government that all the delegates who go to England will accept from

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the Imperial Government no act but one based upon the resolutions if adopted by the House and will not bring back any other.

The resolutions having been adopted by the legislatures of Canada, Nova Scotia and New Brunswick were transmitted to the Imperial Government and at the request of that Government a conference was held upon them in England between delegates from those provinces and the Imperial Government at which conference the resolutions were adopted almost verbatim, with a slight modification as to the power of the executive government of the confederacy introduced at the suggestion of the Imperial Government for the purpose of still further strengthening the central executive of the proposed confederacy, such modification consisting in expunging the 44th resolution which proposed to vest in the provincial executive the power of pardon of criminal offences, as to which resolution Sir John Macdonald had said, when submitting the resolutions to the Canadian legislature, that this was a subject of imperial interest and that if the Imperial Government should not be convinced by the argument they would be able to press upon them for the continuance of the clause (the 44th resolution) they could, of course, as the overruling power, set it aside;—accordingly at the conference in England it was, with the assent of the provincial delegates, set aside and expunged, and that power of pardon was vested in the central or general government and in other respects the language of the resolutions was not only substantially but almost *verbatim et literatim* embodied in a bill agreed upon by the provincial delegates and the Imperial Government as the bill to be presented to parliament to be passed into an Act.

In Her Majesty's address to both houses upon the opening of parliament in February, 1867, she was pleased

to refer to the proposed scheme of confederation in the following manner :—

Resolutions in favour of a more intimate union of the provinces of Canada, Nova Scotia and New Brunswick have been passed in their several legislatures and delegates duly authorised and representing all classes of colonial parties and opinion have concurred in the conditions upon which such a union may be best effected. In accordance with their wishes a bill will be submitted to you which by the consolidation of colonial interests and resources will give strength to the several provinces as members of the same empire, and animated by feelings of loyalty to the same sovereign.

Lord Carnarvon, then colonial minister, in presenting this bill to Parliament, explained its intent and purpose, saying, among other things, with reference to the said resolutions, that they, with some slight changes, formed the basis of the measure he was submitting to Parliament; that to those resolutions all the British provinces in North America were consenting parties, and that the measure founded upon them must be accepted as a treaty of union. Then, referring to the distribution of powers, he said:

I now pass to that which is perhaps the most delicate and most important part of this measure, the distribution of powers between the central government and the local authorities; in this I think is comprised the main theory and constitution of federal government; on this depends the principal working of the new system.

And again:

The real object which we have in view is to give to the central government those high functions and almost sovereign powers by which general principles and uniformity of legislation may be secured in those questions that are of common import to all the provinces, and at the same time to retain for each province such an ample measure of municipal liberty and self-government as will allow, and indeed compel, them to exercise those local powers which they can exercise with great advantage to the community.

And again:

In this bill the division of powers has been mainly effected by a distinct classification; that classification is four-fold: 1st. Those subjects of legislation which are attributed to the central parliament ex-

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clusively; 2nd. Those which belong to the provincial legislatures exclusively; 3rd. Those which are the subject of concurrent legislation; and 4th. A particular subject which is dealt with exceptionally.

Then, as to the subjects of concurrent jurisdiction, he says:

> There is as I have said a concurrent power of legislation to be exercised by the central and the local parliaments. It extends over three separate subjects—immigration, agriculture and public works.

Then in reply to a question asked by a noble lord, whether by the terms of arrangement that had been come to, Parliament was precluded from making any alteration in the terms of the bill?

He said that:

> It was of course within the competence of parliament to alter the provisions of the bill, but he should be glad for the House to understand that the bill partook somewhat of the nature of a treaty of union, every single clause of which had been debated over and over again and had been submitted to the closest scrutiny, and in fact as each of them represented a compromise between the different interests involved, nothing could be more fatal to the bill than that any of those clauses which were the subject of compromise should be subject to such alteration; that of course there might be alterations which were not material and which did not go to the essence of the measure and he would be quite ready to consider any amendments that might be proposed in Committee, but that it would be his duty to resist the alteration of anything which was in the nature of a compromise, and which if carried would be fatal to the measure.

Accordingly the bill was passed as introduced, without any alteration whatever, as the British North America Act of 1867.

From the above extracts it is apparent that that Act is but the reduction into legislative form of a treaty, after the fullest deliberation previously agreed upon between the provincial statesmen who where the originators and framers of the scheme of confederation contained therein and Her Majesty's Imperial Government, and such being the history of the origin of the scheme and of the treaty of union and of its embodiment

in an Act of Parliament, when a question should arise which should create any doubt as to whether a particular subject of legislation comes within any of the items enumerated in section 92, and so under the exclusive jurisdiction of the provincial legislatures, or within section 91 and so under the exclusive jurisdiction of the Dominion Parliament, the doubt must be solved by endeavouring to ascertain the intention of the framers of the scheme and the parties to such treaty. From the above extracts it is also apparent that the essential feature of the scheme of confederation was that the legislative jurisdiction conferred upon the central and provincial legislatures respectively should be exclusive upon all subjects placed under the jurisdiction of each, save only the three subjects which were made the subjects of concurrent jurisdiction; and that such exclusive jurisdiction conferred upon the central legislature, that is to say, the Dominion Parliament, extended over all matters of a *quasi* national and sovereign character and over all matters of common import and general interest, which affect the general interests of the confederacy as a whole, that is to say, over all matters in which the people of the confederacy as a whole may be said to have a common interest; and that the exclusive jurisdiction of the provincial legislatures was restricted to matters of a merely private, provincial, municipal and domestic character, all of which matters are comprehended in the subjects enumerated in the several items in section 92 of the Act, which under the heading "Exclusive Powers of Provincial Legislatures" declares that:

In each Province the Legislature may exclusively make laws in relation to the matters coming within the classes of subjects hereinafter enumerated.

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Then follow sixteen items, every one of which can with the utmost propriety be said to relate to subjects of a purely local, private, provincial, municipal and domestic character. But by section 91, it is declared that:

> It shall be lawful for the Queen by and with the advice and consent of the Senate and House of Commons to make laws for the peace, order and good government of Canada in relation to all matters not coming within the classes of subjects by this act assigned exclusively to the legislatures of the provinces, and for greater certainty but not so as to restrict the generality of the foregoing terms it is hereby declared that, notwithstanding anything in this act, the exclusive legislative authority of the Parliament of Canada extends to all matters coming within the classes of subjects next hereinafter enumerated, that is to say.

Then follow twenty-nine items, the second of which is:

> The regulation of trade and commerce.

The section then closes with this provision:

> And any matter coming within any of the classes of subjects enumerated in this section shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by this Act assigned exclusively to the legislatures of the provinces.

It has been sometimes, and still is by some, suggested that this provision refers grammatically only to item 16 of sec. 92; but this is a too critical construction of the Act, for what the enactment plainly says is that any matter coming within any of the classes of subjects enumerated in sec. 92 shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by this Act exclusively assigned to the legislatures of the provinces, thus, as I submit—and if I may be permitted the expression—explicitly implying that, as the fact in truth appears to me to be, all the matters exclusively assigned to

the provincial legislatures by the enumeration contained in section 92 were (within the intent of the framers of the scheme of confederation and so within the meaning of the British North America Act, 1867) of a purely local and private nature, that is to say, of a purely provincial, municipal and domestic character as distinguished from matters of common import and general interest to the people of the confederacy as a whole. The true effect of this provision in section 91 is plainly, as it appears to me, to give expressly to the Dominion Parliament, for the purpose of exclusive legislation upon all matters coming within the several subjects enumerated in section 91, legislative power, if required, over all of the subjects enumerated in the 16 items of section 92, every one of which relates to matters of a purely provincial, municipal, private or domestic character, that is to say, "of a local and private nature," so that legislation by the Parliament upon any of the subjects comprehended within any of the items enumerated in section 91 may be complete and effectual notwithstanding that for such purpose interference with some or one of the subjects comprehended in the enumeration of subjects in section 92 should be necessary, and such interference by the Dominion Parliament with any of the subjects enumerated in section 92 shall not be deemed to be an encroachment upon or interference with the legislative powers conferred upon the provincial legislatures.

Now according to the canons of construction as laid down by this court in *Fredericton* v. *The Queen* (1) and by the Judicial Committee of the Privy Council in *Russell* v. *The Queen* (2) (between which I do not find there is any substantial difference) if the jurisdiction to prohibit absolutely the carrying on of the trades under consideration, or of any trade,

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

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whether by retail or wholesale, is not comprised in some or one of the items enumerated in sec. 92 of the act the provincial legislatures have no such jurisdiction, but the same is expressly and exclusively vested in the Dominion Parliament; and even though a particular subject of legislation may be capable of being construed to come within sec. 92 reading that section by itself still if that subject comes within any of the items enumerated in sec. 91 it is taken out of the operation of sec. 92 which in such case is to be construed as not comprehending such subject.

Now the several questions in the case submitted to us are resolvable into this one, namely: Is jurisdiction to prohibit absolutely the manufacture in any province of the Dominion of Canada, or the importation into the province, or the sale therein either by wholesale or retail, of spirituous, fermented or other intoxicating liquors vested in the Dominion Parliament or in the legislatures of the respective provinces? In *Fredericton* v. *The Queen* (1) this question directly arose and the judgment of this court therein proceeded upon two grounds. 1st, that the provincial legislature had no jurisdiction over any subject matter not coming within some or one of the classes of subjects specially enumerated in sec. 92 of the Act and that upon principle and the authority of the judgment of the Supreme Court of the province of New Brunswick in the *Queen* v. *The Justices of King's County* (2), which judgment this court approved of and affirmed, the subject of absolute prohibition of the sale of intoxicating liquors (such being the character and purpose of the Act then under consideration) did not come within any of the classes of subjects particularly enumerated in, and contemplated by, sec. 92 as being placed under the jurisdiction of the provincial legislatures; and 2nd, that jurisdiction over such

(1) 3 Can. S. C. R. 505. (2) 2 Pugs. 535.

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subject, that is to say, absolute prohibition of the trade in intoxicating liquors was expressively and exclusively conferred upon the Dominion Parliament by the 91st sec., item no. 2. In *Russell* v. *The Queen* (1), wherein the same question arose as in *Fredericton* v. *The Queen*, (2) the Judicial Committee of the Privy Council, while proceeding wholly upon the first of the above grounds, guard themselves from being considered as dissenting from the second ground, upon which this court proceeded in *Fredericton* v. *The Queen* (2), as follows:

> Their Lordships having come to the conclusion that the act in question does not fall within any of the classes of subjects assigned exclusively to the provincial legislature, it becomes unnecessary to discuss the further question whether its provisions also fall within any of the classes of subjects enumerated in section 91. In abstaining from this discussion, they must not be understood as intimating any dissent from the opinion of the Chief Justice of the Supreme Court of Canada and the other judges who held that the act, as a general regulation of the traffic in intoxicating liquors throughout the Dominion, fell within the class of subjects "the regulation of trade and commerce" enumerated in that section, and was on that ground a valid exercise of the legislative power of the Parliament of Canada.

It has, however, frequently been and still is contended by some, but in my opinion without any sufficient grounds, that there are passages in some of the judgments of their Lordships of the Privy Council upon the construction of the British North America Act, 1867, which tend to the conclusion that the judgment of this court in *Fredericton* v. *The Queen* (2) cannot be sustained upon the second of the above grounds upon which this court proceeded, namely, that the Act under consideration there being for the absolute prohibition of the trade in intoxicating liquors (although by adoption of the principle of local option) was within the exclusive jurisdiction of the Dominion Parliament under sec. 91 item no. 2 of the British North America Act which enacts that "notwithstanding anything in

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

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the Act the exclusive legislative authority of the parliament of Canada extends over all matters coming within," among other items, that of "the regulation of trade and commerce."

It is true that their Lordships of the Privy Council in the *Citizens Insurance Company* v. *Parsons* (1) upon a very different subject from that of prohibition of the exercise of the trade in intoxicating liquors threw out merely the suggestion that possibly the expression "the regulation of trade and commerce" in item no. 2 of sec. 91 may have been used in some such sense as the words "regulations of trade" in the Act of Union between England and Scotland (2), and as those words in the Acts of state relating to trade and commerce, but in construing expressions used in the British North America Act, 1867, we must never, as I have already observed, lose sight of the fact that those expressions are but the embodiment of the terms and provisions of the treaty prepared by the provincial statesmen asembled at Quebec by authority of Her Majesty the Queen, and concurred in by Her Majesty's Imperial Government, for the purpose of federally uniting the British North American provinces into one government, and we must always keep prominently present to our minds that the object of the framers of our constitution in framing its terms and provisions was, as abundantly appears from the above extracted passages from their speeches, to adopt the best features of the constitution of the United States of America, the only federal constitution with which they were familiar, and to which they would naturally look for light as to what they should adopt and what alter or reject, when engaged in the task of distributing the legislative powers between the Dominion Parliament and the legislatures of the confederated provinces. Contemplating, as they

(1) 7 App. Cas. 112. (2) 6 Anne c. 11.

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were, the engrafting of what they considered the best features of the constitution of the United States of America upon the British constitution, for the purpose of framing a federal constitution for the union of the British North American provinces into a confederacy under one central government, it is, to my mind, with great deference I say it, altogether inconceivable that the framers of our constitution should have had present to their minds the Act of Anne, or any act of state of the Imperial Government; neither the one nor the other of these could be expected to throw any light upon the subject in which they were engaged, namely, the distribution of legislative powers between the central or Dominion Parliament and the legislatures of the provinces of the proposed confederacy, while, on the contrary, it was quite natural and to be expected that they should have had constantly present to their minds the constitution of the United States of America, the best features of which they desired to adopt, and to alter or reject those which did not seem to them to be desirable to be adopted. We must therefore, I submit, be excused if we confidently affirm that in making provision for the distribution of legislative powers between the Dominion Parliament and the legislatures of the confederated provinces, and in such distribution making provision that the Dominion Parliament should have exclusive jurisdiction in all matters coming within "the regulation of trade and commerce" in item no. 2 of sec. 91, neither was the Act of Union between England and Scotland, nor any Act of state of the Imperial Government relating to trade and commerce, ever present to the minds of the framers of our constitution, but that what in fact was so present was the constitution of the United States of America, the best features in which they were engaged in grafting upon the British constitution for the pur-

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pose of forming a new and more perfect constitution for the proposed confederacy of the British North American provinces; and that what they intended by the particular expression under consideration was to place "fully and unrestrictedly" (to use the language of the late Mr. George Brown above extracted), unlimited and exclusive jurisdiction in the Dominion Parliament over all matters of trade and commerce in every part of the Dominion, and that what they had in view in so doing was to strengthen the central parliament and to effect thereby an improvement in the constitution of the proposed confederacy over that of the United States of America, the central legislature of which has jurisdiction only over inter-state trade and commerce and that with foreign countries. If the framers of our constitution had contemplated conferring upon the Dominion Parliament only such a limited jurisdiction as that possessed by the Congress of the United States they would have had no difficulty, and doubtless would not have failed, in so expressing themselves; on the contrary the language they have used is of a most unlimited character and exhibits no intention of having such a limited construction. No argument in favour of such a limited construction can, I submit, be fairly drawn from the fact that jurisdiction is independently given by items 15, 18 and 19 of section 91, over banking, bills of exchange, interest and the like, which may be said to be matters coming within the classes of subjects coming under the terms "trade and commerce" for this repetition of powers involved in the enumeration of items appears to have been inserted for greater certainty, and there is, I think, an intention sufficiently manifested on the face of the Act, that the enumeration of particulars should not be construed so as to limit and

restrict the operation and construction of general terms in which the particulars may be included.

Then it was contended that a passage in the judgment of the Privy Council in *Hodge* v. *The Queen* (1) is in favour of the contention that the jurisdiction to declare that the trades of manufacturing and that of importing and that of selling intoxicating liquor shall be illegal and shall not be carried on, is vested in the provincial legislatures under sec. 92. If it be, it must be, under the express terms of the Act, exclusively so vested.

Now the passage relied upon in support of this contention is that wherein their Lordships say,

> that the principle established by their judgment in the *Citizens Insurance Co.* v. *Parsons* and *Russell* v. *The Queen* is that subjects which in one aspect and for one purpose fall within sec. 92 may in another aspect and for another purpose fall within sec. 91

What this passage conveys simply is that a particular subject matter may have two aspects in which it may be viewed and that viewed in one of such aspects jurisdiction over it may be exclusively vested in the provincial legislatures under sec. 92, and that viewed in the other of such aspects jurisdiction over it may be exclusively vested in the Dominion Parliament, and what I understand their Lordships by that passage to say is that for the purpose of determining whether a particular subject having two aspects in which it may be viewed comes under sec. 91 or sec. 92 regard must be had to the aspect in which the particular subject, for the time being under consideration, is to be viewed, not that a subject which according to the true construction of sec. 91 comes within one of the classes of subjects there enumerated and which is therefore under the exclusive jurisdiction of the Dominion Parliament, by the express terms of this section, can, nevertheless, by force of section 92, be under the jurisdiction of provincial legislatures.

(1) 9 App. Cas. 117.

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What is the true construction of the term "the regulation of trade and commerce," as used in section 91, item 2, is a matter which of course is fairly open to argument, and is to be determined, in my opinion, for the reasons already given, by ascertaining the intent of the framers of our constitution, which intent is, in my opinion, as I have above stated; but once it is determined that a particular subject under consideration does come within that term, the jurisdiction over it is vested exclusively in the Dominion Parliament, and being so, cannot be legislated upon by a provincial legislature. There is no concurrent jurisdiction given to both, save only over the three subjects specially designated as subject to concurrent jurisdiction.

The subject which we have now under consideration is the right of absolutely prohibiting the carrying on of the trades of manufacturing, importing and selling spirituous liquors, the right, in fact, of declaring by legislative authority that these trades, or some or one of them, shall not be carried on; that the carrying of them on shall be absolutely unlawful. This subject does not admit of two aspects. Between pronouncing the carrying on of a particular trade to be absolutely unlawful, and prescribing the manner in which, and the persons by whom, that trade, being lawful, shall be carried on, there is a vast difference. *Fredericton* v. *The Queen* (1) and *Russell* v. *The Queen* (2) are cases dealing with the former of such subjects, and *Hodge* v. *The Queen* (3) and *Sulte* v. *Three Rivers* (4) are cases dealing with the latter. In *Fredericton* v. *The Queen* (1) and *Russell* v. *The Queen* (2) the question was as to jurisdiction in the case of prohibition. In the former of those cases this court held that the provincial legislatures had had not under section 92 any jurisdiction to pass the

(1) Can. S. C. R. 505.
(2) 7 App. Cas. 820.
(3) 9 App. Cas. 117.
(4) 11 Can. S. C. R. 25.

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Act then under consideration, the purpose of which was to legislate upon that subject; and that by force of section 91, item 2, the Dominion Parliament had expressly exclusive jurisdiction to pass it. In *Russell* v. *The Queen* their Lordships of the Judicial Committee of the Privy Council, while expressing no opinion as to the applicability of section 91, item 2, held that there was nothing in section 92, conferring on the provincial legislatures jurisdiction to pass the Act in question, the sole purpose of which was in relation to the absolute prohibition of the trade. In *Hodge* v. *The Queen* on the other hand they held that the provincial legislatures had exclusive jurisdiction over the regulation of the manner in which and the persons by whom the trade, being a lawful one, might be carried on, a subject matter as different as it is possible to conceive from jurisdiction legislatively to declare the carrying on of the trade to be absolutely unlawful. Here then we have an illustration of the application of the language of their Lordships in the passage above extracted from their judgment in *Hodge* v. *The Queen*, namely, if we regard the traffic in intoxicating liquor in the aspect of total jurisdiction of the carrying on of the trade, that is to say, eliminating it from the category of lawful trades, in that aspect the jurisdiction is exclusively in the Dominion Parliament; but if we regard it in the aspect of regulating the manner in which and the persons by whom the trade, being a lawful one, may be carried on in a particular province, or a particular locality of a province, that is a subject exclusively within the jurisdiction of the provincial legislatures. Between the judgments in these cases there is no contradiction, nor have I been able to see in any of the judgments of their Lordships of the Privy Council anything which can be said to manifest judicial dissent

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from either of the grounds upon which the judgment of this court in *Fredericton* v. *The Queen* (1) proceeded. It seems however to be a matter of no importance whether the question, as to where is vested jurisdiction over total prohibition of the trade, is rested upon both of the grounds upon which this court proceeded in *Fredericton* v. *The Queen* (1) or upon the single ground upon which their Lordships of the Privy Council proceeded in *Russell* v. *The Queen* (2). The report of the proceedings in the Privy Council of the case of the Liquor License Acts of the Dominion Parliament of 1883 and 1884 which has been laid before us as part of the present case contains observations of their Lordships recognizing the distinction, which I confess to my mind appears very plain, between the right to prohibit the carrying on of a particular trade and so to destroy it and deprive it of lawful existence and the right to regulate the manner in which and the persons by whom the trade, being a lawfully existing one, shall be carried on. Sir Montague Smith there in the course of the argument of counsel said:

> The distinction, if it be one, between the Act in *Russell* v. *The Queen* (1) and this Act (the Act of 1883 then under consideration) is that that (in *Russell* v. *The Queen* (2)) was a prohibition Act applying to the whole of the Dominion regardless of what had been done and prohibiting the liquor traffic. I do not wish to say how it is but the question is whether this (the Act of 1883) is not, whatever terms it may use in the preamble, really regulating in each province the local traffic.

And again:

> of course you must look at every Act and see what is the scope and object and purpose of it. This (the Act of 1883) is not really to prohibit but it is to limit.

And again:

> the main object of the Act is not to prevent the liquor traffic but to regulate it.

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

And again:

to my mind there is a distinction between the two Acts that is to say between the prohibition Act under consideration in *Russell* v. *The Queen*, and the Dominion Liquor License Act of 1883 which was but a regulating Act. The fact that the latter Act applied to the whole Dominion made no difference for it may, I think, be said to be obvious that the Dominion Parliament never could acquire jurisdiction over a subject matter placed by sec. 92 under the exclusive jurisdiction of the provincial legislatures by assuming to legislate upon such subject for the whole Dominion. So neither could a provincial legislature acquire jurisdiction over a subject coming within any one of the classes of subjects enumerated in sec. 91 by restricting the application of an Act of the provincial legislature upon such subject to the limits of the province.

But it is argued that neither in *Fredericton* v. *The Queen* nor in *Russell* v. *The Queen* was the item no. 8 of sec. 92 referred to or considered and that therefore their Lordships' judgment in *Russell* v. *The Queen* and that of this court in *Fredericton* v. *The Queen* are open to review upon the question of prohibition now under consideration. From the fact that this item was not relied upon in those cases it may fairly be inferred that it never was considered by the courts or the bar to be applicable. The jurisdiction conferred by that item seems to be, that of establishing and maintaining municipal institutions. When the framers of our constitution were conferring upon the provincial legislatures exclusive jurisdiction to make laws in relation to "municipal institutions in the province," they had no doubt in view municipal institutions such as existed at the time of confederation, but this item no. 8 sec. 92 says nothing as to the powers

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with which such municipal institutions may be invested; that seems to have been left to the discretion of the provincial legislatures to be exercised within the limits of their own jurisdiction and would reasonably comprehend within such limits all such powers as were then possessed by such municipalities and which were essentially necessary to the good working of such institutions or had always been possessed by all such institutions, as for example the power of issuing licenses to the persons to be engaged in the traffic in intoxicating liquors and the power of regulating the manner in which such persons should carry on the trade in shops, saloons, hotels or taverns, which as being matters of purely provincial, municipal and domestic character were subject to, jurisdiction over which was intended to be exclusively vested in, the provincial legislatures; and this is what *Sulte* v. *Three Rivers* decides and what was intended to be conveyed by the passage from my judgment in that case which was cited by the learned counsel who argued the present case upon behalf of the province of Ontario; but a special power only then recently for the first time conferred upon municipalities in the province of Canada and which had never been conferred upon municipalities in any of the other provinces could never be said to be a power essentially necessary to the good working of such institutions; such power therefore cannot be held to be comprehended in item 8 of that section.

In this subject is involved the particular consideration of the last of the questions submitted to us, namely, whether the 18th section of the Act of the legislature of Ontario, 53 Vic. chap. 56, is or is not *ultra vires*. The jurisdiction assumed to be exercised by the Ontario legislature in this section is not a jurisdiction which is claimed to be conferred upon provincial legisla-

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ures by anything expressed in section 92 of the British North America Act, but a jurisdiction which it is contended is impliedly vested in the Ontario Legislature, arising from the fact that municipalities in the late province of Canada had at the time of confederation, by virtue of special Acts of the legislature of that province, power to prohibit, by by-laws to be passed and adopted in the manner prescribed by the special Act, the sale by retail of spirituous liquors within the limits of the municipality passing such by-laws, a power which was not possessed by municipalities in the province of Nova Scotia or in that of New Brunswick, and such Acts being repealed it is contended that the legislature of Ontario has jurisdiction to revive their provisions. That the legislature of the late province of Canada had jurisdiction to pass an Act in prohibition of all traffic in intoxicating liquors or in any other article of trade may be admitted to be unquestionable, but I apprehend it cannot admit of doubt that unless the provincial legislatures have, all of them, under their new constitution, jurisdiction to pass an act *de novo* for the purpose of prohibiting absolutely within their respective provinces the sale of intoxicating liquors, the legislature of Ontario has no special jurisdiction to invest municipalities with such a power by passing an Act purporting to revive the provisions of an Act passed by the legislature of the late province of Canada within its jurisdiction, and which conferred such a power upon municipalities of the said late province of Canada. The question therefore involved in the seventh question is precisely the same as that involved in the first and subsequent questions, namely: Have provincial legislatures of the confederacy, under their new constitution, jurisdiction to make laws in prohibition of the trades of manufacturing, of importing or of selling spirituous liquors by wholesale or by retail?

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The precise history of the legislation recited in the 18th sec. of the Ontario Act 53 Vic. ch. 56 and upon which the legislature of the province rest the jurisdiction assumed by them in enacting the provisions of that section is as follows: The legislature of the late province of Canada by a special Act passed in 1864, 27 & 28 Vic. ch. 18, conferred power upon the councils of municipalities to pass by-laws in prohibition of the sale of intoxicating liquors within the limits of the municipality, subject to certain conditions involving the adoption of the principle of what is called local option. The provisions of the said Act 27 & 28 Vic. ch. 18 were consolidated in 1866 as sec. 249 subsec. 9 of the consolidated Municipal Act, viz., 29 & 30 Vic. ch. 51. The whole of this section 249 was expressly repealed by an Act of the Ontario Legislature passed in 1869, 32 Vic. ch. 32, but its terms were, either inadvertently or by design, repeated in subsec. 7 of sec. 6 of the latter act. In 1874 the legislature of Ontario passed another Act 37 Vic. ch. 32 intituled "An Act to amend and consolidate the law for the sale of fermented and spirituous liquors," and thereby the said Act 32 Vic. ch. 32, and another Act 32 Vict. ch. 28, and also an Act 36 Vic. ch. 48 intituled "An Act to amend the Acts respecting tavern and shop licenses" were wholly repealed and new provisions were enacted, but among such provisions there was nothing of the nature of the provisions which had been in subsec. 7 of sec. 6 of the repealed Act 32 Vic. ch. 32, but in lieu thereof provision was made for regulating the issue of licenses for the sale of intoxicating liquors in each municipality by an officer to be appointed by the lieutenant governor to be called "the issuer of licenses."

Now, upon and from and after the passing of this Act, the only authority, if any there was, which municipalities in the province of Ontario had, or could claim

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to have, to pass a by-law in prohibition of the sale of intoxicating liquors was in virtue of the provisions of the above recited Act of the legislature of the late province of Canada, 27 & 28 Vic. ch. 18, of 1864, and of sec. 129 of the British North America Act, 1867, which enacted that:

> Except as otherwise provided by this Act, all laws in force in Canada, Nova Scotia or New Brunswick at the union, &c., shall continue in Ontario, Quebec, Nova Scotia or New Brunswick respectively, as if the union had not been made, subject nevertheless, except with respect to such as are enacted by, or exist under, Acts of the Parliament of Great Britain, or of the United Kingdom of Great Britain and Ireland, to be repealed, abolished or altered by the Parliament of Canada or by the legislatures of the respective provinces, according to the authority of the Parliament and of the legislatures under this act.

It being then only in virtue of this Act, 27 & 28 Vic. ch. 18, that municipalities in the province of Ontario possessed, if they possessed, the power to pass by-laws in prohibition of the sale of intoxicating liquors, such power must necessarily absolutely cease upon the repeal of that Act. But in 1878 the Dominion Parliament, regarding the prohibition of the sale of intoxicating liquors to be a subject over which exclusive jurisdiction was conferred upon the Parliament and in exercise of the right reserved to parliament by said sec. 129 of the British North America Act, passed the Canada Temperance Act of 1878, whereby, as is recited in the said 18th section of the Ontario Act, 53 Vic. ch. 56, the above Act of 1864, 27 & 28 Vic. ch. 18, was absolutely repealed, save as regards localities where the Act had then already been acted upon, and power is conferred by the Act of 1878 upon all electors in every municipality in every province of the Dominion qualified and competent to vote at the election of members of the House of Commons, upon certain conditions, and in adoption of the principle of local option, to prohibit the sale of

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intoxicating liquors in every municipality adopting the provisions of the Act. This Act, as an Act of prohibition, has been held by the Judicial Committee of the Privy Council in England in *Russell* v. *The Queen* (1), and by this court in *Fredericton* v. *The Queen* (2), to have been within the jurisdiction of the Dominion Parliament and not to have been within the jurisdiction of a provincial legislature; the object sought to be attained by the said 18th section of the Ontario statute 53 Vic. chap. 56, would seem to be to re-open the question adjudicated upon in those cases, and mainly upon the suggestion that item 8 of section 92 of the British North America Act was not considered by the Judicial Committee of the Privy Council or by this court in those cases. In my opinion there is nothing in this item no. 8 of section 92 or in any part of the British North America Act which calls for or justifies any qualification of the language of their Lordships of the Privy Council as above cited from their judgment in *Russell* v. *The Queen* (1); and the principle established by that judgment is, in my opinion, that jurisdiction over the prohibition of the trade in intoxicating liquors, whether it be in the manufacture thereof, or the importation thereof or the sale thereof either by wholesale or retail, is not vested in the provincial legislatures, but is exclusively vested in the Dominion Parliament. If the provincial legislatures have jurisdiction to prohibit absolutely the sale of intoxicating liquors it must, I think, be admitted that they have like jurisdiction over the manufacturing, and also over the importation thereof; nay more, as the act gives them no more jurisdiction over the prohibition of the exercise of one trade than of another they would equally have jurisdiction to prohibit the manufacture

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

of tobacco, cigars, &c., the importation of opium, and the manufacture, importation and sale of any other article of trade, and so in fact they would have that sovereign legislative jurisdiction over every trade, and over those general subjects in which the people of the confederacy as a whole are interested, and thus the main object which the authors and founders of the confederacy had in view in framing the terms and provisions of our constitution as to the distribution of legislative jurisdiction between the Dominion Parliament and the legislatures of the provinces would be defeated. In addition to the ground upon which their Lordships of the Privy Council proceeded in *Russell* v. *The Queen* (1), this court held, as already observed, in *Fredericton* v. *The Queen* (2) that exclusive jurisdiction over the prohibition of the sale of spirituous liquors which was the subject matter of legislation in the Canada Temperance Act of 1878 was a subject placed expressly under the exclusive jurisdiction of the Dominion Parliament by sec. 91, item 2, of the British North America Act. That judgment has never been reversed, nor, in my opinion, shaken, and while it stands unreversed by superior authority I consider this court to be bound by it. If ever it should be reversed it will in my opinion be a matter of deep regret, as defeating the plain intent of the framers of our constitution and imperilling the success of the scheme of confederation.

Upon the whole then, in answer to the several questions submitted to us I am, for the reasons above stated, of the opinion that upon principle—that is to say upon the true construction of the British North America Act, 1867, apart from all authority—and upon authority that is to say upon the authority of the judgment of the Privy Council in *Russell* v. *The Queen* (1)

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

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apart from *Fredericton* v. *The Queen* (1) and upon the authority of the judgment of this court in *Fredericton* v. *The Queen* (1) apart from *Russell* v. *The Queen* (2), the several questions submitted to us in this case must be all answered in the negative.

SEDGEWICK J.—A study of sections 91 and 92 of the British North America Act leads one to the conclusion that the following proposition may be safely adopted as a canon of construction, viz.:—

When a general subject is assigned to one legislature, whether federal or provincial, and a particular subject, forming part or carved out of that general subject, is assigned to the other legislature, the exclusive right of legislation, in respect to the particular subject, is with the latter legislature. For example, Parliament has marriage, but the legislatures have the solemnization of marriage. On that subject they are paramount and supreme. So, too, the legislatures have "property and civil rights," words in themselves as wide almost as the whole field of legislation; but, parcelled out from that wide field, Parliament has a number of particular and specific subjects where it likewise is paramount and supreme. Among them is "the regulation of trade and commerce." So far Parliament has complete and exclusive jurisdiction as to that. But we have to go farther. We have to turn again to section 92, and we find that "shop, saloon, tavern, auctioneer and other licenses," a subject carved out of "trade and commerce," is given to the legislatures. If the principle above enunciated is sound, then Parliament can only regulate the liquor trade or legislate in respect to it, subject to the paramount and controlling right of the local legislatures in respect to liquor licenses for revenue purposes. The enumeration and assigning of

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

the particular subject to the one body overrides and controls the other body, although charged with the general subject, and that, too, without reference to the question of subordination or co-ordination between the two bodies.

Another principle of construction in regard to the British North America Act must be stated, viz., it being in effect a constitutional agreement or compact, or treaty, between three independent communities or commonwealths, each with its own parliamentary institutions and governments, effect must, as far as possible, be given to the intention of these communities, when entering into the compact, to the words used as they understood them, and to the objects they had in view when they asked the Imperial Parliament to pass the Act. In other words, it must be viewed from a Canadian standpoint. Although an Imperial Act, to interpret it correctly reference may be had to the phraseology and nomenclature of pre-confederation Canadian legislation and jurisprudence, as well as to the history of the union movement and to the condition, sentiment and surroundings of the Canadian people at the time. In the British North America Act it was in a technical sense only that the Imperial Parliament spoke; it was there that in a real and substantial sense the Canadian people spoke, and it is to their language, as they understood it, that effect must be given.

Can a local legislature absolutely prohibit the traffic in intoxicating liquors? That is the substantial question before us. The correct solution of the problem is largely affected (although not concluded) by the meaning that is to be given to the words "the regulation of trade and commerce" in section 91. That these words in their plain and ordinary meaning are wide enough to include the liquor traffic is unques-

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tioned; the making of liquor, its sale, that is a trade or business, the dealing in it, the buying and selling of it for purposes of profit, that is commerce. But was this particular trade, the liquor business, intended to be included in the general words? That is the question. And as I have already suggested, the true answer is to be sought not so much from the rules of statutory construction laid down in the text books in regard to ordinary enactments, as by reference to provincial statutes and jurisprudence at the time of the union, and to the circumstances under which that union as well as its particular character took shape and form

It was in 1864 that the Quebec convention was held. Upper and Lower Canada, Nova Scotia, New Brunswick, Prince Edward Island and Newfoundland were represented. The Quebec resolutions were passed, and these resolutions having been adopted by the three legislatures of Canada, Nova Scotia and New Brunswick formed the basis of the Union Act of 1867. The union was a federal not a legislative union. The English speaking provinces (considering Upper Canada as a province) were in the main in favour of a legislative union, but Lower Canada properly tenacious of "its language, its institutions and its laws," secured as they had been by international treaty and imperial enactment, desired a provincial legislature in order to the perpetuity of these rights, rights which it was thought might be invaded were they to be left to the mercy of a sovereign and untrammelled legislature, the large majority of which would necessarily belong to the English speaking race. And so the question was, a federal union or none at all. That being decided the question of distribution of powers arose. To what powers shall the federal Parliament succeed, what powers shall the provincial legislatures retain? The

American civil war was just closing, a conflict which from a legal standpoint had its origin in a dispute as to the constitution of the United States, the question of State rights; that controversy was not to be a ground of strife in the new nation and so first and foremost it was agreed that the central parliament was to have plenary legislative authority and that the local legislatures should have jurisdiction over such subjects alone as were expressly enumerated and in terms assigned to them. I have said that the Lower Canadian delegates were determined to maintain their peculiar institutions by means of a local legislature; but they were none the less desirous of giving the central authority all jurisdiction compatible with that determination, including generally those subjects that would be common to the whole Canadian people irrespective of origin or religion. Now the English criminal law was the law of Lower Canada; it had become part of that law in 1764; and Lower Canada was satisfied with it. It would therefore be the common heritage of the new Dominion, and by common consent it was given as a subject of jurisdiction to the central Parliament.

Then, too, the Lower Canadian legislature and people had long previously adopted of their own free will the general principles of English commercial law. As early as 25 Geo. III, they had made the laws of England the rules of evidence in all commercial matters. They had adopted, practically without variation, the English law respecting bills of exchange and promissory notes, partnerships, the limitations of actions in commercial cases and even the statute of frauds. In 1864 they had accepted a general law of bankruptcy limited, however, to traders only, and had previously adopted the practice of the English courts in the trial of commercial cases. Commercial law was not in that

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class of "institutions and laws" which they regarded as peculiarly their own, and they were willing and anxious, seeing how the future progress and prosperity of the country would largely depend upon its trade and commerce, upon the growth, manufacture and interchange of commodities throughout the whole Dominion, irrespective of and untrammelled by provincial boundaries or provincial enactments, that the federal parliament should alone legislate in respect thereto, so that as there would be a common criminal law throughout Canada there should be a common commercial law as well. And that was in fact the common aim and object of all the provinces. But how give expression to this aim? In making that clear what form of words should be used? A question not difficult of solution.

Five years previously the statute law of the then province of Canada had been revised, consolidated and classified in three volumes, one volume containing the statute law common to the united province, the others the statute law applicable exclusively to Upper and Lower Canada respectively. This revision and classification, the work of the most eminent jurists in the province, became by Act of Parliament the statute law of the country, the classification having the same legal force as the statutes classified, just as if there had been a substantive enactment to the effect that thereafter in Canadian legislation the specification of a general subject in the general classification should include all the specific and particular subjects enumerated under that specification.

Reading this classification in the three volumes referred to and comparing it with sections 91 and 92 indubitable evidence will be found that the compilers of the Quebec resolutions were largely aided by the work of 1859, in the selection of words by which the distribution of powers was described. The language of a

large proportion of the 45 enumerated subjects is substantially identical with the language of the classification in the Canadian consolidation.

Now let us examine this classification. In the Consolidated Statutes of Canada the whole subject matter of legislation is divided into 11 titles of which "trade and commerce" is the 4th. Under this title are included among other subjects, navigation, inspection laws in relation to lumber, flour, beef, ashes, fish, leather, hops, &c., weights and measures, banks, promissory notes and bills of exchange, interest, agents, limited partnerships, and pawn brokers. In the Consolidated Statutes of Upper Canada under "trade and commerce" are included among other subjects, commercial law, written promises, chattel mortgages and trading and other companies. And in the Consolidated Statutes of Lower Canada under the same designation of "trade and commerce" are included the inspection of butter, the measurement and weight of coals, hay and straw, partnerships, the limitation of actions in commercial cases, and the Statute of Frauds.

Let us turn now to Nova Scotia; a few weeks before the convention in Quebec, the Nova Scotia legislature had passed the Revised Statutes of Nova Scotia (third series) divided as in the case of Canada into parts, titles and chapters. One of the titles is "of the regulation of trade in certain cases," and under it are among others, the following subjects:—partnerships, factors and agents, bills of exchange, currency, mills and millers, regulation and inspection of merchandise, and weights and measures. This classification was practically the same in the first revision in 1851, so that for at least 13 years the expression "regulation of trade" had no uncertain meaning.

In the Revised Statutes of New Brunswick of 1854 there was practically the same classification. Under

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"the regulation of trade in certain cases" were included statutes relating to lime, bark, flour, weights and measures, and lumber, the Interpretation Act (cap. 161 sec. 35) enacting that parts, titles, &c., should be deemed as parts of the statutes.

It will be observed that in no case is reference made to the liquor traffic under "trade and commerce" or "the regulation of trade." In the Canadian consolidation it is placed under "revenue and finance" (subhead) "Provincial duty on tavern keepers." In the Upper Canada consolidation it is referred to in the Municipal Act (cap. 54, 1866,) and in two ways; first under the head of "shop and tavern licenses," and secondly under the head of "prohibited sale of spirituous liquors." In the Lower Canada consolidation it is referred to under "fiscal matters." In the Nova Scotia revision under "the public revenue," the Revised Statutes of New Brunswick containing no chapter regulating the liquor traffic.

Now, we have here, I think, a clear indication of what at the time of confederation the Canadian people and legislatures understood to be included within the words "trade and commerce." They included, unquestionably, the carrying on of particular trades or businesses, and I think commercial law generally. The actual legislation under "trade and commerce" in regard to certain staple articles of commerce, such as bread, fish, coals, &c., indicates that any other legislation in the same line respecting any other article of commerce would come under the same description, so I take it that the regulation of the liquor traffic, whether by licensing it or prohibiting it altogether, has to do with "trade and commerce."

Such being the state of the existing legislation and the view that the different legislatures had of the all-inclusiveness of the phrases "trade and commerce"

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and "regulation of trade," what better collocation of words could be used for the purpose of making it clear that Parliament was to have exclusive jurisdiction in all matters relating to trade and relating to commerce, including the importation, manufacture and sale of all kinds of commodities, than that combination of the two phrases, the one from the sea board, the other from the inland provinces, to be found in sec. 91 "the regulation of trade and commerce"? And the words having that meaning, having been placed there for that object, are we not bound to give them the intended effect?

I am not attempting to even criticise the correctness of the conclusion to which their Lordships of the Privy Council came in *Citizens Ins. Co.* v. *Parsons.* I may be permitted, however, with all deference, to suggest that some of the considerations to which I have referred were not presented to their Lordships when the effect of the words under review was being discussed (1). All I suggest is that, inasmuch as the British North America Act was an Act materially affecting, modifying, repealing, pre-existing Canadian statute law, and revolutionizing the constitution of the component provinces, in interpreting that Act reference may and must be had to provincial statute law, rather than to imperial statute law, and that where, as in the present case, the constitutional Act uses a phrase which for years had had a well defined meaning in Canadian legislation, that is the meaning which should be given to it when used in that Act.

And I have this further observation to make. The judgment referred to contains the following: "If the words (trade and commerce) had been intended to have the full scope of which, in their literal meaning, they are susceptible, the specific mention of several of the

(1) P. 277, vol. 1, Cartwright; 7 App. Cas. at p. 112.

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other classes of subjects enumerated in section 91 would have been unnecessary; as "15 banking, 17 weights and measures, 18 bills of exchange and promissory notes, 19 interest, and even 21, bankruptcy and insolvency."

Now, circumstances existing in Canada, the then state of jurisprudence, for example, rendered it wise, if not absolutely necessary, that the classes just referred to should be specifically mentioned. The provinces had "property and civil rights" given them. In one phase or another, almost every enactment in some way affects property and civil rights; the *raison d'être* of constitutional society, the *motif* of the social contract, is the protection of property and civil rights. Criminal law, fiscal law, commercial law, in fact, all law at some point, or in some way, touches or affects property and civil rights. Leave out several of the subjects mentioned in 92, and there would have been a perpetual conflict between "property and civil rights" on the one hand, and many of the enumerated subjects of 91, on the other; so wisdom suggested *ex abundanti cautelâ* what was done.

Besides, in Lower Canada, there had been a long course of jurisprudence as to what constituted "a commercial matter." Some business transactions were held to be commercial matters, others not. In a dispute between an officer of the British army and his wine merchant, a promissory note given for a wine bill was held to be a non-commercial matter. So, I suppose, interest on such a note would be held to be non-commercial. Nor would the case be altered if the note were discounted at a bank. All these questions, and difficult and important many of them have been, were wisely ended, so far as the constitution was concerned, when banking, bills and notes and interest were expressly given to the Dominion. So, too, with weights and measures

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the duty of making by-laws, or enforcing statutes in respect to weights and measures was in some cities and provinces under municipal control. The question would be, is this subject a "matter of trade and commerce," or a municipal matter? Its insertion in 91 settled it. And lastly as to bankruptcy and insolvency. This subject was wisely inserted in 91 in view of the fact already pointed out that in Lower Canada bankruptcy legislation applied to traders only (the phrase "insolvent" being limited in its use to non-traders) and in view too of the further fact that in the jurisprudence of the United States where the constitution gave "the matter of bankruptcies" to congress, it was held that "insolvency" belonged to the state legislatures. The insertion of both in 91, settled for Canada that particular question.

I have ventured to make these observations merely with the view of inviting further consideration and investigation as to the proper functions and jurisdiction of the federal authorities in regard to "trade and commerce," and to the line of delimitation between that subject and "property and civil rights."

Assuming however, that the prohibition of the liquor traffic is a matter of "trade and commerce," the question is not ended. "Property and civil rights" is controlled by the "regulation of trade and commerce," but is there anything in section 92 which controls or modifies "trade and commerce"? In my view there is much. First, there is "direct taxation within the province in order to the raising of a revenue for provincial purposes." That involves the right of taxing, even unto death, institutions incorporated under Dominion law (as was decided by the Privy Council in the Lambe case (1), such institutions obtaining corporate rights in all cases excepting banks, not because of any express

(1) *Bank of Toronto* v. *Lambe* 12 App. Cas. 575.

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powers given to Parliament, but either under "trade and commerce" or under its general authority to legislate in respect to "peace, order and good government," it being clear that the legislatures may incorporate such companies as are formed for provincial objects only (article 11).

Secondly, there is (article 9) "shop, saloon, tavern auctioneer and other licenses in order to the raising of a revenue for provincial local or municipal purposes."

The effect of this article is practically to give the regulation of the liquor traffic to the legislatures.

So long as such regulating legislation has as its main object the raising of revenue, it may contain all possible safeguards and restrictions as ancillary to the main object, the effect of which may be to repress drunkenness, and promote peace, order and good government generally. If, however, a fair examination of an Act purporting to be of this kind leads inevitably to the conclusion that the object of the legislature in passing it was not the raising of revenue and the licensing and regulating of the traffic for that purpose, but the suppression of the traffic altogether, in other words, that it was intended to be not regulative but prohibitory, such an Act will find no support for its validity from this article. (I will presently inquire whether that support can be found elsewhere). And *a fortiori*, the legislatures cannot under this article pass an Act of absolute prohibition, for that would be in direct conflict with the expressed object for which the power was solely given. The destruction of the traffic would entail the destruction of the revenue, not the raising of it.

Except for the decision of the Judicial Committee in *Russell* v. *The Queen* (1) (the Scott Act case), much might be said to favour the view that the right of the

(1) 7 App. Cas. 829.

legislatures to regulate the liquor traffic for revenue purposes was unlimited and could not be taken away by virtue of anything in 91, whether "peace, order and good government," or "trade and commerce," or even "the criminal law"; that the central Parliament could not, by virtue of any of its powers, destroy a special power given to the local legislatures for a special and particular purpose, and that the Scott Act itself was an infringement of the provincial rights.

It might be urged that neither body could of itself, by virtue of its given powers, pass a prohibitory law, but that independent legislation on the part of both would be necessary, the Dominion passing an Act prohibiting the traffic in so far only as it had a right to prohibit it, but reserving to the provinces the fullest and freest right under article 9 to raise revenue from it, and the provinces thereupon passing legislation abrogating the license system, and surrendering their right to revenue from it.

(The theory that if, under our constitution, one body cannot pass an Act upon any given subject the other necessarily can is a fallacy. A subject may be so composite in its character, may be formed of one or more elements assigned to the one legislature and of one or more elements assigned to the other, that neither one can effectually deal with the combination. For example, neither legislature could pass an Act abolishing direct taxation for municipal purposes and authorizing the raising of revenue by means of *octroi* or imposts upon all goods coming in through the city gates, or an Act authorizing a province to raise and collect its revenue by indirect taxation. This disability is a necessary incident of the federal system, and if it is to be got rid of that can only be effected by abolishing the system itself.

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The view which has pressed itself upon my mind is that prohibition may be a question of that character, but as it was not so held in *Russell* v. *The Queen* (1), and as it does not substantially affect the result of this reference, I take it for granted that the fallacy to which I have referred is not an element in the present case.)

The question now arises: Is the general right of the federal Parliament to legislate in regard to the liquor traffic, further restrained by article 8 of sec. 92, "municipal institutions in the province"? In other words, can a provincial legislature by virtue of that article, absolutely prohibit the traffic?

At the time of the union the province of Canada had given to municipalities in both sections the right of passing by-laws prohibiting the sale of liquor. In that province there was also then in force an act known as the "Dunkin Act," an enactment similar in scope and object to the present Canada Temperance Act, the principle of local option being allowed to operate to its fullest extent. But neither in Nova Scotia nor New Brunswick (as I understand the facts) did local option prevail. It is true that an applicant for license had to comply with certain conditions, one of them, in Nova Scotia, being that his application had to be accompanied by a petition from a fixed proportion of the ratepayers of the locality. To that extent only did local option (if that is local option) exist.

Such was then the state of the law, but some historical facts may also be mentioned as having relation to the matter. The question of prohibition had then for years been a vital political question in the maritime provinces; the public mind had been in a perpetual state of turmoil about it, the ablest statesmen of the time had been in public antagonism over it; elections had been won and lost upon it. For two successive

(1) 7 App. Cas. 829.

years prohibitory legislation had been introduced in the Nova Scotia legislature, and a bill of that character was on one occasion successfully carried through the lower house. In New Brunswick a prohibitory law had actually passed and remained in operation for a year. It was then repealed with a reversion to license law. Such then was the attitude of the public mind in two of the three confederating provinces at the time of the union.

What meaning then is to be given to "municipal institutions in the province"? Three answers may be advanced. First, it may mean that a legislature has power to divide its territory into defined areas, constitute the inhabitants a municipal corporation, or community, give to the governing bodies or officers of such corporations or communities, all such powers as are inherently incident to or essentially necessary for their existence, growth and development, and confer upon them as well all such authority and jurisdiction as it may lawfully do under any of the enumerated articles of sec. 92. That is the narrowest view. Or, secondly, it may mean that a legislature may also confer upon municipalities, in addition to these powers, all those powers that were possessed or enjoyed in common by the municipalities or municipal communities of all the confederating provinces at the time of the union, the *jus gentium* of Canadian municipal law; or, finally, it may mean that a legislature may confer upon municipalities all those powers which in any province, or in any place in a province, any municipality at the time of the union, as a matter of fact, possessed by virtue of legislative or other authority.

And the argument in the present case is that because at the time of the union one of the three provinces had given the right of local prohibition to municipalities it must be assumed that the framers of

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the Act and all the provincial legislatures as well as the Imperial Parliament itself, must have intended by the use of the phrase "municipal institutions" to give to the local legislatures the right to pass prohibitory legislation, and that, too, without reference to municipalities at all. I dissent from this wide proposition. The first view, in my judgment, is the proper one, a view which gives scope for liberal interpretation as to what may constitute the essence of the municipal system, and give due effect in that direction to the municipal *jus gentium* of the three old provinces; and I entertain the strongest doubt if it ever was contemplated by the use of the words "municipal institutions" to make any particular reference to the liquor traffic at all. The following considerations point, I think, in that direction:

(*a.*) The question of the liquor traffic was dealt with, and I think disposed of, by article 9 in relation to licenses. In the Quebec resolutions and in the proceedings of the three assenting legislatures, the article read "shop, saloon, tavern, auctioneer and other licenses" only; the limitation as to revenue was an addition made in London, with the assent of the colonial delegates there, just before the Act became law (1). The article as first framed would have had a much broader application than it has in its present shape, and possibly might have given prohibitory powers to the legislatures, and I can only suggest that the limitation was imposed for the very purpose of clearly limiting the provinces to regulation only. Besides, if the right to prohibit as well as to regulate is involved in "municipal institutions," if that phrase includes all powers previously given municipalities, including the issuing of all the licenses referred to in article 9, why particularly specify these licenses in a separate article?

(1) See Pope's life of Sir John Macdonald, Appendix vol. 1.

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I have always understood it to be a rule of statutory construction that where special provisions are made in regard to a particular matter and there are in the same statute general provisions broad enough apparently to cover the same matter, the special provisions govern, not the general; the particular intent prevails (2).

(*b.*) The collocation of articles 8 and 9, and the sources from which the phraseology was probably taken point to the same conclusion; the article relating to licenses follows the one relating to municipal institutions as if the former were of the less moment. In the Municipal Act of Upper Canada (1866), at page 583, there is a sub-title "shop and tavern licenses" and in the same section and on the same page there is another sub-title "Prohibited sale of spirituous liquors." May it not be properly suggested that this particular subject was designedly omitted?

(*c.*) Considering that the question of prohibition was a vital social and political question (and almost as much so in 1864 as to-day); considering especially the history of the question in the lower provinces; I can scarcely bring myself to believe that it was omitted from 92 by reason of "municipal institutions" containing it. If it had been intended that the provinces should have it it would have been expressly enumerated. Regulation by means of license was. Why omit prohibition?

(*d.*) The jurisprudence on the question also throws light. In *Keefe* v. *McLennan* (1) decided in Nova Scotia in 1876, nine years after confederation, a most able judgment was delivered by the learned Equity judge upon the whole question, and neither in the argument, nor in the judgment was it even suggested that the

(1) 2 R. & C. 5.

(2) Potter's Dwarris 272–3; and see *London Assoc. of Ship Owners* v. *London & India Docks Joint Committee*, Lord Justice Lindley 2 Rep. at pp. 30 and 31.

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power claimed came under "municipal institutions." The same observation applied to *Fredericton* v. *The Queen* in the Supreme Court of New Brunswick (1). Why this long silence? The words "municipal institutions" were there in section 92, as prominent then as now, but no one in the maritime provinces ever dreamed that "prohibition" was concealed or wrapped up within them. Their Lordships of the Privy Council seemed of like opinion in *Russell* v. *The Queen* (2), decided in 1882, even although at that time *Re Slavin* and *Orillia* (3) had been decided in the Queen's Bench of Ontario, and the question was at the argument expressly raised as stated by the present Lord Chancellor at the argument of the McCarthy case. I take the reason to be that the phrase "municipal institutions" had no such broad meaning as is now contended for.

(*e.*) But there are more weighty considerations than these. Prior to the union powers of many diverse kinds and varieties were from time to time given to municipalities. The legislatures conferring them were then supreme. There was then no possible question of jurisdiction or right of legislation; their authority was as unfettered as that of the Imperial Parliament itself. And so it happened that many municipal councils had authority to deal with matters since transferred to the central Parliament, for example, weights and measures, the inspection of staple articles of commerce, the regulation and control of navigable rivers, and in the case of St. John, N.B., and of the whole of Upper Canada, of public harbours. The preparation of the electoral lists was for the most part with them. In some instances they had authority to deal with the criminal law, with the violation of the dead and

(1) 3 P. & B. 139. (2) 7 App. Cas. 829.
(3) 36 U. C. Q. B. 159.

cruelty to animals, and so in many other cases they possessed powers in respect to subjects now transferred to Parliament.

When the change came and the field of legislation was parcelled out, one portion to the Dominion and the other to the provinces, the municipalities retained all their powers, but the local legislatures did not. If before the union they had given a municipal council power to regulate a harbour, or to make a by-law respecting weights and measures, they lost the power of taking it away by virtue of the union Act, the right being transferred to Parliament alone. There can be no doubt about this, the possession by a municipality of a certain power at the time of the union affords no guide in the inquiry as to which legislature may subsequently deal with it. The only test is: Is the power referred to within the subjects of 91 or of 92? Regulations made by Dominion law as well as by local law, must be enforced by some sort of machinery. Parliament, I think, may use existing municipal machinery for this purpose; may in respect to those subjects committed to it, such *e.g.*, as weights and measures, the fisheries inspection, navigation, &c., give to municipal councils power to make by-laws. But however this may be it is out of the question, it is absolutely futile, to argue that because before confederation the old legislatures had given power to the municipalities to make regulations in respect to certain subjects they still have that power, although with their consent these powers were by the constitutional Act, in so many words, taken from them and given exclusively to Parliament. It follows then that if prohibition is not an essentially component part of the subject matter described by the phrase "municipal institutions," and is "a regulation of trade and commerce," it is a matter for Parliament alone to deal with.

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(*f*). But it is argued that what is called "the police power" is possessed by the provinces under "municipal institutions," and that the right in question is a mere incident of "the police power." Now, if by "police power" is meant the right or duty of maintaining peace and order and of seeing that law, all law whether of imperial, federal or local origin is enforced and obeyed, then I agree that that power is wholly with the provinces. But it is with them, however, not because it specially belongs to "municipal institutions," but because they are charged with the "administration of justice." The legislatures may delegate this duty to municipal functionaries, but the mode of administration is purely a matter of provincial concern.

If, however, that wide meaning is given to "the police power," which the jurisprudence of the United States has given to it, the power of limiting or curtailing without compensation the natural or acquired rights of the individual for the purpose of promoting the public benefit, the power, for instance, which enables a state legislature to regulate the operation and tolls of a grain elevator in Chicago, or to compel a company to use interlocking switches upon its line of railway, then, I say, the provinces do not exclusively possess it. It is the common possession of both, to be exercised by both in their respective domains for the common weal.

(*g*). The cases decided in the Privy Council, in my view, practically conclude the question. *Russell* v. *The Queen* (1) decided that the Canada Temperance Act, a prohibitory Act, was such an Act as the Dominion Parliament might properly pass. It has been put forward, I have already suggested, that provision should have been made for the preservation of the provincial right to raise a revenue by means of liquor licenses,

(1) 7 App. Cas. 829.

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but that judgment is conclusive as it decides, in so many words, that the Act in question "does not fall within any of the subjects assigned exclusively to the provincial legislatures."

The judgment of the Privy Council on the McCarthy act was inevitable. That Act unquestionably was an invasion of provincial rights. Its provisions were regulative only. It purported to legislate in respect to liquor licenses and the raising of revenue therefrom, as well as to municipal regulations theretofore prescribed under provincial legislation, its practical effect, if valid, being to make invalid all local statutes then in force having reference to the liquor traffic. It purported to create the machinery, to prescribe the method by which the local authorities might raise a revenue from liquor licenses, a right unquestionably the prerogative of the provincial legislatures, and it therefore fell, destroyed by its own inherent and manifest illegality.

In the Hodge case (1), the question there being:—Was the Ontario Provincial Act *regulating* the traffic *intra vires* of that legislature? the decision of the Privy Council was that it was *intra vires*. When the McCarthy Act came up, a Dominion Act also purporting to *regulate* the traffic, the Privy Council as a necessary sequence, held that it was *ultra vires* of the Dominion Parliament. It is true their Lordships in the Hodge case intimated that the Ontario License Act came within articles 8, 15 and 16 of section 92, as doubtless many of its provisions in one way or another did, but I do not assume, because article 9 was omitted, that it was intended to be laid down that that article had no relation to the subject of legislation. Many of the provisions of the Act were municipal in their character, and therefore came under 8, were penal in their char-

(1) 9 App. Cas. 117.

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acter and therefore under 15, merely local, and therefore under 16, but the whole Act was an Act regulating liquor and other licenses with a view of raising a revenue, and therefore under 9 as well. And there, up to the present time, so far as our ultimate appellate tribunal is concerned, and so far as the liquor traffic is concerned, the question rests.

Now, having regard to these decisions of the final appellate tribunal, I cannot help asking myself this question: Supposing the Ontario legislature passes an Act absolutely prohibiting the sale of intoxicating liquors in the province, whether by retail or wholesale for the present purpose makes no difference, but making no exception as in the Canada Temperance Act in favour of liquors sold for sacramental, chemical or medical purposes, and that the Canada Temperance Act is in force, say in the city of Ottawa, and suppose that a lawful sale for such purpose is made; in that case we would have Parliament saying, the sale is legal; the Ontario legislature saying, it is not; which is the valid legislation? There can be but one answer to this question.

Whether the recent decision of the Privy Council in *The Attorney General of Ontario* v. *The Attorney General of Canada* (1) has a bearing upon the present case, may be questioned. It was there decided that the Ontario legislature having, under "property and civil rights," enacted certain provisions as to the legal consequences of a general assignment for the benefit of creditors, the same provisions that in a federal bankruptcy law as ancillary thereto might constitutionally be enacted by the federal Parliament, was within its constitutional right, but only because the federal Parliament had not taken possession of the field by dealing with the subject. Now, admitting that under "municipal insti-

(1) [1894] A. C. 189.

tutions," or "the police power," or "property and civil rights," a province may prohibit the traffic can it now do so in view of the Canada Temperance Act?

The federal Parliament has already seized itself of jurisdiction. It has passed the Scott Act. It has prescribed the method by which in Canada prohibition may be secured and is not any local enactment purporting to change that method or otherwise secure the desired end, for the time being inoperative, overridden by the expression of the controlling legislative will.

In my view the provincial legislatures do not possess the right to prohibit the liquor traffic.

Referring now to the specific questions set out in the reference, I have but few observations to make. I cannot in the absence of a specific enactment on the subject, recognize any distinction, from a constitutional point of view, between the selling of liquor and its manufacture or importation. If it is admitted that a provincial legislature under "municipal institutions" has power to absolutely prohibit the selling of liquor it must have incidentally the right of prohibiting the having of it, and as incidental to that right the right as well of making or importing it.

Neither can I, in the absence of a specific enactment on the subject, recognize any constitutional distinction between sale by wholesale and sale by retail notwithstanding the case of *Re Slavin* and *Orillia* (1); that, apparently, was subsequently conceded with the full concurrence and approval of the Privy Council in "the Dominion Liquor License Act" case (the case on the McCarthy Act). In the light of which particular provincial candle are we to investigate the question? In Upper Canada a sale of liquor to the extent of five gallons, or one dozen bottles, was considered a wholesale transaction, the question as to the origin of the

(1) 36 U. C. Q. B. 159.

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package being of vital moment but the capacity of each bottle immaterial. In Lower Canada there was no question as to "original packages," but it was doubtless the case that a sale of three gallons or upwards was "wholesale," the character of a sale between three gallons and three half pints being left doubtful. In Nova Scotia the line was apparently drawn at ten gallons, but inasmuch as "shop" licensees could not sell in quantities less than one gallon and as the distinction between "wholesale" and "retail" did not there receive express statutory recognition, it is left an open question whether the constitutional line between wholesale and retail was at one gallon or ten. In New Brunswick the minimum amount that a wholesale licensee might sell was one pint. Now in view of this diverse legislation in the several provinces, the five gallons of Ontario, the three gallons of Quebec, the ten gallons of Nova Scotia and the pint of New Brunswick, how can this court arbitrarily define the line or fix the limit between a wholesale and a retail transaction? How can we in the exercise of judicial office determine the delimitating boundary? The constitutional Act in my view imposes on us no such duty. It does not give colour even to the idea that the right of legislation in either body is to be determined by such questions as quantity or quality, and in my view no such distinction exists.

Neither in my view is there any distinction between those places in Canada where the Canada Temperance Act has been put in force (as the phrase is) and those places where it has not. The whole Act is an Act applicable to all Canada. Certain cities or municipalities may take advantage of its provisions to secure the kind of prohibition therein contemplated, but it is a law providing for prohibition everywhere. To admit the right of a legislature to enact a law for the same pur-

pose applicable only to localities that have failed to place themselves under Canadian prohibition, is to make the constitutional authority of a legislature dependent on the whim or fancy for the time being of the public sentiment, a principle in support of which I can find neither authority nor reason. For the reasons stated, I think the 7th question must be answered in the negative, and in my judgment an affirmative answer can be given to none.

KING J.—Upon this continent there are two methods of dealing with the liquor traffic, viz., by license and by prohibition. The latter may be general, or exercised through what is called local option. The licensing system is one of regulation, with only so much of suppression as is incidental to regulation. Prohibition has suppression as its primary and distinct object. No one is likely to confuse the two things.

The licensing system is exclusively within provincial powers. All that is fairly incident to its effectual working goes with it, as a branch of local police power. In *Hodge* v. *The Queen* (1), their Lordships, after summarizing the clauses of the Ontario License Act then in question, say of them:

> They seem to be all matters of a merely local nature in the province and to be similar to, though not identical in all respects with, the powers then belonging to municipal institutions under the previously existing laws passed by the local Parliaments. Their Lordships consider that the powers intended to be conferred by the Act in question, when properly understood, are to make regulations in the nature of police or municipal regulations of a merely local character for the good government of taverns, etc., licensed for the sale of liquors by retail, and such as are calculated to preserve in the municipality peace and public decency, and to repress drunkenness, and disorderly and riotous conduct. As such they cannot be said to interfere with the general regulation of trade and commerce which belongs to the Dominion Parliament, and do not conflict with the provisions of the Canada

(1) 9 App. Cas. 117.

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Temperance Act, which does not appear to have as yet been locally adopted. The subjects of legislation in the Ontario Act of 1877, ss. 4 and 5, seem to come within the heads of nos. 8, 15 and 16 of section 92 of the British North America statute 1867.

The Dominion Parliament having in 1883 passed a general licensing Act applicable to the entire country, this, with an amending act of 1884, was held *ultra vires* upon a reference of the subject to the Judicial Committee of the Privy Council.

Then, with regard to prohibition, the Canada Temperance Act (1) is a local option prohibitory Act. It gives to each county and city throughout the country (or electoral division in Manitoba) the right of determining, by a vote of the parliamentary electors therein, whether or not the prohibitory clauses of the Act shall be adopted. These clauses prohibit (with some exceptions not material to be now stated) the sale of intoxicating liquors entirely. When locally adopted they continue in operation for three years, and thereafter until withdrawn upon like vote. On the other hand, a vote adverse to local adoption bars the subject for a like period. In *City of Fredericton* v. *The Queen* (2), the Act was held valid, chiefly as relating to the subject of trade and commerce. In *Russell* v. *The Queen* (3), it was sustained on other grounds. Their Lordships, approaching the subject from the side of provincial powers, held that the provisions of the Act did not fall within any of the classes of subjects assigned exclusively to the provincial legislatures. It was therefore, in their opinion, at least within the general, unenumerated and residual powers of the general Parliament to make laws for the peace, order and good government of Canada in relation to all matters not coming within the classes of subjects assigned exclusively to the provincial legislatures.

(1) R. S. C. c. 106. (2) 3 Can. S. C. R. 505.
(3) 7 App. Cas. 829.

"It was not doubted," say their Lordships in *Hodge* v. *The Queen* (1), referring to their decision in *Russell* v. *The Queen*, (2) "that the Dominion Parliament had such authority under sec. 91 unless the subject fell within some one or more of the classes of subjects which by sec. 92 were assigned exclusively to the legislatures of the provinces."

Referring to the grounds of decision in *City of Fredericton* v. *The Queen* (3), their Lordships (who had shortly before in *Citizens Ins. Co.* v. *Parsons* (4) referred to the words "trade and commerce" in a way that is sometimes sought to be put in opposition to the views of this court in *City of Fredericton* v. *The Queen*) (3), say: "We must not be understood as intimating any dissent from the opinion of the Chief Justice of the Supreme Court of Canada and the other judges who held that the Act fell within that section."

In treating of the exclusive powers of the provincial legislatures, clause 8 of sec. 92 respecting municipal institutions, was not in terms referred to in *Russell* v. *The Queen* (2), and this fact has sometimes been made use of in the way of criticism of that case. Indeed, in the argument of the Dominion License Act, one of their Lordships expressed the opinion that clause 8 of sec. 92 had not been argued in *Russell* v. *The Queen* (2), but the counsel then arguing (the present Lord Chancellor) stated that it appeared from a shorthand note of the argument that the point had been distinctly urged. When *City of Fredericton* v. *The Queen* (3) (which is known to be substantially the same case) was before this court, the point was argued. Mr. Lash Q.C., one of the counsel for the Act, thus alludes to the argument as adduced by the other side: "It is also contended that this law, having for its object the suppression of drunken-

(1) 9 App. Cas. 117.
(2) 7 App. Cas. 829.
(3) 3 Can. S. C. R. 505.
(4) 7 App. Cas. 96.

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ness, is a police regulation, and so within the powers of municipalities," etc. In *Reg.* v. *Justices of Kings* (1), Chief Justice Ritchie had previously dealt with the like contention, and in *City of Fredericton* v. *The Queen* (2), adhered to that decision. To that case I beg to refer.

But what is more pertinent is the fact that, after clause 8 of sec. 92 had been fully considered and given effect to in *Hodge* v. *The Queen* (3), their Lordships, as though it might be thought to make a difference with *Russell* v. *The Queen* (4), took occasion to reaffirm that decision: "We do not intend to vary or depart from the reasons expressed for our judgment in that case."

Now it is important to note that the substantial thing effected by the Canada Temperance Act is the suppression of the liquor trade in the municipalities severally by a separate vote of each. What is effected is local prohibition in all its local aspects. It could not have been really meant by their Lordships that this was outside of the classes of subjects by section 92 assigned to the provincial legislatures simply by reason of the Act having operation as a local option Act throughout Canada, while a provincial Act is necessarily limited to the province. That would indeed have been a short road to a conclusion, but it would have confused the boundaries of every subject of legislation, besides rendering unnecessary the particular provisions of the British North America Act (5) respecting concurrent legislation on certain specified subjects. This was recognized in the decision upon the Dominion License Act, where it was held that where a subject, such as the licensing system, is within a class of subjects assigned exclusively to the provinces, the Do-

(1) 2 Pugs. 535.
(2) 3 Can S.C.R. 505.
(3) 9 App. Cas. 117.
(4) 7 App. Cas. 829.
(5) Sec. 95.

minion does not, by legislative provisions respecting it applicable to the entire Dominion, draw it at all within their proper sphere of legislation.

But it is argued that prohibition may in one aspect and for one purpose fall within section 91, and for another purpose and in another aspect fall within section 92. And inasmuch as it is not possible by general words to enter into the complexities of transactions, and distinguish entirely one subject from another in all its relations, the cases clearly establish that legislative provisions may be within one or other of these sections, according as, in one aspect or another, they may be incidental to the effectual exercise of the defined powers of parliament or legislature. In the effectual exercise of an enumerated power it may be reasonably necessary to deal with a matter which, apart from its connection with such subject, would appear to fall within a class of subjects within the exclusive authority of the other legislature, and in such case there is the ancillary power of dealing with such subject for such purpose, as explained and illustrated in *Attorney General of Ontario* v. *Attorney General of Canada* (1). In the application of this principle, the Dominion legislation overrides where the same subject is dealt with through ancillary powers; and, pending the existence of Dominion legislation, the provincial legislation, if previously passed, is in abeyance. If subsequently passed it is *ultra vires*. In all such cases regard is to be had to the primary purpose and object of the legislation, and (except in the few cases where concurrent legislation is authorized, of which this is not one), the primary object is to be attained through one of the legislative authorities, and not indifferently through either.

(1) [1894] A. C. 200.

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Now, prohibitory acts are very single in their aim. Those who favour them may be influenced by variant motives, although probably these vary but little; but the direct, well understood and plain purpose is the suppression of the liquor trade. This is accustomed to be effected, not incidentally in the effectual carrying out of some larger project of legislation, or as ancillary to something else, but as a principal political object in itself.

If this power exists in the provinces, it must be found either in the enumerations of section 92, or in what is reasonably and practically necessary for the efficient exercise of such enumerated powers (subject to the provisions of section 91), otherwise it can in no aspect be within the sphere of provincial legislation.

The power in question is not an enumerated one. On the contrary, what indirect reference there is to the liquor traffic is made in connection with the license system; and licensing does not import suppression, except, at most, as incidental and subordinate to it.

Then, is the power to prohibit reasonably or practically necessary to the efficient exercise by the province of an enumerated power? It is urged that this is so with regard to clause 8 respecting municipal institutions. The licensing system is ordinarily associated with that subject, and licensing is also pointed at in clause 9; but there is no inherent or ordinary association of prohibition with municipal institutions. Neither in England nor the United States is this so. The state of things in the confederating provinces at the time of union will be referred to hereafter. What is reasonably incidental to the exercise of general powers is often a practical question, more or less dependent upon considerations of expediency. The several judgments of the Privy Council have placed the respective powers of the Dominion and provinces

upon the subject on a wise and practical working basis; affirming, on the one hand, the exclusive right of the provinces to deal with license and kindred subjects, and affirming, on the other, the right of the Dominion to prohibit, either directly, or through the method of endowing the several provincial municipalities with a faculty of accepting prohibition or retaining license. Wherein is it reasonably necessary for purposes of municipal institutions that the provinces should have like power of suppression, to be exercised either directly upon the entire province or through the bestowment of a like faculty upon the municipalities? Why (in any proper constitution) should a considerable trade be subjected to prohibition emanating from different legislative authorities in the one country? The suppression of a lawful trade impairs the value of the power to raise revenue by indirect taxation. *Primâ facie* the power that levies indirect taxation has the power to protect trade from suppression and the sole power of suppression. And in a system of government where the provinces receive annual subsidies out of the Dominion treasury, it seems repugnant that the provinces should, through mere implications respecting municipal institutions, possess the power to destroy a large revenue bearing trade. It is for the Dominion to determine for itself whether or not such a trade shall be suppressed, and if so, how, and to what extent. The Dominion has so expressed itself. It has entered every municipality and offered to it the suppression within it of the liquor trade under sanctions of Dominion law.

It is further contended, however, that prohibition is local and municipal because that, at the time of the union, two out of the three original members of the union (having then, of course, full power of legislation) had conferred upon the municipalities a local option

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of prohibition (within wider or narrower limits), and had incorporated this provision in the municipal Acts. Even had this been general with all the provinces, I do not think that the conclusion drawn from it is warranted, in view of the whole of the British North America Act; nor perhaps would it support the claim to deal with the matter otherwise than through the like method of municipal local option. But, assuming that a common understanding of words in an unusual sense might be inferred from such a state of things, if it had been general, the fact that in one of the confederating provinces (New Brunswick) there was no such provision, deprives the argument of the weight that only an entire consensus could give to it. In New Brunswick there were at the union two groups of municipal institutions, the representative kind (as in Upper and Lower Canada), throughout part of the province, and the system of local government of counties through the justices in session (as in Nova Scotia), throughout the remaining part. But in neither kind was there vested the power of suppressing the liquor trade. The Act in force in New Brunswick was 17 Vic. c. 15, as from time to time revived and continued (1). This is important, for temperance legislation had gone further in New Brunswick than in any other province. In 1855 an Act was passed (2) prohibiting throughout the province the importation, manufacture and traffic in intoxicating liquors. This was repealed in 1856 (3) amid great political excitement, and the absence of local option at the time of the union was not a casual omission. Notwithstanding the great weight of judicial authority the other way, I cannot, in view of this, give to the words "municipal institutions," as used in the British North America Act, a meaning not

(1) See 20 Vic. ch. 1. [1856]; 33 Vict. ch. 2.
(2) 18 Vict. ch. 36.
(3) 20 Vict. ch. 1.

inherent in them, simply because of this extension of power to the municipalities in several, but not all, of the confederating provinces. It seems to me that the contention in question comes to this, that the words "municipal institutions" are to be read not only as meaning everything inherent in or ordinarily associated with them, but also all other powers exercised by the municipalities of any of the confederating provinces. I must add that, even if the practice had been general, such an excrescence on the municipal system would be removed by the other provisions of the British North America Act.

Assuming, however, that there is such a right in the provinces, and that, in some aspects, prohibitory legislation is within their powers, I agree with Mr. Nesbitt, (who was permitted to address us on behalf of the Brewers Association), that no such legislation could have validity while the Canada Temperance Act is in force. The provisions of that Act giving the option are in force throughout the entire country. The option is exercisable everywhere and at any time, and these options (with such other law as is in force) represent what parliament deemed adequate upon the subject. Why, then, should there be competing local options established under provincial legislation, or a competing system of provincial prohibition?

The Dominion Parliament, in passing the Act, declared an intention to enact a uniform law upon the subject. It assumes the right to prohibit and fixes the conditions. The freedom of the trade (subject to license and any other unrepealed law), if the conditions are not met, is correlative with its suppression if they are. Mr. Nesbitt has well stated the confusion in the working out of the Canada Temperance Act that would follow upon absolute prohibition by the province, or prohibition through different local options. The result would be very far from uniformity.

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As to a distinction between prohibition of the retail trade and that of the wholesale trade, it is a difference of degree and not of kind. The wholesale trade could not long survive the extinction of the retail business throughout a province. The matter has to be looked at broadly, without too much refinement or distinction.

As to the power to prohibit importation, that manifestly and directly affects "trade and commerce" and the power of raising revenue by customs duties. As to the suppression of the manufacture of liquor, this contention interferes with excise and subjects the argument respecting the implied powers of municipal institutions to a great strain.

The question regarding the Ontario Act of 1890 remains. It has already been incidentally considered. No doubt much latitude ought to be given to the exercise of the licensing power, in the way of restriction or regulation. Prevention of selling in certain ways, at certain times or places, to certain persons, etc., etc., is greatly removed from prohibition proper. But, as I read it, the Act appears to go beyond license and regulation or restriction. It seems substantially to give the power to prohibit altogether. It is true that the Act is expressed to be merely the revival of provisions in force at the union, and since assumed to be repealed by the provincial legislature. But, if the power to pass the Act as a new provision of law does not exist, no more does the power to revive the old law, which, on the other hand, needs no revival so far as Ontario legislation is concerned, inasmuch as it was never effectually repealed by such legislation.

I therefore answer each of the questions submitted in the negative, with deep acknowledgments to the learned counsel who have been heard on behalf of the several interests before the court.

WILLIAM ALEXANDER CALDWELL *es qual.* (PLAINTIFF *par reprise d'instance*) ..... APPELLANT;

AND

THE ACCIDENT INSURANCE CO. OF NORTH AMERICA (DEFENDANTS) ..... RESPONDENTS.

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

Partnership—Registered declaration—Art. 1835 *C.C.—Cons. Stats. L.C. ch.* 65, *sec.* 1—*Oral evidence—Life policy.*

An action was brought by W. McL. and F. W. R. to recover amount of an accident policy insuring the members of the firm of McL. Bros. & Co., alleging that J. S. McL., one of the partners, had been accidentally drowned

After the policy was issued the plaintiffs signed and registered a declaration to the effect that the partnership of McL. Bros. & Co. had been dissolved by mutual consent, and they also signed and registered a declaration of a new partnership under the same name, comprising the plaintiffs only.

At the trial the plaintiffs tendered oral evidence to prove that these declarations were incorrect, and that J. S. McL. was a member of the partnership at the time of his death.

Held, affirming the judgment of the court below, that such evidence was inadmissible. Art. 1835 C.C. and ch. 65 C. S. L. C.

APPEAL by the curator to the insolvent estate of the firm of McLachlan, Bros. & Co., dry goods merchants, from a judgment of the Court of Queen's Bench for Lower Canada, which confirmed a judgment of the Court of Review (1), granting defendants' motion for judgment in their favour on the verdict of the jury, and dismissing the motion of plaintiff *par reprise d'instance* for a new trial.

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

(1) Q.R. 3 S.C. 230 sub nom. *McLachlan* v. *Accident Ins. Co.*

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The action was brought by William McLachlan and Francis W. Radford, as co-partners, under the style of McLachlan, Bros. & Co., for ten thousand dollars, under an accident insurance policy.

The case was originally appealed to the Supreme Court from an order for a new trial made by the Court of Queen's Bench for the purpose of eliciting further information as to the facts and the appeal was quashed for want of jurisdiction, on the ground that the judgment appealed from was not a final judgment and did not come within the exceptions allowing an appeal in cases of new trials.

The facts are given in the former reports of the case (1) and in the judgment of Mr. Justice Taschereau hereinafter given.

Abbott Q.C. and *Geoffrion* Q.C. for appellant.

Cross Q.C. for respondents.

THE CHIEF JUSTICE.—I am of opinion that this appeal must be dimissed with costs.

TASCHEREAU J.—This is the same case that came before us in 1890, upon a first jury trial, *sub nomine*, *McLachlan* v. *The Accident Insurance Co.* (1).

It now comes back to us upon a motion for a new trial by the plaintiffs, the Court of Review in Montreal, by a judgment confirmed in appeal, having dismissed their action upon the finding of the jury that at the time of the death of John McLachlan he had ceased, since the 10th April preceding, to be a member of the firm of McLachlan Bros. & Co. Caldwell, the present appellant, represents the original plaintiffs by *reprise d'instance*, as curator to their insolvent estate. This however does not make any difference in the case which has to be considered, as to parties, upon

(1) See 18 Can. S.C.R. 627 ; Q.R. 3 S.C. 230.

this appeal, precisely as it stood before the *reprise d'instance*, and I will treat it in its original form.

Only one question of law arises on the present appeal: Had the plaintiffs the right to prove by oral evidence that John McLachlan had not ceased at his death to be a member of the said firm? The courts below held that they had not, and from this holding they now appeal. The case turns upon the application and construction of art. 1835 of the civil code and c. 65 C.S.L.C., which enact that the allegations contained in a registered declaration of partnership made under the statute cannot be controverted by any person who has signed the same, an enactment, I take it, which creates against any such signer a presumption *juris et de jure*.

It appears that there never was a registered firm of McLachlan Bros. & Co. composed of John McLachlan, William McLachlan, F. W. Radford, and Thomas Brophy, as mentioned in the policy of insurance in question. However, no point is made on this, nor is there anything in it that affects this case.

It is conceded that there was only one firm of McLachlan Bros. & Co.

In October, 1881, a declaration was filed of a partnership between John and William McLachlan, under the name of McLachlan Bros. & Co. By a notarial deed of October, 1885, between the said four parties mentioned in this policy, it appears that John McLachlan and William McLachlan continued then to be the only members of the firm of McLachlan Bros. & Co. On the 12th April following, a few months after the issue of the policy in question, the said John and William McLachlan filed in the office of the Superior Court a declaration dated the 16th signed by them both, that the partnership theretofore existing between them, under the name of McLachlan Bros. & Co., had been dissolved by mutual consent.

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Public notice in the Montreal *Gazette*, signed by the two parties, was given of this dissolution of partnership. On the 20th of the same month a declaration was filed of the formation of a new partnership under the same name, by William McLachlan and Radford, the two plaintiffs in the present case.

In express terms, according to the statute, ch. 65 C. S. L. C., sec. 1, subsec. 2, they certify by the said declaration that they were the only members of the firm.

It is these two registered declarations that the plaintiffs would now controvert by oral evidence, that is to say, they offer to prove that it is not true that the partnership between John and William McLachlan was dissolved on the 16th April, 1886, and that it is not true that they, the plaintiffs, were the only members of the firm of McLachlan, Bros. & Co., as stated in the declaration registered on the 20th of April, and that, notwithstanding these declarations, the deceased, John McLachlan, had not, at the time of his death, ceased to be a member of the said firm.

They would contend that these declarations were simulated; that they were made in fraud of the law; that they contained falsehoods; that they were, in fact, false altogether; that they were made to impose upon the public, to make the public believe what was not true. They offer to prove that their obedience to the statute was only colourable, and this, in face of an express enactment that any of the allegations in these registered declarations cannot be controverted by any evidence whatsoever, as against any party, by any person who has signed the same. Sec. 4, c. 65, C.S.L.C.; sec. 5635 *et seq.* R.S.Q.; art. 1835 C.C.; *Cassidy* v. *Henry* (1); *Stadacona Bank* v. *Knight* (2); *Hodgson* v. *La Banque d'Hochelaga* (3).

(1) 31 U.C.Q.B. 345. (2) 1 Q.L.R. 193.
(3) 15 R.L. 75.

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Now, are not these two plaintiffs the persons who have signed the declaration that, on the 14th of April, 1886, they were the only two members of this firm? Can they now controvert the truth of that declaration, and prove that John McLachlan was a third member of the firm? Did not William McLachlan, the plaintiff, sign the declaration of dissolution of partnership between him and the deceased, John McLachlan? Can he now be admitted to contend that he knowingly certified to an untruth? I say, unhesitatingly, no. Even without the statute, I would be inclined to think that the plaintiff would be estopped from doing so. They gave notice to this company that John was no more a member of the firm; the notice to the public, by the registration itself, was a notice to the company; and when did they ever notify the company that they had done this only to deceive? Immediately upon getting this notice the company cancelled another policy which they carried on John's life, payable to himself, and duly notified him of it. As to the policy in favour of the partnership, they had no notice to give the policy remained in force. It is only the insurance on John himself that ceased by his withdrawal from the firm, notified to them by the registration in the public registers kept for that purpose. The plaintiffs would now argue that the company should not have believed their solemn statements. The judgment rejecting their contention, and dismissing the action, is unquestionably right, and the appeal should be dismissed with costs.

GWYNNE, SEDGEWICK and KING JJ. concurred.

Appeal dismissed with costs

Solicitors for appellants: *Abbotts, Campbell & Meredith*

Solicitors for respondents: *Hall, Cross, Brown & Sharp*

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WILLIAM R. WEBSTER *et al.* (PETITIONERS) ..... } APPELLANTS;

AND

THE CORPORATION OF THE CITY OF SHERBROOKE (RESPONDENTS) } RESPONDENTS.

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

Quebec License Laws—55 & 56 Vic. ch. 11, sec. 26—City of Sherbrooke —Charter—55 & 56 Vic. ch. 51, sec. 55—Powers of taxation.

By virtue of the first clause of a by-law passed under 55 & 56 Vic. ch. 51, an Act consolidating the charter of the city of Sherbrooke, the appellant was taxed five cents on the dollar on the annual value of the premises in which he carried on his occupation as a dealer in spirituous liquors, and in addition thereto, under clause three of the same by-law, was taxed a special tax of two hundred dollars also for the same occupation. Sec. 55 of the Act 55 & 56 Vic. ch. 51, enumerates in subsections from *a* to *j* the kinds of taxes authorized to be imposed, subsec (*b*) authorizing the imposition of a business tax on all trades, occupations, &c., based on the annual value of the premises and subsec. (*g*) providing for a tax on persons, among others, of the occupation of the petitioner. At the end of subsec. (*g*) is the following: "the whole, however, subject to the provisions of the Quebec License Act." The Quebec License Act (art. 927 R.S.P.Q.) limits the powers of taxation for any municipal council of a city to $200 upon holders of licenses.

Held, affirming the judgment of the court below, that the power granted by 55 & 56 Vic. ch. 51, to impose the several taxes was independent and cumulative, and as the special tax did not exceed the sum of $200, the by-law was *intra vires*, the proviso at the end of subsection *g* not applying to the whole section. Taschereau and Gwynne JJ. dissenting.

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

The proceedings were commenced in the Superior Court by a petition to annul a municipal by-law taken under section 4389 of the Revised Statutes of Quebec.

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

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By the judgment of the first court one section only of the by-law, viz., section 3, which imposes a special tax of $200 a year on hotel-keepers, &c., was declared *ultra vires* and illegal, and was set aside and annulled.

The judgment of the Court of Queen's Bench reversed this judgment and declared the said section and the tax thereby imposed to be *intra vires* of the municipal council. The clauses of the by-law and sections of the statutes under consideration on the present appeal are referred to at length in the judgments hereinafter given (1).

Panneton Q.C. for appellants, contended that the clauses 1 and 3, taken conjunctively, impose upon the hotel and restaurant keepers of the city of Sherbrooke "an annual tax, license, impost duty" exceeding two hundred dollars per year in connection with their occupation as hotel and restaurant keepers, in direct contravention of the clearly expressed provision of the law contained in the Quebec License Act, 927 *b*, 54 Vic. ch. 13, as amended by 55 & 56 Vic. ch. 11, sec. 26, by which it is enacted that it shall be lawful for the "municipal council of any city or town to levy by by-law, resolution or otherwise, any license, tax, impost or duty not exceeding two hundred dollars in any one year upon the holders of license for the sale of intoxicating liquors for the occupation for which they hold such license"; and that the charter of the city of Sherbrooke under which said by-law was enacted is subject to the provisions of the Quebec License Act.

The learned counsel referred to Endlich on Interpretation of Statutes (2); art. 4389 R.S.P.Q. and Dillon on Municipal Corporations (3).

Brown Q.C. for respondents, contended that the general powers of taxation conferred by the special Act

(1) See on the question of jurisdiction, 24 Can. S.C.R. 52.

(2) P. 8, pars. 5 & 7.

(3) 4 ed. pars. 91-793.

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could not be taken away by implication, and that the general tax imposed under clause 1 of the by-law, although hotel-keepers may be included in its terms, is not a tax imposed on the occupation of hotel-keeper as such, for the confirmation of a certificate or otherwise, but is a contribution to the revenues of the city that he, in common with all other classes, is called upon to make, irrespective of the nature of the business he carries on.

THE CHIEF JUSTICE was of opinion that the judgment of the Court of Queen's Bench should be affirmed, for the reasons given by King J.

TASCHEREAU J.—In 1892 the corporation of Sherbrooke passed a by-law for the purpose of imposing certain taxes in virtue of the powers conferred upon it by its special charter, 55 & 56 Vic. c. 51.

By sec. 1 of said by-law an annual business tax of five per cent on the annual value of the premises occupied, is imposed upon every person carrying on any trade, occupation or business in the said city.

By sec. 3 of the by-law a special tax of $200 is imposed on every hotel-keeper, and on the keeper of every place wherein spirituous liquors are sold.

Are the hotel-keepers and other holders of licenses under the Quebec License Act, carrying on, exercising or having an occupation in the city, liable to both of the aforesaid taxes? is the naked question submitted to us.

The Superior Court (Lynch J.) held that they were not, and the Court of Appeals held that they were. The Superior Court was right, in my opinion.

By its charter, 55 & 56 Vic. c. 51 s. 55*b*, the corporation is empowered to impose a business tax on all trades, occupations and business. Sec. 1 of the aforesaid by-

law purports to have been passed under this enactment. By subsec. *g* of this same sec. 55 of its charter, the corporation is empowered to impose a special tax on keepers of houses of public entertainment, taverns and saloons, subject, however, to the provisions of the Quebec license law.

Sec. 3 of the aforesaid by-law purports to have been passed under this enactment.

Upon the words "subject, however, to the provisions of the Quebec License Law," the hotel and tavern keepers, holders of licenses under that law, claim that the council cannot impose on their occupation a tax exceeding $200 a year, and that they cannot be taxed under both of the said sections of this by-law. The section of the Quebec License Law upon which they rely for their contention (927 *b*, enacted by 54 Vic. c. 13, sec. 30, amended by 55 & 56 Vic. c. 11 sec. 26) enacts that: (I read it as applied to this case) "The holder of any license under the Quebec License Act cannot be taxed by the corporation of Sherbrooke to an amount exceeding $200 a year for the occupation for which he holds such license," or, in other words: "The occupation for which a license is held under the Quebec License Act, shall not be taxed by the corporation of Sherbrooke to an amount exceeding $200 a year."

Now, is such holder of a license taxed by the corporation of Sherbrooke to an amount exceeding $200 a year by the by-law in question, on the occupation for which he holds such license, if this by-law purports to impose on them both of these taxes?

To this question there is, in my opinion, room for only one answer. By the two said sections 1 and 3 of the said by-law, the occupation of a licensed hotel or tavern keeper is clearly made liable to a tax of over $200 a year. And this puts an end to the case.

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The corporation has clearly no such right. The words, in subsec. *g* of sec. 55 of their charter subjecting their right under that section to the provisions of the Quebec License Law, must mean something, and if they do not mean that the aforesaid sec. 927 *b* of that law must be read as if it had been specially re-enacted in the charter, I am at a loss to understand what other meaning can be put upon them.

In other words, I read that subsec. *g* of sec. 55, as if, at the end thereof, the words "the whole however subject to the provisions of the Quebec License Law," were replaced by a proviso in these terms "provided, however that no licensed hotel, tavern or saloon keeper shall be liable to a tax on his occupation exceeding $200 per annum."

And that both of these sections 1 and 3 of this by-law impose a tax on the occupation of the hotel-keepers and other license holders therein mentioned does not seem to me to require demonstration.

A tax such as the tax of $200 imposed by sec. 3 of this by-law, on retailers of spirituous liquors is a tax on the occupation of retailing liquors (1). And the tax imposed by sec. 1 of that by-law is, in its own express terms, a tax on the occupation, amongst others, of licensed hotel-keepers and liquor retailers.

Now, when the corporation impose first a yearly tax of five per cent on the value of the premises wherein he carries on his business, or any one carrying on or exercising the occupation of a hotel-keeper, bearer of a license under the Quebec License Act, and at the same time impose upon him another yearly tax of $200, I cannot see how it can be contended that they do not impose upon the holder of a license a tax exceeding $200 a year for the occupation for which he holds such

(1) Hilliard on Taxation pars. 392-412.

license, in direct contravention of sec. 927 b, of the Revised Statutes as now in force.

If they had, in sec. 3 of the by-law, imposed a tax of over $200, it is conceded that they would have exceeded their powers. Now, it cannot be that they have the power to evade the law, and do indirectly what they cannot do directly, simply by calling taxes by different names, or imposing them by different by-laws, or different sections of the same by-law. The law imposes on the corporation a restriction as to license holders, upon the unlimited power they would otherwise have under this subsec. *g* of sec. 55 of their charter. And this restriction was imposed, not for the benefit of the licensed retailers, not to favour them as a class, but to enable the government to tax them more heavily than they had ever been for provincial purposes.

That clearly appears from the 54 Vic. c. 13, wherein that restriction originated.

The provincial revenue on these licenses might also suffer a material decrease if the municipalities were allowed to exact any sum whatever, never mind how exorbitant, from the hotel-keepers, before they could get their provincial license. Great stress has been put, on the part of the corporation, on the argument that though the license holders, it must be conceded, are in the result made liable to a tax exceeding $200 a year, by the combined operation of secs. 1 and 2 of their by-law, yet the by-law is legal, and the license holders fall within these two sections, because, as it was argued, the tax of $200, under sec. 3, is a special tax on the occupation of hotel-keepers and liquor retailers as a special class, whilst the tax imposed by sec. 1 is a general tax on every occupation, and one for which the license holders are liable in common with all the other occupations or business, besides the special tax of $200. I was at first struck with the argument, but, after con-

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sideration, it seems to me to rest on a fallacy. It is *petitio principii*, it assumes the very question to be determined.

Every business or occupation in Sherbrooke is liable, under sec. 55*g* to be, as a general rule, taxed to any amount per annum.

There is a restriction, however, as to the occupations for which licenses are held under the license law; these cannot be made liable to more than $200 a year. The very object of that restriction is to make a difference for the benefit of the province, as I have said, between occupations upon which the province raises a large part of its revenues, by means of licenses, and those from which the province desires no such revenue; between licensed occupations and unlicensed occupations. On the latter the corporation has unrestricted powers; on the former, the province, depending on them itself in a large measure for a provincial revenue, has decreed that the corporation shall not have a right to impose a tax exceeding $200 a year.

It is conceded by the appellants that this restriction applies only to a tax on the occupation, and that the license holders are liable to the other classes of taxes, such as the tenant's tax, for instance, which are imposed by the corporation. A tax on the occupation of hotelkeepers and others, for which a provincial license is held, is the only one in question in the case.

For these reasons I am of opinion that the appeal should be allowed with costs.

The judgment of the Superior Court, however, should be reformed. It declares sec. 3 of this by-law *ultra vires*. Now, why sec. 3 more than sec. 1? Sec. 3, by itself, is perfectly legal and within the powers of the corporation. It is the two, together, if applied to these license holders, that constitute an illegality, but an illegality as to them only.

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If they are not made liable to the tax under sec. 1, they have no ground of complaint against sec. 3. The last paragraph of the judgment of the Superior Court should read: "Doth declare that all persons holding licenses in the said city, under the Quebec License Act, which are liable to the tax of $200 imposed by sec. 3 of the said by-law, are not liable to the tax imposed by sec. 1 of the said by-law."

The decree so framed, though not granting all the relief prayed for by the appellants, will be within the conclusions of the declaration that this by-law be declared illegal.

GWYNNE J. concurred with TASCHEREAU J.

SEDGEWICK J. was of opinion that the appeal should be dismissed for the reasons given by Mr. Justice King.

KING J.—I am of opinion that the reasons given by Mr. Brown are sufficient to support the judgment appealed from.

The action is for the annulment of municipal by-law no. 145, secs. 1 and 3, passed on 11th November, 1892, imposing an annual tax upon keepers of hotels, restaurants, etc.

The objection is that the necessary effect of these sections taken together is to impose a greater tax upon certain classes of persons than that permitted by the Quebec License Law (article 927 *b* R. S. Q., as amended by 54 Vic. c. 13, sec. 30, and 55 & 56 Vic. c. 11, s. 26.) That enactment is as follows:

> It shall not be lawful for any Municipal Council of a city, town, village or other local municipality to levy by by-law, resolution or otherwise, any license, tax, impost, or duty, exceeding in any one year two hundred dollars in cities and towns, and fifty dollars in all other municipalities, upon holders of licenses under this law, either for the confirmation of a certificate to obtain a license or otherwise, for the occupations for which they hold such licenses.

The by-law in question was made under the act 55 & 56 Vic. ch. 51, intituled "An Act to revise and

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WEBSTER v. THE CITY OF SHERBROOKE.

King J.

consolidate the charter of the city of Sherbrooke and the several acts amending the same," assented to on 24th June, 1892 and it is therefore necessary to determine the extent to which the powers of taxation granted by the special Act are limited by the prior general Act.

By sec. 55 of the special Act it is enacted that the council may, by by-law, impose and levy several different kinds of taxes. Thus, (by subsec. *a*), a tax on immoveable property not to exceed one and a half per cent of its value; by (subsec. *b*), a tax to be called "a business tax" on all trades, occupations, &c., not to exceed seven and a half per cent on the annual value of the premises where they are so carried on, a tax which, by a subsequent section is to be payable for every establishment of such trade, etc., when carried on by the same person in separate buildings or places of business in the city; by (subsec. *c.*), a special tax on certain traders; by (subsec. *d.*), a special tax on tenants; by (subsec. *e.*), a special tax on dogs; by (subsec. *g*), a special tax in the discretion of the council on the proprietors or keepers of houses of public entertainment, taverns, saloons, restaurants, &c.; on brewers, distillers, wholesale and retail liquor dealers; on pedlars, &c., on theatres, &c.; on auctioneers, grocers, traders, manufacturers and other enumerated classes, "and generally on any commerce, manufacture, business or trade which has been or may be introduced into the said city, and exercised or carried on or followed therein, whether the same be or be not mentioned in this act, and whether they be or be not of the same description or kind as those herein enumerated, the whole, however, subject to the provisions of the Quebec License Law."

Then follow, by subsecs. *h*, *i* and *j*, other kinds of taxes authorized to be imposed, viz., taxes on vehicles

and horses, upon professional men, and upon the incomes of persons receiving wages or salaries. If the words at the close of subsec. *g*, viz., "the whole, however, subject to the provisions of the Quebec License Law," were at the close of the enumeration of authorized taxes, I should think that the contention of the appellant would have to prevail; but, looking at these words in their context, and at their position in the middle of the enumeration of the classes of taxes, it seems manifest that they have relation, not to the entire scheme of taxation, but to the special tax authorized by subsec. *g*. Of that tax, the incidence of which is expressed with some redundancy and repetition, it is declared that the whole is subject to the provisions of the Quebec License Law. The power to levy the several taxes is independent and cumulative. The amount of the "business tax," of subsec. *b*, is limited only by the maximum of seven and a half per cent fixed by the statute, a maximum that might yield a considerable amount in the case of several establishments carried on by the same person or company. On the other hand, the entirely independent power to levy the special tax, subsec. *g*, is in the discretion of the council as to amount, subject only to this, that a greater sum than $200 shall not be so levied upon holders of licenses, under the Quebec License Law, for the occupations for which they hold such licenses.

These several limitations are not exceeded in the by-law in question, sec. 1 of which imposes the "business tax" under subsec. *b*, and sec. 3, the "special tax" under subsec. *g*. I therefore think that the appeal should be dismissed.

Appeal dismissed with costs.

Solicitors for appellants: *Panneton, Mulvena & Leblanc.*

Solicitor for respondents: *J. T. L. Archambault.*

1894 J. T. CRAIG (DEFENDANT)..... ..... APPELLANT;

*Oct. 18, 19

AND

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*Jan. 15. M. & L. SAMUEL, BENJAMIN & CO., (PLAINTIFFS) ..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Promissory note—Consideration—Transfer of patent right—Bills of Exchange Act 53 V. c. 33 s. 30 s.s. 4 (D).

C. & F. were partners in the manufacture of certain articles under a patent owned by F. A creditor of F. for a debt due prior to the partnership induced C. to purchase a half interest in the patent for $700 and join with F. in a promissory note for $1,000 in favour of said creditor who also, as an inducement to F. to sell the half interest, gave the latter $200 for his personal use. In an action against C. on this note:

Held, reversing the decision of the Court of Appeal, Taschereau J. dissenting, that the note was given by C. in purchase of the interest in the patent and not having the words "given for a patent right" printed across its face it was void under the Bills of Exchange Act, 53 Vic. c. 33 s. 30 ss. 4 (D.).

APPEAL from a decision of the Court of Appeal for Ontario (1) reversing the judgment of the Divisional Court (2) in favour of the defendant.

The action in this case was on promissory notes of the defendant and his partner Fairgrieve and the defence that there was no consideration to the defendant for said notes unless it was the sale to him of a half interest in a patent owned by Fairgrieve as to which the notes were void as not complying with the provisions of the Bills of Exchange Act, 53 Vic. ch. 33 s. 30 ss. 4 (D). The way in which the notes came to be

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

(1) 21 Ont. App. R. 418 *sub nom. Samuel v. Fairgrieve.* (2) 24 O. R. 486.

given is stated as follows in the judgment of the Divisional Court.

"The defendant Fairgrieve had been in business on his own account prior to Craig becoming his partner on the 1st November, 1890, when he (Craig) put $1,600 into the business which was thereafter carried on under the firm name of "Fairgrieve & Craig."

"At the time of the formation of the partnership Fairgrieve was indebted to the plaintiffs on his personal account to the amount of at least $1,000, for which the plaintiffs desired to obtain the notes of the firm of Faigrieve & Craig, and in order that Fairgrieve might be authorized to give the firm's notes it was suggested by Mr. Benjamin, one of the plaintiffs, that Craig should purchase a half interest in a patent of which Fairgrieve was the owner. The terms are set out in an agreement under seal between Fairgrieve and Craig dated the 18th of March, 1891, as follows: Whereas on or about the 3rd day of March, 1891, (the day on which the notes were given) the said Fairgrieve agreed to sell and the said Craig agreed to buy a half interest in the said Canadian patent no. 34093 in consideration of $700, payable as follows, $200 to be paid to Fairgrieve out of Craig's share of income from the business, and $500 by the firm becoming responsible to the extent of $1,000 for the personal indebtedness of Fairgrieve to Messrs. Samuel, Benjamin & Co., for which amount the promissory notes of the said firm were in pursuance of the said agreement given to the said Samuel, Benjamin & Co."

By the "Bills of Exchange Act," sec. 30, subsec. 4:

"Every bill or note the consideration of which consists in whole or in part of the purchase money of a patent right or of a partial interest, limited geographically, or otherwise, in a patent right, shall have written or printed prominently and legibly across the

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face thereof, before the same is issued, the words: 'given for a patent right', and without such words thereon such instrument shall be void except in the hands of a holder in due course, without notice of such consideration."

The words required by the section were not printed or written across the notes sued upon.

The trial judge held that the transaction was not within the provision of the "Bills of Exchange Act," and that there was good consideration for the notes independently of the patent. His decision was reversed by the Divisional Court but restored by the Court of Appeal, from whose judgment the defendant appealed to this court.

Moss Q.C. and *Thompson*, for the appellant.

Watson Q.C. and *Parkes*, for the respondents.

THE CHIEF JUSTICE.—I concur in the judgment of Mr. Justice Gwynne.

TASCHEREAU J.—I would dismiss this appeal. Mr. Justice Osler's reasoning in the Court of Appeal seems to me unanswerable.

GWYNNE J.—It is a fallacy, I think, to say that the loan of $200 to Fairgrieve for which he gave his note formed any part of the consideration of the notes signed by Craig and now sued upon. The loan of the $200 by Benjamin to Fairgrieve may have been and no doubt was made to induce Fairgrieve to accept Craig's terms for the patent right which he, at Benjamin's suggestion and to forward his private purpose, had induced Craig to consent to buy and to make an offer for to Fairgrieve; but the consideration for Craig being a party to and signing the notes sued on was the transfer of an interest in the patent by Fairgrieve to him

and that only, and it was by Benjamin's contrivance and to forward his own purpose of trying to make the firm of Fairgrieve and Craig become answerable for the old discharged debt of Fairgrieve alone, that the notes were made payable to the respondents.

Now however different may have been the condition of things to meet which the legislature passed the section of the "Bills of Exchange Act" under consideration, it is impossible to say that the present case does not come within its letter, and I must say that I think it comes within the mischief intended to be guarded against, for otherwise the act might be readily evaded by the person who sells patent rights making all notes given therefor payable to one cognizant of the consideration for which they are given. The plaintiffs gave no consideration whatever to Fairgrieve and Craig or to Craig, or to Fairgrieve, which can support their claim to recover against Craig upon the notes sued upon, and that is the sole question on this appeal. The appeal must therefore be allowed with costs.

SEDGEWICK and KING JJ. concurred.

Appeal allowed with costs.

Solicitors for the appellant: *Wickham & Thompson.*

Solicitors for the respondents: *James Parkes & Co.*

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*Oct. 23.
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THE CORPORATION OF THE TOWNSHIP OF OSGOODE AND OTHERS (DEFENDANTS) .... } APPELLANTS;

AND

JAMES YORK THE ELDER, AND OTHERS (PLAINTIFFS)..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Municipal corporation— Ditches and Watercourses Act, R. S. O. [1887[*c.* 220—*Requisition for drain—Owner of land—Meaning of term "owner."*

By sec. 6 (*a*) of the Ditches and Watercourses Act of Ont. (R. S. O. [1887] c. 220) any owner of land to be benefited thereby may file with the clerk of a municipality a requisition for a drain if he has obtained "the assent in writing thereto of (including himself) a majority of the owners affected or interested."

Held, affirming the judgment of the Court of Appeal, that "owner" in this section does not mean the assessed owner; that the holder of any real or substantial interest is an "owner affected or interested"; and that a mere tenant at will can neither file the requisition nor be included in the majority required.

Quarre.—If the person filing the requisition is not an owner within the meaning of that term are the proceedings valid if there is a majority without him?

APPEAL from a decision of the Court of Appeal for Ontario (1), reversing the judgment of the Divisional Court (2) in favour of the defendants.

The action in this case was brought for a declaration that an award under the Ditches and Watercourses Act (R. S. O. 1887, ch. 220) was made without jurisdiction because the requisition filed was not accompanied by the preliminaries referred to in section 6 of the act.

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

(1) 21 Ont. App. R. 168. (2) 24 O. R. 12.

The requisition was filed by one George Comrie, and among the lands to be affected by the proposed drain were lots for which the plaintiff James York the elder, was assessed. Some time before the filing of the requisition portions of the last mentioned lots had been conveyed by said plaintiff to James York the younger and Isaac York who are also plaintiffs in the action, and the question for decision is whether or not the said two Yorks were owners under the act and whether or not Comrie was an owner he being in possession of a part of the land to be affected but the legal title thereto being in his father. It was admitted that if Comrie was counted in and the two Yorks out there was a sufficient majority under section 6 (*a*) of the act for the requisition to be filed.

The Divisional Court held that an owner under the act was one in whom the property was for the time being beneficially vested and who had the occupation or usufruct of it and that George Comrie was such an owner. The court also held that the assessment roll was also a test of ownership, and James York the elder being assessed for the property conveyed to his sons the latter were not owners under the act. The Court of Appeal reversed these holdings and gave judgment for the plaintiffs. The defendants appealed to this court.

Henderson and *MacCracken* for the appellants referred as to the meaning of owner in the statute to Washburn on Real Property (1), and contended that Comrie was a beneficial owner according to the facts in evidence, citing *Dillwyn* v. *Llewelyn* (2).

O'Gara Q.C. and *MacTavish* Q.C. for the respondents referred to *In re Flatt and the Counties of Prescott and Russell* (3).

(1) 4 ed. vol. 3 p. 235. (2) 4 DeG. F. & J. 517.
(3) 18 Ont. App. R. 1.

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THE TOWNSHIP OF OSGOODE v. YORK.

Gwynne J.

The judgment of the court was delivered by:

GWYNNE J.—This appeal must be dismissed. The question is as to the validity of an award purporting to be made by the engineer of the municipality of the township of Osgoode, under the provisions of ch. 220 of the revised statutes of Ontario, entitled "an Act respecting Ditches and Watercourses" The question arises under section 6, subsec. *a*, of that act, whereby it is enacted that where parties interested in a ditch required by an owner of land for the drainage of his land shall not be able to agree upon the proportion to be borne by such owner of land to be benefited by the proposed ditch:

Any owner may file with the clerk of the municipality in which the lands requiring such ditch or drain are situate, a requisition in a form supplied by the act, shortly describing the ditch or drain to be made, &c., &c., and naming the lands which will be affected thereby and the owners respectively and requesting that the engineer appointed by the municipality for the purpose be asked to appoint a day on which he will attend at the time and place named in the requisition, &c., &c.

Provided nevertheless that when it shall be necessary to obtain an outlet that the drain or ditch shall pass through or partly through the lands of more than five owners (the owner first mentioned in this section being one) the requisition shall not be filed unless

(*a*) Such owner shall first obtain the assent in writing thereto of (including himself) a majority of the owners affected or interested.

Upon the 25th of August, 1891, one George Comrie, claiming to be the owner of the south-west quarter of lot no. 27, of the 7th concession of the township of Osgoode, and as such entitled to avail himself of the above section, filed a requisition with the clerk of the municipality whereby, representing himself to be owner of the said south-west quarter of said lot no. 27, he required a ditch to be made through such lot and therein alleging that it would be necessary to continue the ditch through certain other lots mentioned therein, among others, the north-west quarter of the same lot no. 27 of which his father William Comrie was named as owner, and the west half of lot no. 28, in the 7th

concession, and the north half of lot no. 27, in the 6th concession, whereof the appellant James York was named as owner, and alleging further that as the said owners had failed to agree upon the respective portions of the proposed work, they required that the engineer appointed by the municipality for the purpose should name a day when he would attend at the locality of the said proposed drain and examine the premises, hear the parties and make his award under the provisions of the statute. This requisition was signed by George Comrie and his father and four others of the persons named as owners of the respective lots named, such owners including the municipality as owners of the roads to be crossed or benefited by the proposed ditch being in all ten in number.

The award made by the engineer upon its face professed to have been made in pursuance of the above requisition, so that several matters referred to in the argument as having taken place prior to the presentation of the said requisition can have no bearing upon the present question which must be determined upon the sufficiency of the above requisition to set the act in motion, the contention of the appellants being that as it was not signed by a majority of the owners of the lands affected by or interested in the proposed drain, the award affects the south half of lot 28 in the 6th concession, not named in the requisition at all, or professes so to do, of which the appellant Isaac York claims to have then been and to be the owner. The appellant James York the younger claims to have then been and to be the owner of the north half of lot no. 27, in the 6th concession, set down in the requisition as having then been owned by the appellant James York, and who although being as stated in the requisition the owner of the west half of lot no. 27, in the 7th concession, did not sign the requisition Now it is admitted that if James York the younger and Isaac

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York were respectively at the time of the presentation of the said requisition owners of the said respective lots claimed by them, and if George Comrie who was the person who as owner of the lot of which he was named to be owner was asserting the right to set the act in motion was not such owner, then the requisition was not signed by a majority of the owners of lands affected or interested as required by the act, and in such case the award which is impeached must be set aside as unauthorized by the act. Indeed it seems to me that if George Comrie who was the person who as the one requiring the drain to be made was the originator of the requisition was himself not an owner, that alone would be sufficient to invalidate proceedings originated by him, and taken upon his requisition, but it is not necessary to proceed upon this ground alone concurring as we do entirely in the judgment delivered by Mr. Justice Osler, that James York the younger and Isaac York were respectively owners of the lots whereof they claim to have been owners and must be counted as such in estimating the sufficiency of the said requisition, and that George Comrie was not such owner of the lot whereof he claimed to be the owner. It is difficult to see how the municipality are to assent in writing to the requisition to be presented to their clerk before it can be presented, but however that may be we entirely agree with the judgment of the Court of Appeal that they cannot be as such assenting parties to the requisition presented by George Comrie upon which the award which is impeached was made. The appeal must be dismissed with costs.

Appeal dismissed with costs.

Solicitors for appellants: *Belcourt, MacCracken & Henderson.*

Solicitors for respondents: *O'Gara, MacTavish & Gemmell.*

R. M. C. TOOTHE (PLAINTIFF).....APPELLANT; 1894

AND *Oct. 24.

A. H. KITTREDGE.....RESPONDENT. 1895

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO. *Mar. 11.

Statute of Limitations—Partnership dealings—Laches and acquiescence—Interest in partnership lands.

A judgment creditor of J. applied for an order for sale of the latter's interest in certain lands the legal title to which was in K. a brother-in-law and former partner of J. An order was made for a reference to ascertain J.'s interest in the lands and to take an account of the dealings between J. and K. In the master's office K. claimed that in the course of the partnership business he signed notes which J. indorsed and caused to be discounted but had charged against him, K., a much larger rate of interest thereon than he had paid and he claimed a large sum to be due him from J. for such overcharge. The master held that as these transactions had taken place nearly twenty years before K. was precluded by the Statute of Limitations and by laches and acquiescence from setting up such claim. His report was overruled by the Divisional Court and Court of Appeal on the ground that the matter being one between partners and the partnership affairs never having been formally wound up the statute did not apply.

Held, reversing the decision of the Court of Appeal and restoring the master's report, that K's claim could not be entertained; that there was, if not absolute evidence at least a presumption of acquiescence from the long delay; and that such presumption should not be rebutted by the evidence of the two partners considering their relationship and the apparent concert between them.

APPEAL from a decision of the Court of Appeal for Ontario affirming the judgment of the Divisional Court by which the master's report in favour of the plaintiff was set aside.

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

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TOOTHE v. KITTREDGE.

The facts of the case sufficiently appear from the above head-note and the judgment of the court.

Gibbons Q C. for appellant.

Fraser for respondent.

The judgment of the court was delivered by:

THE CHIEF JUSTICE.—I am of opinion that the master's report should have been confirmed.

The plaintiff is a judgment creditor of Johnston. Johnston and Kittredge were in partnership some twenty years ago. The partnership business was never formally wound up, but it was so substantially, and this was done as far back as 1883. All debts were paid in equal proportions by the partners, and there are no assets except three judgments against one Crawford, and some lands in the village of Wiarton and township of St. Vincent. To enforce payment out of Johnston's interest in these lands the appellant has taken the present proceedings. In these lands Johnston and Kittredge are interested in equal moieties. The property is still subject to an old mortgage on which $2,000 remains due, which is to be paid by Kittredge, Johnston having paid his share.

Johnston and Kittredge are brothers-in-law. They were in partnership in a land, oil and general speculation business in Strathroy. They had no capital. Funds were raised by means of discounts through Johnston, who was himself carrying on a banking business in Strathroy; he indorsed Kittredge's notes and procured them to be discounted in some of the banks at Strathroy. Johnston kept the books. Now Kittredge brings forward a claim against Johnston's interest in these lands, first raised after the lapse of some twenty years, that he was defrauded by Johnston who charged him in the partnership accounts more for

discount than he really paid to the banks; that whilst in fact Johnston only paid 7 per cent discount he charged 10 or 12 per cent, contrary to agreement and in fraud of his partner. Kittredge had access to the books (see the evidence of Cuddy) and it must be assumed he inspected them before they finally settled the business by paying the debts in equal shares and agreeing to a division of what assets remained.

I do not think this claim ought now to be entertained. There is evidence of acquiescence, at all events a presumption of acquiescence, from the long delay. Should we consider that presumption sufficiently rebutted, especially considering the relationship and apparent concert between the parties, by the evidence of the defendant Johnston himself, who thus seeks to defeat the claim of his brother-in-law's creditors, and by that of Kittredge who is giving evidence for himself? I think not. I refer again to Cuddy's evidence as disclosing circumstances which strengthen the presumption from lapse of time.

The witnesses were examined before the master but he never adjudicated as to the credit due to them, the report being founded on acquiescence and the statute of limitations. The evidence, in the absence of any finding by the master, is in my judgment wholly insufficient to establish such a claim as that which Kittredge has propounded and which therefore for that reason alone fails.

I entertain a strong opinion that the master was right as to the acquiescence, and also as to the statute of limitations (1), and that his report should be restored.

There is no necessity for taking the partnership accounts; the evidence shows these were long since settled by the mutual arrangement of the parties.

(1) *Noyes* v. *Crawley* 10 Ch. D. 31.

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The Chief Justice.

I am of opinion that we should allow the appeal, discharge the order of the Court of Appeal, and restore and confirm the master's report with costs to the appellant in this court and in both the courts below.

Appeal allowed with costs.

Solicitors for appellant: *Gibbons, McNab & Mulkern.*

Solicitors for respondent: *Fraser & Fraser.*

HENRY HEADFORD (PLAINTIFF).....APPELLANT; 1894

*Oct. 24, 25.

AND

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THE McCLARY MANUFACTURING COMPANY (DEFENDANTS)... } RESPONDENTS. *Mar. 11.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Negligence—Workman in factory—Evidence—Questions of fact—Interference with on appeal.

W., a workman in a factory, to get to the room where he worked had to pass through a narrow passage and at a certain point to turn to the left while the passage was continued in a straight line to an elevator. In going to his work at an early hour one morning he inadvertently walked straight along the passage and fell into the well of the elevator which was undergoing repairs. Workmen engaged in making such repairs were present at the time with one of whom W. collided at the opening but a bar usually placed across the opening was down at the time. In an action against his employers in consequence of such accident :

Held, affirming the decision of the Court of Appeal, Strong C.J. *hesitante*, Taschereau J. dissenting, that there was no evidence of negligence of the defendants to which the accident could be attributed and W. was properly non-suited at the trial.

Held, per Strong C.J., that though the case might properly have been left to the jury, as the judgment of non-suit was affirmed by two courts it should not be interfered with.

APPEAL from a decision of the Court of Appeal for Ontario (1) affirming the judgment of the Divisional Court (2) which sustained the non-suit at the trial.

The facts material to the appeal are sufficiently stated in the above head-note and in the judgments published herein.

Gibbons Q.C. for appellant. There was some evidence of negligence and the case should not have been with-

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

(1) 21 Ont. App. R. 164. (2) 23 O.R. 335.

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drawn from the jury. *Denny* v. *Montreal Telegraph Co.* (1).

The want of a guard on the shaft was of itself negligence for which defendants would be liable. *Hollinger* v. *Canadian Pacific Railway Co.* (2). And see *Smith* v. *Baker* (3).

Nesbitt and *Grier* for the respondents referred to *Callender* v. *Carlton Iron Co.* (4); *Quebec Central Railway Co.* v. *Lortie* (5); *Black* v. *Ontario Wheel Co.* (6).

THE CHIEF JUSTICE.—The only question open on this appeal is that as to the non-suit. In deciding this we must, of course, entirely disregard the findings of the jury which the appellant is not entitled to invoke in his support as he has done in his factum. The judge at the trial had to decide two preliminary questions. First, was there any evidence of negligence of sufficient substance to be submitted to the consideration of the jury? Secondly, if there was such evidence, did it appear from the undisputed facts that the plaintiff's own negligence had contributed to the accident?

Had I been dealing with the case as judge of first instance, or even in the Divisional Court, I might have thought that the evidence did disclose a sufficient case for the consideration of the jury tending to show that the respondents' premises were at the time of the accident in a defective state, and that they were therefore guilty of a breach of duty towards the appellant who was rightfully passing through them when he fell through the shaft of the hoist. The space left between the shaft and the shelving on the left side of the room for the passage of workmen going to the carpenter's shop, appears to me to have been so narrow that I might have considered there was some proof of

(1) 42 U.C.Q.B. 577.
(2) 21 O.R. 705.
(3) [1891] A.C. 325.
(4) 10 Times L.R. 366.
(5) 22 Can. S.C.R. 326.
(6) 19 O.R. 578.

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The Chief Justice.

a maintenance of the premises in a defective condition and, therefore, proof of negligence on the part of the defendants in omitting to provide some barrier or at least some warning to persons rightfully using the passage.

This preliminary question, however, being substantially one of fact, no matter of law being involved, and it having been held in three successive courts, composed in the aggregate of seven judges, that the facts found did not constitute a sufficient case for the consideration of the jury, I do not think I ought now to act on my own somewhat doubtful view of the effect of the evidence so far as to reverse the unanimous judgments of the Court of Appeal and of the Divisional Court (1). I therefore, though somewhat doubtfully I admit, agree that the appeal must be dismissed.

TASCHEREAU J.—I would allow the appeal.

GWYNNE J.—The evidence in this case fails, in my opinion, to show any negligence of the defendants to which the accident from which the plaintiff sustained the injury he complains of can be attributed. Being engaged as a workman in a room in a factory to which he could have proceeded without any danger or risk of danger whatever, and whither a fellow workman had without any difficulty just proceeded but a few steps ahead of him, he went out of his course and walked into an elevator the door of which was open it is true, but necessarily open because of some mechanics being then employed doing some necessary work to it, one of whom was so employed at the very opening through which the plaintiff fell and which he had approached without apparently taking any notice of where he was going. The case does not present a

(1) *Allen* v. *Quebec Warehouse Company* 12 App. Cas. 101.

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Gwynne J.

question of contributory negligence at all; the only conclusion which is warranted by the evidence is that the accident happened by and the injury consequent thereon is attributable wholly to the carelessness of the unfortunate sufferer himself and for which the defendants are in no way responsible. The appeal must in my opinion be dismissed.

SEDGEWICK J.—I am of opinion that this appeal should be dismissed for the reasons stated by Mr. Justice Burton in the Court of Appeal.

The accident which happened to the plaintiff was occasioned by his own carelessness and not through any negligence on the part of the company. The repairing of the elevator was a necessary act on their part. It is true that the guard protecting the elevator was not up at the time of the accident and that if it had been up the accident would not have occurred, but at the time the defendants' workmen were engaged in repairing the elevator, workmen were about it and around it engaged in that duty, and the accident happened in consequence of the defendant, instead of looking about him, looking up towards the roof of a room in which he was walking to a man engaged in the repairs and actually collided with a workman at the opening also engaged in the repairs. One can hardly conceive of a case stronger than the present where it can be said that the man himself was wholly to blame for what happened to him. I am of opinion that the appeal should be dismissed with costs.

KING J. concurred.

Appeal dismissed with costs.

Solicitors for appellant: *Gibbons, McNeil & Mulkern.*

Solicitors for respondents: *Beatty, Blackstock, Nesbitt & Chadwick.*

MICHAEL B. WRAYTON (PLAINTIFF)...APPELLANT; 1894

AND *Nov. 6.

JOHN NAYLOR AND EDWARD GUY STAYNER (DEFENDANTS)... } RESPONDENTS. 1895 *Jan. 15.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Sale of land—Sale by auction—Agreement as to title—Breach of—Determination of contract.

W. bought property at auction signing on purchase a memo. by which he agreed to pay 10 per cent of the price down and the balance on delivery of the deed. The auctioneer's receipt for the 10 per cent so paid stated that the sale was on the understanding that a good title in fee simple clear of all encumbrances up to the first of the ensuing month was to be given to W. otherwise his deposit to be returned. After the date so specified W., not having been tendered a deed which he would accept, caused the vendor to be notified that he considered the sale off and demanded repayment of his deposit, in reply to which the vendor wrote that all the auctioneer had been instructed to sell was an equity of redemption in the property; that W. was aware that there was a mortgage on it and had made arrangements to assume it; that a deed of the equity of redemption had been tendered to W.; and that he was required to complete his purchase. In an action against the vendor and auctioneer for recovery of the amount deposited by W.:

Held, reversing the decision of the Supreme Court of Nova Scotia, that the vendor having repudiated the agreement W., being entitled to a title in fee clear of encumbrances and not bound to accept the equity of redemption, could at once treat the contract as rescinded and sue to recover his deposit.

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

The facts of the case are sufficiently stated in the above head-note. The documents signed at the sale

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

(1) 26 N. S. Rep. 472.

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and correspondence between the parties are set out in full in the judgment of the Chief Justice.

Harris Q.C. for appellant.

Borden Q.C. for respondent.

THE CHIEF JUSTICE.—The appellant brought this action to recover back $530, the amount of a deposit paid by him on the purchase at auction of a house and premises situate in South Park Street, in the city of Halifax.

The defendant, Edward Guy Stayner, the assignee for the creditors of his father, Charles A. Stayner, was the vendor, and the defendant, Naylor, the auctioneer employed by him to sell the property. At the conclusion of the sale the appellant signed an agreement, as follows:—

HALIFAX, N.S., 13th April, 1893.

I hereby purchase this house and lot, no. 179 South Park St., for the sum of fifty-three hundred dollars, the same having been knocked down to me at auction by John Naylor, auctioneer.

I agree to pay 10 per cent deposit on the signing of these presents and the balance on delivery to me of the deed.

(Sgd.) M. B. WRAYTON.

On the day following the sale the appellant paid to the defendant, Naylor, the deposit of 10 per cent and received from him a receipt in the words and figures following:—

14th April, 1893.

$530.

Received from Captain M. B. Wrayton the sum of five hundred and thirty dollars, being ten per cent deposit on purchase money of property no. 179 South Park Street, sold by me to him by auction yesterday for the sum of five thousand three hundred dollars, said deposit to be retained by me until his solicitor is satisfied with the title of said property, and the sale is on the understanding that a good title is to be given to Captain Wrayton in fee simple, clear of all incumbrances up to the first day of May next, save and except the civic taxes for the years 1893-4. Should the title not be a good one I undertake to re-

turn the deposit in full, and, on the other hand, if the title is good and Captain Wrayton fails to carry out the sale, the said deposit is to become forfeited as stipulated and ascertained damages to the owner of said land and premises. Possession of said house to be given on or before the first day of May now next ensuing.

(Sgd.) JOHN NAYLOR.

There cannot be a doubt but that, under the contract thus formed, the vendor was bound to make out a good title in fee simple.

On the 2nd of May, 1893, Mr. Barnhill, the solicitor of the appellant, wrote to Mr. Gray, the solicitor of the vendor, Edward Guy Stayner, a letter in the following terms :—

DEAR SIR,—I hereby notify you as the solicitor of Mr. Stayner that unless the title to property no. 179 South Park Street, in this city, is at once fixed up and a deed thereof in fee simple prepared for delivery to us, Capt. M. B. Wrayton will consider said sale off, and proceed accordingly.

Time is an essential condition with Capt. Wrayton.

On the 4th of May, 1893, Mr. Barnhill again wrote Mr. Gray, as follows :—

DEAR SIR,—I inclose herewith the key which Mr. Naylor sent me to-day. I have no use for it, and you can give same to your client, Mr. Stayner. I now notify you that as no sufficient title in fee simple to the property has been furnished Capt. Wrayton, he now declines to have any further dealings and requires payment of his deposit.

On the 8th of May, 1893, Mr. Barnhill sent a further letter to Mr. Gray, saying :—

DEAR SIR,—Capt. M. B. Wrayton has instructed me to notify you that unless the $530 paid by him to you as a deposit on the Stayner property is paid to me, as his solicitor, at once, he will bring an action against you to recover the same, no sufficient title to the property having been furnished him by the assignee.

Oblige me by an immediate reply, as the conditions on which the money was paid you have not been complied with, viz. : a title in fee imple, and Mr. Wrayton is going away in a day or two.

And on the 9th of May, 1893, the purchaser's solicitor again wrote the vendor's solicitor as follows :—

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DEAR SIR,—As no title in fee simple has been offered or tendered to Capt. M. B. Wrayton of the property no. 179 South Park Street, Halifax, by the owner, he now instructs me to notify you that he considers the sale to him off.

He thinks he has given the sellers sufficient time to furnish the deed, and it not being forthcoming he cannot wait any longer, but must sue for his deposit paid Mr. Naylor.

To this last letter Mr. Gray, on the same day, replied by the following letter:—

HALIFAX, N.S., 9th May, 1893.

J. L. BARNHILL, Esq., Barrister, etc., Halifax.

DEAR SIR,—Replying to your letter of this date in the above matter, Mr. Stayner's assignee has tendered you, on your client's behalf, a deed of the title which he held and sold in the property purchased by your client, who was aware of the mortgage held by Mr. Jones, and, of his own motion, made arrangements to assume it, and so informed those acting for the assignee.

The assignee had but the equity of redemption; could sell nothing further, and instructed no sale beyond it, even if the mortgage, as stated, had not been arranged for by your client, who is required promptly to complete his purchase with damages for the delay.

I am, yours truly,

(Sgd.) B. G. GRAY.

This was a distinct repudiation of the contract evidenced by the memorandum and receipt before stated, under which the appellant was clearly entitled to have made out a good title in fee simple, and was not bound to accept just such title as Mr. Edward Guy Stayner had under his father's conveyance to him, nor was he bound to accept a mere conveyance of the equity of redemption, having agreed to purchase the whole estate in fee and not a mere equity of redemption. The appellant was therefore entitled at once to rescind the contract and sue to recover his deposit which he did.

Where a vendor repudiates the contract and distinctly refuses to make out a good title after having been repeatedly requested to do so by the purchaser, as was done in the present case, the purchaser is not bound to wait but may at once treat the contract as rescinded.

When, however, the vendor merely delays to show a good title, and time is not either by the terms of the contract or from the circumstances of the case of the essence of the agreement, the purchaser is required to wait a reasonable time for a title to be shown.

This latter rule can have no application in a case like the present where the vendor distinctly disclaims the obligation to make out such a title as the contract calls for

Sir Edward Fry, in his work on Specific Performance (1), states this very clearly at page 484, where he says :—

> Where one party to a contract absolutely refuses to perform his part of the contract when the hour for performance has arrived, the other party may accept that refusal and thereupon rescind the contract.

I am of opinion that the judgment of Mr. Justice Townshend was right and ought to be restored.

Had the defendant furnished an abstract or shown by the deeds that he had a good title in fee simple, as he might have done quite consistently with the existence of the mortgage to Mr. Jones provided he was in a position to compel Mr. Jones to take his money and release his mortgage, he would have done enough. It would then have been reduced to a mere question of conveyancing and the contract could have been completed by applying a sufficient proportion of the purchase money to the payment of the mortgagee and procuring him to join in the conveyance. But this the respondent, Stayner, did not offer to do ; he never produced any title, and for all that appears his title may have been, in respects other than the mortgage, a defective one. What he insisted on in effect by the last letter his solicitor wrote, was that the purchaser was bound to accept just such title as he had, a conveyance of the equity of redemption, and that with-

(1) 3rd ed.

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out establishing in any way that the title was, irrespective altogether of the mortgage, otherwise good, a wholly untenable position which relieved the appellant from submitting to further delay, and authorized him to treat the agreement as determined,

The appeal must be allowed with costs.

TASCHEREAU J.—We expressed our opinion at the close of the argument that this appeal was to be allowed. It merely stood over to allow his Lordship to put down in writing our reasons for that conclusion I fully concur in his opinion.

GWYNNE, SEDGEWICK and KING JJ. concurred.

Appeal allowed with costs.

Solicitor for appellant: *J. L. Barnhill.*

Solicitor for respondent: *Wallace McDonald.*

THE CORPORATION OF THE TOWN OF CORNWALL (DEFENDANT)..... APPELLANT;

AND

ANNIE DEROCHIE (PLAINTIFF).....RESPONDENT.

1894
*Oct. 26.

1895
*Mar. 11.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Municipal corporation—Negligence—Repair of street—Accumulation of ice—Defective sidewalk.

D. brought an action for damages against the Corporation of the Town of C. for injuries sustained by falling on a sidewalk where ice had formed and been allowed to remain for a length of time.

Held, Gwynne J. dissenting, that as the evidence at the trial of the action showed that the sidewalk, either from improper construction or from age and long use, had sunk down so as to allow water to accumulate upon it whereby the ice causing the accident was formed the corporation was liable.

Held, per Taschereau J.—Allowing the ice to form and remain on the street was a breach of the statutory duty to keep the streets in repair for which the corporation was liable.

APPEAL from a decision of the Court of Appeal for Ontario (1) affirming the judgment of the Chancery Division (2) in favour of the plaintiff.

The plaintiff was injured by falling on a sidewalk of a street in the town of Cornwall in consequence, as she alleged in her statement of claim, of water having been allowed to accumulate on said sidewalk which, by alternately freezing and thawing, rendered the surface uneven and slippery. The action was twice tried, the first verdict for plaintiff for $500 damages having been set aside by the Divisional Court and a new trial ordered which resulted in a verdict for plaintiff for $700 which was sustained by the Divisional Court and the Court of Appeal.

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

(1) 21 Ont. App. R. 279. (2) 23 O.R. 355.

1894

THE TOWN OF CORNWALL v. DEROCHIE.

McCarthy Q.C. and *Leitch* Q.C. for the appellant. Unless the corporation could be indicted for a nuisance it is not liable to plaintiff in this action. *Ringland* v. *City of Toronto* (1); *Ray* v. *Petrolia* (2); *Boyle* v. *Dundas* (3); *Hutton* v. *Windsor* (4).

The corporation is not liable for mere non-feasance. *Sanitary Commissioners of Gibraltar* v. *Orfila* (5); *Municipality of Pictou* v. *Geldert* (6).

As to what constitutes negligence in a case such as this see *Skelton* v. *London & North-Western Railway Co.* (7); Beven on Negligence (8).

Moss Q.C. for the respondent referred to *The Queen* v. *Greenhow* (9); *St. John* v. *Christie* (10); *Town of Portland* v. *Griffiths* (11).

THE CHIEF JUSTICE.—My reasons for dismissing this appeal are so exactly identical with those stated in the judgments of the Chief Justice and the Chancellor, that anything I can say is only a repetition of what has already been well said by both these learned judges.

I am of opinion that the learned Chief Justice of the Queen's Bench could not have withdrawn the case from the jury. There was evidence to show that the sidewalk was in a defective state; that it had been either originally improperly constructed, or had from age and long use sunk down so as to allow water to accumulate upon it, and in consequence of this the ice which caused the accident was formed. There being this evidence a non-suit would have been manifestly wrong.

(1) 23 U.C.C.P. 93.
(2) 24 U.C.C.P. 73.
(3) 25 U.C.C.P. 420.
(4) 34 U.C.Q.B. 487.
(5) 15 App. Cas. 400.
(6) [1893] A.C. 524.
(7) L.R. 2 C.P. 631.
(8) P. 111.
(9) 1 Q.B.D. 703.
(10) 21 Can. S.C.R. 1.
(11) 11 Can. S.C.R. 333.

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THE TOWN OF CORNWALL v. DEROCHIE.

The Chief Justice.

I do not consider the weather alone caused the formation of the ice on which the respondent slipped and fell, for without the structural defect there would, according to some of the witnesses whose testimony it was for the jury to consider and weigh, have been no ice at the spot.

The case on all the questions which arose was left to the jury in a charge which I have read more than once and which I consider to have been a clear, full and able exposition of the evidence and of the points on which the jury had to pass.

The admission in evidence of the by-law was, I think, a correct ruling, and even if it were not it would not, in my opinion, in the present state of the law, necessarily be ground for a new trial.

Apart from the insufficient condition of the sidewalk there may have been no evidence for the jury; probably there was none. I do not enter upon the question much dwelt upon in the judgment of Mr. Justice Burton as to the liability of municipalities generally for accidents caused by ice and snow on streets and highways for the reason that I do not think it arises in the present case.

The appeal must be dismissed with costs.

TASCHEREAU J.—This is a clear case for a dismissal. The case of *Caswell* v. *St. Mary's Road Co.* (1), seems to me to be good law; it was there held that if snow collect on a certain spot, and by the thawing or freezing the travel upon it becomes specifically dangerous, and if this special difficulty can be conveniently corrected by removing the snow or ice, or by other reasonable means, there is the duty on the person or body, on whom the care or reparation rests, to make

(1) 28 U. C. Q. B 247.

1895

THE TOWN OF CORNWALL v. DEROCHIE.

Gwynne J.

the place fit and safe for travel. I agree with Chief Justice Hagarty's reasoning.

GWYNNE J.—I am entirely of opinion that there is no evidence in the case of any neglect upon the part of the corporation of the town of Cornwall to keep the street upon which the accident which caused injury to the plaintiff occurred free from ice, much less of the fact that such accident and injury can be attributed to any such neglect if there had been any. The accident was plainly attributable to the peculiar state of the weather at the time, namely, a severe frost suddenly ensuing upon a thaw and melting of the snow upon the sidewalk thereby causing some ice there upon which the plaintiff slipped and fell. The appeal should, in my opinion, be allowed with costs and judgment be ordered to be entered for the defendants as upon total failure of the plaintiff to prove the cause of action as alleged.

SEDGEWICK and KING JJ. concurred in the judgment of the Chief Justice.

Appeal dismissed with costs.

Solicitors for appellant: *Leitch, Pringle & Harkness.*

Solicitors for respondent: *Maclennan, Liddell & Cline.*

MARY ELLA MURDOCH, ADMINISTRATRIX OF THE ESTATE OF HENRY E. MURDOCH, DECEASED (PLAINTIFF) ..... APPELLANT;

1894
*Nov. 7.
1895
*Mar. 11.

AND

PHILO T. WEST AND ROBERT H. LAMB, ADMINISTRATORS OF THE ESTATE OF ROBERT WEST, DECEASED (DEFENDANTS) RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Contract—Specific performance—Agreement to perform services—Relationship of parties.

M., on his father's death at the age of three years, went to live with his grandfather W. who sent him to school until he was sixteen years old and then took him into his store where he continued as the sole clerk for eight or nine years when W. died and M. died a few days later. Both having died intestate the administratrix of M's estate brought an action against the representatives of W. for the value of such services rendered by M. and on the trial there was evidence of statements made by W. during the time of such service to the effect that if he (W.) died without having made a will M. would have good wages and if he made a will he would leave the business and some other property to M.

Held, reversing the decision of the Supreme Court of Nova Scotia, Gwynne J. dissenting, that there was sufficient evidence of an agreement between M. and W. that the services of the latter were not to be gratuitous but were to be remunerated by payment of wages or a gift by will to overcome the presumption to the contrary arising from the fact that W. stood *in loco parentis* towards M. There having been no gift by will the estate of W. was therefore liable for the value of the services as estimated by the jury. *McGugan* v. *Smith* (21 Can. S. C. R. 263) followed.

APPEAL from a decision of the Supreme Court of Nova Scotia (1) setting aside a judgment at the trial for the plaintiff and ordering judgment to be entered for defendants.

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

(1) 25 N. S. Rep. 172.

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MURDOCH v. WEST.

The material facts of this case are sufficiently set out in the above head-note. The case was twice tried, the jury giving a verdict for plaintiff on each occasion, the damages on the last trial being assessed at $1,950 at the rate of $325 a year for six years. The court *en banc* set aside the last verdict holding that Robert West the grandfather of the deceased Henry E. Murdoch stood *in loco parentis* towards him and there was nothing to rebut the presumption arising from the relationship that the services performed by West were to be gratuitous.

Ross Q.C. for the appellant. There is nothing to distinguish this case from *McGugan* v. *Smith* (1) where the plaintiff recovered for services performed for her grandfather on evidence very like that in this record. See also *Walker* v. *Boughner* (2).

Borden Q.C. for the respondent.

THE CHIEF JUSTICE.—I am of opinion that there was ample evidence for the consideration of the jury to shew that services were rendered by the plaintiff's husband to his grandfather as a clerk in the management of his business; and that such services were understood not to be gratuitous, but were to be remunerated by the payment of wages, or by a gift by will. In short that there was proof of an agreement to that effect between the parties. The case therefore in all legal aspects resembles that of *McGugan* v. *Smith* (1), and must be governed by the same principle. There is nothing in the relationship of the parties disentitling the plaintiff to recover, if the services were agreed to be paid for, as the jury have found they were. When services are rendered to a person standing *in loco parentis* to the person rendering them there

(1) 21 Can. S. C. R. 263. (2) 18 O.R. 448.

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MURDOCH v. WEST.

The Chief Justice.

is a certain presumption that such services were not to be remunerated by wages, but such presumption may be overcome by evidence of an express agreement. Here there was, as I have said, evidence of such an agreement. It was for the jury to weigh this evidence, and if they found there was an agreement and there having been no gift by will, to estimate the value of Murdoch's services. They have found for plaintiff at the rate of $325 per annum.

The appeal must be allowed with costs and the judgment of the Supreme Court of Nova Scotia must be discharged, and judgment entered for the plaintiff for $1,950 and interest from the date of the verdict together with the costs of the plaintiff in the court below.

TASCHEREAU J.—I would allow this appeal and restore the judgment in favour of the plaintiff. I cannot see how the defendant could get a dismissal of the action upon the finding of the jury.

GWYNNE J.—The evidence in my opinion wholly fails to establish that any contract of service had been entered into between the deceased Henry Murdoch and the deceased Robert West, his grandfather, who had brought up and maintained his grandson from his infancy as one of his own family and at the age of 16 took him into his own shop to assist him in the small retail business as a general country dealer which he carried on. The evidence goes no further than to show that the grandfather had the intention, with knowledge or expectation of the grandson, to provide for the latter by his will, and this doubtless he would have done if he had not deferred making a will until it was too late. He died intestate and within a week the grandson who had recently been married died also. The case

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MURDOCH v. WEST.

Gwynne J.

is, in my opinion, distinguishable from *McGugan* v. *Smith* (1). In that case there was an express promise proved that if the plaintiff would remain with her grandfather until either she should marry or he should die he would provide for her by his will as amply as for his daughters, which promise he did not fulfil although he did leave to her a bequest by his will. This promise was made to induce the plaintiff in that case to remain with her grandfather and she accepted the terms offered and did remain with him doing for him all sorts of menial services until she arrived at the age of 25 when she married.

In the present case no such contract is proved. It is said that the jury by their answers to the questions submitted to them have found that the deceased Robert West, did arrange with his grandson that he would compensate the latter for his services, but the evidence justified a finding to no greater extent than that the grandfather had an intention to make a provision for his grandson by will of which intention they might perhaps have found that the grandson was aware; but there was no evidence whatever that any contract for services to be compensated by wages or by testamentary bequest had been entered into between the grandson and grandfather. We cannot, I think, allow this appeal without giving to the judgment in *McGugan* v. *Smith* (1) an effect which the evidence in the present case does not warrant. I think the appeal must be dismissed.

SEDGEWICK and KING JJ. concurred in the judgment of the Chief Justice.

Appeal allowed with costs.

Solicitor for the appellant: *James A. McLean.*

Solicitor for the respondents: *F. B. Wade.*

(1) 21 Can. S. C. R. 263.

THE MICHIGAN CENTRAL RAILROAD COMPANY (DEFENDANTS)... } APPELLANTS;

AND

JOHN WEALLEANS (PLAINTIFF).....RESPONDENT.

1894
*Oct. 25.

1895
*Mar. 11.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Railway Co.—Agreement with foreign Co.—Lease of road for term of years—Transfer of corporate rights.

The Canada Southern Railway Co., by its charter and amendments thereto, has authority to enter into an agreement with any other railway company with respect to traffic arrangements or the use and working of the railway or any part thereof, and by the Dominion Railway Act of 1879 it is authorized to enter into traffic arrangements and agreements for the management and working of its railway with any other railway company, in Canada or elsewhere, for a period of twenty-one years.

Held, reversing the decision of the Court of Appeal, that authority to enter into an arrangement for the "use and working" or "management and working" of its road conferred upon the company a larger right than that of making a forwarding agreement or of conferring running powers; that the Co. could lawfully lease a portion of its road to a foreign company and transfer to the latter all its rights and privileges in respect to such portion, and the foreign company in such case would be protected from liability for injury to property occurring without negligence in its use of the road so leased, to the same extent as the Canada Southern Railway Co. is itself protected.

APPEAL from a decision of the Court of Appeal for Ontario (1), reversing the judgment of the Queen's Bench Division in favour of the defendants.

The action was originally brought by Wealleans against the Canada Southern Railway Company and the Michigan Central Railroad Company to recover damages for the loss of property destroyed by fire from a locomotive of the Michigan Central when running over the Canada Southern's road. The Michigan Central pleaded

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

(1) 21 Ont. App. R. 297, *sub nom. Wealleans* v. *Canada Southern Railway Co.*

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THE MICHIGAN CENTRAL RAILROAD COMPANY v. WEALLEANS.

that it was using the line under an agreement made in 1882 with the other company and the action against the Canada Southern having been dismissed, it being admitted that the loss of plaintiff's property was not due to negligence, the only question for the court was whether or not, under the laws in force in Ontario relating to railways, the Canada Southern could lawfully lease its road for a term of years to a foreign company.

The statutes affecting the case are set out in the judgment of Mr. Justice Sedgewick.

Saunders for the appellant. The Canada Southern Railway Co., by its charter is authorized to make traffic arrangements with any other company and it makes no difference that in this case it was with a foreign company. *Canadian Pacific Railway Co.* v. *Western Union Telegraph Co.* (1). And the Railway Act of 1879 authorizes an agreement with a foreign company.

The more recent decisions of our courts are in favour of upholding agreements such as these. *Bickford* v. *Grand Junction Railway Co.* (2); *Attorney General* v. *Great Eastern Railway Co.* (3).

Moss Q.C. for the respondent. A corporation cannot give to others the right to exercise its special powers and franchises. *Richmond Waterworks Co.* v. *Vestry of Richmond* (4); *Hinckley* v. *Gildersleeve* (5).

And see *Mann* v. *Edinburgh Tramways Co.* (6).

THE CHIEF JUSTICE concurred in the judgment of Mr. Justice Sedgewick.

TASCHEREAU J.—I was of opinion at the argument that we should allow this appeal without reserving judgment, and I have not changed my views since

(1) 17 Can. S.C.R. 151.
(2) 1 Can. S.C.R. 696.
(3) 11 Ch.D. 449; 5 App.Cas.473.
(4) 3 Ch. D. 82.
(5) 19 Gr. 212.
(6) [1893] A. C. 69.

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THE MICHIGAN CENTRAL RAILROAD COMPANY v. WEALLEANS.

Sedgewick J.

But for the judgment of the Court of Appeal in his favour, I would have thought the respondent's contentions utterly untenable. I need not say more than to adopt the cogent reasoning of Hagarty C.J. who dissented in the Court of Appeal.

GWYNNE J. concurred.

SEDGEWICK J.—This is an action brought by the plaintiff against the Canada Southern Railway Company and the Michigan Central Railroad Company for damages occasioned by the burning of his buildings caused by sparks from a locomotive of the latter company while operating the road.

The case was tried before Mr. Justice Street who dismissed the action against both companies upon the ground, which is now admitted, that no negligence on the part of either company was shown. Upon appeal to the Divisional Court (Armour C. J. and Falconbridge J.) the judgment of the trial judge was confirmed. Upon appeal to the Court of Appeal judgment was given ordering a new trial as against the Michigan Central Company, Chief Justice Hagarty dissenting.

The sole question to be determined upon this appeal is as to whether the defendant company is liable for the damage occasioned to the plaintiff by the fire in question, although that damage was wholly accidental, having been caused (it is admitted) by sparks from the defendant company's engine, without negligence of any kind on the part of the defendants or their employees. In order to determine this question a careful examination must be made of the various statutes under which the Canada Southern Railway was built, and under which the Michigan Central Railroad Company professes to have authority to operate the line, for there can be no question that if the defendant company were at the time of the accident operating

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THE MICHIGAN CENTRAL RAILROAD COMPANY v. WEALLEANS.

Sedgewick J.

their locomotive at the place of the accident without statutory authority, then, upon the authority of *Fletcher* v. *Rylands* (1) they are liable for any damage occasioned by their having brought the dangerous machine into the vicinity of the plaintiff's lands. The construction of that portion of the Canada Southern Railway which runs through these lands was first authorized by an Act of the province of Ontario of 1868 (31 Vic. ch. 14) and by section 2 of that Act a large number of sections of the Act respecting railroads (chap. 66 of the Consolidated Acts of Canada, 1859), including the clauses of that Act respecting powers, became part of the Canada Southern Railway Company's charter, then known as the Erie and Niagara Extension Railway Company. By a provincial Act 33 Vic. ch. 32 (1869) the company received its present name, and by another Act of 1872 the following further powers were conferred upon the company:

> *The Company* may make arrangements for the conveyance or transit of traffic with any other railway company or companies, or with the International or any other railroad bridge, or tunnel company, and may *enter into an agreement with such other company or companies with respect to the terms of such traffic arrangements, or with respect to all* or any of the matters following, namely: The maintenance and management of the works of the companies respectively, or of any one or more of them or of any part thereof respectively; the use and working of the railway or bridge, or of any part thereof respectively and the conveyance of the traffic thereon; the fixing, collecting and apportionment of the tolls, rates, charges, receipts and revenues levied, taken or arising in respect of traffic; and the joint or separate ownership, maintenance, management and use of a station or other work or any part thereof respectively.

In 1874 the Parliament of Canada in pursuance of the provisions of the British North America Act, declared the Canada Southern Railway to be a work for the general advantage of Canada, and by that Act

(1) L. R. 3 H. L. 330.

also declared the company to be a "body corporate and politic within the jurisdiction of Canada for all and every the purposes mentioned in, and with all and every the franchises, rights, powers, privileges and authorities by virtue of the provincial Acts," and further that the company should in all matters occupy the same position, and stand in the same plight and condition in every respect, as the company incorporated under the provincial Acts.

In 1868 the Parliament of Canada substantially re-enacted the Railway Act in the Consolidated Statutes of old Canada, and at the time of the accident the general law in force throughout Canada respecting railways was embodied in the Consolidated Railway Act of 1879 (42 Vic. ch. 9) a portion of section 60 being as follows:

> The directors of any railway company may at any time, and from time to time, make and enter into any agreement or arrangement with any other company, either in Canada, or elsewhere, for the regulation and interchange of traffic passing to and from their railways, and for the working of the traffic over the said railways respectively, or for either of those objects separately, and for the division and apportionment of tolls, rates and charges in respect of such traffic, and generally in relation to the management and working of the railways, or any of them, or any part thereof, and of any railway or railways in connection therewith, for any term not exceeding twenty-one years, and to provide, either by proxy or otherwise, for the appointment of a joint committee or committees for the better carrying into effect any such agreement or arrangement, with such powers and functions as may be considered necessary or expedient, subject to the consent of two-third of the stockholders, voting in person or by proxy.

this latter provision being a substantial re-enactment of a similar provision of the Dominion Railway Act of 1868.

Such was the state of legislation in force regarding the Canada Southern Railway on the 12th December, 1882, on which date an agreement was entered into between the defendant companies, namely, be-

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tween the Canada Southern Railway Company and the Michigan Central Railroad Company, by which the Canada Southern practically transferred to the Michigan Central for a term of twenty-one years the exclusive right to use and operate the former company's line of railway, at that time extending from Niagara River to Detroit River, the object being to enable the Michigan Central Railroad to have under their management and control a continuous line of railway from the Eastern States on the Atlantic sea board to the city of Chicago, and to the North-western States; and from that time to the present the Michigan Central have continuously operated under the agreement in question the Canada Southern line, the latter company, however, maintaining its corporate existence and receiving at stated periods the consideration specified in the agreement for the transfer therein contained.

It may be at once admitted that a railway company cannot delegate its franchises except by the authority of a statute, and the question here is: Could the Canada Southern Railway Company under their charter and the general railway Acts incorporated therein, delegate to any other company the right which they possessed of exclusively using and operating their own railway for a period of twenty-one years? In the determination of this question reference, I think, must principally be had to the provincial Act of 1872, section 9, to which Act it seems to me sufficient consideration has not been given in the courts below. Now what does that clause say? The company may enter into an agreement with any other railway company with respect to traffic arrangements or with respect to *the use and working of the railway or of any part thereof*, and the conveyance of traffic thereon and the joint or separate ownership, maintenance, manage-

ment and use of a station or other work, or any part thereof. In my view this provision gives a special power to the Canada Southern Railway Company to delegate to any other railway so much of its franchise as authorizes it to use and work its railway. It confers upon the company a much larger right than the right of making a forwarding agreement or an agreement for conferring running powers or having reference to the convenient or more economical working of the joint traffic. No company but a company having the exclusive operation of a road, such as the Canadian Pacific Railway Company has over its road, or the Grand Trunk Railway Company has over its road, can be said to be engaged in "*the use and working*" of a railway. That phrase is applicable only to the company possessing the road, not to a company having mere running or other rights over it. Besides, the clause would seem to infer that traffic arrangements in connection with the railway was one thing and the use and working of the railway was another thing, a larger and more general thing; and I take it that these words were inserted in this clause for the very purpose of enabling such an agreement to be entered into as the one in question. If then the Canada Southern Railway Company had a right to operate a line of railway at the place where the accident happened, it had a right to transfer to any other company a right to use and work the railway at that place and that company as a consequence would succeed to all the rights, privileges and immunities of the former company, one of these rights being the right to run a locomotive engine the motive power of which was steam, without negligence, over the line of railway there. There can, I think, in this case be no question as to the powers which the Michigan Central Railroad Company possesses under the authority of

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the legislature of the state of Michigan. The provincial statute must be read as if it had enacted that the Canada Southern Railway Company might enter into an agreement with the Michigan Central Railroad Company for the use and working of its line for a period of twenty-one years. Whether as between the Michigan Central Railroad Company and its shareholders, the company would require authority from its own state legislature to take advantage of the privileges conferred upon it by the Ontario Legislature is a question which does not arise in the present case. The legislature has, in my opinion, given authority to the Michigan Central Railroad Company to operate the railroad in question, without negligence, and no British subject resident in Canada, who has in Canada been accidentally injured by such operation, can be permitted to say that such operation was illegal as not possessing statutory authority for its exercise. The judgment of the Court of Appeal proceeded mainly upon the ground that section 131 of the Dominion Railway Act, which likewise at the time of the accident was binding upon the defendant companies, was not wide enough in its terms to make legal the agreement of December, 1882, between the two companies; but it must be borne in mind that that clause was substantially the same as section 48 of the Dominion Railway Act of 1868, which Act, it must be presumed, was before the Ontario Legislature when it was passing the Act of 1872, and that inasmuch as the powers given in section 9 of the Ontario Act are apparently broader, having reference to traffic, tolls, running powers and management and working generally, it must be presumed that there was an intention on the part of the legislature to give the company larger powers than those specified in the Dominion Act. At the same time I am reluctantly compelled to disagree

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with the opinion of the majority of the Court of Appeal in their construction of this particular section of the Dominion Railway Act. In a country coterminous as Canada is for nearly three thousand miles with the United States, where it is necessary in the interest of both countries with a view to the interchange of commerce and the carrying on of traffic, that the lines of railway in the one country should be worked in conjunction with the lines of the other, public policy would seem to suggest that every facility should be given with a view to the cheap and rapid transit of merchandise from one part of the country to the other, and it was doubtless in that view that the Canadian Parliament expressly provided that Canadian railway companies might enter into agreement with foreign railway companies, or as the statute says, "any other company either in Canada or elsewhere." The object of the legislature was to facilitate in every possible way the operation and working of railways generally throughout Canada, and to legalize the bringing in of foreign railways and the capital of foreign railway companies for that purpose. We are therefore required to give such a construction to the section in question as will best give effect to that policy provided we keep within the expressed intention of the legislature as manifested in the section itself. Now that section authorizes the directors of any railway company to make arrangements with any other company either in Canada or elsewhere in relation to the management and working of the railway for a period not exceeding twenty-one years. The words "management and working" are not so broad or all inclusive as the words "use and working" in the provincial Act. They are, however, in my judgment, sufficiently comprehensive to cover the agreement in question. If one company may by agreement hand over the management and working

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of its railway to another company, that, it seems to me, would enable that other company to secure the exclusive right to manage and work the railway. The agreement in question was one not broader than this in its character, and therefore within the statute, not beyond it.

To return, however, to the provincial statute it has been urged that under the provisions of section 92 of the British North America Act a local legislature could not authorize a provincial railway company to enter into an agreement with a United States railway company, the effect of which would be to connect the railway system of the United States or any of them with the Canadian railway system, with a view of providing for unity of management over a continuous line of railway running partly in one country and partly in the other. It is not necessary to determine this question here for whether the provincial Act of 1872 was *ultra vires* or not, all the powers therein purported to be conferred were conferred upon it by the Canadian Act of 1874, and thereby section 9 of the provincial Act in respect to the use and working of the railway was ratified and confirmed.

I am further of opinion that the plaintiff in this action cannot under the circumstances set up in support of his claim that the agreement under which the appellant company operated the railway was *ultra vires*. Clearly the appellant company were running the train in question by the leave and license of the Canada Southern Railway Company. It is admitted that the Canada Southern Railway Company had the statutory right to give running powers to the appellant company. It had the right to say to the appellant company that at certain times and subject to certain conditions you may run your trains over our railway. The Canada Southern Railway Company did say so to the

appellant company, and it was by virtue of their saying so that the appellant company was there. I do not think that a stranger accidently injured, injured without any fault on the part of the appellant company, can be permitted to say to the appellant company: it is true I was accidently injured by your locomotive; it is true that your locomotive was there with the permission and by the authority of the Canada Southern Railway Company; it is true that the Canada Southern Railway Company had authority from the legislature to permit you to be there and to operate your locomotive there, but the agreement was too wide. The Canada Southern Railway Company gave you larger rights and more extended powers than the legislature authorized it to do, and therefore you must pay me. This position, I submit, a stranger cannot set up. I have not been able to find express authority upon this point, but upon the principle that the acts of the corporations in excess of their corporate powers can be attacked only by the corporation itself or by its shareholders, or by the Attorney General in the interests of the public, or by others specially interested, laid down in such cases as *Stockport Dist. Waterworks Co.* v. *Mayor, &c., of Manchester* (1), and *Pudsey Coal Gas Co.* v. *Corporation of Bradford* (2), the plaintiff cannot appeal in the present case to the doctrine of *ultra vires*. It is unnecessary for me to refer at length to the cases of *Jones* v. *Festiniog Ry. Co.* (3); *Powell* v. *Fall* (4); *Hilliard* v. *Thurston* (5); cited at the argument. In all of these cases the courts found that there was no statutory authority for the use of the instrument by which the injury was occasioned, but the principle laid down by Cockburn, C. J. in *Vaughan* v. *Taff Vale Ry. Co.* (6) "when the legislature has

(1) 9 Jur. N.S. 266.
(2) L.R. 15 Eq. 167.
(3) L. R. 3 Q. B. 733.
(4) 5 Q. B. D. 597.
(5) 9 Ont. App. R. 514.
(6) 5 H. & N. 679.

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sanctioned and authorized the use of a particular thing, and it is used for the purpose for which it was authorized, and every precaution has been observed to prevent injury, the sanction of the legislature carries with it this consequence, that if damage results from the use of such thing independently of negligence, the party using it is not responsible" was clearly recognized.

As already pointed out there was, in my view, statutory authority for the use of the locomotive in question at the time of the accident, and there being no negligent use of it the defendants are not liable.

I am of opinion that the appeal from the Court of Appeal should be allowed with costs here and in that court and that the judgment of the Queen's Bench Divisional Court, and the judgment of the trial judge should be restored.

KING J. concurred.

Appeal allowed with costs.

Solicitors for appellants: *Kingsmill, Saunders & Torrance.*

Solicitors for respondent: *Meredith, Cameron & Judd.*

HUGH McDONALD (DEFENDANT).....APPELLANT; 1894

AND *Nov. 7.

SELDEN W. CUMMINGS, ASSIGNEE OF THE ESTATE OF NEIL McKINNON (PLAINTIFF) ..... } RESPONDENT. 1895 *Mar. 11.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Chattel mortgage—Preference—Hindering and delaying creditors—Statute of Elizabeth.

In an assignment for benefit of creditors one preferred creditor was to receive nearly $300 more than was due him from the assignor on an understanding that he would pay certain debts due from the assignor to other persons amounting in the aggregate to the sum by which his debt was exceeded. The persons so to be paid were not parties to nor named in the deed of assignment.

Held, reversing the decision of the Supreme Court of Nova Scotia, Taschereau J. dissenting, that as the creditors to be paid by the preferred creditor could not enforce payment from him or from the assignor who had parted with all his property, they would be hindered and delayed in the recovery of their debts and the deed was, therefore, void under the statute of Elizabeth.

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

The material facts of the case are thus set out in the judgment of Mr. Justice Sedgewick:

"The question involved in this case is as to whether the assignment in the pleadings referred to is void under the statute of 13 Elizabeth, chapter 135. One Neil McKinnon, a trader at Mabou in Inverness, Nova Scotia, being in insolvent circumstances, on the 11th November, 1892, made an assignment to S. W. Cummings, the plaintiff in this action. Subsequent to the

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date of the assignment Mr. Robert Taylor recovered a judgment against McKinnon for $919.60, and having issued execution thereon the sheriff levied upon and sold a considerable quantity of the goods covered by the assignment, and the plaintiff, McKinnon's assignee, brought this action to recover damages from the sheriff by reason of this alleged conversion of the goods in question. The case was tried before the Chief Justice of Nova Scotia without a jury and he gave judgment in favour of the plaintiff. Upon appeal to the Supreme Court *en banc* this judgment was sustained, Meagher J. dissenting. The assignment in question, upon its face, was in no respect obnoxious under the authorities to the statute of Elizabeth although it provided for preferences and contained a clause by which the executing creditors released the assignor as a consideration for participating in its benefits.

"It is, however, claimed that the instrument is void by reason of the following facts:—William Cummings & Sons were, shortly previous to the assignment, creditors of McKinnon to the extent of $318. It was at the instance of these creditors that the assignment was made. It would appear that McKinnon was anxious to pay in full certain creditors before executing the assignment, and to provide for the payment of certain other creditors after the assignment, and thereupon an understanding was come to between the plaintiff and one Gladwin (both of whom were representing William Cummings & Sons at the time) on the one hand, and McKinnon on the other, by which Cummings & Sons paid on account of one Murray $162; a Mr. Hunt $101; and a further sum of $340 to other creditors; making McKinnon's indebtedness to Cummings & Sons amount in the whole to about $921. But it was further provided in the deed of assignment that the assignee was to pay to William Cummings & Sons not $921 but

$1,201 therein alleged to be due them by McKinnon, and the defendant claimed that that firm having been preferred for an amount largely in excess of their real claim against McKinnon the effect is that the deed is void as against the creditors under the statute of Elizabeth. The plaintiff, on the other hand, claims that the amount of this difference, $280, represented amounts due by McKinnon to certain local creditors about Mabou for cattle and otherwise, and that the plaintiff and Gladwin having agreed on behalf of Cummings & Sons that they would subsequently pay these local claims in full it was perfectly justifiable to add this amount, $280, to McKinnon's actual indebtedness, and thereby make his total claim, as represented in the instrument, $1,201. And the question is whether this particular transaction, in connection with other facts, to which I will refer, has the effect of vitiating the deed."

Ross Q.C. and *McNeil* for the appellant relied on *Ex parte Chaplin* (1).

Harrington Q.C. for the respondent.

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

SEDGEWICK J. (His Lordship stated the facts set out above and proceeded as follows) :—

The instrument contained a clause giving authority to the assignee to employ any person he pleased, upon such wages as he might think fit, to carry out the trusts of the deed, and it seems to have been understood at the time the assignment was executed that that duty was to be performed by the assignor himself. The learned Chief Justice who tried the case came to the conclusion that the plaintiff should recover, stating that—

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it was strongly urged that the payment by which the debt of Cummings was apparently increased from $300 to $1,200 could not be sustained, but it was quite clear that no deception or fraud was intended or practised. The assignor declared his intention before making the assignment to make these debts preferential and the mode adopted, when explained, removes all difficulty as to the *bona fides* of the transaction. The transaction was not a "mere cloak" for retaining a benefit to the grantor. If the deed is *bonâ fide*, that is, if it is not a mere cloak for retaining a benefit to the grantor, it is a good deed under the statute of Elizabeth; *Alton* v. *Harrison* (1), *Ex parte Games* (2);

and this view of the case was accepted by Ritchie and Townshend JJ. upon appeal. Mr. Justice Meagher, however, was not satisfied as to the proof of the alleged indebtedness to the "local creditors" and thought there should be a new trial.

The solution of the question in controversy very largely depends upon the nature of the transaction, and upon the question whether or not the assignment might not be used as a method for securing an advantage to the assignor at the expense of the creditors or, to use the language of the Chief Justice, whether the assignment was not "a cloak" for his benefit. Now the actual payment by Wm. Cummings & Sons of the $600 above mentioned, either to McKinnon's creditors or to McKinnon himself, whether on his own account or for the purpose of paying creditors, had, of course, the effect of increasing McKinnon's indebtedness to the firm by the amount of such payments. But the effect of that firm's verbal promise to pay at a future time certain other creditors of McKinnon is of a totally different character. Cummings & Sons entered into no contractual obligation with these creditors. Even supposing, as between them and McKinnon, an enforceable bargain had been made, yet the creditors for whose benefit it was made could not in any way take advantage of it or enforce their claims, either against

(1) 4 Ch. App. 622. (2) 12 Ch. D. 324.

S. W. Cummings & Sons or their agent and nominee, the assignee. In the event of Cummings & Sons failing to pay them they could look to McKinnon alone, but inasmuch as he had divested himself of his property by virtue of the assignment it is manifest that they would fail in their efforts to secure payment unless their debtor subsequently acquired means for that purpose. Assuming, however, the arrangement above referred to to have been made as between Cummings & Sons and McKinnon, and that that firm failed to carry it out, McKinnon doubtless would have his action against Cummings & Sons, and would be entitled to recover the amount which, under his agreement, he was bound to pay the local creditors. These local creditors, in any action which they might bring against McKinnon for the recovery of their debts, might possibly have the right, after judgment, to compel McKinnon to assign to them his rights against Cummings & Sons; but it is apparent that their rights and remedies against him must necessarily be very seriously prejudiced by reason of the assignment. It is obvious, in other words, that they, by the assignment, are hindered and delayed in their remedies for the recovery of their claims. When they seek for payment the debtor has no money to give them, no goods which they can take under execution, nothing but an imperfect obligation, possibly available and possibly not, against individuals whom they never knew and who may or may not be able to pay them.

The facts may be looked at from another point of view so far as this body of creditors is concerned. The preferences in the deed amounted to about $2,800, the assets to about $3,810, while the whole liabilities were about $7,500. The assignment provided that the preferences were to be first paid, that the executing creditors were next to be paid, and that the residue was to

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be divided among the non-executing creditors. The promise on the part of Cummings & Sons to pay the local creditors was not even communicated to them. It did not appear in the assignment that there was any intention on the part of the assignor to pay them in full; there was no method provided by which they could enforce any claim against Cummings & Sons; so that their position in relation to the assignment was a most peculiar one. If they executed the assignment they thereby became entitled to participate in a very small and insignificant residue after the preferred claims were paid and were at the same time releasing their debtor from all liability. If they refused to execute it it is apparent that, apart from the promise to McKinnon, there was even less probability of their getting anything. They were thus placed in a dilemma; all the property of their debtor had passed from him into the hands of the assignee and their only chance of payment was a possibly moral, but certainly unenforceable, obligation, so far as they were concerned, on the part of Cummings & Sons. This, I take it, was unquestionably a hindering and delaying of creditors within the meaning of the statute.

All these difficulties would have been avoided (assuming the arrangement to be a fair and honest one) had these local creditors been named in the assignment as preferential creditors. In that case they would have been secure in their rights and no difficulty such as the present would have arisen. The question is not whether the parties intended to be honest, or to act towards these creditors as they now allege they intended to act towards them; but it is: What does the instrument enable the debtor to accomplish? Is it possible that under its provisions he may secure a benefit for himself at their expense? If so the law presumes that he intends all that the instrument pro-

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vides or permits. The assignee was bound, under the instrument to pay William Cummings & Sons $1,201; they might or might not, as they chose, pay the local creditors; if they did, good and well, if not McKinnon was entitled to recover from them. That was a personal benefit for himself, a secret advantage for himself, the effect being to make the instrument void. It is elementary law that where there are in an assignment for the benefit of creditors provisions under which the assignor may be personally benefited at the expense of his creditors the instrument is void under the statute of Elizabeth. Notwithstanding the able criticism of Mr. Justice Townshend in the court below of the case of *Ex parte Chaplin* (1), I am of opinion that the views expressed by Fry L. J. in dealing with that case apply equally to the present. The learned Lord Justice points out the distinction between hindering and delaying creditors and defrauding creditors, and he shows that the form of the instrument in that case representing an indebtedness, as in the present case, which did not exist, together with other facts similar to the concomitant facts in the present case, led to the conclusion that the intention was to do that which in fact the deed did, namely, to hide from the creditors the real facts of the case, thereby not to defraud them but to hinder and delay them in enforcing their legal rights.

In my view, to uphold an assignment such as the one in question in the present case would be giving the sanction of the court to a method of procedure on the part of insolvent debtors in reference to their property fraught with great danger and detriment to the mercantile community. It is of course settled law that under the statute of Elizabeth an insolvent debtor may prefer one creditor to another, may in fact transfer his whole estate to a few individual favourites, leaving the

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great body of his creditors to fruitless or illusory remedies. We must, however, insist that where preferences are given they should be open, honest and fully disclosed; they must be so declared and that under no circumstances can the debtor as a matter of right, secure an advantage for himself by reason of them.

On the whole I am of opinion that this appeal should be allowed with costs, and the action dismissed with costs, including all costs in the court below.

TASCHEREAU J.—I would dismiss this appeal. The case turns upon questions of fact and I fail to see upon what ground we could interfere. The two courts below have come to the same conclusion.

Appeal allowed with costs.

Solicitor for appellant: *Alexander McNeil.*

Solicitor for respondent: *H. O. Lovett.*

THE TOWN OF SAINT STEPHEN (DEFENDANT) ..... APPELLANT: 1894 *Nov. 8, 9.

AND

THE MUNICIPALITY OF THE COUNTY OF CHARLOTTE (PLAINTIFF).. ..... RESPONDENT; 1895 *May. 6.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

Canada Temperance Act—Application of fines under—Incorporated town—Separated from county for municipal purposes.

By Order in Council made in September, 1886, it is provided that "all fines, penalties or forfeitures recovered or enforced under the Canada Temperance Act, 1878, and amendments thereto, within any city or county *or any incorporated town separated for municipal purposes from the county* * * * shall be paid to the treasurer of the city, incorporated town or county," &c.

Held, reversing the decision of the Supreme Court of New Brunswick, King J. dissenting, that to come within the terms of this order an incorporated town need not be separated from the county for all purposes; it includes any town having municipal self-government even though it contributes to the expense of keeping up certain institutions in the county.

APPEAL from a decision of the Supreme Court of New Brunswick upon a case stated for the opinion of the court as follows:

The following special case is stated for the opinion of the Supreme Court by agreement between the above parties, and it is consented that the Supreme Court should determine the law and the rights of the plaintiff and defendant respectively set forth.

1. The town of Saint Stephen is situate within the boundaries of the parish of Saint Stephen, one of the parishes in the county of Charlotte, and was incor-

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porated by Act of Assembly, thirty-fourth Victoria, chapter 26, which Act and the several Acts in amendment thereof were further amended and consolidated and the incorporation of the town continued by Act of Assembly, forty-eighth Victoria, chapter 47.

2. Section four and subsequent sections of the said incorporating Act vest the administration of all fiscal, prudential and municipal affairs of the town, and the whole legislative power and government thereof, in the mayor and council, and the town council has under the Act the sole authority to make by-laws for the good rule and government of the town, and for the several purposes in the said Act declared.

3. The jail of the county of Charlotte is by section 54 of the said Act made the jail of the town of Saint Stephen, and all the assessments which may be required to be levied in the town for county purposes are to be made under section 61 by the town assessors.

4. Section 9 of chapter 99 of the Consolidated Statutes of Municipalities makes provision for the election of five county councillors from the parish of Saint Stephen one of which, styled an *ex officio* councillor, is authorized to be elected by the town council of Saint Stephen; and section 57 of forty-eight Victoria, chapter 47, together with section 109 of chapter 99, Consolidated Statutes, treat of the levying and appropriating upon the town by the county council the amount to be paid by the town towards county contingencies, and sections 32, 33 and 34 of chapter 100 of the Consolidated Statutes make further provision in respect to the levying of that portion of the charge for county contingencies payable by the town.

5. The town council of the town has each year since the passing of the said chapter 99 elected an *ex officio* county councillor, who has attended the meetings of

the county council and acted as such *ex officio* councillor.

6. The town of Saint Stephen has annually paid an amount into the county funds for county contingencies and its proportion into the county school fund.

7. The Canada Temperance Act, 1878, came in force in the county of Charlotte on the second day of August, A.D. 1879, and has remained and is still in force in the said county.

8. That by order in council dated 29th day of September, 1886, under the provisions of 49 Victoria, chapter 48, section 2 D, the Governor General in council ordered that

"All fines, penalties or forfeitures recovered or enforced under the Canada Temperance Act, 1878, and amendments thereto, within any city or county which has adopted the said Act, which would otherwise belong to the Crown, for the public uses of Canada, be paid to the treasurer of the city or county, as the case may be, for the purposes of the Act."

And by order in council dated 15th November, 1886, after reciting the said second section of 49 Victoria, chapter 48, it was ordered that the order in council of 29th September, 1886, relating to the application of fines and penalties unpaid under said Act, be and the same was thereby cancelled, and that

"All fines, penalties or forfeitures recovered or enforced under the Canada Temperance Act, 1878, and amendments thereto, within any city or county or any incorporated town separated for municipal purposes from the county, which would otherwise belong to the Crown for the public uses of Canada, were directed to be paid to the treasurer of the city incorporated town, or county, as the case may be, for the purposes of the said Act."

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9. A large number of persons have been prosecuted by the town authorities since the passing of the last mentioned order in council for violations of the said Act, and while a considerable sum has been received into the town treasury for fines under the Act, a large sum has also been paid out for the purposes of and connected with its enforcement; all sums collected under the said Act within the town have been put into the town treasury to the credit of a special fund called the Scott Act Fund, and there now remains a balance of such fund unexpended in the treasury of the said town.

10. No portion of the funds so collected within the town have been paid into the county treasury.

11. The county council has not expended any money for the purposes of the said Act or of enforcing the same in the said town of Saint Stephen since the coming into operation of the Act in the said county, and the expense of such enforcement in the town has been wholly borne by the said town, except it may be the expense incidental to the imprisonment of persons convicted under the said Act in the county jail, of which expense the town bears its portion in the tax imposed for county contingencies in the county.

12. It is admitted and mutually agreed that in case of judgment for the plaintiffs, the municipality shall only receive and be entitled to such funds as have not been expended *bonâ fide* for the purposes of the Act and remain in the hands of the town treasurer of the town of Saint Stephen at the time of such judgment.

The question to be determined by the court is whether under the above statement of facts the town of Saint Stephen is liable to pay over to the municipality of the county of Charlotte the said balance of Scott Act funds, and if it shall be of opinion that the town is so liable then judgment is to be rendered for

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the plaintiff, otherwise judgment to be for the defendants.

Upon this case the Supreme Court of New Brunswick held that the town of St. Stephen is not separated from the county of Charlotte for municipal purposes within the meaning of the order in council of September, 1886, and therefore not entitled to the fines collected on prosecutions under the Canada Temperance Act. The town appealed.

Blair Q.C., Attorney General of New Brunswick, for the appellants referred to *Caledonian Railway Co.* v. *North British Railway Co.* (1) on the construction of the order in council.

Pugsley Q.C. and *Grimmer* for the respondents relied on *Leeds & Grenville* v. *The Town of Brockville* (2) where the same order in council was under consideration.

THE CHIEF JUSTICE.—I concur in the judgment prepared by Mr. Justice Sedgewick.

TASCHEREAU J.—I expressed my opinion at the argument that this appeal should be allowed. A further consideration of the case has confirmed me in that opinion. I agree in Mr. Justice Hanington's reasoning. I cannot see that the appellant is incorporated at all but for municipal purposes so as to make it a legal entity separate and distinct for such purposes. The words "separated for municipal purposes" in the order in council are meaningless. I do not know of any incorporated town that is not separated from the county for municipal purposes; and I might, perhaps, add that there are very few, if any, that are so separated absolutely and for all municipal purposes whatsoever.

(1) 6 App. Cas. 114. (2) 18 Ont. App. R. 548.

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GWYNNE J.—By the Dominion statute 49 Vic. ch. 48, it was enacted that where no other provision is made by any law of Canada for the application of any fine, penalty or forfeiture imposed for the violation of any such law the same shall belong to the Crown for the public uses of Canada; and,

2. That the Governor in Council might, from time to time, direct that any fine, penalty or forfeiture or any portion thereof which would otherwise belong to the Crown for the public uses of Canada should be paid to any provincial, municipal or local authority which wholly or in part bears the expenses of administering the law under which such fine, penalty or forfeiture is imposed or that the same should be applied in any other manner deemed best adapted to attain the objects of such law and to secure its due administration.

By an order in council made in pursuance of this enactment bearing date the 13th day of November, 1886, it was ordered that:

> All fines, penalties or forfeitures recovered or enforced under the Canada Temperance Act of 1878, and amendments thereto, within any city or county or any incorporated town separated for municipal purposes from the county which would otherwise belong to the Crown for the public uses of Canada should be paid to the treasurer of the city, incorporated town or county, as the case may be, for the purposes of the said Act.

In the treasury of the town of St. Stephen there is a sum of money collected within the town as and for fines inflicted upon persons prosecuted within the town for breach of the Canada Temperance Act which sums have been paid into the said treasury to the credit of a special fund called the Scott Act fund; it is admitted that the prosecutions in which these fines were inflicted were conducted wholly at the expense of the town except only such expense as may have been incidental to the imprisonment in the county jail of persons convicted under the Act; and the question now

is whether the town of St. Stephen or the county of Charlotte is entitled to those moneys; the contention of the town being that it is, and of the county that it is not, the contention of the latter being that the town of St. Stephen is not an incorporated town separated for municipal purposes from the county, within the meaning of the above order. This question must, in my opinion, be answered in favour of the appellant, the defendant in the court below, in whose favour judgment must be rendered upon the case stated.

By the New Brunswick Act 34 Vic. ch. 20, the inhabitants of that part of the parish of St. Stephen particularly specified in the Act were declared to be a town corporate in right and in name by the name of the town of St. Stephen. By the 3rd section of the Act it was enacted that the administration of the fiscal, prudential and municipal affairs and the whole legislative power and government of the said town should be vested in a mayor and six other persons, styled councillors, and in no other power or authority whatever. By the 69th section it was enacted that the jail of the county of Charlotte should be the jail of the said town of Saint Stephen, and that notwithstanding the same should be without the limits of the said town all warrants, commitments, &c., awarded under the Act whereby any person might be ordered to be confined in the common jail should have like powers and effect as if the common jail was within the limits of the town. This provision that the common jail of the county should be also the common jail of the incorporated town necessitated that the town should contribute to the expense of the maintenance of the common jail in some reasonable proportion to its use of the jail, but such use did not in the slightest degree detract from the completely independent, autonomous character of the corporation as established by the Act.

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So neither do the provisions of sections 64 and 65 detract from such autonomous character, the former of which enacts that the overseers of the poor for the parish of St. Stephen and the overseers of the town should make such arrangements for the support of the poor of the said town and parish as they or a majority of them might deem equitable, and the latter of which enacts that in any assessment for county purposes to be made in the parish of St. Stephen the sessions or county council should apportion the amount to be levied between that portion of the parish not incorporated and the town of St. Stephen. So neither do the provisions of the Common School Act passed in the same session, 34 Vic. ch. 21, by which a fund called the county school fund was established composed of an amount equal to 30 cents for every inhabitant of the county according to the last preceding census, the duty of ascertaining which was imposed upon the clerks of the peace of the several counties, detract in the slightest degree from the complete independence of the incorporated town of St. Stephen as an autonomous municipal corporation separate for municipal purposes from the municipality of the county of Charlotte. Unless therefore there be some Act which qualifies the very precise terms of the Act of incorporation, and the provisions of section 61 of the St. Stephen incorporation amendment Act, 48th Vic. ch. 47, which enacts that all assessments required to be levied for town or county purposes shall be made by the assessors elected under that Act and shall be levied, assessed and collected under the provisions thereof, those Acts are conclusive upon the point that the town of St. Stephen is an incorporated town, separated for municipal purposes from the county of Charlotte on which territorially it is situate, and upon this point the 3rd section of ch. 99 of the Consolidated Statutes of New Brunswick,

which is the Act relating to the general incorporation of county municipalities, has been referred to as enacting that:

> This chapter shall not extend to nor include within the municipality of any county any city or incorporated town in the county, which by Act of Assembly is "wholly withdrawn" from the jurisdiction of the county.

The argument, as I understand it, is that no incorporated town in the province of New Brunswick, unless by Act of Assembly it be expressly or impliedly "wholly withdrawn" from the jurisdiction of the county council, can be said to be separated for municipal purposes from the county. The very same section, however, enacts that nothing in the chapter contained shall interfere with, limit or restrain the corporate powers or privileges of any city or incorporated town. It is plain, therefore, that the provision in the Act that the town council of the town of St. Stephen shall annually send one of its own members to the county council as an *ex officio* county councillor, does not, nor does any other provision in the Act, in the slightest degree qualify, limit or restrain the corporate powers and privileges of the incorporated town of St. Stephen. With great deference I do not at present see the difficulty in holding, if it were necessary, that the inhabitants of the town of St. Stephen are a corporate body incorporated by the name of the town of St. Stephen and are by the terms of their acts of incorporation "wholly withdrawn" from the jurisdiction of the county council, although certain funds and property, in which as being distinct, independent corporations, they are mutually interested, are not so withdrawn, but are (for the very reason that they are wholly distinct municipal corporations separated one from the other but mutually interested in such funds and property) placed under special legislation in the interest

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of both. But we are not, I think, concerned in inquiring what distinction, if any, there was in the opinion of the legislature of New Brunswick, between a town separated for municipal purposes from the county in which it is territorially situate and one wholly withdrawn from the jurisdiction of the county council or what was intended by the two provisions of the same section in the Act 48 Vic. ch. 47, namely, that nothing in the Act contained should interfere with, limit or restrain the corporate powers or privileges of any incorporated town, and that the Act should not extend to nor include within the municipality of any county an incorporated town in the county by Act of Assembly wholly withdrawn from the jurisdiction of the county council. The question before us is not as to the construction of that Act, but as to the true construction of an order of the Governor General in Council made upon the authority of a statute of the Dominion Parliament, the statute declaring that the Governor in Council may, from time to time, direct that any fine, &c., &c., or any portion thereof which would otherwise belong to the Crown for the public purposes of Canada should be paid to any provincial, municipal or local authority which wholly or in part bears the expense of administering the law under which such fine, &c., &c., is imposed and the order in council directing that:

all fines, &c., &c., recovered under the Canada Temperance Act of 1878, and the amendments thereto, within any city or county, or any incorporated town separated for municipal purposes from the county, which would otherwise belong to the Crown for the public uses of Canada, shall be paid to the treasurer of the city, incorporated town or county, as the case may be, for the purposes of the said Act.

Now that the incorporated town of St. Stephen is a provincial, municipal and local authority within the meaning of the statute cannot be questioned and that it is an incorporated town separated for municipal purposes from the county of Charlotte within the meaning

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of the order cannot, in my opinion, admit of any doubt notwithstanding that both corporations have a joint interest in the common jail which is situate within the limits of the county but outside of the limits of the town, and in the funds called the county contingencies fund and the county school fund, which funds are not wholly withdrawn from the jurisdiction of the county council, for both county and town corporations are interested therein, but the town corporation may notwithstanding be well said to be wholly withdrawn from the county municipality as it most undoubtedly, in my opinion, is separated for municipal purposes from the county. The appeal must therefore, in my opinion, be allowed with costs and judgment be ordered to be entered for the defendant in the court below as the party entitled to the moneys in question.

Reference was made in argument to certain sections of chapter 100 of the Consolidated Statutes of New Brunswick, which is a statute regarding the assessment and levying of taxes in the several municipalities and parishes in the province, but I have not referred to them as they do not, in my opinion, in any manner affect or prejudice the right of the town of St. Stephen to the moneys in question.

SEDGEWICK J.—The sole question upon this appeal is as to whether the town of St. Stephen is an incorporated town, separated for municipal purposes from the county of Charlotte within the meaning of an order of the Governor General in Council of the 15th November, 1886, whereby it was ordered that all fines, penalties or forfeitures recovered or enforced under the Canada Temperance Act, 1878, and amendments thereto, within any city, or county, or incorporated town, separated for municipal purposes from the county, which would otherwise belong to the Crown for the

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public uses of Canada, were directed to be paid to the treasurer of the city, incorporated town or county as the case may be, for the purpose of the said Act.

The Supreme Court of New Brunswick decided that St. Stephen was not a town separate from the county for municipal purposes within the meaning of that order in council, Palmer and Landry JJ. dissenting, and it is from that judgment that this appeal is taken.

In my judgment this appeal should be allowed. The evident policy and intention of the Governor General in Council in making the order in question and specifying the authority entitled to all fines recovered under the provisions of the Canada Temperance Act, was doubtless to give effect to the principle expressed in the converse of the maxim *qui sentit commodum sentire debet et onus* (he who sustains a burden ought to derive the advantage.) It was intended that where a city, county or town with a view to the public welfare undertook to and did incur the expense of enforcing the Canada Temperance Act, the enforcing authority should receive the moneys recovered thereby which would otherwise belong to the Crown. This manifest intent must be borne in mind in giving a meaning to the order in council, and effect must be given to that aim if it can be done consistently with the terms in which that order is expressed. The question then is: Is the town of St. Stephen separate from the county for municipal purposes? The county of Charlotte was an incorporated municipality years before the incorporation of the town of St. Stephen. The regulation of its municipal affairs was given to its county council. That council had municipal control for all the territory within its limits. Its jurisdiction was coterminous with those limits. Its power to make by-laws (now regulated by section 96 of chapter 99 of the Consolidated Statutes of New Brunswick) was clearly defined, cover-

ing in a general sense all those subjects in respect of which municipal bodies throughout Canada are usually given jurisdiction. Such was the state of affairs when by an Act of Assembly (34 Vic. ch. 26) the town of St. Stephen was incorporated, the full charter of the town being now contained in the Act (48 Vic. ch. 47). By this charter the limits of the town were defined, section 3 providing:

That the fiscal, prudential and municipal affairs and the whole legislative power and government of the said town shall be vested in one principal officer who shall be the mayor of the town of St. Stephen, and in six other persons, and in no other power or authority whatever, two of whom shall be annually elected for each ward and shall be styled councillor, and all of whom shall be severally elected.

Section 47 of the charter gives authority to the town council to make by-laws. The jurisdiction thereby given to the town council in respect of the territorial area of the town is substantially the same as the jurisdiction which the county council possessed in regard to its territorial area. There can be no question but that immediately upon the incorporation of the town the jurisdiction of the county council in regard to the area comprised in the town substantially ceased, the authority of the town council supervening and taking the place of the authority previously exercised over the town limits by the county council. Did the whole matter rest here there could not, I think, be any question but that the town, by the mere fact of its incorporation, and by its having been given the powers to which I have referred, thereby became separate from the county. There was an absolute destruction of the ordinary and general powers of municipal legislation so far as the town limits were concerned which the county council had previously exercised. There was, in effect, a legislative declaration that thereafter the territorial area of the county should be separated or divided for municipal purposes, and that for the one

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portion the county council should alone have jurisdiction and for the other the town council should alone have jurisdiction; a legislative declaration, too, that in so far as the town council had power to enforce law and order within the town it might use municipal funds for that purpose, funds derivable from such persons and property only as were within its domain, the county council having the like power in respect to persons and property within its domain. So far and for these purposes it cannot be disputed that the town is separate from the county. The contention, however, is that before the town could take the benefit of the order in council it must not only be separate from the county territorially and for the ordinary and common powers of municipal self-government, but it must be wholly separate from the county for all purposes; the two must have nothing in common; they must have separate and different machinery for the carrying on of their respective purposes; that inasmuch as in the present case the town of St. Stephen by express statutory provision sends a councillor to the county council; that the valuators appointed by the county council have certain jurisdiction within the town; that the county council may order the town to assess for purposes common to both county and town, and the county jail, court house and record office are jointly maintained by the town and county; and that the salary of the sheriff, clerk of the peace and other officers, are made up by the joint contribution of town and county alike; it is contended that these and other similar facts sustained the contention that the town is not separate (that is wholly separate) from the county for municipal purposes and that therefore the fines in question belong to the county.

I have not been able to appreciate the strength of this contention. The object of the legislature in set-

ting apart St. Stephen as a town was to give it the advantage of municipal town government. It was practically impossible to absolutely separate the town from the county to the same extent as two contiguous counties are separated. The town when created did not require a county jail for its own exclusive use, nor a court house, nor a sheriff, nor a registrar of deeds, nor a special sittings of the court of assize. There were of necessity a few matters, such as the maintenance of these institutions and the payment of these officials and expenses, that were common to both corporations, and therefore special provisions were made in the statute in relation to them, the general power of municipal government within their respective areas being exclusively given to the respective councils. If the other contention is to prevail and no town can take the benefit of the order in council unless wholly separate from the county for all municipal purposes, then, so far as I know, there is not a town in Canada that would be covered by the order in council. So far as I know, there is not a city in Canada that is wholly separate for all municipal purposes from the county of which it forms a part. Halifax, St. John, Ottawa, are all connected by legislative enactments in some way or other with the county of which they each territorially form part. Every city in Canada has to a greater or less extent some connection, some joint function to perform, with the county in which it is situated and of which it forms a part, and this is to a much greater extent true of the connection for common purposes between towns generally through Canada and the counties from which they for municipal purposes have been set apart.

In my view it is a perfectly accurate use of language to say that towns such as St. Stephen, and there are scores of them throughout the Dominion, are separate

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from the counties in which they are situate, for municipal purposes, notwithstanding the fact that there may be many common objects in which the two councils have a common interest and must therefore act together.

In coming to this view I have not overlooked the meaning which by express definition the Municipal Act of Ontario gives to the phrase used in the order in council, but the phrase in that Act must be interpreted as therein defined. Other rules must govern, ordinary principles of interpretation must be observed, when the true meaning of this document is to be ascertained. The order has all the force of and is in effect a statute of Canada and must be interpreted by rules applicable to the whole of Canada, and not by a provision in a provincial statute made especially applicable to that province and that statute alone.

I am of opinion that the appeal should be allowed and that judgment should be entered for the defendants with the costs of this appeal and of all costs in the court below.

KING J.—I regret to have to differ. The question is whether the town of St. Stephen is an incorporated town separated from the county of Charlotte within the meaning of the order in council of 15th November, 1886. It is convenient first to inquire into the meaning of the words of the order in council "any incorporated town, separated for municipal purposes from the county." All towns that are incorporated are *ex vi termini* to some extent separated for municipal purposes from the county. The object of civic incorporation is municipal self-government, greater or less according to the circumstances. But this is not enough to fill the terms of the order in council. Not all incorporated towns are meant. The incor-

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porated town must be therefore in a fuller sense separated. It must be separated wholly for municipal purposes from the county, or what amounts to the same thing separated from the county for all municipal purposes. An incorporated town is not separated for municipal purposes from the county if there is any organic union between it and the county for any municipal purpose whatever. This, I think, is the natural meaning of the words, and is supported and illustrated also by a state of facts existing in this province at the time of the passing of the order in council. Under the Ontario municipal system, as I understand it, there were and are two classes of incorporated towns. Both classes have large powers of self-government, but they differ in this, that the one has, and the other has not, an organic union with the county for some municipal purposes. Incorporated towns may, upon certain conditions, pass from one of these states to the other. The term used in the order in council, "incorporated towns separated from the county for municipal purposes," is an expression found in section 460 of the Municipal Act as indicating that class of incorporated town that has no organic union with the county for any municipal purpose.

Now let us look at the state of things in New Brunswick where this appeal comes from. There, by chapter 99, Consolidated Statutes, every county in the province is erected into a municipality, and the municipality includes every city and incorporated town "not wholly withdrawn from the jurisdiction of the county council." Within the meaning of that Act there is only one city or incorporated town in the province to which that expression applies, viz., the city of Fredericton, in the county of York. Every other city and every incorporated town in the province is (under the municipal system of New Brunswick) an integral part of the municipality and is represented in

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the county council. Such is the case with the town of St. Stephen; such also the case of the city of St. John. The town of St. Stephen, like the city of St. John, has very wide powers of self-government; these extend to cover almost every subject of a municipal nature. Within their range of subjects the power of city and town is supreme and exclusive, but there are some subjects of municipal concern affecting them with which the county council has to do, and which are regulated and dealt with by the county council as representing them and the other parts of the municipality. For instance the city and town are organically united with the rest of the county in the management and control of public buildings used for general municipal purposes; in the appointment and payment of certain officers for general county purposes; in the levying of rates for county contingencies, and in the determination of the amount which the town or city and each parish throughout the county shall contribute to county rates. For instance, one considerable rate imposed upon the county is the county school rate for the support in part of the schools within the county. The proportion that each part of the county, including the cities and incorporated towns (other than the city of Fredericton), shall contribute to this is determined, like other county rates, by a valuation of the property of the entire county made at stated intervals by valuators appointed by the county council, and these valuators are paid out of the rates levied upon the entire county. Here is a very considerable and important municipal purpose that is under the jurisdiction of a body of which the incorporated town is organically a part, viz., the municipal council of the county. When the county municipality imposes rates and orders their collection upon the town of St. Stephen for a municipal purpose without the consent of the town, except so far as such consent is implied by its

being part of the governing body of the county, it is impossible to say that it is, within the ordinary and natural meaning of the term, separated from the county for municipal purposes. It is entirely immaterial that the rate when ordered is levied and collected through the machinery of the town. I conclude, therefore, that although the town of St. Stephen has a wider range of self-government than the incorporated towns of Ontario that are not separated from the counties for municipal purposes, it has less power of self-government than the incorporated towns in Ontario that come specifically within the meaning of the language of the order in council and of the Municipal Act of Ontario as "incorporated towns separated from the county for municipal purposes." An incorporated town is not so separated when there is an organic connection between it and the county for any municipal purpose, and when it has or may have a certain share in the government of the county by reason of its being represented in the municipal council and entitled to take part in the municipal affairs of the county.

This is a sensible view too considering the nature of the order in council. Its object is to regulate the application of fines, etc., under the Canada Temperance Act. The legislative unit under that Act is the city and the county. The Act is adopted in city or in county as the case may be. It is reasonable therefore that the fines should go to city or to county, as the case may be, and that in the case of a county they should be diverted from it to an incorporated town within its territorial limits only where there is an entire want of identification or organic union for any municipal purpose between the two.

For these reasons I think that the appeal should be dismissed.

Appeal allowed with costs.

Solicitor for appellant: *James Mitchell.*

Solicitor for respondent: *W. C. H. Grimmer.*

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THE CHATHAM NATIONAL BANK...APPELLANT;

*Feb. 19, 20.
*May 6.

AND

LEWIS McKEEN AND EASTERN TRUST COMPANY, LIQUIDATORS OF THE MABOU COAL AND GYPSUM CO. } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Winding-up Act—Sale by liquidator—Purchase by director of insolvent company—Fiduciary relationship—R. S. C. c. 129 s. 34.

Upon the appointment of a liquidator for a company being wound up under R. S. C. c. 129 (The Winding-up Act) if the powers of the directors are not continued as provided by s. 34 of the Act their fiduciary relations to the company or its shareholders are at an end and a sale to them by the liquidator of the company is valid.

APPEAL from a decision of the Supreme Court of Nova Scotia reversing the ruling of the Chief Justice who refused to confirm a sale by the liquidator of the Mabou Coal and Gypsum Company to the respondent McKeen of property of the company.

At the time the winding-up order was made the respondent, McKeen, was a director of the insolvent company and the sole question for decision was whether or not his position as such director continued after the order was made so as to prevent him from becoming a purchaser of the property of the company from the liquidator. The Chief Justice held that it did and refused to confirm the sale but his ruling was reversed by the full court.

Gormully Q.C. and *Orde* for the appellant. Though the powers of directors cease when the winding-up

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

order is made their duties do not. *Madrid Bank* v. *Bayley* (1).

As to duties of superseded directors see *Grover* v. *Hugell* (2); *Ex parte James* (3); *Tennant* v. *Trenchard* (4).

Code for the respondent referred to *Re Alexandra Hall Co.* (5); *Coles* v. *Trecothick* (6).

The judgment of the court was delivered by:

THE CHIEF JUSTICE.—A careful consideration of this case since the argument has led me to the conclusion that the judgment of the Supreme Court of Nova Scotia is right and ought not to be disturbed.

By the 34th section of the Winding Up Act it is enacted that:—

> Upon the appointment of the liquidator all the powers of the directors shall cease except in so far as the court or the liquidator sanctions a continuance of such powers.

We have nothing before us to show that there was any continuance of powers to the directors in the present case.

It does not therefore appear that there was any fiduciary relationship subsisting between Mr. McKeen and the company or its shareholders when he became a purchaser at the sale which the order appealed from upholds. I can see no reason therefore why the sale should not be confirmed.

I have examined the note of the Alexandra Hall Co. case in the Weekly Notes (7) and although the report is certainly very meagre, yet it seems to be an authority for the decision now under appeal.

(1) L. R. 2. Q. B. 37.
(2) 3 Russ. 428.
(3) 8 Ves. 337.
(4) 4 Ch. App. 537.
(5) W. N. [1867] p. 67.
(6) 9 Ves. 234.
(7) [1867] p. 67.

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The Chief Justice.

I do not write at greater length because I entirely agree in the judgment of Mr. Justice Townshend in which the case is fully and clearly treated.

The appeal must be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Silver & Payzant.*

Solicitors for the respondent McKeen: *Ross, Mellish & Mathers.*

Solicitors for the respondent Eastern Trust Co.: *W. & J. A. McDonald.*

ELIZABETH ANN BRADSHAW, ADMINISTRATRIX OF THE ESTATE OF JACOB BRADSHAW, DECEASED (PLAINTIFF) ..... } APPELLANT;

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*Feb. 20.

*May 6.

AND

THE FOREIGN MISSION BOARD OF THE BAPTIST CONVENTION OF THE MARITIME PROVINCES (DEFENDANT) ..... } RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

Practice—Equity suit—New trial—Construction of statute as to—Persona designata—54 V. c. 4, s. 85 (N.B.)

53 V. c. 4, s. 85 (N.B.), relating to proceedings in equity, provides that in an equity suit "either party may apply for a new trial to the judge before whom the trial was held."

Held, reversing the decision of the Supreme Court of New Brunswick, Taschereau J. dissenting, that such application need not be made before the individual before whom the trial was had but could be made to a judge exercising the same jurisdiction. Therefore, where the judge in equity who had tried a case resigned his office an application for a new trial could be made to his successor. *Footner* v. *Figes* (2 Sim. 319) followed.

APPEAL from a decision of the Supreme Court of New Brunswick affirming the ruling of the Judge in Equity who held that he had no jurisdiction to grant a new trial in the case.

The sole question for decision on this appeal was whether or not the present Judge in Equity, Mr. Justice Barker, could hear an application for a new trial, the former trial having been had before his predecessor Mr. Justice Palmer. The decision of this question depended on the construction to be placed on 53 Vic. ch. 4, sec. 85, which provides that in an equity suit "either party may apply for a new trial to the judge before whom the trial was had."

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

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Mr. Justice Barker refused to hear the application holding that the statute authorized it to be made before no judge but Mr. Justice Palmer. His decision was affirmed by the full court. The plaintiff then appealed to this court.

C. A. Stockton for the appellant referred to *Footner* v. *Figgs* (1); *Pemberton* v. *Pemberton* (2).

Palmer Q.C. for the respondent. The court will not interfere on a mere matter of procedure. *Gladwin* v. *Cummings* (3).

As to the merits see *Armstrong* v. *Armstrong* (4); *Hodge* v. *Reid* (5).

THE CHIEF JUSTICE.—This suit was brought in the Supreme Court in Equity of the province of New Brunswick, and on the cause coming on for hearing before Mr. Justice Palmer, then the Judge in Equity, certain issues were directed by that learned judge to be tried by a jury. The jury by a majority verdict found the issues in favour of the respondent. The appellant moved for a new trial before Mr. Justice Palmer. Afterwards and before the hearing of the motion, Mr. Justice Palmer resigned his office as a judge of the Supreme Court of New Brunswick. By Act of the legislature of New Brunswick, 57 Vic., chap. 7, it was enacted:

> That from and after the going into effect of this Act the Supreme Court shall be composed of a Chief Justice and five puisne judges.

And it was further enacted:

> That it shall be the duty of the judges of the Supreme Court, by order to be made from time to time, to assign one of their number to attend specially to business upon the equity side of the court.

Under the authority of this Act the judges of the Supreme Court, by order duly made, assigned one of

(1) 2 Sim. 319.
(2) 11 Ves. 50.
(3) Cass. Dig. 2 ed. 426.
(4) 3 Mylne & K. 45.
(5) 1 Han. 89.

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their number, Mr. Justice Barker, to attend specially to business on the equity side of the court. After the passing of this Act and after the making of the order assigning Mr. Justice Barker to act as equity judge, a motion was made to him for a new trial in this case. This motion was opposed by the counsel for the respondent on the ground that, under the 85th section, cap. 4, Acts 1890, relating to practice and proceedings in the Supreme Court in Equity, which enacts that

> either party may apply for a new trial to the judge before whom the trial was held,

a motion for a new trial could only be made to the judge before whom the trial was had and that Mr. Justice Barker could not hear the application for that reason.

The learned judge gave effect to the objection, determined that he had no jurisdiction, and refused to entertain the application for a new trial. From this order the appellant appealed to the Supreme Court of New Brunswick, which court (Mr. Justice Hanington dissenting) dismissed the appeal. From this judgment the present appeal is brought.

It is argued for the respondent that the decision of the Supreme Court was right inasmuch as the statute means that the application for a new trial should be made to the judge who tried the cause personally, and that it is not sufficient that it should be made to his successor in the event of the former having vacated the office. I am unable to agree in this conclusion; on the contrary I entirely concur with Mr. Justice Hanington both in the conclusions at which he arrived and the reasons he has given therefor.

Without authority I should have thought that such a very inconvenient construction as that adopted by the learned judges of the Supreme Court could hardly have been sustained. The result of the decision of the

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Supreme Court would of course be that in every case where a trial of issues in an equity suit had taken place, and the judge who tried them had either died or resigned before a new trial was moved for, there could be no new trial. An intention to enact a law leading to such a failure of justice ought not to be attributed to the legislature except on the strongest expressions and only in the absence of a possibility of giving any other meaning to the language used. I see no difficulty in giving to the words used a sensible meaning which would prevent any such inconvenient and unjust consequence as would follow in the present case if the order now appealed against should stand. In my opinion the judge referred to in the statute before whom the new trial is to be moved for does not mean the same natural person as the judge before whom the trial took place, but the person filling the same office and exercising the same jurisdiction. No reason can be suggested why the motion should be necessarily made to the person who presided at the trial, whilst there was a good reason why the jurisdiction should be assigned to the judge in equity whoever he might be, namely, that the motion should be made to that judge and not to the Supreme Court in *banc*. I think this was the intention of the legislature and I should have come to that conclusion even in the absence of authority. The case of *Footner* v. *Figes* (1), cited by Mr Justice Hanington is however a conclusive authority in support of his view. A motion was made before Vice Chancellor Sir Lancelot Shadwell for a new trial of an issue which had been directed by Sir John Leach, when Vice Chancellor. Sir John Leach had been afterwards and before the motion was made, promoted to the office of Master of the Rolls. There was a general order of the court which directed that every application for a new trial

(1) 2 Sim. 319.

should be made to the judge who directed the issue, and the question was raised whether the motion ought not to be made before the Master of the Rolls. But the Vice Chancellor said that "the meaning of the order was that the motion should be made before the same jurisdiction though the judge might have been removed. This case seems to me directly in point, for I cannot adopt the suggestion that any distinction between it and the present case is to be made because we are here construing a section of a statute whilst in *Footner* v. *Figes* the question depended on the interpretation of a general order. Such orders are always construed on the same principle as statutes.

The appeal must be allowed with costs and the cause remitted with a declaration that the present learned judge in equity has jurisdiction to hear the motion for a new trial.

TASCHEREAU J.—I am of opinion that this appeal should be dismissed. This statute may be absurd but fortunately we have not to remedy all the absurdities to be found in the statute-book. I am against judicial legislation. Then this is a question of practice and procedure, and, as we held lately again in *Arpin* v. *Merchants Bank* (1), one we should not interfere with.

GWYNNE J.—I concur in the construction put upon the statute by Mr. Justice Hanington in the court below, and so am of opinion that the learned judge in equity had jurisdiction in the matter. The appeal must therefore be allowed with costs and the case remitted to him to exercise such jurisdiction.

SEDGEWICK and KING JJ. concurred.

Appeal allowed with costs.

Solicitor for the appellant: *C. A. Stockton.*

Solicitor for the respondent: *Mont. McDonald.*

(1) 24 Can. S. C. R. 142.

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*Mar. 26.

*May 6.

HENRY KING AND OTHERS (DEFENDANTS) ..... } APPELLANTS;

AND

SARAH JANE EVANS (PLAINTIFF).....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Will—Devise of life estate—Remainder to issue in fee simple—Intention of testator—Rule in Shelley's case.

A testator by the third clause of his will devised land as follows: "To my son J. for the term of his natural life and from and after his decease to the lawful issue of my said son J. to hold in fee simple." In default of such issue the land was to go to a daughter for life with a like remainder in favour of issue, failing which to brothers and sisters and their heirs. Another clause of the will was as follows: "It is my intention that upon the decease of either of my children without issue, if any other child be then dead the issue of such latter child (if any) shall at once take the fee simple of the devise mentioned in the second and third clauses of this my will."

Held, affirming the decision of the Court of Appeal, that if the limitation in the third clause, instead of being to the issue to hold in fee simple had been to the heirs general of the issue, the son, J., under the rule in Shelley's case, would have taken an estate tail; that the word "issue" though *primâ facie* a word of limitation equivalent to "heirs of the body" is a more flexible expression than the latter and more easily diverted by a context or superadded limitations from its *primâ facie* meaning; that it will be interpreted to mean "children" when such limitations or context requires it; that "to hold in fee simple" is an expression of known legal import admitting of no secondary or alternative meaning and must prevail over the word "issue" which is one of fluctuating meaning; and that effect must be given to the manifest intention of the testator that the issue should take a fee.

APPEAL from a decision of the Court of Appeal for Ontario (1), reversing the judgment of the Divisional Court (2), in favour of the defendants.

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

(1) 21 Ont. App. R. 519. (2) 23 O. R. 404.

The question for decision in this appeal turns upon the construction of the will of one Andrew Hamilton the clauses of which bearing upon the matters in issue, are as follows:

Thirdly, I give and devise lot * * * * to my son James for the full term of his natural life, and from and after his decease to the lawful issue of my said son James, to hold in fee simple, but in default of such issue him surviving then to my daughter said Sarah Jane for the term of her natural life, and upon the death of my daughter Sarah Jane then to the lawful issue of my said daughter Sarah Jane to hold in fee simple, but in default of such issue of my said daughter Sarah Jane then to my brothers and sisters and their heirs in equal shares.

Clause two devised other lands in the same way to the testator's daughter Sarah Jane with reversion on default of issue to the son.

The sixth clause is as follows:

It is my intention that upon the decease of either of my children without issue if my other child be then dead, the issue of such latter child (if any) shall at once take the fee simple of the devise mentioned in the second and third clauses of this my will.

The defendants claimed, and Mr. Justice Ferguson held, that under the provisions of clause three the son James took an estate tail by application of the rule in Shelley's case. The Court of Appeal reversed the decision of Mr. Justice Ferguson and held that James took only a life estate with remainder to his issue in fee. The defendants appealed.

Armour Q.C. and *McBrayne* for the appellants. The interpretation put upon the will by the Court of Appeal is that it created an estate for life with an executory devise to grand children. But a devise will never be construed as executory if it can be held to be a remainder. *Carwardine* v. *Carwardine* (1); *Goodtitle* v. *Billington* (2); Fearne on Contingent Remainders (3).

(1) 1 Eden 27.
(2) 2 Doug. 753.
(3) Vol. 1. p. 386.

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A devise to A. for life and after his decease to the male issue of his body and their heirs and in default of issue to other devisees creates an estate tail in A. *Frank* v. *Stovin* (1); and to the same effect are *Denn* v. *Puckey* (2); *Williams* v. *Williams* (3); *Hellem* v. *Severs* (4).

The words "to hold in fee simple" cannot control the meaning of "issue" and make it a word of purchase. *Parker* v. *Clarke* (5); *Roddy* v. *Fitzgerald* (6).

Nesbitt Q.C. and *Bicknell* for the respondent. The rule in Shelley's case is a rule of law not of construction. *Evans* v. *Evans* (7).

The expression "to hold in fee simple" is one of known legal import and must have its legal effect unless from the context it is very clear that the testator meant otherwise. *Doe d. Gallini* v. *Gallini* (8); *Montgomery* v. *Montgomery* (9).

THE CHIEF JUSTICE.—The Court of Appeal in this case reversed the judgment of Mr. Justice Ferguson whereby judgment was directed to be entered for the present appellant.

The sole question for determination is the construction of the will of Andrew Hamilton. The date of this will was the first of April, 1869. It was therefore made before the passing of the Ontario Wills Act (10) and is unaffected by that statute. By the third clause of his will the testator devised the lands in question in this cause as follows:—

To my son James for the full term of his natural life and from and after his decease to the lawful issue of my said son James to hold in fee simple, but in default of such issue him surviving then to my

(1) 3 East 548.
(2) 5 T. R. 299.
(3) 51 L. T. N. S. 779.
(4) 24 Gr. 320.
(5) 6 DeG. M. & G. 108.
(6) 6 H. L. Cas. 823.
(7) [1892] 2 ch. 184.
(8) 5 B. & Ad. 621.
(9) 3 J. & La.T. 47.
(10) R. S. O. Cap. 109.

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daughter said Sarah Jane for the term of her natural life, and upon the death of my daughter Sarah Jane, then to the lawful issue of my said daughter Sarah Jane to hold in fee simple, but in default of such issue of my said daughter Sarah Jane then to my brothers and sisters and their heirs in equal shares.

By the second paragraph the testator devised other lands to his daughter Sarah Jane in the same terms as those upon which by the third clause he devised the lands now in question to his son James, with similar devises over in favour of James and his issue, with a like ultimate gift over in favour of the testator's brothers and sisters.

The sixth paragraph was as follows:

It is my intention that upon the decease of either of my children without issue, if any other child be then dead, the issue of such latter child (if any) shall at once take the fee simple of the devise mentioned in the second and third clauses of this my will.

Mr. Justice Ferguson was of opinion that by the operation of the rule in Shelley's case the testator's son James took an estate tail which had been effectually barred by a disentailing assurance executed by the devisee. The Court of Appeal on the other hand have held that James took an estate for life with remainder to his children in fee.

The rule in Shelley's case, as is well known, is a rule not of construction but of law. Before applying it, however, it is requisite to ascertain, by the application of settled rules of construction, what was the testator's meaning by the language in which he has expressed himself.

The word "issue" is no doubt well settled to be *primâ facie* a word not of purchase but of limitation equivalent to heirs of the body; it will, however, be interpreted as meaning "children" when that interpretation is required either by the context or from superadded limitations. The same may indeed be said of the more technical expression "heirs of the body,"

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which may be read as children, if the testator has sufficiently expressed his intention that that shall be done. The word "issue" is, however, said to be a more flexible expression than "heirs of the body" and will more readily be diverted by force of a context or superadded limitations from its *primâ facie* meaning than the term "heirs of the body."

Lord Brougham in *Fetherston* v. *Fetherston* (1), where the question was whether a gift to W. F. and his heirs male could by force of the subsequent words be cut down to an estate for life in W. F., thus states the rule:

> So again if a limitation is made afterwards, and is clearly the main object of the will—which never can take effect unless an estate for life be given instead of an estate tail—here again the first words become qualified and bend to the general intent of the testator, and are no longer regarded as words of limitation, which, if standing by themselves, they would have been.

In the case before us the controversy has turned on the effect of the words "to hold in fee simple" following the gift to the issue of James. Mr. Justice Ferguson held that the words should have the same effect as if there had been a limitation to the issue and their heirs in which case the learned judge was of opinion that James would have taken an estate tail.

That a limitation to the heirs general of the issue would have that effect is, I think, clear upon the authorities. In *Montgomery* v. *Montgomery* (2), Sir Edward Sugden, L. C. of Ireland, says in his judgment:

> Thus far it appears to be clearly settled that a devise to A. for life with remainder to his issue with superadded words of limitation in a manner inconsistent with a descent from A., will give to the word "issue" the operation of a word of purchase. This is established by a series of cases from *Doe d. Cooper* v. *Collis* (3) to *Greenwood* v. *Rothwell* (4)

(1) 3 Cl. & F. 67.
(2) 3 J. & LaT. 47.
(3) 4 T. R. 294.
(4) 6 Scott N. R. 670.

with which it may be found difficult to reconcile the decision in *Tate* v. *Clark* (1). But I say this with hesitation and with great respect for the learned judge who pronounced the latter decision.

Upon this passage there has been much criticism. Some text writers have insisted that the Lord Chancellor did not mean to apply his remarks to a case where the additional limitation was to the heirs general of the issue; others have thought differently, and have considered that the proposition was an erroneous statement of the principle to be deduced from the authorities. In the notes to Shelley's case in Tudor's leading cases on the law of Real Property (2) it is said:

> Nor will a limitation to heirs general superadded to the word issue convert it into a word of purchase; and the rule in Shelley's case (as we have formerly seen is the case where a similar limitation comes after the limitation to the heirs of the body) will still take effect.

In Jarman on Wills (3), the law is laid down as follows:

> It is also established that the addition of words of limitation to the heirs general of the issue will not prevent the word "issue" from operating to give an estate tail as a word of limitation.

And in a subsequent page (4), the editor of the last edition of that work referring to *Montgomery* v. *Montgomery* and the passage already extracted from that judgment says:

> Lord St. Leonards is sometimes cited as if he had laid down a contrary rule; but what he says is "a devise to A. for life with remainder to his issue with superadded words of limitation in a manner inconsistent with a descent from A. will give the word 'issue' the operation of a word of purchase."

thus pointing out that what Sir Edward Sugden referred to was a subsequent limitation changing the course of descent which is sufficient to convert even "heirs of the body" into words of purchase (5).

(1) 1 Beav. 100.
(2) 3 ed. p. 618.
(3) 5 Eng. ed. p. 1265.
(4) P. 1269.
(5) Ed. 3 Tudor's L. C. 613 citing *Doe d. Bosnall* v. *Harvey* 4 B. & C. 610 *Hamilton* v. *West* 10 Ir. Eq. Rep. 75. *Dodds* v. *Dodds* 10 Ir. Ch. Rep. 476; 11 Ib. 374.

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Mr. Hawkins in his treatise (1) says:

But under a devise to A. for life with remainder to his issue and their heirs without a gift over on failure of issue of A. it has been laid down by Lord St. Leonards in *Montgomery* v. *Montgomery* that the words of limitation exclude the rule and that the issue take by purchase.

He afterwards adds:

It may perhaps be doubted whether *Montgomery* v. *Montgomery* is on this point an authority at the present day.

Theobald on Wills lays it down very distinctly that the addition of a limitation to the heirs of the issue does not prevent the operation of the rule; the learned author says (2):

Words of limitation in fee or in tail superadded to the word "issue" where there is a limitation in default of issue in cases before the Wills Act will not make it a word of purchase, provided they do not change the course of descent.

It is clear that in the case of an estate limited to the heirs of the issue there is no change of descent, as there would be if there was a limitation to the "heirs male" of the body, or "heirs female" of the body, of the issue, (3) inasmuch as heirs is restrained so as to mean the same class of heirs as the word issue itself imports, thus leaving the latter to operate as a word of limitation.

In *Parker* v. *Clarke* (4), Lord Cranworth said:

I quite agree with the general rule which has been advanced in the argument that when the gift is to one for life and after his death to the issue of his body and the heirs of such issue for ever, there, by the addition of the words of limitation the testator is merely using words which are idle and which shall not prevail to convert the word "issue" into a word of purchase.

In that case as Alderson B. had already said in *Lees* v. *Mosley* (5):

(1) P. 195 2 Am. Ed.
(2) 4th ed. p. 355.
(3) See Tudor's L. C. p. 613 and cases cited supra.
(4) 6 De G. McN. & G. 109.
(5) 1 Y. & C. (Ex.) p. 589.

The word "heirs" would be first restrained to "heirs of the body" and then altogether rejected as unnecessary.

The case of *Parker* v. *Clarke*, supported as it is by a great number of decided cases (1), is therefore conclusive of the question which had thus far been the subject of consideration. It is however a very different thing from holding that the general word "heirs" may be restricted to "heirs of the body" in order to conciliate it with the previous limitation to say that the words "to hold in fee simple" should, without any context, be translated as meaning "to hold in fee tail," or be altogether rejected.

In the older cases a rule was applied which was generally stated as one which required that the particular intent should give way to the general intent, and although probably some traces of it still linger in the rule just referred to, that a limitation to heirs following a gift to issue shall be confined to heirs of the body, this rule is universally treated by modern authorities as exploded. In *Doe d. Gallini* v. *Gallini* (2), Lord Denman referring to this old rule says:

> The doctrine that the general intent must overrule the particular intent has been much, and we conceive justly, objected to of late as being, as a general proposition, incorrect and vague and likely to lead in its application to erroneous results. In its origin it was merely descriptive of the rule in Shelley's case, and it has since been laid down in others where technical words of limitation have been used and other words showing the intention of the testator that the objects of his bounty should take in a different way from that which the law allows have been rejected; but in the latter cases the more correct mode of stating the rule of construction is, that technical words, or words of known legal import, must have their legal effect, even though the testator uses inconsistent words, unless those inconsistent words are of such a nature as to make it perfectly clear that the testator did not mean to use the technical words in their proper sense, and so it is said by Lord Redesdale in *Jesson* v. *Wright* (3). This doctrine of general and par-

(1) See authorities collected Tudor's L.C. p. 618.

(2) 5 B. & Ad. 640.

(3) 2 Bligh 57.

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ticular intent ought to be carried no further than this, and thus explained it should be applied to this and all other wills.

Were we to give effect to the appellants' contention in the present case we should not only be reviving the old and exploded rule of the general intent overriding the particular intent, but applying it in a manner much stronger than any of the cases, decided in times when it was generally approved of, afford a single instance of. We have here not a word like "heirs," but in the words "to hold in fee simple" an expression of "known legal import" which can admit of no secondary or alternative meaning. Then we have the inconsistent word "issue," and as we cannot reconcile the two, except by reading "issue" in its secondary meaning as equivalent to children, that must be done.

As to the word "issue" we find it laid down in the authorities over and over again that it is a flexible word which will yield its primary meaning more readily than "heirs of the body." As Alderson B. puts it in *Lees* v. *Mosley* (1):

> But the authorities clearly show that whatever be the *primâ facie* meaning of the word "issue" it will yield to the intention of the testator to be collected from the will, and that it requires a less demonstrative context to show such intention than the technical expression "heirs of the body" would do.

We have already seen that even the words "heirs of the body" themselves will have to give way if there is a change in the course of descent.

Then can it be doubted that when we have this word of fluctuating meaning "issue" coupled with the unyielding words "to be held in fee simple" that the latter are to prevail over the former, and that we must refuse either to strike out the words "to hold in fee simple" or, in defiance of the testator's expressed intention, to alter his will by reading them as meaning

(1) 1 Y. & C (Ex.) 589.

something entirely different, namely, "to hold in fee tail." I think there can be no doubt but that we must give effect to the manifest intention of the testator The question is whether he meant the issue of his son to take in fee simple, and in so many words he said that he did. Would it be anything short of setting aside the will were we on technical grounds to hold that "fee simple" did not mean "fee simple," or to reject it as altogether meaningless?

Three modern cases of the highest authority, *Abbott* v. *Middleton* (1), *Grey* v. *Pearson* (2), and *Roddy* v. *Fitzgerald* (3), have now settled the general rule of construction to be that every word which the testator has used is to be given effect to and nothing is to be rejected if it is in any way possible to reconcile and give a consistent meaning to the terms in which the testator has expressed himself.

I have not adverted particularly to the sixth clause, but I may say generally that so far from detracting from the construction before indicated that part of the will greatly strengthens it.

The judgment of the Court of Appeal was entirely right and must be affirmed and the appeal dismissed with costs.

TASCHEREAU J.—I am of the same opinion

GWYNNE J.—I cannot entertain a doubt upon reading the second, third and sixth clauses of the testator Andrew Hamilton's will, that the testator, by the terms "to hold in fee simple," as used in the second and third clauses, and the expression "shall at once take the fee simple of the devise mentioned in the second and third clauses," as used in the sixth clause, meant to

(1) 7 H. L. Cas. 68. (2) 6 H. L. Cas. 61.
(3) 6 H. L. Cas. 823.

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devise exactly what the words express, namely, an estate in fee simple and not a fee tail, and there is no rule of law which can override a testator's intention plainly expressed. The estate devised to the testator's son James, to which alone the question submitted in the case relates, is an estate for life only and the appeal must be dismissed with costs.

SEDGEWICK and KING JJ. concurred.

Appeal dismissed with costs.

Solicitors for the appellants: *Teetzel, Harrison & McBrayne.*

Solicitors for the respondent: *Nesbitt & Gould.*

ADOLPHE BARTHEL (DEFENDANT)..... APPELLANT; 1895

AND *Mar. 23, 25.
*May 6.

DANIEL SCOTTEN (PLAINTIFF) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Construction of deed—Conveyance of land—Uncertain description—Evidence of intention—Verba fortius accipiuntur contra proferentem—Application of—Patent ambiguity.

A grant of land bounded by the bank of a navigable river, or an international waterway, does not extend *ad medium filae* as in the case of a non-navigable river.

If in a conveyance of land the description is not certain enough to identify the locus it is to be construed according to the language of the instrument, though it may result in the grantor assuming to convey more than his title warranted.

The intention of the parties to a deed is paramount and must govern regardless of consequences. *Res magis valeat quam pereat* is only a rule to aid in arriving at the intention and does not authorize the court to override it.

A general description of land as being part of a specified lot must give way to a particular description by boundaries and, if necessary, the general description will be rejected as *falsa demonstratio.*

Where there is an ambiguity on the face of a deed incapable of being explained by extrinsic evidence the maxim *verba fortius accipiuntur contra proferentem* cannot be applied in favour of either party.

Where a description is such that the point of commencement cannot be ascertained it cannot be determined at the election of the grantee.

APPEAL from a decision of the Court of Appeal for Ontario (1), reversing the judgment of the Divisional Court in favour of the plaintiff.

The action in this case is for possession of land the title to which depended upon the construction of a convey-

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

(1) 21 Ont. App. R. 569.

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ance in which the description was mentioned and the point of commencement difficult to ascertain. The Queen's Bench Divisional Court construed it in favour of the defendant, and the Court of Appeal in favour of the plaintiff. The conveyance and all material facts are set out in the judgments published herewith.

Armour Q.C. for the appellant. The ambiguity in the description being patent no evidence was admissible to explain it. *Baird* v. *Fortune* (1); *Meres* v. *Ancell* (2); *Colpoys* v. *Colpoys* (3).

Evidence of surrounding circumstances may be given but only to enable the court to construe the instrument in a manner consistent with its words. *Attorney General* v. *Drummond* (4).

Evidence of title to what was purported to be conveyed cannot be received in order to affect the interpretation. *Hickey* v. *Stover* (5); *Summers* v. *Summers* (6).

A part of the description cannot be rejected as *falsa demonstratio* unless what is left makes the description adequate and sufficient. *Morrell* v. *Fisher* (7); *Goodtitle* v. *Southern* (8); *Day* v. *Trigg* (9).

McCarthy Q.C. and *Nesbitt* for the respondent. Every shift will be resorted to sooner than to hold the gift void for uncertainty. *Doe d. Winter* v. *Perratt* (10).

As to the rule of construction see Elphinstone on Interpretation of Deeds (11); Wigram on Extrinsic Evidence (12).

THE CHIEF JUSTICE.—It is not necessary to state at length the evidence or the several deeds constituting

(1) 4 Macq. H. L. Cas. 149.
(2) 3 Wils. 275.
(3) Jac. 455.
(4) 1 Dr. & War. 367; 2 H. L. Cas. 837.
(5) 11 O. R. 106.
(6) 5 O. R. 110.
(7) 4 Ex. 591.
(8) 1 M. & S. 299.
(9) 1 P. Wm. 286.
(10) 6 M. & G. 362.
(11) Pp. 157-9.
(12) Prop. 5.

the titles of the parties respectively; they all sufficiently appear in the judgments delivered in the Queen's Bench and the Court of Appeal.

The title of the respondent, who was the plaintiff in the action, depends altogether on the construction to be placed on the deed of the 13th of January, 1883, whereby Laurent Bondy purported to convey to Charles W. Gauthier, the respondent's predecessor in title, a piece of land described as follows:—

All and singular that certain parcel or tract of land and premises situate, lying and being in the Township of Sandwich West, in the County of Essex, in the Province of Ontario, being composed of a part of lot forty-three (43) in the first concession of the said Township of Sandwich West, described as follows:—

Commencing in the southerly limit of said lot forty-three, at a distance of twenty feet from the water's edge of the Detroit River, thence northerly parallel to the water's edge two hundred and eight feet, thence westerly parallel to the said southerly limit six hundred feet more or less to the channel bank of the Detroit River, thence southerly following the channel bank two hundred and eight feet, thence easterly six hundred feet more or less to the place of beginning, together with the fishery privileges appurtenant to the premises hereby conveyed.

The patent from the Crown granting lot 43, Petite Cote, to Joseph Puget in fee, dated the 26th of October, 1798, was put in evidence and by it lot 43 is described as a piece of land containing about 118 acres the side lines of which run back from the Detroit River in a course south 73 degrees east.

The respondent's contention was that the point of commencement was twenty feet east (or landwards) from the water's edge; that this was necessarily so, inasmuch as the water's edge was itself, according to the description in the patent, the western boundary of lot 43; that consequently by the deed of the 13th of January, 1883, a piece of land twenty feet in width from east to west and two hundred and eight feet from south to north passed.

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On the other hand the appellant insists that the point of commencement cannot be ascertained; that it is uncertain whether it is at twenty feet to the east or at twenty feet to the west of the water's edge; and that therefore there is no sufficient description and nothing passed under this conveyance of the 13th of January, 1883.

The Queen's Bench Division adopted the latter view. The Court of Appeal in a unanimous judgment reached the contrary conclusion.

There can be no doubt that situate as this lot 43 is, on a large navigable river, an international waterway, the water's edge forms the western boundary. A grant of land bounded by the banks or edges of such streams does not extend to the middle thread as is the case where lands described as so limited lying on the banks of non-navigable rivers are granted (1). Therefore lot 43 is in truth and legally a piece of land bounded on the south and north by the side lines mentioned in the patent, on the west by the bank of the river, and on the east by the second concession. From this the Court of Appeal concluded that a point in the southerly limit of lot 43 at twenty feet from the water's edge must necessarily be to the east of the river.

I quite accede to the principle so strongly stated in *Doe d. Winter* v. *Perrat* (2), cited in the respondent's factum, "that every shift will be resorted to sooner than hold the gift void for uncertainty." This however does not authorize a mode of construction which would be directly opposite to the intention of the parties as apparent from intrinsic evidence contained in the instrument itself. Further it matters nothing in a case of this kind whether the grantor had or had not title to all he assumed to convey; we are to construe

(1.) *Dickson* v. *Snetsinger* 23 U. C. C. P. 235. *Kairns* v. *Turville* 22 U. C. C. P. 17.
(2) 6 M. & G. 362.

the description according to the language of the instrument abstracted from all considerations as to title. I am not disposed to accede to all the propositions of the learned counsel for the appellant as to the admission of extrinsic evidence on a question of construction. I think some of these propositions as to the admissibility of evidence of surrounding circumstances were too broad. I do agree, however, that it is quite competent for the appellant to show if he can from the terms of the deed itself that it did not comprise the land the respondent claims. The maxim *res magis valeat quam pereat* is only a rule authorizing a certain presumption to be made in arriving at what must govern in all cases of construction, namely, the intention of the parties, and if that intention is clear it is not to be arbitrarily overborne by any presumption. Taking therefore this description in the deed of 1883, the description in the patent and the evidence as to the local situation and surroundings of the property in dispute, I ask myself: Can I on this say that the point of commencement is established? If we are to consider the reference to lot 43 in this deed as meaning absolutely the piece of land so described in the patent to the exclusion of any other meaning then the reasoning of the learned judges of the Court of Appeal is unanswerable. But must we necessarily attribute to the parties such an intention? Is it not open to them to show that by the description of lot 43 they meant a lot of land, including land covered with water, of much greater extent than the lot 43 of the patent? Provided they can do this by sufficient evidence, and if such a meaning and intention appears from intrinsic evidence, that is from the deed itself without going out of its four corners, must not the meaning, which it thus appears the parties have themselves attached to the language in which they have expressed themselves, prevail?

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An interpretation clause is no doubt very unusual in the practice of conveyancing, though in some very modern deeds of great intricacy such provisions are sometimes to be found, but for the sake of illustration let us suppose that there had been in this deed of the 13th of January, 1883, a clause expressly declaring that by lot 43 was meant not merely a parcel of land limited according to the description of the patent, but a lot the area of which was comprised in the northern and southern boundaries of the patented lot produced to a westerly boundary formed by the middle thread or by the channel bank of the river. Surely this might have been done, and if so, could it be said in that case where the point of commencement in this description was to be found? And if it would have been competent to the parties to have done this expressly in the formal way I have mentioned, can they not do the same thing in less formal terms, provided they do it clearly and without ambiguity? Then, does it not appear from the description before us that this has been done? I think that it does clearly so appear. Let us follow the description: It commences on the southerly limit of lot 43 at a distance of twenty feet from the water's edge, thence it runs parallel to the water's edge two hundred and eight feet. So far there is nothing to show that the land referred to as lot 43 was not that described in the patent, but then the next course and distance is "westerly parallel to the said southerly limit six hundred feet more or less to the channel bank of the Detroit River."

What is this but saying, almost in so many words, that the southerly and as a consequence the northerly limit of the parcel of land which the parties to the deed were dealing with and describing as lot 43, extended six hundred feet more or less to the bank of the deep water channel of the river? The words "southerly

limit" refer of course to the southerly limit previously mentioned in the beginning of the description as "the southerly limit of said lot 43." Therefore this is equivalent to a declaration on the face of the deed that lot 43 extended westerly at least to the channel bank. The intention of the parties was that it should be so considered for the purposes of the deed, the description in which must consequently be governed by the intention thus expressed. In the face of this to force upon the parties a description of lot 43 according to a strict legal definition of its boundaries is, it seems to me, and I say it with all possible respect, to vary the terms of the instrument which they have deliberately entered into. I cannot see that there is anything in this way of putting the case obnoxious to the rule *res magis valeat quam pereat*, which is only a rule to aid in arriving at the intention and does not in any case authorize the court to overrule the intention which is paramount and must govern whatever may be the consequence.

It is probable that the parties were under a mistaken impression as to the law and supposed that the same rule which applied to grants of land in non-navigable waters were applicable to this land, That, however, is a matter of no moment. I have not referred to the parol evidence of extrinsic facts, as a good deal of it, however conclusive in an action for rectification, seems to me to be strictly inadmissible in aid of the construction of the deed. If there had been an ascertained point of commencement by designating it as at twenty feet to the west of the water's edge, I think there can be no doubt that the whole land as described would have passed although lot 43 did not in fact extend westerly beyond the water's edge. If the description had thus commenced west of the water's edge the words "in the southerly limit of lot 43" would have been construed to mean the southerly limit of lot 43

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produced westward. In that case the general description as part of lot 43 would have had to give way to the particular description by boundaries. This is shown by the opinion of Willes J. in the case of *Rorke* v. *Errington* (1). The only difference between that case and the case I have just hypothetically put would be that in the latter the description would be on the face of the deed, whilst in the case quoted it was described by reference to a plan. The words to be rejected as *falsa demonstratio* would then be "part of lot 43." It follows from this that we cannot allow the general and uncertain words of description "part of lot 43" to control the rest of the description in the deed actually before us, and reject the specific description by boundaries as immaterial.

In what part, therefore, of this southern boundary described by the parties in their deed as extending westerly of the water's edge, at least to the navigable channel of the river, a distance of some 600 feet, are we to place the point of commencement? It is impossible to tell.

This, therefore, is the case of a patent ambiguity, that is, an ambiguity apparent on the face of the deed itself, and therefore one which is incapable of being explained by extrinsic evidence even if any such evidence had been given or tendered. Then there being an ambiguity patent on the face of the deed I do not see that we can apply the maxim *verba fortius accipiuntur contra proferentem* in favour of the respondent. In the first place if it could be applied here it might be applied in every case and there would be no such thing as a patent ambiguity, but we know this is not so. However that rule of interpretation may be applied to determine the meaning of particular words or expressions I can find no instance of its being

(1) 7 H. L. Cas. 617.

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used to determine the meaning of the parties where the words in which they have expressed themselves have left that meaning *in equilibrio* as to the subject matter of a conveyance. In short the deed must be construed according to the intention of the parties, and judging from the language they have used they have left the point in dispute undetermined, and the court cannot on any arbitrary principle determine it one way rather than another (1).

In *Taylor* v. *The Corporation of St. Helens* (2), Jessel M. R. says of this rule:—

> I do not see how, according to the established rules of construction as settled by the House of Lords in the well known case of *Grey* v. *Pearson* (3), followed by *Roddy* v. *Fitzgerald* (4), and *Abbott* v. *Middleton* (5), that maxim can be considered as having any force at the present day. The rule is to find out the meaning of the instrument according to the ordinary and proper rules of construction. If we can thus find out its meaning we do not want the maxim. If, on the other hand, we cannot find out its meaning, then the instrument is void for uncertainty, and in that case it may be said that the instrument is construed in favour of the grantor, for the grant is annulled.

Then can it be said that this is the case of an uncertainty of description to be determined by the election of the grantee?

This principle is applied to determine the ambiguity where a description applies equally to different subjects, as where there is a grant of 10 acres of land part of lot A, or a grant of one of the grantor's four horses. In such a case the grantor is presumed to leave the selection to the choice of the grantee. But this is not the case here; the question is, whether a larger or a smaller piece of land was intended to be conveyed. The grantor meant either the one or the other, which, he has, it is true, left uncertain, and it would be to do violence to his intention if we were to hold that the

(1) 6 ch. D. 270.
(2) 6 Ch. D. 270.
(3) 6 H. L. Cas. 61
(4) 6 H. L. Cas. 823.
(5) 7 H. L. Cas. 78.

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grantee should have a right of election. The doctrine has no application to a case like that now before us, where it is manifest that the grantor intended, not that there should be one or the other of two alternative points of commencement either of which the grantee might adopt, but one point only, though that has not been properly ascertained. Further, if such a right to elect did exist it must be considered as having been determined by Gauthier, under whom the respondent claims, when he allowed Barthel to build a house on the twenty feet strip now in question and otherwise to treat it as his own property.

The appeal must be allowed with costs and the judgment of the Queen's Bench Division restored.

TASCHEREAU and SEDGEWICK JJ. concurred in the judgment of the Chief Justice.

GWYNNE J.—This action was brought to recover possession of a piece of land which is the front part of three acres of land of which the defendant has been in actual undisputed possession from May, 1884, to January, 1893, under parol leases from year to year made to him by one Laurent Bondy at a yearly rent and from the 3rd January, 1893, under a deed of bargain and sale whereby the said Laurent Bondy, in consideration of the sum of $2,600 paid to him by the defendant, conveyed the said three acres to the defendant, his heirs and assigns, and thereby covenanted for good title as against his own acts. A piece of this land the plaintiff now claims, under the description, in his statement of claim, of a certain parcel or tract of land being composed of a part of lot numbered forty-three in the first concession of the township of Sandwich West—

commencing on the southerly limit of said lot forty-three at the distance of twenty feet easterly from the water's edge of the Detroit

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River; thence running northerly parallel to the water's edge up stream and twenty feet distant easterly therefrom two hundred and eight feet; thence westerly parallel to said southerly limit of lot forty-three twenty feet to the water's edge aforesaid; thence southerly following the water's edge of the said river down stream to the said southerly limit of lot forty-three two hundred and eight feet; thence easterly along the said southerly limit of lot forty-three to the place of beginning.

It is admitted that the piece of land so claimed by the plaintiff is within the limits of the three acres as described in the deed executed by Laurent Bondy in favour of the defendant in January, 1893, but the plaintiff claims title under a prior deed of bargain and sale bearing date the thirteenth day of January, 1883, executed by the same Laurent Bondy, whereby he, in consideration of the sum of three hundred dollars, conveyed to one Charles W. Gauthier, his heirs and assigns, the land therein described, the description of which, as the plaintiff contends, includes the piece of land for which this action is brought. That the plaintiff is seized of whatever title Gauthier acquired in the land covered by the description contained in that deed is not disputed, and as the plaintiff and defendant both claim title under the same grantor, the sole question in issue between the parties to this action is, whether or not the description in the prior deed from Bondy to Gauthier does include within its limits that portion of the three acres of which the defendant still is and has been so as aforesaid in possession by title under Bondy, for which this action is brought.

The whole onus of this issue is cast upon the plaintiff, and the solution of it depends solely upon the construction of the words used in the deed, read of course in the light of the surrounding circumstances, and if the words used leave the matter in doubt the plaintiff must fail. Now the description in the deed from Bondy to Gauthier of the land thereby intended to be conveyed is as follows:—

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That certain parcel or tract of land being composed of a part of lot forty-three in the first concession of the township of Sandwich West described as follows:—Commencing in the southerly limit of the said lot forty-three from the water's edge of the Detroit River, thence northerly parallel to the water's edge two hundred and eight feet, thence westerly parallel to the said southerly limit six hundred feet more or less to the channel bank of the Detroit River, thence southerly following the channel bank two hundred and eight feet, thence easterly six hundred feet more or less to the place of beginning, together with the fishery privileges appurtenant to the premises hereby conveyed.

It is here to be observed, that this description varies, in that which is the crucial point of this case, from the description of the piece of land for which this action is brought as described in the plaintiff's statement of claim, in this, namely, that the point of commencement in the latter is stated to be in the southerly limit of lot forty-three at the distance of twenty feet "easterly" from the water's edge, whereas in the deed to Gauthier the word "easterly" does not appear; and the sole question in the case is reduced to this: Does it sufficiently appear upon the face of the deed itself, construed in the light of the surrounding circumstances, that the deed to Gauthier (the word "easterly" not being used therein) must be construed precisely as if it had been? And this having been the sole issue in the case, I must say that I think a vast deal of matter was inquired into at the trial which was not at all relevant to that issue, or admissible as evidence in the case.

Now at the time of the purchase by Gauthier of the land described in the deed from Bondy to him he was engaged in the pursuit of his calling as a fisherman upon a very extensive tract of land covered with the waters of the Detroit River, which, as I think sufficiently appears, was commonly understood in the neighbourhood to be composed of part of lot 42, the northerly part of lot 43, lots 44 and 45 in the first concession of the township of Sandwich West. These lands covered

with the waters of the river upon which Gauthier was pursuing his calling as a fisherman extended out to what was called the channel bank of the River Detroit, the side of which nearest to the Canada shore was deemed to be at the distance of 600 feet or thereabouts from the water's edge of the river on the Canada shore. The parcels were separated from each other by the strip of 208 feet in width of the land covered with the waters of the river which is described in the deed from Bondy to Gauthier. The piece of the lot 42, or commonly known as such, Gauthier held under title from one Joly, and by an indenture dated the 18th February, 1889, he conveyed it, together with the piece of land as described in the deed from Bondy to him, for the consideration of three hundred dollars, to one Reeves (who was a man who pursued, like himself, the calling of a fisherman) by the following description:

All and singular that certain parcel or tract of land and premises situate in the township of Sandwich West, composed of all that portion of lot number forty-two in the first concession of the said township which lies between the beach and the channel bank of the Detroit River, with the privilege of using the beach for the purpose of fishing and also of erecting thereon a fishing shanty reel and windlass sufficient for the purpose of catching fish, and also the right to land at all times upon the said beach for the purposes aforesaid.

These were the rights and privileges enjoyed by Gauthier upon the said described piece of land covered with water on the said lot 42 at the time of his purchasing the piece described in the deed from Bondy to him. Upon the land covered with water as above described he had at the same time a portion enclosed and used by him as a fish-pond for keeping therein fish caught by him in the river. The boundary line of this pond extended in places over the northern limit of the said piece called part of lot 42, which constituted the southern boundary line of the adjoining lot commonly known as 43. He had also upon the beach of the said

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lot 42 a windlass for drawing his fishing seines, and upon the beach of the lots 44 and 45 he had windlasses used for the like purpose. Now these are surrounding circumstances proper to be taken into consideration for the purpose of construing the description of the piece of land intended to be conveyed by deed from Bondy to Gauthier, and they appear to indicate very plainly that Gauthier's object in purchasing that piece and the fishing privileges thereby purported to be granted was to acquire as fishing ground the land covered with the waters of the river of which Bondy claimed to be and was believed to be seized, which lay between those portions of the land covered with the waters of the river upon which Gauthier was pursuing his calling as a fisherman which lay to the north, and that which lay to the south of the piece described in the deed from Bondy. That such was Gauthier's object, and that he required no part of the beach adjoining the piece of land covered with the waters of the river purchased from Bondy for his fishing purposes or for any purpose, and that his sole object was to acquire land covered with the waters of the river, is confirmed by the fact that while he pursued his calling as a fisherman upon the said piece covered with water until 1889, when he sold to Reeves as aforesaid, he never used or asserted any right whatever to use the piece which the plaintiff now claims to have in fact been the only piece which at all passed by the deed. In fact neither Gauthier or Reeves or any one ever made any claim to this piece until the plaintiff, who is not a fisherman as Gauthier was, but who describes himself as being a real estate owner and manufacturer residing in the city of Detroit, purchased from Reeves, not by the description used in the deed from Bondy to Gauthier, but with the word "easterly" added as above shown, his object not being to use the land for the purpose for

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which Gauthier bought it, but to insist that no land covered with water passed by the deed and that what did pass was the piece for which this action was brought, and which the plaintiff desires to use for a drive to unite lands which he owns above and below the piece in dispute. The plaintiff's title, however, must depend upon the construction of the description in the deed from Bondy to Gauthier, read in the light of the circumstances surrounding Gauthier's purchase, and these circumstances, as already pointed out, show, I think, very clearly, that Gauthier's object and intent was simply to purchase land covered with the waters of the river and the fishing privileges thereto, or supposed to be thereto attached, and that he had no occasion for, and did not contemplate purchasing, the piece of land for which this action is brought. By the line which is spoken of in the deed as the southern limit of lot 43 is plainly, I think, meant a line in the river extending from the shore to the channel bank of the river, which both parties believed to be the northern limit of the land covered with the waters of the river in which Gauthier's fish-pond was situate, and which was deemed part of lot 42, and the southern limit of the land covered with the waters of the river which Gauthier was purchasing from Bondy and which both parties understood to be part of lot 43. Now the surrounding circumstances important to be considered as regards Bondy are, that while the piece of land which is the subject of this action was never used or claimed by Gauthier or by Reeves under him it was always, ever since the execution of the deed to Gauthier, claimed and used by Bondy and the defendant, or his tenant, until the sale in fee simple by Bondy to the defendant in January, 1893, and indeed that piece was invaluable to Bondy as constituting his water frontage by which he had access to the river; without it, to say the least,

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his remaining land there would have been very much depreciated in value. Then again the reservation from his grant to Gauthier of ten feet out into the river from the water's edge, upon which Gauthier should have no right so as to prejudice Bondy's approach to the land by water, was a matter no doubt of such great value to Bondy as to make it difficult, if not impossible, to conceive that he could have intended to include the piece of land for which this action is brought in the description of the land sold to Gauthier for $300. Bondy's dealing with the piece as his own in presence of Gauthier ever since the execution of the deed to Gauthier, coupled with the fact that Gauthier never used or claimed any right to use that piece as part of his purchase, indicates I think very clearly, that neither did Bondy intend to sell or Gauthier to purchase the piece for which this action is brought; and there is nothing in the deed so clearly expressed as to override their intentions,—indeed nothing so expressed as to be inconsistent with these intentions. In view then of the surrounding circumstances the true construction to be put upon the deed, I think, is that the point of commencement mentioned in the deed is in the waters of the river and not to the east of the water's edge; not being to the east of the water's edge the only alternative is that it must either be to the west, or so undetermined that the plaintiff must fail.

For these reasons I am of opinion that the very able argument addressed to us by the learned counsel for the appellant must prevail and that the appeal must be allowed with costs and the judgment of the learned trial judge and the Divisional Court of Queen's Bench restored.

KING J.—I agree with the learned judges of the Court of Appeal and with their reasons. The point of

commencement is a point in the southerly limit of lot 43 in the first concession of the township of Sandwich upon the Detroit River, and extending back from it in an easterly direction. There is no other evidence of any other lot that would fill the terms of this designation. A point in its southerly limits at a distance of twenty feet from the water's edge of the Detroit River is an ascertainable point. From this as a starting point the different courses mentioned in the deed may be followed, first by going northerly parallel to the water's edge two hundred and eight feet; then by going westerly parallel to the said southerly limit six hundred feet more or less to the channel bank of the Detroit River; then by going southerly following the channel bank two hundred and eight feet; and thence easterly six hundred feet more or less to the place of beginning. It is true that the second course, viz., the western course, is described as being parallel to the southerly limit of lot 43 in which the point of beginning is found, and it is true that the southerly limit so referred to does not extend as far west as does the second course so described, but lines may be parallel to each other although they may not be opposite to each other on a right angle. Here, for probably twenty feet at least, they might be directly opposite to each other, but whether so or not the two lines may very well be parallel. This, then, gives us a consistent piece of ground which can readily be plotted from the deed. The only thing appearing to make against it is, that in the first part of the description the parcel conveyed is described as being "composed of a part of lot 43 in the first concession" etc., whereas in the respondent's view, the lot conveyed is composed in part of a part of lot 43. This variance is not a very serious one, but, if material, I think that these words of reference may be rejected. First, as being general and opposed to the particular

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description, and in the next place because, if not rejected as misdescription, the whole deed fails by reason of uncertainty; for if these words are to be retained and are to be allowed to impose a non-natural meaning upon the words that follow, we have a patent ambiguity by reason of the manifest uncertainty as to whether the twenty feet from the water's edge of the Detroit River are to be measured landward or otherwise. This consequence ought, if possible, to be avoided. *Res magis valeat quam pereat.* The maxim, of course, may not be used to force a conclusion contrary to the clear meaning of language, but that is not this case. It further seems to me that the only known or ascertainable southerly limit of a lot 43 is the southerly limit of the lot 43 which we know as duly patented.

For these reasons I think the appeal should be dismissed.

Appeal allowed with costs.

Solicitors for the appellant: *Clarke, Bartlet & Bartlet.*

Solicitors for the respondent: *Fleming, Wigle & Rodd.*

J. MORTON CLINCH AND OTHERS (DEFENDANTS)..... } APPELLANTS;

AND

MARGARET E. G. PERNETTE AND OTHERS (PLAINTIFFS) ..... } RESPONDENTS.

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*Nov. 7.

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*May 6,

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Lease for lives—Renewal—Insertion of new life—Evidence of insertion—Counterpart of lease—Custody of—Duration of life—Presumption.

By indenture made in 1805 F. demised certain premises to C. to hold for the lives of the lessee, his brother and his wife "and renewable forever." The lessee covenanted that on the fall of any of said lives he would, within twelve months, insert a new life and pay a renewal fine, otherwise the right of renewal of the life fallen should be forfeited, and if any question should arise it would be incumbent on the one interested in the premises to prove the person on whose death the term was made terminable to be alive, or in default such person would be presumed to be dead. In 1884 a purchaser from the assignees of the reversion entered into possession, and in 1890 an action was brought by persons claiming through the lessee to recover possession and for an account of mesne profits. On the trial a counterpart of the lease, found among the papers of the devisee of the lessor, was received in evidence, upon which was an endorsement dated in 1852, and signed by such devisee, by which a new life was inserted in place of one of the original lives and receipt of the renewal fine was acknowledged.

Held, affirming the decision of the Supreme Court of Nova Scotia, that the words "renewable for ever" in the habendum, taken in conjunction with the lessee's covenant to pay a fine for inserting a new life in place of any that should fall, conferred a right to renewal in perpetuity notwithstanding there was no covenant by the lessor so to renew; that the endorsement was an operative instrument, though found in possession of the owner of the reversion, or at all events it was an admission by their predecessor in title binding on defendants and entitled plaintiffs to a renewal for a new life so inserted, but the right to further

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

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renewal was gone, exact compliance with the requirements of the lease in the payment of the fines being essential and the evidence having shown that the original lessee was dead, and the proper assumption being that his brother, the third life, who was a married man in 1805, was also dead in 1884, even if the lease itself had not provided that death would be presumed in default of proof to the contrary.

Held, per Gwynne J. dissenting, that the term granted was for the joint lives of the three persons named and ceased upon the falling of any one life without renewal as provided; and the fines not having been paid on the death of the lessee and his brother there was a forfeiture which entitled defendants to enter.

The person in possession pleaded that he was a purchaser for value without notice and entitled to the benefit of the Registry Act R. S. N. S. 5th Ser. ch. 84.

Held, that the memorandum endorsed on the lease was not a deed within sec. 18 of the Act, nor a lease within sec. 25; that if a speculative purchaser, having just such an estate as his conveyance gave him, the person in possession would not be within the protection of the Act; and that there was sufficient evidence of notice.

Semble, that section 25 of the Nova Scotia Act R. S. N. S. 5th Ser. c. 84 applies only to leases for years.

APPEAL from a decision of the Supreme Court of Nova Scotia (1), varying the judgment in favour of the plaintiffs at the trial.

The facts are fully set out in the judgment of the Chief Justice.

Ross Q.C. for the appellants.

Borden Q.C. for the respondents.

THE CHIEF JUSTICE.—This is an appeal from a judgment of the Supreme Court of Nova Scotia sitting in banc which varied the judgment of Mr Justice Ritchie, who tried the action without a jury. The judgment which prevailed in appeal was that of Mr. Justice Henry and was concurred in by Mr. Justice Weatherbe, who, however, was of opinion that the judgment of the learned judge at the trial was right, but assented to the

(1) 26 N. S. Rep. 410.

judgment of Mr. Justice Henry, as otherwise there would have been no judgment, the learned Chief Justice being of opinion that the action wholly failed and should be dismissed.

On the 16th of June, 1805, John Fraser, by indenture bearing that date, made between himself of the one part and one Preserved Coffil of the other part, granted and demised to Preserved Coffil the premises in question in this cause to have and to hold the same unto—

the said Preserved Coffil, his executors, administrators and assigns, from the day of the date hereof for and during the natural lives of him, the said Preserved Coffil, Patrick Coffil, brother of the said Preserved Coffil, and Elizabeth Coffil, wife of the said Preserved Coffil, and renewable for ever.

This lease was expressed to be made in consideration of the yearly rents and covenants thereinafter reserved and contained. These covenants were to pay annually, on the first day of May, the sum of four pounds ten shillings, Nova Scotia currency. The lease also contained a clause entitling the lessor to re-enter and avoid the lease in case the rent should be in arrear for thirty days and no sufficient distress should be found on the premises, or "in case of failure on the part of the said Preserved Coffil, his executors, administrators or assigns in performing the covenants and agreements herein contained." Then followed covenants on the part of the lessee to pay the rent, to make certain improvements and repairs and to pay taxes. Next there was the clause upon which the decision of the case principally depends, which is as follows:—

And also shall and will at the fall of every life mentioned in this indenture, pay to him the said John Fraser, his heirs, executors, administrators or assigns, the sum of four pounds for inserting a new life in the place of the one so fallen, and if such new life be not inserted and the sum of four pounds so paid within twelve months after the fall of each life, the said Preserved Coffil, his executors, administrators or assigns shall forfeit and lose their rights of renewal of such life so fallen, anything herein to the contrary notwithstanding, provided

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always that when and as often as any question shall arise whether the person on whose death the term hereby granted is made determinable, it shall be incumbent on the person interested in the premises, by and under the demise, to prove such person to be living, or in default the person about whom such question shall arise shall be taken to be dead.

The lease also contained a covenant by the lessor for quiet enjoyment, and a penalty of one hundred pounds for the performance of the covenants was mutually stipulated for. The testatum clause was in these words:—

In witness whereof the said parties have hereunto interchangeably set their hands and seals.

This lease and the estate created by it was assigned by the lessee to one David Dill, and through certain mesne assignments it became, on or about the first of March, 1850, vested in Edward McLatchy, the father of the respondents other than Margaret Pernette. Edward McLatchy, by his will, devised the premises in question to his widow Eleanor Maria McLatchy, for life, with remainder to the respondents, other than Margaret Pernette. The widow died before this action was brought. The reversion became, upon the death of the lessor, vested in Elizabeth Fraser, his widow, and upon her death in the appellants, other than William B. Shaw. The appellant William B. Shaw claims as a purchaser from the other appellants.

The yearly rent was paid up to the first of May, 1884. In June, 1884, William B. Shaw, claiming as before mentioned took possession of the premises. From the date of the lease until the time Shaw took possession the possession was continuously in the parties from time to time claiming under the lease. In October, 1890, the present action was brought to recover possession and for an account of mesne profits, and the respondents also claimed a declaration that James Shand, junior, now James Shand, was inserted in the said lease as a new life in place of the life of Elizabeth Coffil, which

had fallen, and that the said lease was renewed for the life of James Shand, junior, now James Shand, or in the alternative that the appellants be ordered, decreed and adjudged to insert the said James Shand as a new life in said lease in the place of the life of Elizabeth Coffil, which had fallen, or to execute to the respondents a lease of the land and premises upon the terms and conditions contained in the lease for life of James Shand, renewable forever by the insertion of new lives as in the lease provided. The appellants by their defence deny the principal allegations of the respondent's statement of claim and in substance insist that there never had been any renewal of the lease; that all the original lives had dropped, and that the estate of the lessee had ceased and come to an end before the possession was taken as before mentioned. The defendant William B. Shaw pleaded the Nova Scotia Registry Act and also that he was a purchaser for valuable consideration without notice. In their reply the respondents, besides joining issue upon the defence, insist upon a waiver of any forfeitures by receipt of rent, and allege that the defendant William B. Shaw had notice.

The action came on for trial before Mr. Justice Ritchie without a jury. At the trial evidence was given that Patrick Coffil was dead, and it was proved that Preserved Coffil had left the province many years before and gone to live in the State of Maine, and that the witness (Edward McLatchy) had heard he was dead. A document purporting to be the original lease or a counterpart thereof was produced which had been found amongst the papers of Elizabeth Fraser the widow of the lessor. Upon this document was the following endorsement :—

Elizabeth Coffil, the wife of Preserved Coffil within named, having died and Edward McLatchy, of Windsor, assignee of the within estate, having paid to me the sum of four pounds, I do hereby, at his request

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and in consideration of the said payment and in order fully to carry out and effectuate the conditions and covenants to the within indenture of lease set forth, agree to insert and do by these insert and put James Shand, junior, son of James Shand, of Windsor, blacksmith, in the stead and place as a life or heir in the said lease according to the conditions thereof.

Dated at Halifax this sixth day of April, 1852.

(Sgd.) ELIZABETH FRASER,
Devisee of John Fraser within named.

At the date borne by this endorsed memorandum the reversion was vested in Elizabeth Fraser, and Edward McLatchy was then the assignee of the lease. James Shand therein named was still living and was called and examined as a witness at the trial. No counterpart of the lease was found among the papers of Edward McLatchy, although due search was proved to have been made therefor. The learned judge considered that the lease was renewable for ever; that there had been a good renewal for the life of James Shand; that any forfeiture of the right to renew had been waived by the receipt of rent; and that the respondents were entitled to have a renewal lease executed for two new lives to be named by them in addition to the subsisting life of James Shand. By the judgment entered it was declared that the respondents, other than Mrs. Pernette, were entitled to the possession and that the possession of the appellant Shaw was wrongful. An account of mesne profits was directed and it was ordered that the defendants, upon payment of $182.95, should execute a new lease to the plaintiff Edward McLatchy (upon proof by him that his co-plaintiffs, other than Mrs. Pernette, had assigned their interest to him) for the life of James Shand and two other persons to be named, renewable for ever. Upon an appeal to the Supreme Court in banc, this judgment was varied by striking out the third paragraph directing the execution of a new lease. Of the

two judges who formed the court *in banc* Mr. Justice Weatherbe agreed with the trial judge. The Chief Justice wholly dissented and was of opinion that the action should be dismissed, whilst Mr. Justice Henry, whose judgment prevailed inasmuch as Mr. Justice Weatherbe formally concurred in it, was of opinion that the respondents were entitled to the possession and enjoyment of the estate during the life of James Shand, but were not entitled to name new lives nor to have a renewal lease containing a clause for perpetual renewal executed.

From this judgment the present appeal has been brought, and the respondents have also instituted a cross appeal.

The first consideration which presents itself relates to the proper construction of the lease. Does it confer a right to a renewal in perpetuity? This must depend on the words "renewable for ever" in the habendum, taken in conjunction with the covenant on the part of the lessee to pay a fine on the dropping of a life which has been already set forth, for the lease contains no formal covenant or agreement by the lessor to renew. The learned Chief Justice was of opinion that the expression in the habendum, read together with the lessee's covenant, was not sufficient to make out a covenant on the part of the lessor to renew, and he relied upon the case of *Sheppard* v. *Doolan* (1). In that case the Irish Master of the Rolls certainly did hold that words like those in the habendum of this case without any other covenant by the lessor, did not amount to a covenant to renew. But on appeal to the Lord Chancellor (Sir Edward Sugden) (2), that decision was not approved of, but on the contrary a previous decision of Lord Manners, in the case of *Taylor* v. *Pollard* (3), where a covenant had been implied under

(1) 4 Ir. Eq. R. 654. (2) 5 Ir. Eq. R. 6; 3 Dr. & War. 1.
(3) Lyne on Leases App. p. 62.

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still stronger circumstances, was considered to have been well decided. The Lord Chancellor did not, it is true, decide the point but offered to send a case to a court of law according to the practice of those days; this, however, was declined by the party who contended there was no covenant and who subsequently abandoned the objection.

In *Chambers* v. *Gaussen* (1), a case which much resembles this, the same point again arose before Sir Edward Sugden. There it was also expressed in the habendum that there should be a perpetual renewal, but reference was made in the habendum to "covenants for that purpose hereinafter expressed." As in the present case no covenants to renew by the lessor were contained in the lease but there was such a covenant on the part of the lessee. The Lord Chancellor there said :—

> The demise is for certain lives named in the lease and for "the life and lives of such other person or persons as shall be nominated by the said James Boyle upon the death of any of the persons for whose lives the premises are hereby granted and upon the death of any such person or persons as shall at any time hereafter be nominated and appointed for ever according to the covenants and agreements for that purpose hereinafter expressed." Now supposing these words "according to the covenants and agreements for that purpose hereinafter expressed" had not been here, this would have been in this court a lease for lives renewable for ever. There is no magic in words to express a covenant. This would amount both to a legal demise for three lives and an equitable demise for such lives as thereafter the lessee should nominate. But then it is "according to the covenants and agreements for that purpose hereinafter expressed." For what purpose? For the purpose of the renewal of the lives. There is no covenant by the lessor to renew but there is one by the lessee. The lessee, if he names the lives, is to hold during those lives according to the covenant thereinafter expressed, and the lessee afterwards covenants that "he will within six calendar months after the decease of each of the persons whose lives are hereinbefore mentioned and of each person who shall hereafter be nominated and appointed" pay in the nature of a fine for each person so dying one peppercorn if demanded.

(1) 7 Ir. Eq. R. 575.

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This case I think is a sufficient authority for holding, as the court below have done, that the lease before us was renewable in perpetuity according to the terms of the lessee's covenant to pay the fines. It is true that there was not here, as in *Chambers* v. *Gaussen*, to be found in the habendum any reference to the nomination of new lives and therefore if we had nothing but the words "renewable for ever" it might have been difficult to say how a renewal was to be carried out; and again there is not here any express reference as there was in the case cited to subsequent covenants. We are however to construe the instrument as a whole and this entitles us, notwithstanding the omission of any express reference to the lessee's covenant in the habendum, to read that covenant in connection with the habendum, and when that is done the mode of renewal by the appointment of a new life on the death of each of the original nominees becomes apparent. I hold, therefore, that the lease originally conferred an estate for the lives of the three persons named with a covenant by the lessor to renew from time to time upon the dropping of any of those lives and so on for ever.

I also refer to the case of *Swinburne* v. *Milburn* (1), as to the effect of the words "renewable for ever." Lord Fitzgerald in his opinion in that case says:

> In the numerous cases which arose in Ireland on the construction of covenants alleged to be for perpetual renewal, I have not been able to call to mind a single one in which the covenant was interpreted to be of that character, unless it contained sufficient evidence of intention by the use of words importing perpetuity such as "for ever," or "from time to time forever hereafter" or some other expression of a like or equivalent character.

The lessee had then a legal estate for the term of the original lives, at least I assume he had, though for a technical reason he may have had only an equitable

(1) 9 App. Cas, 844.

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estate; this technical point, however, makes no difference and need not be dwelt upon or further adverted to. He had also a good equitable right to insist on a renewal in perpetuity provided he complied with the conditions as to terms and payment of the fines specified in his covenant. The proper mode of carrying this out would have been by executing a renewal lease in identical terms with the original lease on the occasion of the dropping of each life inserting the name of the new nominee in the place of the dead person, with the habendum and lessee's covenant in the very words of the first lease.

Then what was the effect of the indorsement on the lease or counterpart found amongst the papers of Mrs. Fraser?

I have no doubt whatever that this lease was, as Mr. Justice Henry holds it to have been, a counterpart. The testatum clause shows that there was such a counterpart executed by the use of the word "interchangeably" found therein. That it was found in the possession of the owner of the reversion makes no difference. It has been held in many cases that conveyances, even deeds of gift, so found, are to be taken as operative instruments sufficient to pass an estate (1). I do not think therefore that we can conclude, from the mere fact that this indorsement was upon the part of the original lease retained by the lessor, that it was a mere undelivered agreement withheld because the fine had not been paid. It is at least an admission by their predecessor in title binding on the appellants. The non-production of the part of the lease which the lessee had is accounted for by the evidence of Robie McLatchy who proves a sufficient search for it among his father's papers.

(1) Doe d. Garnons *v.* Knight 5 B. & C. 671. Exton *v.* Scott 6 Sim. 31. Fletcher *v.* Fletcher 4 Hare 67.

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I think we must assume that the life of Elizabeth Coffil was the first life which dropped, and that at the date of the indorsement in April, 1852, the other two lives, those of Preserved Coffil and Patrick Coffil, were existing. We ought not as against the lessor to presume that it was intended by the receipt of the fine and by the indorsement of the memorandum to waive a forfeiture or to alter the terms of the original lease which would have been the case if the lives, other than that of Elizabeth Coffil, had then fallen in.

I am also of opinion that we must presume that at the date of the purchase by the defendant Shaw both Preserved Coffil and Patrick Coffil were dead. As to Patrick Coffil there is evidence of his death, and as to Preserved Coffil, the great age he would have attained if alive in 1884 (assuming him to have been of age in 1805, and he was then a married man) alone warrants this conclusion. The lease, moreover, contains an express clause requiring us to make this presumption since it is provided that whenever any question shall arise as to the life or death of any of the nominees such person shall in the absence of proof to the contrary by the lessee or those claiming under him "be taken to be dead." This is, it seems to me, conclusive. The clause of the lease already referred to making provision for the presumption of death also applies in favour of the appellants to establish, in the absence of proof by the respondents of the exact date of the death of Preserved Coffil and Patrick Coffil, that they both died more than twelve months before the respondents were evicted. In that case the right to any further renewal in substitution for those lives was forfeited according to the express terms of the lease. This clause of forfeiture it will be observed is in express terms confined to a forfeiture of the right to a renewal and does not extend to any subsisting estate for a life then in existence.

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The actual estate for the life of James Shand would therefore be unaffected by it, but the right of renewal on the death of James Shand would be gone. The forfeiture of that right of renewal would be worked by the general clause of forfeiture contained in the lease though that general clause would not extend to the subsisting equitable estate for Shand's life depending on the renewal effected by the indorsement, for the reason that the receipt of rent down to the 1st of May, 1884, kept it alive.

It was, however, held by Mr. Justice Ritchie, proceeding upon the Irish cases, that the plaintiffs are entitled to relief against the consequences of their failure to renew. I cannot assent to this. In the absence of any special equitable ground for interference to reinstate the respondents in their rights of renewal, I am of opinion that we must apply the law as settled by the cases determined in England. Exact compliance with the requirements of the lease in the payment of the fines was therefore essential. That this is the law is I think clearly established by cases cited in the judgments of the Chief Justice and Mr. Justice Henry. I particularly rely on *Murray* v. *Bateman* (1); *Baynham* v. *Guy's Hospital* (2); *Harries* v. *Bryant* (3); and *Maxwell* v. *Ward* (4). The right to any further renewal even on the dropping of the life of James Shand, the present *cestui que vie*, is I think absolutely extinguished. As I have already said the receipt of rent applies so far as the present equitable interest for Shand's life is concerned to keep it alive but no further.

Some provision should be made in the judgment for the payment by the respondents of the rent accrued since 1st of May, 1884, and it should be credited to the appellants in taking that account.

(1) 1 Ridgway, P. C. 187.
(2) 3 Ves. 295.
(3) 4 Russ. 89.
(4) 13 Price 674.

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There remains to be considered the special defences of Shaw which are: First, that he is entitled to the benefit of the registry laws. Secondly, that he is a purchaser for value without notice, and as such entitled to the protection afforded by the general doctrines of the courts of equity to such purchasers. As regards the registry laws, the sections of the Nova Scotia Registry Act (Revised Statutes Nova Scotia cap. 84) which are relied on are the 18th and 25th. The lease itself was duly registered many years ago. The 18th section provides that deeds of land not registered shall be void against subsequent purchasers who shall first register. The memorandum indorsed on the lease was not a deed and does not come within this provision (1). The 25th section provides that leases of lands for a term exceeding three years shall be void against any subsequent purchaser for valuable consideration, unless such lease shall have been previously registered. This section also appears to me to be inapplicable. First it seems only to apply to leases for years. But without insisting on this I am of opinion that the memorandum of the 6th of April, 1852, indorsed on the lease was not itself a lease coming within this clause. Further, I agree with both Mr. Justice Ritchie and Mr. Justice Henry that there is sufficient evidence of actual (not merely constructive) notice to be found in the admission of Shaw and the evidence of Robie McLatchy to disentitle him to the benefit of the registry laws. He admits he knew of the dispute when he took his deed, and Robie McLatchy, one of the respondents, swears that he gave him notice. Further, he appears to me to have been a speculative purchaser who bargained for and bought, not the fee simple estate in possession or any precise interest, but just such an estate as the conveyances he took—a mere quit claim deed in one

(1) See *Rodger* v. *Harrison* [1893] 1 Q. B. 161.

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instance—would confer on him. If so (and I do not decide this fact positively) he cannot take advantage of the Registry Act. Such purchasers, it has been decided both in Ireland (1) and Ontario (2), are not within the statutory protection conferred by such acts. Lastly, the defence of purchase for value without notice also fails for the reason already stated under the other head, that Shaw had notice.

The result is that I agree in all respects with Mr. Justice Henry in both his reasons and conclusion. Subject to the slight variation as to setting off the accrued rents payable under the lease against mesne profits, both the appeal and cross appeal must be dismissed with costs.

TASCHEREAU, SEDGEWICK and KING JJ. concurred.

GWYNNE J.—The action in this case was brought by the respondents as plaintiffs claiming under an indenture of lease for lives executed by one John Fraser since deceased, under whom the defendants claim, to one Preserved Coffil, under whom the plaintiffs claim, to be entitled to possession of the land in the lease mentioned, from which they had been evicted by the entry of the defendants thereon in the month of June 1884. The plaintiffs in their statement of claim, after setting out the original indenture of lease and tracing title to the possession of the land therein mentioned by mesne assignments of the indenture of lease from the lessee and an indorsement alleged to have been made thereon in 1852 by Elizabeth Fraser devisee of the lessor John Fraser, and the entry and eviction by the defendants in 1884, claimed among other things as follows:—

(1) *Rice* v. *O'Connor* 12 Ir. ch. 424. (2) *Goff* v. *Lister* 14 Gr. 451.

1. A declaration that they are entitled to the possession of and the receipt of the rents and profits of the said tract or parcel of land.

2. A declaration that James Shand junior, now James Shand, was inserted in the said lease as a new life in the place of the life of Elizabeth Coffil which had fallen, and that the said lease was renewed for the life of James Shand junior, now James Shand, or in the alternative that the defendants be ordered, decreed and adjudged to insert the said James Shand as a new life in the said lease in the place of the life of Elizabeth Coffil which has fallen; or to execute to the plaintiffs a lease of the said tract or parcel of land upon the terms and conditions contained in the said lease for the life of the said James Shand renewable for ever by the insertion of new lives as in said lease provided.

3. An account of the rents and profits of said tract or parcel of land received by the defendants or any or either of them since June, 1884, or which without the wilful default of the defendants might have been received, and payment of that amount to the plaintiffs.

The learned judge who tried the case, Mr. Justice Ritchie, made a decree in favour of the plaintiffs, whereby it was adjudged that the entry by the defendants in 1884 was wrongful, and that the plaintiffs are entitled to the possession of the said piece of land.

2. An account in favour of the plaintiffs was directed and decreed to be taken of the rents and profits received, or which but for the wilful default of the defendants might have been received by them, from the date of such their entry in June, 1884, up to the time of the bringing of the action.

3. It was thereby further decreed that the defendants do execute to the plaintiff Edward McLatchy, upon proof by him of conveyance to him by the other plaintiffs other than the plaintiff Margaret E. G. Pernette of

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all their right, title and interest in said tract or parcel of land and upon payment of the sum of $182.95 a lease for the life of James Shand of Halifax in the county of Halifax auctioneer and two other persons to be named by said Edward McLatchy, renewable for ever, of said tract or parcel of land in the terms of the decree set out in plaintiffs' statement of claim, in so far as the same are now applicable, the form of such lease to be settled by a judge.

Upon appeal by the defendants to the Supreme Court of Nova Scotia the judgment of Mr. Justice Ritchie was varied by striking out of the decree the said third paragraph above extracted providing for the execution of a lease to the plaintiff Edward McLatchy and affirming in other respects the said judgment and decree.

The Chief Justice of the Supreme Court dissented from this judgment for the reason that in his opinion there had been a complete forfeiture of the lease for which the plaintiffs had shown no equity to be relieved, and that judgment in the action should have been rendered for the defendants.

From the judgment of the Supreme Court of Nova Scotia both parties appeal, the defendants contending that judgment should have been rendered for them, and the plaintiffs, on the contrary, insisting that the paragraph expunged from the decree made by Mr. Justice Ritchie should be restored.

There is, in my opinion, no foundation whatever for the contention urged before us, that the indorsement made in 1852 upon the lease by Mrs. Fraser, the devisee of the lessor, can be construed to operate, either as a new lease for the life of James Shand alone therein mentioned, renewable for ever by the substitution of another life in his place upon his death, and so on for ever by the substitution of a new life from time to time as each substituted life falls, or as an agree-

ment for such a lease of which specific performance can be decreed by this court.

The true construction of the lease of the 16th June, 1805, in my opinion, is that it was a lease of the premises therein mentioned to the lessee, his executors, administrators and assigns, for and during the term of the joint lives of the lessee and of his wife and his brother named in the lease, subject to payment of the rent reserved and to renewal by the substitution of another life in the place of each of such lives, as each should fall, and the payment of a renewal fine of four pounds within twelve months after the falling in of each life. The words of the habendum are:

> To have and to hold, &c., &c., for and during the natural lives of him the said Preserved Coffil, Patrick Coffil, brother of the said Preserved Coffil, and Elizabeth Coffil, wife of the said Preserved Coffil, and renewable for ever.

The term thus granted is a term, renewable it is true as specified in the lease, but still the term granted is only for the duration of the joint lives of the three persons named. Then the words of the reddendum are "yielding and paying therefor during the term hereby granted, &c., &c.," and it was expressly provided by the lease that in case of failure on the part of the said Preserved Coffil, his executors, administrators or assigns, in performing the covenants and agreements therein contained, then and from thenceforth it should and might be lawful for the said John Fraser, his heirs, executors, administrators and assigns, into the said premises to re-enter, and the said lessee, his executors, administrators and assigns, to evict, put out, and remove, notwithstanding anything contained in the indenture of lease to the contrary. The lessee then, among other covenants contained in the indenture, covenanted with the lessor his heirs, &c., &c., that he the lessee, his executors, administrators and assigns

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should and would, "at the fall of every life mentioned in this indenture" pay to the said lessor his heirs, &c., &c., the sum of four pounds for inserting a new life in place of the one so fallen, and that, if such new life should not be inserted and the sum of four pounds so paid within twelve months after the fall of each life, the said lessee, his executors, &c., &c., should forfeit and lose their rights of renewal of such fallen life. The term thus granted, being for the joint lives of the three named, ceased upon the falling of any one life, and the effect of this latter clause was to give to the lessee, his executors &c. &c. twelve months within which they could procure a renewal by payment of the fine of four pounds for each life fallen and the substitution of a new life in the place of each life so fallen, and during such year the lessee, his executors &c., could not be disturbed in their possession. The lease then provided that, whenever any question should arise as to the continuance in life of any of the persons for whose lives the term was granted, the onus should lie upon the lessee, his executors &c., to prove such person to be living, or in default that the person about whom such question should arise should be taken to be dead. Now the utmost operation which upon the proper construction of this lease can be given to the indorsement upon it made by Mrs. Fraser in 1852 is—that such indorsement operated as an acknowledgment then made by her that Mrs. Coffil one of the lives named in the lease had fallen, the other two lives being then still in existence, and as an acceptance of James Shand in the place and stead of Mrs. Coffil, and as an acknowledgment that, the fine for a renewal having been paid, McLatchy the plaintiffs' assignee was entitled to have a renewal lease for the term of the joint lives of Preserved Coffil, Patrick Coffil and James Shand, under and subject to the conditions contained in the lease

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for further renewal; and upon the principle that equity deems that to be done which ought to be done, it may perhaps be construed to have amounted in equity to a renewal of the lease for such further term. To give the indorsement on the lease such operation there can be no objection, but no greater or other operation can be given to it. The defendants, as heirs at law of the devisee of the lessor, entered into possession of the demised premises in June, 1884, claiming that the term granted by the lease had expired and that the lessees' representatives had forfeited all right of renewal. The question now has arisen in this action whether that entry was rightful or wrongful. Under the terms of the lease the onus was cast upon the plaintiffs to prove it to have been wrongful. In order to do so it was necessary for them, treating the indorsement on the lease in 1852 to be a renewal lease under the terms of the indenture of 1805, to have proved either that Preserved Coffil, Patrick Coffil and James Shand were all living in June, 1884, or, if any of them was dead, that when the defendants entered the year after the death within which the plaintiff had a right to obtain a renewal by payment of the fine of four pounds for each fallen life had not expired. They showed James Shand to be still living, but they failed to show that in June, 1884, when the defendants entered, Preserved Coffil and his brother Patrick Coffil were living. They must therefore in the terms of the lease be taken to have been then dead. The lease therefore, giving to the plaintiffs the full benefit of their contention that the indorsement on the lease in 1852 operated as a renewal of the lease, such renewal being of a renewal for a new term, namely, for the term of the joint lives of Preserved Coffil, his brother Patrick and James Shand, had expired and not having been renewed within the provision in

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that behalf in the lease, the entry by the defendants in June, 1884, was rightful.

The plaintiffs' case therefore is resolved into a claim for relief in equity against a plain forfeiture of their right to renewal, for which relief no case whatever that can be entertained has been made.

The appeal therefore of the defendants must, in my opinion, be allowed with costs and that of the plaintiffs dismissed, and judgment be ordered to be entered for the defendants in the action, with costs in all the courts below.

Appeal and Cross-appeal dismissed with costs.

Solicitors for appellants: *W. & J. A. McDonald.*

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

J. B. ROLLAND AND OTHERS.....APPELLANTS; 1895

AND *Feb. 25.
*May 6.

LA CAISSE D'ECONOMIE NOTRE-DAME DE QUÉBEC..... } RESPONDENT.

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

Debtor and creditor—Loan by savings bank—Pledge of securities for—Validity of—Insolvency of borrower—Right of curator to impugn transaction—R. S. C. c. 122 *s.* 20.

L. borrowed a sum of money from a savings bank which he agreed to repay with interest, transferring in pledge as collateral security letters of credit on the Government of Quebec. L. having become insolvent the bank filed its claim for the amount of the loan, with interest, which the curator of the estate and, on appeal, the appellants, as creditors of L., contested on the ground that the said securities were not of the class mentioned in the act relating to savings banks, (R. S. C. c. 122 s. 20), and the bank's act in making said loan was *ultra vires* and illegal.

Held, that L., having received good and valid consideration for his promise to repay the loan, could not, nor could the appellants, his creditors, who had no other rights than the debtor himself had, impugn the contract of loan, or be admitted to assail the pledge of the securities.

Assuming that the act of the bank in lending the money, on the pledge of such securities, was *ultra vires*, although this might affect the pledge as regards third parties interested in the securities, it was not, of itself and *ipso facto*, a radical nullity of public order of such a character as to disentitle the bank under arts. 989 and 990 C.C. from claiming back the money with interest. *Bank of Toronto* v. *Perkins* (8 Can. S. C. R. 903) distinguished.

APPEAL AND CROSS-APPEAL from a decision of the court of Queen's Bench for Lower Canada (appeal side) (1), varying the judgment of the Superior Court (2), in favour of the respondent bank.

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

(1) Q. R. 3 Q. B. 315.
(2) Q. R. 4 S. C. 65 sub nom. *Langlais* v. *La Caisse d'Economie Notre-Dame de Quebec.*

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ROLLAND
v.
LA CAISSE D'ECONOMIE N.-D. DE QUÉBEC.

The material facts giving rise to the litigation in this case are as follows:

On the 11th February, 1891, one J. A. Langlais, then a stationer, in a large way of business in Quebec, borrowed from the Caisse d'Economie, respondents, the sum of twenty-two thousand five hundred dollars, which he agreed to return within one year from that date with interest at 7 per cent. To secure the payment of this sum and the interest, the borrower transferred to the bank as collateral security, a document described as a letter of credit signed by the Provincial Secretary, and dated 10th February, 1891.

Subsequently, on the 23rd February, 1891, Langlais borrowed two further sums of thirty thousand dollars each from the Caisse, and again as collateral security transferred to the bank, two other documents called letters of credit signed by the then Prime Minister, Hon. H. Mercier.

Subsequently, before returning these loans, Langlais become insolvent, made an abandonment of his property (763*a* C. P. C.) for the benefit of his creditors, and to this abandonment one Docithé Arcand was appointed curator, and the bank filed a claim with the curator for the amount of Langlais' indebtedness.

Langlais' estate having been disposed of by the curator, the latter prepared a dividend sheet for the purpose of distributing the moneys realized among the creditors as their rights appeared, and the bank was collocated on the dividend sheet for the amount of its claim, namely, for the sum of eighty-seven thousand five hundred and four dollars and seventy-six cents. This claim was contested by the curator, and this contestation was tried before Mr. Justice Andrews in the Superior Court at Quebec, and dismissed. From this judgment an appeal was taken to the Court of Appeal, not by the curator, but by a creditor, Mr. Rolland, the

appellant herein, and the Court of Queen's Bench, sitting at Quebec, allowed the appeal in part, holding that the bank was entitled to rank as a creditor upon Langlais's estate for the amount loaned to Langlais, but that it was not entitled to interest on the claim. From this latter judgment both sides have appealed.

The Caisse d'Economie is a savings bank, incorporated by 34 Vic., chap. 7, and the law applicable to savings banks at the time this contract was entered into will be found in chap. 122 of the Revised Statutes of Canada, section 20 of which is as follows:

The bank may also loan such moneys, upon the personal securities of individuals, or to any corporate bodies, if collateral securities of the nature mentioned in the next preceding section, or British or foreign public securities, or stock of some chartered bank in Canada, or stock in any incorporated building society, or bonds or debentures, or stock of any incorporated institution or company, are taken in addition to such personal or corporate security, with authority to sell such securities if the loan is not paid.

The creditors of Langlais contended that the letters of credit pledged to the bank were not securities of the kind mentioned in this section and that the loan was, therefore, *ultra vires* of the bank and the estate was not liable to pay it.

Drouin Q.C. for the appellants Rolland and others. The Caisse d'Economie is governed by statute law and has no powers other than those conferred by statute. Brice on *Ultra Vires* (1); *Ashbury Railway Co.* v. *Riche* (2).

The pretended loan is a radical nullity affecting public order. Brice on *Ultra Vires* (3); Arts. 989 and 990 C. C. And see *Bank of Toronto* v. *Perkins* (4); *Bank of Montreal* v. *Geddes* (5).

The contract being contrary to public order the bank cannot enforce payment any more than it could claim performance if it were executory. 31 Demolombe (6); Troplong (7); Pothier (8); Aubry & Rau (9).

(1) 3rd ed. p. 27.
(2) L. R. 7 H. L. 653.
(3) 3rd ed. p. 37 et seq.
(4) 8 Can. S. C. R. 603.
(5) 3 Legal News 146.
(6) Pp. 335 337.
(7) 3 Louage No. 818.
(8) Obligations nos. 43, 45.
(9) Vol. 1 p. 118.

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Langelier Q.C. and *Fitzpatrick* Q.C. for La Caisse d'Economie. Whether or not the loan was *ultra vires* is immaterial. There was an advance by the bank to Langlais which created a valid debt, and the courts will not aid the debtor to repudiate it. *Bank of Australasia* v. *Cherry* (1); *Ayers* v. *South Australian Banking Co.* (2); *Grant* v. *La Banque Nationale* (3).

The creditors are in no different position than Langlais would have been if sued personally. *Tourville* v. *Valentine* (4).

The judgment of the court was delivered by:

TASCHEREAU J.—The principal appeal must fail. I would have dismissed it at the hearing, without calling on the respondent. Such an attempt to plunder this bank in the name of public order and public policy, such a self-constituted championship of public interests in order to defeat a legitimate claim, cannot receive the countenance of a court of justice. The appellants' contention that Langlais received no legal consideration for his undertaking to pay the bank the sum of $82,500, with interest, is to me an astonishing one.

Was not the good, legal coin to that amount (less discount) advanced to him by the bank, a consideration? And a most valid and substantial one? On a contract of loan (*mutuum*) the thing lent is the consideration for the borrower's promise to pay, the *cur promisit* as Demolombe calls it (5). And in the case of a loan of money, the use and enjoyment of the amount lent for the time agreed upon is the consideration for the payment of the interest in addition to the amount lent. The word "consideration," I may here notice, in arts. 989 and 990 of the Quebec Code, is clearer than

(1) L. R. 3 P. C. 299.
(2) L. R. 3 P. C. 548.
(3) 9 O. R. 411.
(4) Q. R. 2 Q. B. 588.
(5) 24 Demol. nos. 346, 350, 354.

the word "*cause*" in the corresponding articles of the French Code.

Assuming that the bank had not the power to lend him that money, did not Langlais, nevertheless, receive, as a matter of fact, a good and valid consideration for his promise to pay both capital and interest?

Can he say that he gave his note without consideration, or for an illegal consideration?

Is it not the converse, and he, or the appellants for him, who want to pocket over $82,000 of the bank's funds, without ever having given any consideration for it to the bank?

He gave his note for value received. Did he not receive this value? Is there anything illegal in his promise to pay it back? The illegality, it is plain, would be the other way; he would, if the appellants' contentions prevailed, have got richer by $82,500 to the clear detriment of the bank.

Then there is no direct prohibition in the statutory provision affecting this case, as there was in *Bank of Toronto* v. *Perkins* (1); and nullities of the nature of those in question in that case must be restricted to the narrowest limits. Solon, Nullites (2); *Duncomb* v. *N. Y. Housatonic and N. Rd. Co.* (3); *Sistare* v. *Best* (4). But, say the appellants, the statute does not empower the bank to effect loans on the pledge of such securities as those taken from Langlais, and consequently it acted *ultra vires* in the matter.

But assuming this to be so, that might perhaps affect the pledge as regards third parties interested in the securities pledged, but it does not bear in the least upon Langlais' contract to pay; and the appellants cannot avail themselves of it to repudiate Langlais' liability towards the bank.

(1) 8 Can. S. C. R. 603.
(2) Vol. 1 nos. 307, 314, 431, 435.
(3) 84 N. Y. 190.
(4) 88 N. Y. 527.

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The contract of loan and the contract of pledge, are so far reciprocally independent that one may stand and the other fall. They are separable contracts. See per Miller J., *National Bank* v. *Matthews* (1).

A borrower cannot be allowed to cheat his lender, under the pretext that the lender had not the power to loan. Such a plea does not lie in his mouth; he is estopped from relying upon it: *il n'a pas de qualité pour s'en prévaloir.* "*Pas de nullité sans griefs,*" says Solon, Nullités (2). Still less, would I say, "*de nullité,*" to cover a glaring fraud.

The proposition laid down in Randolph (3), that "One who borrows money from a corporation cannot in his own defence question its power to lend," is based on principles which must necessarily prevail through all the civilized world.

And, as put by Sedgwick on Stat. Constr. (4):

> Where it is a simple question of capacity or authority to contract, arising either on a question of regularity of organization, or of power conferred by the charter, a party who has had the benefit of the agreement cannot be permitted, in an action founded on it, to question its validity. It would be in the highest degree inequitable and unjust to permit the defendant to repudiate a contract, the fruits of which he retains.

The appellants' case rests on a fallacy. They assume as law the untenable proposition that the *ultra vires* act of the bank, always assuming that *ultra vires* there was in lending this money to Langlais, is, by itself and *ipso facto*, a radical nullity of public order of such a character as to disentitle the bank, under arts. 989 and 990 C. C., to claim it back, and free Langlais for ever from his contract to repay it.

Pothier (5), speaking of a case where a lender had no right to lend, says:

(1) 98 U. S. 621.
(2) Vol. 1, No. 407.
(3) Vol. 1, par. 333.
(4) 2 ed. vol. 2, p. 73.
(5) Du prêt de consomption, nos. 5 and 21.

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Néanmoins, si de fait l'emprunteur a de bonne foi consommé l'argent ou les autres choses qu'il a reçues, cette consomption supplée à ce qui manquait à la validité du contrat, et oblige l'emprunteur envers le prêteur, à la restitution d'une pareille somme ou quantité que celle qu'il a recue, de la même manière que si le contrat eut en toute sa perfection. * * * La consomption qu'en fait l'emprunteur répare le vice qui naît de l'incapacité que le prêteur avait de contracter ou d'aliéner.

And in the case of the loan of a thing not belonging to the lender, where the borrower has had the delivery of the thing lent, the contract is perfectly good between the lender and the borrower. The owner is the only party entitled to complain (1).

On the same, or kindred principles, a depositary is estopped from controverting the depositor's title (2), an agent is precluded from questioning his principal's title to the subject matter of the agency, a bailee of any kind from disputing his bailor's rights, and a lessee from disputing the title of his landlord to the premises demised. If Langlais had leased a house from the bank, he could not refuse to pay the rent on the ground that the bank is not, by its charter, empowered to own real estate, supposing that to be so. And, even where by its charter a corporation is not empowered to contract but under seal, yet, where a contract, within the purposes for which it has been created, has been executed and the corporation has received the benefit of it, it is not permitted to claim exemption from liability upon the ground that the contract was not under the corporate seal (3).

Some modern writers seem to controvert Pothier's views as expressed in the passage I have quoted; (it seems to be thought a mark of distinction nowadays,

(1) Pothier, Idem. no. 34; 26 Laurent, nos. 494, 497, 498; Guillouard, prêt, nos. 75 à 78; 6 Boil. 398.

(2) 27 Laurent, no. 84; Guillouard, dépôt, no. 32; arts. 1800, 1808 C. C.

(3) *Bernardin* v. *North Dufferin*, 19 Can. S. C. R. 581.

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among a certain class of writers in France, to controvert Pothier). But we adopt his opinion as a correct exposition of the law. Then, no book goes to the length of saying that the borrower is at liberty to avail himself of his lender's legal incapacities, of whatever nature, in order to repudiate the repayment of the loan, when the lender's part of the contract has been executed by the delivery of the thing lent to the borrower, and its consumption by him. Of all the possible pleas to an action *ex mutuo* (1), the appellants have the merit of having found a novel one. That is the only merit of their case.

It is an incontrovertible proposition that no private individual has the right to institute legal proceedings against a corporation, on account of *ultra vires* acts of the said corporation, however great the detriment caused by these acts to the public or to others than himself, unless he has, himself, been personally damnified.

Now, as a general rule, what cannot be used as a weapon cannot be resorted to as a shield, and any one who has incurred liabilities under an executed contract with a corporation of which he has got the benefit, cannot get rid of his liabilities on the sole ground that the corporation acted in the matter beyond its powers, though within the purposes for which it was created, unless he has a legitimate interest to do so, or has suffered, or is exposed to suffer, from the alleged infringement of the corporation's charter.

And here, not only has Langlais not suffered any prejudice or been damnified in any way by the act of the bank, but it is to damnify the bank and burden it with the loss of over $80,000 that, in the name of public order and public interests, he, or the appellants for him, impugn his dealing with the bank as *ultra vires* in

(1) Pothier, prêt, no. 47.

order to repudiate his promise to pay, after having had the full benefit of the contract. A more flagrant misapplication of the doctrine of *ultra vires*, it is hardly possible to conceive. If the bank had lent this money to Langlais without any security whatever, the appellants would contend, forsooth, that Langlais was not bound to repay it, because the bank is not authorized to lend without security; they would contend that a party can go to a bank, get his note discounted, and at maturity refuse to pay it on the ground that the bank had no authority to advance him that money, and had acted beyond its statutory powers in doing so.

They were not able, as might be expected, to find any authorities to support their contentions, though their case was presented to us with great ability and learning. Those they cited have no application. *Collins* v. *Blantern* (1), and that class of cases under the English law, are clearly distinguishable, and the authorities under the French law do not give them more assistance.

And it is not merely the contract of loan that Langlais, and the appellants for him, are precluded from impugning. The pledge itself of these securities, likewise, they cannot be admitted to assail. For, Langlais is, in law, the warrantor of the bank upon this contract of pledge; a pledge implies a warranty from the pledger, and even if these securities had not belonged to Langlais, yet this pledge would have been perfectly valid as between him and the bank (2). Now, though here the alleged incapacity to contract is in the pledgee, the rule still applies, it seems to me, that as pledger, Langlais cannot impeach the contract of pledge on the ground of that incapacity. He is presumed in law to have known of that incapacity when

(1) 1 Sm. Lead. Cas. 9 ed. 398. (2) Pothier, Nantissement, nos. 7, 27.

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he effected this loan. And had he, on any ground whatever, even for nullity of public order, if any such nullity there be, at any time claimed the restitution of the securities pledged, he never could have obtained it, in the terms of art. 1975 C.C., until full payment in principal, interest, and costs of his note to the bank. And, on the other hand, upon such payment, the bank would have been bound to return the pledge to him, and would never have had the right to refuse to do so on the ground that their contract of pledge with him was null for reasons of public policy, as *ultra vires* on their part.

Their attempt to prove that Langlais had not benefited from this loan was rightly checked by the Superior Court. The bank was not bound to see what disposition Langlais made of this money. He had the *jus utendi et abutendi* over it; it is, for the lender, a matter of total indifference whether the borrower doubles the amount lent, or keeps it idle, or throws it in the river. As to the appellants' contention, that as creditors they have the right to invoke the nullity of their debtor's contract in the matter, though their debtor himself might not have had the right to do so, it has been correctly rejected by the two courts below. There is no foundation for it in this case. Unquestionably, in cases of fraud, and of contracts made in fraud of creditors, the curator's or assignee's and creditors' interests are adverse to those of the insolvent, and they do not represent him when acting to set aside his fraudulent dealings; but here, there is nothing of the kind; and the appellants have no other rights than those their debtor himself had; and the rule that "aequum est neminem cum alterius detrimento fieri locupletiorem" applies to them as it did to their debtor. His insolvency has substituted them to all his rights, but they must, with his rights, bear the burden

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of his liabilities. They are seized with his estate, but *cum onere*. That estate is the common pledge of what is due to the bank by Langlais, as it is of what is due to themselves; they are on an equal footing.

The appellants' contestation of the bank's claim was, in my opinion, rightly dismissed with costs *in toto* by the Superior Court, whose judgment must be restored.

Appeal dismissed with costs. Cross-appeal allowed with costs. Costs in Queen's Bench against appellants.

Appeal dismissed with costs and cross-appeal allowed with costs.

Solicitor for Rolland, *et al.*: *F. X. Drouin.*

Solicitors for La Caisse d'Economie: *Hamel, Tessier & Tessier.*

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*Feb. 22.

*May 6.

DAME A. A. BAKER, *et vir* (PLAINTIFFS)..APPELLANTS;

AND

ALEXANDER McLELLAND (DEFENDANT) AND F. W. WEBSTER & CO. (MIS EN CAUSE) ..... } RESPONDENTS;

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

Construction of deed—Sale of phosphate mining rights—Option to purchase other minerals found while working—Transfer of rights.

M. by deed sold to W. the phosphate mining rights of certain land, the deed containing a provision that "in case the said purchaser in working the said mines should find other minerals of any kind he shall have the privilege of buying the same from the said vendor or representatives by paying the price set upon the same by two arbitrators appointed by the parties." W. worked the phosphate mines for five years and then discontinued it. Two years later he sold his mining rights in the land and by various conveyances they were finally transferred to B., each assignment purporting to convey "all mines, minerals and mining rights already found or which may hereafter be found" on said land. A year after the transfer to B. the original vendor, M., granted the exclusive right to work mines and veins of mica on said land to W. & Co. who proceeded to develop the mica. B. then claimed an option to purchase the mica mines under the original agreement and demanded an arbitration to fix the price, which was refused, and she brought an action to compel M. to appoint an arbitrator and for damages.

Held, affirming the decision of the Court of Queen's Bench, that the option to purchase other minerals could only be exercised in respect to such as were found when actually working the phosphate, which was not the case with the mica as to which B. claimed the option.

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

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judgment of the Superior Court in favour of the defendant.

The material facts of the case are sufficiently set forth in the above head-note. The Superior Court dismissed the plaintiffs' action and its judgment was affirmed by the Court of Queen's Bench, from whose decision the plaintiffs appealed to this court.

The judgment of the majority of the judges in the Court of Queen's Bench was delivered by Chief Justice Lacoste and was as follows:—

Appel d'un jugement de la Cour Supérieure, District d'Ottawa, qui déboute l'appelante de son action.

L'appelante, comme étant aux droits d'un nommé Wilkins, réclame de l'intimé McLelland un droit de préemption sur les minerais de la demie sud du lot n° 10 B du quatorzième rang du Township de Hull, que ce dernier a vendu aux autres intimés, et de plus $20,000 de dommages, consistant principalement dans des profits qu'elle aurait faits sur le mica extrait par les intimés acquéreurs.

En 1877 McLelland a cédé à Wilkins le droit d'extraire du phosphate de la mine en question. Dans le contrat de cession, se trouve la clause suivante :

"In case the said purchaser in working the said mines should find some other minerals of any kind whatever he shall have the privilege of buying the same from the said vendor or representatives by paying the price set upon the same by two arbitrators appointed by the parties."

Wilkins a travaillé la mine pendant cinq ans, puis a discontinué. Durant tout ce temps il n'a pas fait option d'acheter les autres minerais qu'il à pu trouver.

Quelle est l'étendue de la promesse de vente contenue dans la clause précitée? Elle est limitée au minerai que Wilkins trouverait en extrayant le phosphate, et à celui-là seulement, et non à tous les autres minerais qui se trouveraient dans la mine, et qui n'auraient pas été découverts dans l'exploitation du phosphate. Le droit de préemption est subordonné à l'exploitation de la mine de phosphate. Comme le dit le juge de première instance, 'l'esprit de la clause, est de permettre à l'acquéreur de tirer parti de tout autre minerai qu'il tirerait de la mine exploitée en extrayant le phosphate. C'est le minerai trouvé pendant l'exploitation que l'acquéreur s'est réservé le droit d'acheter.

Dans le cas d'ambiguité d'une clause, elle doit s'interpréter contre celui qui a stipulé et en faveur de celui qui a contracté l'obligation

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(C. C. 1019.) or c'est Wilkins qui a stipulé et c'est McLelland qui a contracté l'obligation.

En outre, la clause constitue une promesse de vente unilatérale. Or cette promesse n'emporte aliénation de la chose, que du jour où celui à qui elle est faite a déclaré vouloir en profiter, jusque là elle ne confère aucun droit réel opposable aux tiers. McLelland restait donc propriétaire de l'objet de la promesse, jusqu'à ce que Wilkins eut signifié son intention d'acheter. Dès lors, McLelland pouvait louer, vendre et faire avec les tiers tous les actes de propriétaire. Il pouvait donc céder le droit d'extraire tout autre minerai que le phosphate aux tiers et le recours de Wilkins se résumait dans une action en dommages pour inéxécution de la promesse de vente. McLelland n'est donc pas en mesure d'exécuter aujourd'hui sa promesse de vente, et pour ce motif la conclusion principale de l'action, c'est-à-dire, celle par laquelle l'appelante demande l'exécution d'une vente, devrait être renvoyée. Et l'appelante ne reste sans aucun recours contre les intimés, tiers acquéreurs de la mine de mica.

Maintenant quant aux dommages réclamés. Ils consisteraient principalement dans le droit régalien que les acquéreurs auraient payé à McLelland, mais ce droit régalien représentait le droit de propriété de McLelland dans le mica. Ce dernier n'était pas tenu d'attendre que Wilkins eut fait son option pour disposer de sa propriété dans le mica. Je suppose que Wilkins eut exploité le phosphate, McLelland aurait pu disposer du mica extrait en même temps, jusqu'à ce qu'il eut été arrêté par une demande régulière d'achat de la part de Wilkins. Ce dernier avait l'option, mais tant qu'il n'optait pas, McLelland pouvait se servir de sa propriété. D'où je conclus que McLelland avait le droit de percevoir la royauté, qu'elle lui appartenait et qu'elle ne peut pas être réclamée par l'appelante à titre de dommages.

La seconde clause des dommages réclamés, consisterait dans le fait que les mis en cause auraient jeté de la pierre dans les trous, faits autrefois par Wilkins en extrayant le phosphate. Rien n'indique que l'appelante ait l'intention de continuer l'exploitation de la mine de phosphate. Ces dommages sont problématiques et indéterminés. Peut-être l'appelante trouvera-t-elle dans ces pierres du phosphate en quantité suffisante pour l'indemniser. McIntosh, le seul témoin qui parle de ces dommages, le fait d'une manière vague.

Si l'appelante a un recours, ce n'est pas dans la présente cause où elle demande l'exécution d'une promesse de vente, et les dommages résultant de l'inexécution de cette promesse. Or les dommages ne résultent pas de l'inexécution de promesse, mais d'une cause qui lui est étrangère.

McDougall Q. . for the appellants. The option to purchase was not a mere personal right, but one

capable of being assigned. Pothier, Obligations (1); 4 Aubry & Rau (2).

It was not a requisite that minerals must be found during the actual working to allow the purchaser to exercise his option. If it was, the evidence shows that mica was discovered by Wilkins while operating the phosphate, but mica was not then valuable. The right of option was merely held in abeyance, but was not lost by lapse of time and cannot be considered as abandoned. 24 Laurent (3).

Aylen for the respondents referred to *Webster* v. *Watters* (4); *Levy* v. *Connolly* (5); 24 Laurent (6); Troplong (7).

THE CHIEF JUSTICE.—For the reasons given by Chief Justice Lacoste in the Court of Queen's Bench I am of opinion that this appeal should be dismissed with costs.

FOURNIER J.—I would dismiss this appeal for the reasons given by Mr. Justice Taschereau.

TASCHEREAU J.—This appeal must be dismissed for the reasons given by Chief Justice Lacoste in the Court of Queen's Bench. The appellants have no right of action. The clause in McLelland's sale to Wilkins, the appellants' *auteur*, upon which she bases her claim against the respondents is not free from ambiguity, but, as remarked by the learned Chief Justice, this ambiguity must be interpreted against the appellants.

SEDGEWICK and KING JJ. concurred.

Appeal dismissed with costs.

Solicitor for the appellants: *J. M. McDougall.*

Solicitor for the respondents: *Henry Aylen.*

(1) No. 481.
(2) Pp. 337, 338.
(3) Pp. 23, 24, no. 18.
(4) 21 R. L. 447.
(5) 7 Q. L. R. 224.
(6) Nos. 8, 16.
(7) Vente vol. 1 p. 122.

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*May 15, 16.

Oct. 9.

THE CITY OF QUEBEC (SUPPLIANT)....APPELLANT;

AND

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

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Constitutional law—Dominion Government—Liability to action for tort—Injury to property on public work—Non-feasance—39 V. c. 27 (D) R. S. C. c. 40, s. 6—50 & 51 V. c. 16 (D).

50 & 51 V. c. 16 ss. 16 and 58 confers upon the subject a new or enlarged right to maintain a petition of right against the Crown for damages in respect of a tort (Taschereau J. expressing no opinion on this point.)

By 50 & 51 V. c. 16, s. 16 (D) the Exchequer Court is given jurisdiction to hear and determine, *inter alia:* (*c*). Every claim against the Crown arising out of any death or injury to the person, or to the property, on any public work, resulting from the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment;

(*d*). Every claim against the Crown arising under any law of Canada. * * *

In 1877 the Dominion Government became possessed of the property in the city of Quebec on which the citadel is situated. Many years before that a drain had been constructed through this property by the Imperial authorities, the existence of which was not known to the officers of the Dominion Government, and it was not discovered at an examination of the premises in 1880 by the city engineer of Quebec and others. Before 1877 this drain had become choked up, and the water escaping gradually loosened the earth until in 1889, a large portion of the rock fell from the cliff into a street of the city below, causing great damage for which compensation was claimed from the Government.

Held, per Taschereau, Gwynne, and King JJ., affirming the decision of the Exchequer Court, that as the injury to the property of the city did not occur upon a public work, subsec. (*c*) of the above Act did not make the Crown liable, and, moreover, there was no evidence

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that the injury was caused by the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment.

Held, per Strong C.J. and Fournier J., that while subsec. (*c*) of the Act did not apply to the case, the city was entitled to relief under subsec. (*d*); that the words "any claim against the Crown" in that subsec., without the additional words would include a claim for a tort; that the added words "arising under any law of Canada" do not necessarily mean any prior existing law or statute law of the Dominion, but might be interpreted as meaning the general law of any province of Canada and even if the meaning be restricted to the statute law of the Dominion the effect of sec. 58 of 50 & 51 V. c. 16 is to reinstate the provision contained in s. 6 of the repealed Act R.S.C. c. 40 which gives a remedy for injury to property in a case like the present; that this case should be decided according to the law of Quebec, regulating the rights and duties of proprietors of land situated on different levels; and that under such law the Crown, as proprietor of land on the higher level, was bound to keep the drain thereon in good repair and was not relieved from liability for damage caused by neglect to do so by the ignorance of its officers of the existence of the drain.

Held also, per Strong C.J. and Fournier J., that independently of the enlarged jurisdiction conferred by 50 & 51 V. c. 16 the Crown would be liable to damages for the injury complained of not as for a tort but for a breach of its duty as owner of the superior heritage by altering its natural state to the injury of the inferior proprietor.

APPEAL from a decision of the Exchequer Court of Canada (1) granting a motion on behalf of the Crown for a nonsuit.

The facts of the case sufficiently appear from the above head-note and the judgments published herewith. The Chief Justice in his judgment also points out the grounds relied on by counsel in argument.

Pelletier Q.C. and *Flynn* Q.C. for the appellant.

Hogg Q.C. for the respondent.

THE CHIEF JUSTICE.—This is a petition of right by which the city of Quebec seeks to recover from the Crown reparation for the damage caused by an acci-

(1) 3 Ex. C. R. 164.

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dent which took place on the 19th September, 1888, when a large portion of rock fell from the side of Cape Diamond into Champlain Street, in the Lower Town of that city, breaking into pieces and forming an enormous heap by which the street was blocked up for a considerable length, and communication between the northerly and southerly ends of it rendered impossible, and whereby the water pipes and drains belonging to the city were covered over and rendered inaccessible. A demurrer by the Crown having been overruled, the petition of right came on for hearing before the judge of the Exchequer Court, who, at the close of the suppliant's case, ordered judgment of non-suit to be entered from which judgment the present appeal has been brought.

One of the principal questions to be decided by this appeal is the extent of the remedy by petition of right, which depends on the construction to be placed on two Acts of Parliament.

Before the passing of the Petitions of Right Act, 39 Vic. ch. 27, there was no remedy against the Crown as representing the Dominion of Canada, in any dominion or provincial court, in respect of any act or omission on the part of the Crown, or any of its officers or servants, which in the case of a subject would have entailed liability as being a tortious act or a negligent omission of duty, save in so far as by statute (hereafter referred to) power was given to certain ministers of the Crown, being heads of departments, in their discretion to refer claims for relief in such matters to the arbitration of public officers, called "official arbitrators."

The Petitions of Right Act did not confer any remedy in such a case, for by the 19th section of Revised Statutes of Canada, ch. 136, sec. 21, it was enacted that :

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Nothing in this Act contained shall give to the subject any remedy against the Crown in any case in which he would not have been entitled to such remedy in England under similar circumstances by the laws in force there prior to the passing of an Act of the Parliament of the United Kingdom, passed in the 23rd and 24th years of Her Majesty's reign, intituled "An Act to amend the law relating to Petitions of Right, to simplify the proceedings and to make provision for the costs thereof."

That the law of England did not authorize a petition of right as a remedy for a tortious act alleged against the Crown, or its officers or servants, is a proposition scarcely requiring any authority. The cases of *Lord Canterbury* v. *The Attorney General* (1); *Tobin* v. *The Queen* (2); and *Feather* v. *The Queen* (3), may be referred to as establishing it beyond a doubt or question. That the Petitions of Right Act did not alter the law in this respect was held in *The Queen* v. *McLeod* (4), and *The Queen* v. *McFarlane* (5), which are conclusive authorities for that proposition binding on this court. If therefore the present appellant is now entitled to a judicial remedy against the Crown in respect of a delict or tort such remedy, and the jurisdiction to enforce it, must have been conferred since the decision of the last of the two cases referred to. In order to ascertain whether this is so or not it is necessary to examine with care the subsequent legislation which is relied on by the appellant as having so altered the law, and also to notice some prior enactments referred to in such subsequent legislation.

By the 6th section of chapter 40 of the Revised Statutes of Canada, intituled "An Act respecting Official Arbitrators," which was a consolidation and re-enactment of previous legislation, it was enacted as follows:

If any person has any claim for property taken, or for alleged direct or consequential damage to property arising from or connected

(1) 1 Ph. 306.
(2) 16 C. B. N. S. 310.
(3) 6 B. & S. 295.
(4) 8 Can. S. C. R. 1.
(5) 7 Can. S. C. R. 216.

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with the construction, repair, maintenance, or working of any public work, or arising out of anything done by the government of Canada, or arising out of any death, or any injury to person or property on any public work, or any claim arising out of or connected with the execution or fulfilment, or an account of deductions made for the non-execution or non-fulfilment, of any contract made and entered into on behalf of Her Majesty, such person may give notice in writing of such claim to the Secretary of State, stating the particulars thereof, and how the same has arisen, which notice the Secretary of State shall refer to the head of the department with respect to which the claim has so arisen; and thereupon the minister may, at any time within thirty days after such notice, tender what he considers a fair compensation for the same with notice that the said claim will be submitted to the decision of the arbitrators, unless the sum so tendered is accepted within ten days after such tender.

I have set forth this long section *in extenso*, for although the statute itself is repealed it has, nevertheless, a very material bearing on the question of the Crown's liability.

By the same Act provision was made for the appointment of official arbitrators, for their powers and for the procedure on references before them.

By 50 & 51 Vict. ch. 16, by which the Exchequer Court, the jurisdiction of which up to that time had been administered by the judges of the Supreme Court, was re-constituted under a separate judge, with an enlarged and more fully defined jurisdiction, it was (by the 15th section) enacted that:

The Exchequer Court shall have exclusive original jurisdiction in all cases in which demand is made or relief sought in respect of any matter which might, in England, be the subject of a suit or action against the Crown, and for greater certainty, but not so as to restrict the generality of the foregoing terms, it shall have exclusive original jurisdiction in all cases in which the land, goods or money of the subject are in the possession of the Crown, or in which the claim arises out of a contract entered into by or on behalf of the Crown.

The 16th section is as follows:

The Exchequer Court shall also have exclusive original jurisdiction to hear and determine the following matters:

(*a.*) Every claim against the Crown for property taken for any public purpose;

(*b.*) Every claim against the Crown for damage to property, injuriously affected by the construction of any public work;

(*c.*) Every claim against the Crown arising out of any death or injury to the person or to property on any public work, resulting from the negligence of any officer or servant of the Crown, while acting within the scope of his duties or employment;

(*d.*) Every claim against the Crown arising under any law of Canada or any regulation made by the governor in council.

By section 23 it is provided that:

Any claim against the Crown may be prosecuted by petition of right, or may be referred to the court by the head of the department in connection with the administration of which the claim arises, and if any such claim is so referred no fiat shall be given on any petition of right in respect thereof.

By section 58 of the same Act chapter 40 of the Revised Statutes of Canada was repealed, but expressly "subject to the provisions of the Interpretation Act," and it was enacted that:

Whenever in any Act of the Parliament of Canada, or in any order of the governor in council, or in any document, it is provided or declared that any matter may be referred to the official arbitrators acting under the "Act respecting the Official Arbitrators," or that any powers shall be vested in or duty shall be performed by such arbitrators, *such matters shall be referred to the Exchequer Court* and such powers shall be vested in and such duties performed by it; and whenever the expression "official arbitrators" or "official arbitrator" occurs in any such Act, order or document, it shall be construed as meaning the Exchequer Court.

Upon the argument of the demurrer in this case it was contended, on behalf of the Crown, that the effect of this legislation was to leave parties just where they were before the passing of the 50 & 51 Vic. ch. 16 (the Exchequer Court Amendment Act) in respect of any right to recover against the Crown in respect of a *tort*, for the reason that it was not intended to confer any new or enlarged right to maintain a petition of right against the Crown in the matter of such claims,

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but merely to enact that wherever there was a previous liability of the Crown in respect of the matters referred to in section 16, that liability might be enforced by a reference to the Exchequer Court instead of to the official arbitrators. And in support of this proposition the case of *Northcote* v. *The Owners of the Henrich Björn* (1) was relied on. That case, however, does not seem to have any application. Jurisdiction was there given to the Court of Admiralty in certain new cases, and the question was whether this necessarily implied that a maritime lien was thereby conferred. It was held that the only effect of the Act was to enable a liability *in personam*, which before had existed at common law, to be enforced in the Admiralty. This manifestly has no application here.

This objection was overruled by the learned judge of the Exchequer Court, and I am of opinion that in this his decision was correct.

The right of the city of Quebec to relief in respect of the grievances alleged in the petition of right depends on subsection (*d*) of section 16 of the Exchequer Court Act and not on subsection (*c*) of the same section 16, the last subsection being for several reasons inapplicable to the case before us. This subsection (*d*) which gives jurisdiction to the Exchequer Court to hear and determine "every claim against the Crown arising under any law of Canada" would indubitably and upon the direct authority of two recent decisions of the Privy Council, if the words "under any law of Canada" were eliminated, have the effect of giving a remedy to the subject against the Crown in all claims for damages for *torts* or *delicts*. In the case of *Farnell* v. *Bowman* (2), an appeal from New South Wales, it was held that the government of that colony was liable to be sued in an action *ex delicto* under a statute providing "that

(1) 11 App. Cas. 270. (2) 12 App. Cas. 643.

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any person having or deeming himself to have any just claim or demand whatever against the government" might set forth the same in a petition to the governor, upon which petition a certain prescribed procedure being followed, judicial relief might be obtained as in the case of an ordinary action between subject and subject. In this judgment it is said with reference to the proper construction of the statute:—

> Thus, unless the plain words are to be restricted for any good reason, a complete remedy is given to any person having or deeming himself to have any just claim or demand whatsoever against the government. These words are amply sufficient to include a claim for damages for a *tort* committed by the local government by their servants.

In the case of the *Atty. Gen. of the Straits Settlement* v. *Wemyss* (1), the words of an ordinance authorizing a remedy by petition of right against the Crown for tortious Acts was in words even more apposite to the case before us; these words were:

> Any claim against the Crown for damages or compensation arising in the colony shall be a claim cognizable under this ordinance.

The Judicial Committee in their judgment make the following observations upon the meaning of this provision:

> Their Lordships are of opinion that the expression "claim against the Crown for damages or compensation" is an apt expression to include claims arising out of *torts*, and that as claims arising out of contracts and other classes of claims are expressly mentioned, the words ought to receive their full meaning. In the case of *Farnell* v. *Bowman* (2), attention was directed by this committee to the fact that in many colonies the Crown was in the habit of undertaking works which in England are usually performed by private persons, and to the consequent expediency of providing remedies for injuries committed in the course of these works. The present case is an illustration of that remark. And there is no improbability, but the reverse, that when the legislature of a colony in such circumstances allows claims against the Crown in words applicable to claims upon *torts*, it should mean exactly what it expresses.

(1) 13 App. Cas. 192. (2) 12 App. Cas. 643.

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These two cases have a two-fold application here, first as showing that the words "any claim against the Crown" are sufficiently comprehensive to include *torts*, more especially as the 15th section makes express provision for the case of claims arising from contracts; secondly, these judgments of the Privy Council lay down a rule or canon for the construction of colonial enactments by which the remedy of the subject against the Crown is enlarged, which it is the duty of this court to apply, as far as possible, to the acts of parliament now under consideration.

It being then established by the cases cited that the language of section 16, subsection (*d*) "every claim against the Crown" is to have the wide construction before stated applied to it, which would include claims for damages arising *ex delicto*, we are next to inquire whether any and what restriction on the meaning which would be thus attributable to the expression in question, if it had stood alone, is imposed by the words "arising under any law of Canada," which immediately follow. It may be said that these are words of limitation which confine the clause to claims in respect of which some pre-existing law had imposed a liability on the part of the Crown. Again, it may be said that a "law of Canada" necessarily means not only some prior law of Canada, but must also exclusively refer to statute law. In support of this last proposition it might be said that there is no general common law prevailing throughout the Dominion of Canada, that each of the several provinces possesses its own private common law, and that the common law of the territories not included within any of the provinces depends on the enactments of the Dominion Parliament. This may be true, and is a necessary incident and result under every system of federal government where the several provinces or states forming the confederation have

each its own separate and different system of private law. This has been recognized as a necessary consequence under the federal constitution of the United States, and that for a reason which would be equally applicable to Canada. It can make no difference that all the provinces, save one, derive their common law from that of England; the circumstance that the private law of one province, that of Quebec, is derived from a different source, makes it impossible to say that there is any system of law, apart from statute, generally prevalent throughout the Dominion. No inconvenience can result from this, since every case which could arise would be provided for by the law of some one or other of the provinces.

Were I obliged to determine this question of construction as one on which the decision of this appeal depended I should probably come to the conclusion that the clause in question ought not to be so interpreted as to exclude claims in respect of *torts* and *delicts*, not referable to any prior statute of the Dominion, but being such as would, under the law of any of the provinces of Canada, have entitled parties to relief as between subject and subject. Taking the rule so clearly and emphatically laid down by the Privy Council in the cases before cited as a guide which we are bound to follow, it would appear to be proper that a wide and liberal construction, what is called a beneficial construction, should be placed upon the language of the legislature; a construction calculated to advance the rights of the subject by giving him an extended remedy. Proceeding upon this principle, we should, I think, be required to say that it was not intended merely to give a new remedy in respect of some pre-existing liability of the Crown, but that it was intended to impose a liability and confer a jurisdiction by which a remedy for such new liability might be administered in every

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case in which a claim was made against the Crown which, according to the existing general law, applicable as between subject and subject, would be cognizable by the courts. Further, I am of opinion that it would be right to hold that the words "law of Canada" did not mean exclusively a statute of the Dominion of Canada, but might be interpreted as meaning the law of any province of Canada which would have been appropriate for the decision of a particular claim in respect of a *tort* or *delict* if it had arisen between subjects of the Crown. It would not, I think, be taking any unwarrantable liberty with the language of the legislature so to interpret the words "any law of Canada," for in a non-technical and popular sense the laws of the several provinces of Canada are laws of Canada, and the rule laid down by the cases before cited requires us to give the terms used the most favourable and comprehensive construction possible. Granting, however, that this subsection (*d*) of section 16 is to be construed as literally and narrowly as possible, and that it is to be confined to cases of claims arising under some pre-existing law; and further that such pre-existing law must be a law of Canada which shall be an act of parliament of the Dominion; my proposition is that a remedy to be obtained through the exercise of the jurisdiction of the Exchequer Court is conferred on the subject by this subsection (*d*) of section 16 for a claim such as the present.

Section 6 of the Revised Statutes of Canada, chapter 40, before set forth, gives in the most explicit terms a remedy to be attained by means of the administrative procedure thereby prescribed, for any direct or consequential damage to property arising from or connected with the construction, repair, maintenance or working of any public work, or arising out of anything done by the government of Canada. If this enactment, or that

particular portion of it to which I have just referred, still remains in force, it is clear that there is an existing law of Canada which authorizes the claim against the Crown made by the suppliant in this petition of right. I now proceed to show how this section 6 of chapter 40 is kept alive, notwithstanding the express repeal of the whole chapter 40 by section 58 of 50 & 51 Vic. ch. 16. In the beginning of section 58 it is provided that the Acts and parts of Acts mentioned in schedule B to the Act are thereby repealed, and in the schedule this chapter 40 is specified as wholly repealed; such repeal is, however, expressly made subject to the "Interpretation Act." By the subsequent part of section 58 it is declared that wherever in any Act of Parliament it is provided that any matter may be referred to "the official arbitrators" or "that when any powers shall be vested in or duty shall be performed by such arbitrators" such matters shall be referred to the Exchequer Court, and such powers shall be vested in and duties performed by that court, and that wherever the expression "official arbitrators" occurs in any such Act it shall be construed as meaning the Exchequer Court. It follows from this that claims provided for by section 6 of the Revised Statutes, chapter 40, which by that Act were to be referred to the arbitrators, are now, under this Act 50 & 51 Vic. ch. 16, to be referred to the Exchequer Court, which necessarily implies that all such claims against the Crown are saved from the repeal and are therefore matters in which parties are for the future to be entitled to a remedy by the judicial procedure of the Exchequer Court. According to the section just quoted from, the matters so saved from the repeal of chapter 40 are to be referred to the Exchequer Court; from this, if it stood alone, it would follow that the jurisdiction of the Exchequer Court in such cases, could only be exer-

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cised upon a reference by a minister. By the 23rd section of 50 & 51 Vic. ch. 16, it is, however, provided "that any claim against the Crown may be prosecuted by petition of right, or may be referred to the court" by a minister; "any claim" of course would include a claim such as that made by the petition of right in the present case in respect of "direct or consequential damage to property" under the sixth section of the Revised Statutes, ch. 40, as reinstated by section 58 of 50 & 51 Vic. ch. 16. Therefore not merely are such claims now the proper subject of reference to the Exchequer Court, but they may also be asserted by petition of right. This must follow not merely from the use of the comprehensive expression "any claim" but also from the latter part of section 23. This latter part of the section provides that "if any claim is referred no fiat shall be given on any petition of right in respect thereof." This I construe as necessarily implying that claims which might have been referred may be properly the subject of petitions of right, thus indicating that the wide meaning which I have already attached to the words "any claim" in the preceding part of the section is in accord with the deliberate intention of the legislature. And this may well be considered not to be an extravagant concession on the part of the Crown in favour of claimants for reparation for *torts* or *delicts*, inasmuch as the power to grant or withhold the fiat on a petition of right enables the administrative officers of the Crown to exercise as much control over a remedy in that form as a minister could under the statute exercise in granting or refusing a reference.

The case made by the petition of right must then, for the foregoing reasons, be considered a claim against the Crown under subsection (*d*) of section 16 of the Exchequer Court Amendment Act arising under that

particular law of Canada which is embodied in the reinstated section 6 of the repealed Act, Revised Statutes ch. 40. The claim is one within the purview of that section inasmuch as the suppliant complains of and claims damages for a direct and also a consequential injury to its property, or to the street which it was bound to keep and maintain as a thoroughfare, by blocking it up with a heap of rock, stones and earth which also covered its water and drainage pipes, thus preventing access to the pipes in case of leakage, which damage the suppliant says is proved to have arisen from or in connection with the construction, repair and maintenance of a public work, namely, a certain drain, running through the property of the Crown. It is true that the allegations of the petition of right are very general, merely alleging carelessness, want of precaution and gross negligence on the part of the Crown and its officers. But no objection was taken to this general form of pleading, either at the trial or upon the appeal to this court, and I therefore feel justified in putting the case as it was shaped in argument by the appellant's counsel at this bar, and as it was disclosed by the evidence which was admitted without objection. It being then sufficiently established that the suppliant was rightly before the Exchequer Court on a petition of right, the next question is: In what system of law is the rule of decision applicable to the case so presented to be found? So long as such a claim was one at large to be referred to lay arbitrators under the administrative procedure prescribed by the repealed Act, it might not matter that it should be brought under any particular system of law, but where it was made a matter for judicial decision, as it was by the transfer of the jurisdiction to the Exchequer Court, it became necessary to ascertain by what rules of law the suppliant's case was to be

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determined. The decision of the case must of course be regulated either by the law of the province of Quebec as expressed in the civil code, and by the old French law by which the code is supplemented, or by the law of England, these being of course the only systems to which resort can properly be had for a rule of decision. As both the property of the suppliant alleged to have received the injury, and the property of the Crown from which the damage proceeded, are in the province of Quebec, I think there can be no question but that the proper rule of decision is that afforded by the law of that province. It matters, however, in my opinion, but little whether the law of England or the law of the province of Quebec be applied to this case, as in all material respects the two systems of law are identical in the principles applicable to the facts disclosed by the evidence in the present record.

The learned judge of the Exchequer Court was of opinion that neither misfeasance nor negligence on the part of the Crown or any of its officers was proved. What the learned judge said on this head is contained in the following paragraph, which I extract from his judgment:

> With reference to this question of nonfeasance I agree with the view which Mr. Hogg and Mr. Cook put forward, that no officer of the Crown is under any duty to repair or to add to a public work at his own expense, or unless the Crown has placed at his disposal money for or credit with instructions to execute the repairs or the addition.
>
> In that sense there is no evidence here of any officer who was charged with any such duty, and being so charged neglected to perform his duty. The truth of the matter is with regard to the drain that no one knew of its existence until after this accident had occurred and minute inquiry was made into its causes. And it seems to me that the suppliant must fail, unless there was some officer or servant of the Crown whose duty it was to know of the existence of this drain, of its choking up and to report the fact to the government, and who was negligent in being and remaining in ignorance of the drain and of the defect.

Upon this view of the evidence the learned judge stopped the case at the end of the suppliant's evidence, and without hearing any evidence in defence ordered judgment to be entered for the Crown. So far as proof of any misfeasance on the part of the Crown, or negligence on the part of any particular officer of the Crown charged with any duty in respect of the lands of the Crown from which this landslide took place, is requisite to make out the suppliant's case, I agree that no such misfeasance or negligence was proved. I am of opinion, however, that the suppliant's evidence does show a *primâ facie* case of nonfeasance on the part of the Crown which under the 6th and 7th paragraphs of the petition it was open to the suppliant to prove, and at all events such a case as would upon an amendment of the petition have entitled the suppliant to relief in the absence of any contradictory evidence on the part of the Crown.

In the judgment delivered in the Exchequer Court there occurs the following passage:

> The accident so far as the evidence goes was occasioned, or at least hastened, by the discharge of the water from the drain which has been so much spoken of.

I have read the evidence several times and attentively considered it, and I entirely agree that this is on the whole a proper conclusion from it, although I might be induced to put it a little stronger and say that in the present state of the record it appears from the evidence that this drain was the sole and immediate cause of the disastrous accident which has led to the present claim.

I do not propose to deal with the evidence exhaustively or with any degree of fulness, as in the event of the case being sent down to another trial such a discussion might lead to embarrassment; but in order to make what I have to say as regards the non-suit plain, I must refer to it to some slight extent.

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In the deposition of Mr. Baillairgé, a civil engineer, and the city engineer of Quebec, a witness whose evidence seems to have commended itself to the learned judge as entirely worthy of credit (which, however, is not now material since on this appeal against the non-suit we have nothing to do with the credibility of witnesses or the weight of testimony) I find the following description of the accident itself, and of the causes which led to it:

Q. You remember the 19th September, 1889, the evening of the catastrophe?—A. Yes.

Q. Will you in a few words, state what occurred and how it occurred, that landslide?—A. Well, what occurred was that the whole section of rock between the outer and inner crevasses moved forward about between six and seven inches, moved outwards with the terrace, taking the terrace with it, about two hundred feet of the western end of the terrace. The floor of it had been scribed to the rock, and it still can be seen, the scribing to the rock. It will be seen now that this is six inches at its greatest amplitude and going upward diminishes off to five, four and two inches, showing that the whole cliff moved away; and another point that shows it is the stairs reaching up to the citadel, on the second landing of the stairs the ramps are dislocated, are torn asunder about seven inches so there is no doubt the whole cliff with the terrace moved outwards about six inches; and this section thrust out the other. The present section on which the terrace is built, by pushing out gave the other a push and caused it to fall over. That is my idea. The outer face of the section there at present leans over six feet in sixty or one in ten, and as the crevasse was about two feet, therefore the rear part of the rock must have leaned over about eight feet, making it very unstable the portion that fell.

Q. When it comes there what direction does the water take, does it go into a sewer or drain?—A. Yes, it now takes a direction parallel to the riprap wall on the face of the glacis. This is since last fall when the drain was renewed. It is indicated here on suppliant's exhibit no. 9 by the letters A, F, G, H. The portion A, P, is parallel to the foot of the glacis, A, F, G, H, running out down over the cliff towards the St. Lawrence. That was a drain built for the water, I don't know how many years ago, perhaps fifty years ago, and it was completely choked at the time of the landslide; but it was burst out here just near the bastion, and any water flowing out from it, instead of flowing down the drain, poured out from the side of the brick drain and naturally ran towards and into the crevasse.

By the court:

Q. The upper crevasse?—A. The inner crevasse, the present crevasse.

Q. All that water had to come and go into the sewer and drain which went parallel to the riprap wall?—A. Yes, it would have come down that drain and followed the face of the cliff and gone down into Champlain street, but the drain was choked.

Q. You say you found that drain choked somewhere?—A. Yes, the drain was choked, completely choked, at point A on exhibit no. 9.

Q. You do not say it was choked there, you say that all the water came out from there?—A. All the way down from the point A it was choked, it was all filled, completely filled from the *debris* falling into it.

Q. You found that drain choked?—A. Yes, sir.

Q. Well, where had the water to go?—A. Well, there was a hole in the side of the brick drain which was only four inches thick, half brick thick.

Q. On which side?—A. The outer side, the side towards the river.

Q. By what you saw, Mr. Baillairgé, is there any appearance that this drain was choked lately or long ago?—A. It must have been choked, according to appearances, I should say for more than twenty years. It was very solidly packed, solidly packed with earth and stones to the very summit of the arch. I don't think a drop of water could pass through.

Q. So it had to run down into the crevasse?—A. Yes, it had to run into the crevasse.

Q. Which is immediately under that?—A. Yes, the crevasse is immediately under that or opposite.

Q. That drain was built long ago, I suppose?—A. I suppose at the time the citadel was finished, some fifty or sixty years ago.

Q. That sewer was made to drain the citadel?—A. Yes, evidently made to drain the waters from the ditches of the citadel.

Q. Mr. Baillairgé, in the whole of your evidence this morning, the conclusion was that you attributed the fall of the rock to the extra quantity of water coming from the citadel and which did not pass through the sewer?—A. Yes, sir.

Q. You have no doubt about it?—A. No.

Q. Have you any doubt that if that drain which was choked had not been choked, that the water which drained from the citadel would not have gone into the crevasse?—A. Certainly not; it would have run eastward.

Q. And you have no doubt that the natural quantity of rainfall which went directly into the crevasse would not have been sufficient in pressure to push the rock out?—A. No.

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Q. It would have been impossible?—A. It would not have exercised the necessary pressure.

Now, I think after this evidence it was impossible to say that there was no proof in support of the suppliant's claim as it was put forward in argument here, and as it has been propounded in the appellant's factum. It is sufficiently proved for the purpose of a *primâ facie* case that the landslide in question was caused by a drain which had been constructed when the works of the citadel of Quebec had been completed by the Imperial Government, some sixty years before the accident, having become completely blocked so that it did not after a certain length carry off any water; that it had probably been in this condition for some twenty years previously; that the stopping up of this drain caused the water which ought to have been carried away by it to escape through a hole in the drain caused by its bursting and to spread over the adjacent rock and into certain crevasses of that rock which eventually led to the loosening of the earth and caused the rock to slide forward, which in turn pushed down the huge mass which fell into the street to the lamentable destruction of human life and private and public property before described.

If on a proper application of principles of law to this statement of the facts which I am of opinion was the result of the evidence, the suppliant was entitled to relief, the non-suit was wrong, and the Crown ought to have been called upon to proceed with its evidence in answer to the *primâ facie* case thus established. I have been particular to point out that the defect in the drain, and probably the existence of the drain itself, was not known to any of the officers of the Crown before the accident, and that there was nothing to indicate its existence which would have made it negligence in them not to have known it, for two reasons, first,

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because the learned judge lays stress on this which in point of fact he is entirely justified in doing; secondly, because so far as the case depended in any way on proof of negligence this non-negligent ignorance of the existence of the drain would, on the authority of *The Sanitary Commissioners of Gibraltar* v. *Orfila* (1), be a conclusive answer.

I now proceed to put forward the propositions of law which, applied to the conclusion from the evidence I have just stated, seem to me to show that a case calling for an answer from the Crown was sufficiently made out by the suppliant. I am of opinion that according to the law of the province of Quebec, if the land from which the mass of earth and rock which fell upon the suppliant's streets was detached had been the property of a subject, the city could, under the facts and circumstances established by the evidence, have maintained an action against such proprietor in order to obtain reparation for the damages thus caused. Therefore, under the statutes already referred to there does exist a claim against the Crown which is under the latter statute the proper subject of a petition of right. The principles of law which govern the case are those which regulate the rights and duties of proprietors of land situated on different levels, and these principles are formulated as applicable to one of the many instances in which they apply, by article 501 of the civil code of Quebec. This article is as follows:

> Lands on a lower level are subject towards those on a higher level to receive such waters as flow from the latter naturally and without the agency of man. The proprietor of the lower land cannot raise any dam to prevent this flow. The proprietor of the higher land can do nothing to aggravate the servitude of the lower land.

Article 501 is a literal reproduction of article 640 of the French Code. All the commentators on the Code

(1) 15 App. Cas. 400.

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Napoléon recognize that article 640 is but a single instance of the application of a general principle of law which is not confined to the case of the flowage of water from higher to lower lands belonging to different proprietors, but which is also applicable to the case of earth, rock and stone falling or sliding down from the superior upon the inferior of properties owned by several proprietors. Demolombe (1) says:

L'article 640 n'est relatif qu'à l'écoulement des eaux, mais il est clair que les fonds inférieurs sont également assujettis à recevoir les lavanges, les avalanches, les éboulements, enfin, de toutes sortes de terre, de neige, de glaces, de gravier, de rochers, etc., qui se détachent des fonds supérieurs. C'est là une règle de nécessité qui, pour n'avoir point été consacrée dans un article spécial, n'en est pas moins évidente et dont l'article 640 n'est lui-même qu'une application.

C'est donc d'après la pensée du législateur telle que l'article 640 la révèle et d'après les principes de l'équité et du bon sens, que les magistrats doivent se décider dans les différentes hypothèses qui peuvent se présenter à cet égard, et qui sont très fréquentes dans les pays de montagnes.

55. Ainsi, la première condition est que les éboulements descendent naturellement des fonds supérieurs *et sans que la main de l'homme y ait contribué;* art. 640.

Point de doute, par exemple, que le propriétaire qui, par des travaux quelconques, aurait créé lui-même la pente du sol, ne fût responsable des dommages qui en résulteraient pour ses voisins. (Zachariæ t. 1, p. 427).

Pothier also shows that the principle which was subsequently adopted in the code admits of a very wide generalization. This author, in treating of "Voisinage," in the second appendix to his Traité de Société (2) says:—

Le voisinage oblige les voisins à user chacun de son héritage de manière qu'il ne nuise pas à son voisin. Dig. 50-17-61 De Reg. Jur.

Cette règle doit s'entendre en ce sens que quelque liberté qu'un chacun ait de faire ce que bon lui semble sur son héritage, il n'y peut faire rien d'où il puisse parvenir quelque chose sur l'héritage voisin, qui lui soit nuisible. Dig. 8-5-8 Si. serv. vind.

(1) Servitudes, tome 1, n° 54. (2) Nos. 235 and 236.

So long as the higher lands are left in their natural state and nothing is done by the owner of the superior heritage to cause the descent of water, rock, earth or other matter upon the inferior heritage, the proprietor of the latter cannot complain of the natural flowage of water or falling of earth, but if by any works of the superior proprietor upon his own land, water, rocks, stones or earth are caused to fall upon the lower property and damage is thereby caused, which, if things had been left in their natural state, would not have resulted, the proprietor of the inferior property is entitled to reparation.

Thus Demolombe says (1):

Le propriétaire supérieur n'est pas tenu de réparer le dommage que les éboulements auraient causé aux fonds inférieurs. C'est là un de ces accidents de la nature dont nul n'est responsable, toutes les fois, bien entendu, qu'on ne lui impute d'ailleurs aucune faute.

Marcadé (2) commenting on article 640 C.N. says:

Si c'était par le fait du propriétaire supérieur, que les cailloux, des eaux, etc., descendissent sur le terrain inférieur le propriétaire de celui-ci ne serait plus obligé de les recevoir, car la loi n'entend consacrer que le résultat naturel de la position des lieux.

LaLaure has this passage (3):

Le propriétaire inférieur peut s'opposer à ce que le propriétaire supérieur aggrave sa servitude par quelques travaux qui augmenteraient, à son préjudice, le volume des eaux et leur affluence; sa servitude étant imposée par la nature, il n'est obligé à recevoir les eaux que dans l'état où la nature les lui renvoie elle-même.

I also refer to Merlin (4), and to Baudry-Lacantinerie (5). Two *arrêts* referred to by Demolombe (6), are also much in point, as are also the observations of Aubry et Rau (7), and Laurent (8) upon this point.

(1) Servitudes t. 1, n° 56.
(2) Vol. 2, n° 583.
(3) Traité des Servitudes Réelles p. 655.
(4) Rep. Vo. Eaux Pluviales, n° 1.
(5) Droit Civil 1, p. 880.
(6) Servitudes t. 1, n° 60.
(7) Droit Civil Français, vol. 3, pp. 8, 9, 10, 11.
(8) Principes du Droit Civil Français, vol. 7, p. 428, n° 360.

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The streets of the city of Quebec are by C. S. C. ch. 85, secs. 1, 2 and 3 vested in the suppliant as to the right of user if not as to the property also, and must therefore be deemed to be in the possession of the suppliant who, by the enactment referred to, is bound to keep them in repair and is liable to indictment for neglect of such duty. That the city therefore was subjected to great damage from this landslide must be apparent when it is considered that not only were the streets blocked up by the rock and earth which fell upon them, but the water pipes and drains belonging to the city were also covered by it and rendered inaccessible. That a public street or highway is to be regarded as a servient heritage for the purpose of the application of the article 501, is demonstrated very clearly and satisfactorily by Laurent (1) who shows that public ways, roads and streets are subject to the servitude recognized by the code and that consequently they are entitled to the benefit of the same limitations as regards abstinence from aggravation on the part of the dominant owner as applies to private proprietorship.

If the city is not entitled to relief by petition of right it is manifest it will have to suffer a great wrong without any corresponding remedy. The statute as already stated makes it incumbent on the corporation to maintain the streets and to keep them in good repair, and this of course involved the duty of clearing away the rock and rubbish which fell upon it on the occasion of this accident, thus burthening the city with a large expenditure. The failure of the suppliant to perform this duty would have left it liable to indictment. See *The Queen* v. *Greenhow* (2). Again, it was absolutely necessary to have the surface of the street cleared of this mass of rock and rubbish, in order that in case of need access might be obtained to the drains

(1) Vol. 7, nos. 130, 359. (2) 1 Q.B.D. 703.

and water pipes, the latter being the property of the city. It is no answer to the claim of the city to be indemnified for the damage which it has thus suffered to say that the incumbrance of the street by the *débris* which fell from the property of the Crown was in the nature of a public wrong, an obstruction of the highway which, if it had been wilfully caused by a subject, would have been a public nuisance, for in addition to that it was a special private wrong as regards the city, causing the corporation special loss and damage apart altogether from the injury to the public caused by blocking up the street; for this wrong, as the suppliant is in possession of the street, is under the legal obligation to keep it in repair and open for traffic, and has, if not the full property, at least a *jus in re* by reason of its express statutory right of user, and also by reason of its water pipes and drains laid beneath the surface, it ought to be entitled to recover in this proceeding by petition of right.

The general principle of the law of the province of Quebec applicable to civil wrongs of this kind, is that in all cases where real and actual damage is caused to property, or to rights in the nature of property,—*jura in re*,—an action can be maintained, and if Champlain street had been land belonging to a private owner, not only might such proprietor have maintained an action, but any one having a *jus in re* in respect of the land, such as a servitude of passage over it, which right of passage had been obstructed by the fallen rock, would have been likewise entitled to legal reparation.

Then it appearing that the Crown is the owner of the property in which there existed a drain constructed, as far as can be now ascertained, by the Crown itself in the course of the citadel works, and the damage of which the suppliant complains having arisen from the non-repair of this drain, which became choked up and

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thus caused the accident; and it also appearing that the suppliant has a sufficient *locus standi* in respect of the streets and water pipes to maintain the petition of right, the authorities quoted show that the city of Quebec is entitled to recover from the Crown the indemnity which it seeks, unless the circumstance that the Crown officers were ignorant of the existence of the drain is an answer to the claim.

That the Crown or its predecessors in title having constructed the drain was bound to repair it there can be no doubt. Laurent says (1):

Le défaut d'entretien et le vice de construction sont des fautes, etc.

It appears to me to be sufficiently proved, at least for the purpose of a *primâ facie* case, that the drain was constructed by the Imperial Government in the course of the citadel works many years ago, for the purpose of draining the ditches appertaining to the fortifications; but even granting that it was made before the Crown acquired the property it would make no difference, the Crown would still have been liable to keep it clean and in good repair as the *auteurs* of the Crown had been originally liable to do.

There remains only the question: Does the ignorance of the officers of the Crown of the existence of the drain relieve it from responsibility? If the case depended on proof of negligence or *faute* that might be a reason why the Crown should be excused from liability. But the legal principles invoked by the appellant, those to which the article 501 gives expression, are such as to impose upon the owner of property a duty incident to that ownership in relation to the proprietors of lands on an inferior level which no want of knowledge or ignorance upon the part of himself or his servants of existing facts, however obscure or concealed, can

(1) Vol. 20 p. 692.

properly excuse. The whole doctrine of the law of the province of Quebec, by which this case has to be decided, is in accord with the law of England as laid down by the House of Lords in the case of *Rylands* v. *Fletcher* (1). Then in that case of *Rylands* v. *Fletcher* (1) there was ignorance of the true state of the premises, the owners of which were held liable, but that circumstance was not deemed sufficient to exonerate them from liability. And in a late English case, that of *Humphries* v. *Cousins* (2), this very point arose and the decision turned entirely upon it. The defendant there, although only a tenant, was held by reason of his occupation to be liable to the owner of the adjoining house for sewage which by means of a drain escaped from the premises of the former into the cellar of the latter, although he (the defendant) had not only not constructed the drain, but was entirely ignorant of its existence, and was expressly found by the jury to be free from negligence. These decisions, being those of English courts on questions of English law, have of course no direct application as binding authorities for the decision of this appeal, which we must determine by the law of Quebec. They are, however, guides which, in the absence of French authority upon the point, we may safely follow. The two systems of law are, as I have said, identical as to the liability here invoked being one arising from the breach of an incidental duty towards inferior proprietors appertaining to the ownership of property and not dependent upon any delict or quasi-delict in the nature of personal negligence. I see therefore no reason why the courts of the province of Quebec in administering their own law should not be content to adopt the principle of these English authorities founded upon reasons which must certainly commend them to every judicial mind.

(1) L. R. 3 H. L. 330.

(2) 2 C. P. D. 239.

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I should have pointed out that no legal servitude could have been acquired by the Crown in respect of the drain in question by prescription, since under the code of Quebec, which in this respect differs from the Code Napoléon, a servitude cannot be acquired by prescription.

I now proceed to notice another and distinct point which was forcibly put forward by Mr. Flynn in his very able argument. It was contended by the learned counsel that this is not the case of a party seeking a remedy by petition of right in respect of a cause of action which in English law is denominated a tort, and in French law is classed under the head of *delicts* or *quasi delicts*, a cause of action which according to authorities already quoted would not, irrespective of the statutory enlargement of the jurisdiction before referred to, entitle a subject to maintain a petition of right against the Crown. It was said that the case of the suppliant was not based on *faute* or negligence, but on a breach of duty imposed by the law, or in the nature of a *quasi-contrat*, namely, the duty which, as shown by authorities before quoted, is imposed upon the owner of a superior heritage, who executes works on his land or alters its natural state, to indemnify the owner of an inferior property if any damage should be caused by such works. That this is not in the nature of a *quasi delict* appears from the quotations from Pothier already given. It was insisted that there were no decisions establishing that a petition of right will not lie to compel the performance of an obligation of this kind, and that therefore under the general law as it stood under the petitions of right act, and without having to resort to any statutory extension of that mode of proceeding, just as in the case of a contract the suppliant is entitled to proceed against the Crown in the form of procedure adopted in the present instance.

I am of opinion that this argument was well founded and is entitled to prevail.

None of the cases in which the remedy by petition of right has been denied to a subject upon the ground that it was sought to make the Crown answer for the wrongful acts of its officers or servants at all resemble this.

From Lord Canterbury's case down to the present time, nothing more has been decided in cases of this class than that the Crown cannot be made liable for the malfeasance or misfeasance of those in its employ. It never has been decided that a petition of right will not lie to enforce a liability arising, not from any wrongful act, but from an obligation imposed by the law upon a proprietor to indemnify the owner of an inferior property from the consequences of works which, not wrongfully, but in the exercise of a perfect right, the former has constructed on his own property. To say that whilst a petition of right will lie against the Crown for the non-performance of a contract that proceeding is not available for the enforcement of an obligation such as that which is the basis of the suppliant's claim here, the breach of which does not consist in any act of a wrongful character, but consists in mere non-feasance, would, it seems to me, be to draw an arbitrary line between cases not to be distinguished in principle.

What we have to look at is not the form of action, but the nature of the substantial obligation for a breach of which a remedy is sought.

I do not consider it at all conclusive against the suppliant, or a reason entitled to any weight whatever, that under the old English system of actions and pleadings, now abolished, the appropriate remedy for a claim such as the present between subject and subject would have been an action on the case. And this argument,

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or rather suggestion, arising from the old forms of action formerly prevailing in English law, is the only one which occurs to me as of the slightest relevancy as an answer to the suppliant's contention, for at the bar no answer calling for any observation was given on behalf of the Crown to the point under consideration.

For this last reason, therefore, as well as for that first stated, it appears to me that the suppliant was entitled to relief

If I am correct in this conclusion the case need not at all depend on the reasons in favour of the jurisdiction based upon the Exchequer Act and other statutes which I have before stated, and to which I still adhere. The ground last mentioned shows that the suppliant is within the general jurisdiction entertained by the courts in claims against the Crown made with its assent by petition of right. Logically this important proposition should have been advanced first in order, but for convenience and to avoid repetition I have placed it here.

The conclusion therefore, is that the appeal must be allowed, the non-suit set aside, and the case referred back to the Exchequer Court in order that the Crown may proceed with its defence. I think both parties should have liberty to amend their pleadings.

The Crown must pay the costs of this appeal.

FOURNIER J.—I adopt the reasons of the learned Chief Justice for allowing this appeal.

TASCHEREAU J.—I would dismiss this appeal. I express no opinion as to whether or not the Act 50 & 51 Vic. ch. 16 has changed the law as decided in *The Queen* v. *McLeod* (1), so as to make the Crown liable in damages for a tort, but assuming that it has the rock upon which the citadel of Quebec rests is not, in my opinion, a public work or a work at all within the

(1) 8 Can. S. C. R. 1.

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meaning of the statute, and the suppliant has failed to prove any negligence on the part of any officer in the service of the Crown from which any injury to property on any public work has resulted. I adopt my brother Gwynne's reasons on these points.

Gwynne J.

GWYNNE J.—It cannot be doubted that the Exchequer Court could only acquire jurisdiction over the subject matter of complaint made in the petition of right filed in this case in virtue of some act of the Dominion Parliament giving it jurisdiction in the premises. In 1883 it was decided by this court in *The Queen* v. *McLeod* (1), that upon the law relating to the court, as it then stood, a petition of right did not lie against the Crown for injuries resulting from thenonfeasance, misfeasance, wrongs, negligence and omissions of duty of the subordinate officers or agents employed in the public service upon the Prince Edward Island Railway, a public work placed by statute under the management, direction and control of the Minister of Railways and Canals. It is contended, however, that the law in this respect has been since changed, and no doubt it has been, by the Dominion statute 50 & 51 Vic. ch. 16, sec. 16, par. (*c*), which enacts that the Exchequer Court shall have jurisdiction over

every claim against the Crown arising out of any death or injury to the person or to property on any public work, resulting from the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment,

and it is contended that this enactment confers jurisdiction upon the Exchequer Court in the circumstances of the present case. If it does not, then that court had no jurisdiction whatever in the premises. The object, intent and effect of the above enactment was, as it appears to me, to confer upon the Exchequer Court, in all cases of claim against the government, either for the death of any person, or for injury to the

(1) 8 Can. S.C.R. 1.

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person or property of any person committed to their charge upon any railway or other public work of the Dominion under the management and control of the government, arising from the negligence of the servants of the government, acting within the scope of their duties or employment upon such public work, the like jurisdiction as in like cases is exercised by the ordinary courts over public companies and individuals. It has been suggested that the sentence is open to a wider construction, and it may be that it is so by the insertion of a stop after the word "person" in paragraph (*c*). The court would then have jurisdiction in the case of injury to the person wherever arising, if it should arise from the negligence of any officer or servant of the Crown. With that proposition we are not at present concerned, for the claim here is as to "injury to property" alone not occurring *upon* any public work, and we cannot hold that the Exchequer Court has jurisdiction in the present case without eliminating wholly from the sentence the words "on any public work," which it is not competent for us to do.

I am of opinion also that the evidence fails to show that the injury complained of resulted within the meaning of the provision of the statute from the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment. The suppliant has, in my opinion, failed to bring the case within the provisions of the statute. The Exchequer Court therefore had no jurisdiction in the matter, and the appeal should, in my opinion, be dismissed.

KING J. concurred with GWYNNE J.

Appeal dismissed with costs.

Solicitors for appellant: *Baillargé & Pelletier.*

Solicitors for respondent: *O'Connor, Hogg & Balderson.*

DAME EDMÉE DIONNE ET VIR (PETITIONERS) ..... } APPELLANTS;

AND

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

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*Feb. 21,

*May. 6.

ON APPEAL FROM THE SUPERIOR COURT FOR LOWER CANADA SITTING IN REVIEW AT QUEBEC.

Pension—Commutation—Transfer or cession—R.S.P.Q. Arts. 676 to 691.

D. a retired employee of the government of Quebec in receipt of a pension under arts. 676 and 677 R.S.Q., surrendered said pension for a lump sum to the government, and subsequently he and his wife brought an action to have it revived and the surrender cancelled. By art. 690 of R. S. P. Q. the pension or half pension is neither transferable nor subject to seizure, and by art. 683, the wife of D. on his death would have been entitled to an allowance equal to one-half of his pension.

Held, reversing the decision of the Court of Review, Strong C.J. and Sedgewick J. dissenting, that D. after his retirement was not a permanent official of the government of Quebec and the transaction was not, therefore, a resignation by him of office and a return by the government, under art. 688, of the amount contributed by him to the pension fund; that the policy of the legislation in arts. 685 and 690 is to make the right of a retired official to his pension inalienable even to the government; that D.'s wife had a vested interest jointly with him during his life in the pension and could maintain proceedings to conserve it; and therefore that the surrender of the pension should be cancelled.

APPEAL from a decision of the Superior Court for Lower Canada, sitting in review at Quebec (1), dismissing the petition of the appellants for cancellation of a surrender of pension to the government.

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

(1) Q. R. 4 S. C. 426.

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The facts are sufficiently set out in the above head-note and in the judgments of the court.

Burroughs for the appellants.

Cannon Q.C. Assistant Attorney General of Quebec for the respondent.

THE CHIEF JUSTICE.—This is an action by Charles John Burroughs and Edmée Dionne, his wife, asking that a pension of $242 a year, payable monthly, awarded to the husband as a retired employee of the Provincial Government of Quebec, pursuant to the provisions of the Revised Statutes of Quebec regulating the civil service of that province, and which pension he commuted some four months after it was granted, for $382, may be revived and the surrender cancelled

In the Superior Court Mr. Justice Andrews dismissed the action, and his judgment was affirmed by the Court of Review.

The wife sues claiming to be interested, as, in the event of her husband dying in her lifetime entitled to the pension, she would be entitled to an allowance equal to one-half of that granted to the husband.

The validity of the commutation is impugned for three reasons:—1. It is said that the commutation or surrender of the pension was illegal and void under section 690 of the Revised Statutes. 2. Because the surrender was void under the general law, as being against public policy. 3. Because it prejudicially affected the rights of the wife (conferred by section 683 of the Revised Statutes) to receive a half pension on the death of her husband.

Section 690 enacts that:

> The pension or half pension is neither transferable nor subject to seizure.

It is clear that the surrender of the pension was not a transfer or cession. The plain object of this provision

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was, that pensions should not be sold or assigned to speculators or others, and to assure that the pension, which was intended as an alimentary allowance to persons who whilst they remained under sixty years of age might be recalled to the public service, should be applied to its legitimate uses. There was nothing inconsistent with this that the government itself should be able to take a surrender from a superannuated officer, who, for his own reasons, might wish to be rid of the conditions imposed by section 686, which make it imperative upon him to reside within the limits of the province.

I am equally clear that the general law, on principles of public policy, does not forbid such a surrender. It would be a great hardship upon a retired civil servant, who might for many reasons, health, business, employment or convenience, have to live out of the province, if he should be unable to commute his pension and consequently be compelled to forfeit it. The commutation was therefore unimpeachable on this ground.

Mrs. Burroughs has no *locus standi* to maintain the action. She has no vested interest, but merely a contingent right to a pension in the event of surviving her husband, provided he dies in active service, or whilst in the enjoyment of a pension. It would indeed be a strange result if a superannuated civil servant under sixty years of age should be unable to reside beyond the limits of the province without his wife's assent, or without giving her a right of action against the government, if they commuted the pension at his request, in order that he might not forfeit it by taking up his residence outside the province of Quebec, yet that would be the consequence of a judgment in favour of the appellants.

The appeal must be dismissed with costs.

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FOURNIER J.—I would allow this appeal for the reasons given by Mr. Justice Gwynne.

GWYNNE J.—This is a proceeding by petition of right instituted in the province of Quebec against the government of that province by Charles John Burroughs and his wife, *séparée de biens*, wherein they allege that on or about the 28th day of December, 1878, the said Charles John Burroughs was appointed a permanent clerk in the civil service of the province and continued in such employment until the 31st day of January, 1891, when he was compelled by ill-health to resign the office which as such civil servant he had held and for that reason to retire from the public service, and that by an order in council bearing date the said 31st day of January, 1891, he was permitted to retire from the civil service under the provisions of the law in that behalf as a person no longer capable by reason of ill-health to discharge the duties of his office, and by the same order another person was appointed to fill the office which he had filled in the employment of the government, that he thereby became entitled in virtue of the law of the province of Quebec to a pension which as provided by law was paid to him (to wit, $21.33 per month for the months of February and March, 1891. The law of the province of Quebec by which he became entitled and in virtue of which he received such pension, was first enacted by statute of the legislature of the province 40 Vic. ch. 10, intituled "An Act to establish a pension and aid fund in favour of certain public servants and their families." This fund was created by the payment by each public servant of certain monthly sums of a stated percentage upon the amount of his salary. This Act was amended by 44 & 45 Vic. ch. 14, by which among other amendments, it was enacted that these monthly payments should be

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made into the consolidated revenue fund of the province, which fund was charged with the payment of the pensions granted by the provisions of the Acts in that behalf. These provisions are now contained in the Revised or Consolidated Statutes of the province of Quebec in articles 676 to 691 inclusive. By article 676 a pension is granted to, (among others) every permanent member of the civil service who is incapable of discharging his ordinary duties, by reason of physical or mental infirmity, if such infirmity is not the result of bad conduct. By article 677 the amount of the pension to which such person is entitled is determined upon a scale varying according to the number of years during which the person so retiring and thereby becoming entitled to the pension has been in the public service.

It was under the provisions contained in these articles that upon the order in council of the 31st day of January, 1891, being passed, by which Burroughs was permitted to retire from the public service and another person was appointed in his place, that he became entitled to his pension and which was paid to him in the months of February and March, 1891. This pension was guaranteed to him for his natural life by art. 685 of the statutes which enacts that the pension of every public officer or employee *en retraite*, that is, in retirement, or who has retired from the public service or been superannuated "is paid by the treasurer by monthly payments but not in advance."

By art. 683 it is enacted that:

From and after the first day of the month which follows the date of the death of a public officer or employee, half the pension which the deceased received or which he would have been entitled to receive if he had been superannuated is paid to his widow for life during her widowhood.

That is to say, one-half of the pension which by the law a superannuated or retired public servant was

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entitled to receive and received during his life, or which, if at the time of his death a public servant was still in the service of the government, he would by law be entitled to receive if he had been superannuated, is paid to his widow during her widowhood, and upon her death or marriage again, the article proceeds to enact that such half pension be paid by monthly instalments to those of the children of such person as had not attained the age of eighteen years, until they should attain such age.

The suppliants then proceed to allege in their petition of right, that about the end of the month of March, 1891, the said Charles John Burroughs without the knowledge of his said wife, and in a moment of despondency consented, "*à vendre céder et abandonner à toujours au gouvernement*" all his rights to the said pension for an insignificant sum, that is to say, $382.82; "*que la dite vente, cession et abandon*" of the said pension was accepted and ratified by an order in council dated the 24th day of April, 1891. The petition of right then submits that such "*vente, cession et abandon*" so made of the said Charles John Burroughs of said pension so accepted by the government was illegal and void for the following reasons: 1. Because by the law said pension and half pension "*sont incessibles et insaisissables.*" 2. By force of the said order in council dated the 31st of January, 1891, the right to the said pension had become a right acquired by (or vested in) not only the said Charles John Burroughs but his wife and children also, and that he could not alone dispose of it or renounce it to their prejudice. 3. Because the said sale would have the effect of depriving the female suppliant, his wife, of the half pension (to which she hath right by force of the law) after the decease of her husband. 4. Because the suppliants have children who would be deprived

of the interest which the law gives to them in the said pension in the event of their surviving their father. 5. Because the said transaction is prohibited by the law. The suppliants then pray that the renunciation, sale, surrender and relinquishment of his said pension by the said Charles John Burroughs to the government, as well as the order in council of the 24th April, 1891, accepting such surrender, are illegal and void, and that the government may be condemned to pay to the said Charles John Burroughs the balance due for monthly instalments of his said pension upon and from the 1st April, 1891, after deducting as payments on account thereof the said $382.82, and that it may be declared that the said Charles John Burroughs is entitled to his said pension in the future.

The Attorney General for the province of Quebec for defence of the Provincial Government to the said petition of right pleads:—1st. The general issue. 2nd. That the said Charles John Burroughs was of full age and stricken with no legal incapacity at the date of the order in council of the 24th April, 1891, by which the government accepted the sale and surrender of the said suppliant's pension, previously made by him about the end of the month of March, 1891, for the price and sum of $382.82. 3rd. That the said Charles John Burroughs had a right to surrender that pension as he did do in manner aforesaid. 4th. That the said order in council of the 24th April, 1891, is regular and legal and ought to be maintained. 5th. That all and each of the allegations in the said petition of right are unfounded in law.

The case came down for hearing in the Superior Court for the district of Quebec, upon the matters alleged in the said petition of right, the answer of the Attorney General thereto by way of defence, an admission of facts signed by the attorney of the sup-

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pliants upon their behalf and by the Attorney General of the province for the defence, and the production of copies of the orders in council of the 31st January and 24th April, 1891.

The learned judge of the Superior Court before whom the case was heard by his judgment has adjudged that art. 690 R.S.Q. which enacts that "*la pension et demi pension sont incessibles et insaisissables*" has no application whatever to the arrangement entered into under the order in council of the 24th April, 1891; That such arrangement was in effect a mere consent on the part of the government to an *election* made by Charles John Burroughs to retire from the public service and take the benefit of art. 688 rather than avail himself of the advantages offered to him by art. 676 coupled with the conditions and restrictions contained in articles 690 and 691.

While of opinion that the transaction could not be assimilated to a commutation of his pension he adjudged that, even if it could, it would not therefore be illegal, and in support of this view he referred in his reasons for his judgment to a case of *Wells* v. *Foster* (1), and to the Imperial statutes 47 Geo. 3 2nd. Sess ch. 25 sec. 4 and 34 & 35 Vic. ch. 36.

He adjudged further that the wife of Burroughs had no present legal interest in the matter and finally that the arrangement complained of, that is to say, that contained in the order of council of 24th April 1891, violates no law and is not contrary to public policy, and he therefore dismissed the petition of right with costs.

With reference to this judgment I may here observe that the learned judge in the reasons given for his judgment seems to have arrived at the conclusion in the second *considérant* of his judgment upon the assump-

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tion that Burroughs' motive for the arrangement which is embodied in the order in council of the 24th April was simply this—

That Mr. Burroughs who, as the record shows, was comparatively a young man preferred not to be fettered by these two articles (686 and 691) by which he found himself restrained as to his residence and compelled to give up at any time any employment he might obtain, chose rather to completely sever his connection with the civil service and take the benefit of the art. 688 only available to those who do so.

I must say that I can see nothing in the case in support of this assumption, although no doubt the suggestion may be true, but assuming it to be true it does not appear to me that his having been, if he was, influenced by such motive can have any bearing upon the questions raised by the petition of right, namely, whether in April, 1891, Burroughs was a person then filling any office in the permanent employment of the government as a civil servant, who was retiring from such office, service or employment in such a manner as to demand and have repaid to him under the provisions of art. 688 his contributions to the pension fund; whether in point of fact he did then retire from any office or employment held by him in the civil service under the provisions of art. 688.

If he was then in a position to avail himself of, and did in point of fact retire from, the office which he had held in the civil service under the provisions of that article, and if the order in council of the 24th April was simply a submission by the government to the provisions of that article, then undoubtedly, neither Charles J. Burroughs or his wife has now, nor can his wife or his children upon his death, maintain any claim whatever against the government; this is the main point in the case, but there seems to me to be many points of difficulty which are entitled at least to very grave consideration before that conclusion can be

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reached, as likewise, if such conclusion can not be reached, do there appear to be many points entitled to equally grave consideration in determining upon what ground the order in council of the 24th April, if maintained, can be rested. The Court of Review have simply maintained the judgment of the Superior Court as free from error, but we have very fully presented to us their reasons for arriving at that conclusion which are as follows:

1. They are of opinion that by force of art. 691 every civil servant who has been superannuated or permitted to retire from the public service upon a pension, under 60 years of age, by reason of physical or mental infirmity, is still in the public service as a public officer or employee, who is entitled to retire voluntarily from such service, and thereupon to demand as of right and to receive repayment of all the sums contributed by him to the pension fund. That under that article the will of the person employed is the law, and that the sole obligation cast upon the government is to repay to the person who has so voluntarily resigned his office or employment the sums which he had paid to the pension fund. They hold that the order itself shows that this was precisely what was done in Burroughs' case, and that the transaction did not constitute a sale or cession or commutation of his pension notwithstanding the admissions to the contrary in the answer of the Attorney General to the petition of right, and in the admissions of facts put in as evidence, namely, that the transaction was in fact a sale and surrender, but as is contended a legal sale and surrender, by Burroughs of his pension to the government for a pecuniary consideration paid in one sum in advance, and finally, they are of opinion that the transaction being of the nature which they hold it to have been, it was perfectly legal, and that the wife

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of Burroughs has not now and never can acquire any right to set aside or call in question its legality; and that even if it were illegal she would have no such right until after her husband's decease, if she should then be living.

If these reasons be well founded undoubtedly the appeal must be dismissed but the whole argument of the learned counsel for the appellants was that they are not well founded. The case rests wholly upon the construction of the articles of the Revised Statutes of Quebec relating to the civil service and its officers and their retirement therefrom, and the right of each party so retiring either to a pension or to repayment out of the pension fund of his subscriptions to the fund, as the case may be, in view of the circumstances attending his retirement. By article 685 which is a transcript of sec. 1 of the provincial statute 40 Vic. ch. 9, it is enacted that—

> The members of the civil service are the deputy heads, clerks and messengers permanently employed in the departments at the seat of government and the special officers similarly (that is permanently) employed if with respect to the latter the lieutenant governor in council so orders.

It is alleged in the petition of right and admitted in the admission of facts that Burroughs was a permanent clerk in the civil service of the province of Quebec from the 28th day of December, 1878, until the 31st day of January, 1891. By art. 676, which is a transcript of sec. 1 of the provincial statute 40 Vic. ch. 10, intituled an Act to establish a pension and aid fund "*en faveur*" (*i.e.* for the benefit or on behalf) of certain public employees and their families, there is granted a pension—

> to every permanent member of the civil service who has served as such during ten years or more and has attained the full age of sixty years; or who has become incapable of discharging his ordinary duties by reason of physical or mental infirmity, provided such infirmity be not caused by bad conduct.

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Upon the said 31st of January, 1891, Burroughs being then, as he alleged, incapable of discharging his ordinary duties by reason of physical infirmity within the meaning of that article, claimed and demanded the right to retire from the office which he held in the civil service and to be pensioned under the provisions of the said art. 676 and of art. 677.

By an order in council made on the said 31st day of January, 1891, such his claim and demand were recognized by the government and his resignation of his said office for the cause alleged was accepted and another person was appointed to fill the permanent office which he had filled; and thereupon Burroughs was put upon the pension list as a person entitled to the pension guaranteed to him under the provisions of the said articles 676 and 677 having regard to the duration of his service as such permanent clerk from the 28th day of December, 1878, to the 31st of January, 1891. Upon such acceptance by the government of the only permanent office Burroughs had held in the civil service he ceased under the provision of said art. 685 to be any longer a member of the civil service.

By art. 685, which is a transcript of sec. 8 of the above statute 40 Vic. ch. 10, it is enacted that the pension of every public officer or employee "*en retraite*," that is who has retired upon a pension from the permanent public office which he had filled in the civil service, "is paid to him during his life by the provincial treasurer by monthly payments, but not in advance," and by art. 683, which is a transcript of sec. 10 of said provincial statute 40 Vic. ch. 10, it is enacted that where a person in receipt of a pension dies, one-half of the pension of which he is in receipt, or in the event of an employee dying in the civil service one-half of the pension which such employee would have received if he had been superannuated, "is paid to his widow

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for life during her widowhood, to be paid to her monthly until her death or second marriage, in either of which events occurring, such half is made payable in like monthly instalments to the children under 18 until they attain that age. It is admitted that during the months of February and March, 1891, Burroughs received from the provincial treasurer the monthly instalments of his pension which in these months became due to him under the provisions of the articles 676 and 677.

Now from the above articles of the statute it is apparent that no one is a member of the civil service within the meaning of the articles but a person holding some permanent office in some department of the civil service. Burroughs held such office only as a clerk in the audit office of the treasurer's department, which office he resigned upon the 31st January, 1891, for the cause already stated. That resignation was accepted and another person was appointed to fill the office resigned by him by the order in council of the 31st January, 1891. The acceptance of Burroughs' resignation and the appointment of another person to the office he had held was the sole effect and purpose of that order. Not a word is said in it as to the pension to which by such resignation Burroughs became entitled, that was determined by the statutory articles, and the amount to which he became entitled under art. 677, having regard to the number of years of his service and the salary of which he had been in receipt, was granted and guaranteed to him by art. 685, which imposed upon the treasurer the duty to pay him the pension to which he had such statutory right by monthly instalments and not otherwise. Burroughs never subsequently to the 31st January, 1891, has held any permanent office or employment in the civil service, and as it is only a person in possession of a permanent office

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in the civil service who becomes entitled by voluntary resignation of such office to be repaid under art. 688 the sums contributed by him out of his salary to the pension fund, it is obvious, I think, beyond all controversy, that in April, 1891, Burroughs was not in a position to be capable of availing himself of art. 688. But it is argued that art. 691 shows that he was then in such a position, and it is further contended that the order of that date was made by the lieutenant governor in council in simple discharge of an obligation imposed upon the government by that article to refund to Burroughs as a person then retiring from the civil service under the art. 688 his contributions to the pension fund. With great deference art. 691, instead of supporting that view, has in my judgment the contrary effect, and the case of *Wells* v. *Foster* (1), referred to in support of the contention, is very distinguishable from the present case. The art. 691 recognizes in very plain language the complete resignation of an office in the civil service formerly held by the person with whom the article deals, and his right to a pension acquired by such resignation, and provision is made which is obligatory on the person so in receipt of pension to accept another appointment in the civil service at a future time if it should be offered to him in conformity with the conditions stated, or in default that he should lose his pension. From this case *Wells* v. *Foster* (1), is quite distinguishable. There the question was whether an annual allowance made to a person who had held a place in the audit office and who upon the reduction of the department was paid this allowance for maintenance until he should be called upon to serve again with an express understanding that he was bound whenever he should be called upon to re-enter the audit office or to take any

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other office under the Crown of equal value, and the question was whether such an allowance was assignable, and it was held that it was not upon grounds of public policy and upon the grounds that the allowance was made to him by way of retainer in the public service and in consideration of his holding himself ready, so long as it should be paid to him, for future employment, and that he was by the arrangement still in the service of the government at a salary upon such a contract which, however, could be determined by the government by dismissal or otherwise as pointed out in the report of the case. It was held, however, that it was against public policy that such a salary should be assignable, and in so far it is an authority in support of the present appeal; but we are not at present concerned with any such question as whether Burroughs' pension was assignable. By and by we shall have to deal with that question but at present we are only dealing with the question, whether in April, 1891, he held any permanent public office or employment in the civil service which he could then resign under art. 688, that is to say, which he could retain or resign at his own sole pleasure. He certainly held none from which he could then have been dismissed as it was held that the person whose allowance by way of salary was under consideration in *Wells* v. *Foster* (1) could have been; nor had he any of which he was in possession and could have retained. In my opinion it is very clear that in April, 1891, Burroughs held no office in the civil service which he could then resign under art. 688 or otherwise, and the order of the 23rd April cannot be sustained as one authorized by and made under said article. If made under that article where is to be found the authority for revoking the order in council of 31st January, 1891, which appointed Mr. Tessier as a permanent clerk in the civil

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service in the office which Burroughs is by the order stated to have resigned? Such authority cannot be found in the art. 688 nor, so far as appears, in any of the articles regulating the civil service. But in truth the order in council of the 24th April properly construed does not upon its face purport to have been made under the art. 688, that is to say, as an order made in a matter in respect of which the government had no discretion to exercise, but had imposed upon them the simple obligation of refunding to Burroughs, as a person then retiring voluntarily from a permanent office in the civil service then held by him, the contributions made by him out of salary monthly to the civil service pension fund, without interest. The order recites that Mr. Burroughs "*qui est à sa retraite depuis le 1er février dernier*," had written to the treasurer of the province a letter informing him that he is ready to relinquish—what? A permanent office in the civil service then held by him? No such thing—but all right to the pension of which he is in receipt, provided that the government grant to him the benefit of art. 688 of the Revised Statutes of the province. Now what is the true construction of the offer as here recited? It plainly is not an offer to resign any permanent office then held by Burroughs, as it must needs have been if made under art. 688, for he then held no such office. It is an offer to surrender or relinquish to the government the pension of which he was then in receipt provided government would grant him the benefit of art. 688; it was simply an offer by Burroughs to give up to the government all right to his pension, if they would pay him the amount he would have been entitled under art. 688 to have received if he had resigned under that article, which he had not. Then again it is plain that the government did not regard the offer as one which imposed upon them the simple obligation of refunding

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without interest the sums contributed by Burroughs to the pension fund, as they would have been if Burroughs was in point of fact then resigning under the provisions of art. 688, for the order recites that the amount which would be payable to Burroughs if his offer should be accepted was under $400, and that an arrangement closed with Burroughs for such sum in view of his age and the amount of his pension would be plainly to the advantage of the government which they should accede to. It was not then a transaction in which the government were not given any discretion to exercise as to acceptance or refusal of the offer but must simply have paid the money asked in obedience to an obligation imposed upon them by the art. 688. In fact the order thus shows upon its face that the transaction was precisely what it is alleged in the petition of right, and admitted in the answer of the Attorney General and in the admission of facts, to have been, namely, a sale, surrender or relinquishment of his pension by Burroughs to the government in consideration of the paltry sum of $382.82, paid by the government therefor, and this the Attorney General in the answer to the petition of right claims to have been perfectly legal; whether it was or not is the sole issue raised by the pleadings. The learned judges in the courts below are, as we have seen, of opinion that the transaction was neither a sale, transfer or commutation of his pension. If it was neither, and if it cannot be, as I think it cannot be, supported as a transaction within the authority of art. 688, then it cannot be supported at all, and of necessity the order of the 24th April, 1891, being in that case null, Burroughs' right to his pension must still remain, and the relief prayed by the petition of right seems reasonable and proper. I do not think, however, that we can so deal with the question raised by the pleadings, which is as to the legality

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of the transaction wholly independently of art. 688 as one of bargain and sale, surrender, relinquishment and cession of his pension by Burroughs to the government for the sum of $382.82.

By art. 690 it is enacted "*La pension et la demi-pension sont incessibles et insaissables.*"

This language seems to have been used by the legislature by way of amendment of sec. 14 of the above provincial statute 40 Vic. ch. 10 from which the article purports to be taken, for the language used in the said section 14 is—"*La pension ou demi-pension payable en vertu de cet acte ne sera ni transferable ni saisissable.*" This alteration in the language would seem to impart that the legislature considered the expression "sont incessibles" as imposing a more extensive restriction upon, and greater security against, the pension being capable of being parted with in any manner than was obtained by the 14th sec. of 40 Vic. ch. 10. In Fleming & Tibbins' *Dictionnaire Français* the term "*incessible*" is explained to be "*qui ne peut être cédé*" and the term "*céder*" is by the same authority explained to be "*laisser*," "*abandonner une chose à quelqu'un*" and the term "*cession*" which is involved in "*céder*" and "*incessible*" is explained by the same authority to be, "*action de céder*"—"*de transporter à un autre ce dont on est proprietaire*,"—"*il se dit principalement du transport des droits.*" The English equivalents of the above expressions are, that which cannot be sold, given away, pledged, surrendered, transferred, parted with, relinquished or abandoned to any one. I cannot entertain a doubt that the provisions of the above articles 690 and 685 were intended to prevent and are sufficient to prevent a person in the enjoyment of a civil service pension from parting with it in any way whatever either to the government or to any person whomsoever, the policy of the law being that the pensioner and his

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wife and family shall receive the pension by monthly instalments and not otherwise and direct from the treasury. Indeed there is no provision in law by which the government could, under our system, apply any public money by way of commutation or purchase of a pensioner's right to such a pension unless under the express provision of some Act of Parliament. So indeed it may be said that civil service pensioners and other pensioners upon funds provided by Parliament have this additional restraint upon their being able to part with their pensions by surrender to the government for a present pecuniary consideration or by commutation in any way and this additional security in the enjoyment of their pensions in the precise way in which the payment of them is directed by the Act of the legislature which grants them, as in the present case by payments in monthly instalments and not otherwise.

In England commutations when authorized are so by special Acts of Parliament for that purpose, as—32 & 33 Vic. ch. 32, 33 & 34 Vic. ch. 101, 34 & 35 Vic. ch. 36, 39 & 40 Vic. ch. 73, 45 & 46 Vic. ch. 44.

The policy of the articles in the Revised Statutes of the province of Quebec relating to the civil service and civil service pensions, is, in my opinion, that no such pensioner shall be able to divest himself by any act of his own of his right to receive the pension granted to him by the legislature, and made to him by monthly instalments only, nor shall be deprived of such right by any process of law, and that the pension shall be applied for the purpose for which it is granted, namely, the maintenance not only of the pensioner but of his wife and children also, for which purpose it is made payable by monthly instalments only, and this is what the true construction of the articles above quoted does effect. The suppliants, therefore, are

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entitled to the relief prayed for in their petition of right.

As to the joinder of Burroughs' wife, I am of opinion, that the policy of the law, and its true construction is that immediately upon a married civil servant retiring and acquiring a pension under the statute, his wife acquires a vested interest, not only in the half pension made payable to her after her husband's death, but jointly with him during his life in the monthly instalments which are made payable in that manner for supplying maintenance and support not only to the husband for himself alone, but for his wife and children also; and that, therefore, she has during his life a right to maintain conservatory proceedings in law for the purpose of preventing his improvident squandering of the fund granted by the legislature for their joint support and of preventing herself and her husband being in any way deprived of the statutory right to receive, by monthly instalments, the provision made by the legislature for their maintenance.

The appeal must be allowed with costs and a decree made to the effect prayed in the petition of right.

SEDGEWICK J.—I concur in the opinion of the Chief Justice that we should dismiss this appeal.

KING J.—Burroughs having been a permanent officer in the civil service of Quebec, and having applied for superannuation on the ground of ill-health, his request was complied with; and by order in council of 31st January, 1891, he was superannuated as from the 1st day of February, 1891. By the same order in council the vacancy so caused was filled by the appointment of another.

This entitled him to receive an annual pension during his life by monthly payments, and entitled his wife and children to half pension after his death for certain times and on certain conditions.

One consequence following upon this was that in case he should become able to render services, he might (up to the age of 60 years) be called upon to fill certain public offices. During such service he would, of course, receive the ordinary salary therefor, but payment of his pension would, in the meanwhile, be suspended. If he should decline to discharge the duties of the office so offered he, *ipso facto* (as well as his widow and children) lost all further right to the pension or half pension. (Art. 691).

There is another provision of the law (art. 688) that if any public officer or employee retires voluntarily from the service, or his office be abolished, the sums previously deducted from his salary and paid into the consolidated revenue fund are forthwith returned to him without interest.

After Burroughs had been for about two and a half months superannuated and had received two months' payments of pension, he applied to the government, stating that he was ready to abandon all his rights to the pension provided that the government would accord to him the benefit of art. 688.

The government being of the opinion that such an arrangement would be advantageous to the treasury acceded to it, and by order in council of 24th April, 1891, it was declared that the order in council of 31st January be revoked in order to permit of Burroughs taking advantage of the privilege which article 688 gives to public officers.

Burroughs was not in fact reinstated in office; nor could he well be, for the office had been filled by another. Could he then in any sense be said to be

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still in office, for art. 688 deals with the case of a public officer retiring (voluntarily) from the service?

It is said by the learned judge of the Superior Court, before whom the case first came, that because of his liability under art. 691, to be called upon to fill certain public offices he must still be considered as in the public service. And he cited *Wells* v. *Foster* (1), as an authority for this. In that case, however, the person was liable to be dismissed at any moment either for positive misconduct or on any ground which would render him an unfit person to remain in the service of the Crown. On this account he was deemed to be still in the public service, and the so-called pension was really retainer or compensation in the way of salary.

If, in the case before us, the contingent liability to be called to the public service constituted a pensioner a public officer under sec. 688, it would follow that under that art. he might retire and so become entitled, not only to his pension but to the retiring allowance under art. 688 as well. Clearly art. 688 has no reference to the contingent responsibility or service of a pensioner.

But may not an order be made under art. 688 *nunc pro tunc*, treating it as though the original application for superannuation had not been made, and as though the original application had been for the voluntary retirement referred to in the article?

Suppose the case reversed. Could one who had retired under art. 688 come in after a couple of months and claim, and be allowed, superannuation under art. 676? Would it be competent for the government to pass an order in council revoking what had been done under 688 in order that the person might come in under 676?

It seems to me that it would lead to bad administration and confusion to allow one who had exercised his

(1) 8 M. & W. 153.

election in one way to withdraw it and exercise another option.

In my view, the Act does not contemplate anything of the sort. An election is given; when exercised in one way or the other certain statutory consequences follow, leaving no room for acts of grace or favour on the one hand, or for turning to advantage the necessities of pensioners upon the other.

I agree also that by force of the term "*incessible*" as used in the statute the right, while forfeitable for non-compliance with conditions, is an inalienable right.

Ordinarily this would operate to restrain alienation to individuals. But the inalienable quality of the right is expressed in terms covering every attempted giving up of rights. It seems inconsistent with the very particular provisions controlling the action of the Crown in the dispensing of the statutory aid for the benefit of the pensioner, and of persons having a natural claim upon him for support, that the Crown, who in such matter exercises what are, as it were, the duties of a statutory trustee, should come into the field in competition with any of these objects of bounty and make terms advantageous to the treasury with those for whom Parliament had made certain provision.

I am to some extent influenced by the mischievous consequences that might follow and, while believing that what was done here was done wholly in the supposed interests of the pensioner, I think it should be held null and void, as being entirely wanting in power.

Appeal allowed with costs.

Solicitor for the appellants: *L. F. Burroughs.*

Solicitor for the respondent: *L. J. Cannon.*

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*April 1.
*May 6.

THE MUNICIPAL CORPORATION OF THE TOWN OF TRENTON (PLAINTIFF) ..... APPELLANT;

AND

JOHN S. DYER AND OTHERS (DEFENDANTS)..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Statute—Directory or imperative requirement—Municipal corporation—Collection of taxes—Delivery of roll to collector—55 V. c. 48 (O).

By s. 119 of the Ontario Assessment Act (55 V. c. 48) provision is made for the preparation every year by the clerk of each municipality of a "collector's roll" containing a statement of all assessments to be made for municipal purposes in the year, and s. 120 provides for a similar roll with respect to taxes payable to the treasurer of the province. At the end of s. 120 is the following: "The clerk shall deliver the roll, certified under his hand, to the collector on or before the first day of October." * * *

Held, affirming the decision of the Court of Appeal, that the provision as to delivery of the roll to the collector was imperative and its non-delivery was a sufficient answer to a suit against the collector for failure to collect the taxes.

Held also, that such delivery was necessary in the case of the roll for municipal taxes provided for in the previous section as well as to that for provincial taxes.

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

The action in this case was brought by the corporation of the town of Trenton against the defendant Dyer, collector of taxes for the town, and his sureties, the other defendants, to recover the amount alleged to be due the town for taxes which Dyer should have

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

(1) 21 Ont. App. R. 379.

collected but failed to do so. The defence was that no collector's roll had been delivered to Dyer as required by section 120 of the Assessment Act, 55 Vic. ch. 48. This section and the construction claimed for it by the respective parties appear in the judgments given on this appeal.

The case was tried before Armour C.J. who gave judgment in favour of the corporation, which judgment was reversed by the Court of Appeal. The corporation then appealed to this court.

Marsh Q.C. and *Delaney* for the appellant. The provision as to delivery of the roll is grammatically a part of sec. 120, which deals with provincial taxes only and by no rule of construction can it be held to apply to the taxes mentioned in the previous section.

The provision is directory, not imperative. *Caldow* v. *Pixell* (1); *Lewis* v. *Brady* (2); *Parish* v. *Golden* (3).

Chute Q.C. and *O'Rourke* for the respondents sureties of the collector, and *Abbott* for the respondent Dyer referred to *Welland* v. *Brown* (4); *Whitby* v. *Flint* (5), and *Vienna* v. *Mair* (6), in support of their contention that the provision as to delivery of the roll was imperative. They were not required to argue the other point as the court was satisfied that the provision applied to local as well as provincial taxes.

THE CHIEF JUSTICE.—The only question for decision in this appeal relates to the proper construction of the concluding paragraph of the 120th section of the Ontario Assessment Act (now 55 Vic. cap. 48, formerly R. S. O. 1887, cap. 193). The respondent Dyer was in 1891 the collector for the town of Trenton and his co-respondents were his sureties. This action was

(1) 2 C. P. D. 562.
(2) 17 O. R. 377.
(3) 35 N. Y. 462.
(4) 4 O. R. 217.
(5) 9 U. C. C. P. 449.
(6) 9 U. C. L. J. (O. S.) 301.

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brought to make him liable for the taxes which it was alleged he ought to have collected but had failed to collect.

The defence, so far as it is now material on this appeal, was that he had not been furnished by the town clerk with a properly certified roll. This action was tried before Chief Justice Armour without a jury, when judgment was entered for the appellants. On appeal this judgment was reversed by the Court of Appeal. Mr. Justice Burton dissented from the majority of the court.

The 120th section is as follows:

All moneys assessed, levied and collected under any Act by which the same are made payable to the treasurer of this province, or other public officer for the public uses of the province, or for any special purpose or use mentioned in the Act, shall be assessed, levied and collected in the same manner as local rates, and shall be similarly calculated upon the assessments as finally revised, and shall be entered in the collector's rolls in separate columns in the heading whereof shall be designated the purpose of the rate; and the clerk shall deliver the roll, certified under his hand, to the collector on or before the 1st day of October, or such other day as may be prescribed by a by-law of the local municipality.

It was argued before us that this section had no reference to the roll for purposes of local taxation, and that the requirement that the roll should be certified by the clerk was only for the purpose of collecting provincial taxes. This contention we disposed of at the conclusion of the argument of the learned counsel for the appellant, the court holding that such was not the true legal construction of the clause in question, but that the requirement that the roll should be certified under the hand of the clerk applied as well to municipal as to provincial taxes. The sole question which remains is, therefore, whether the words "shall deliver the roll certified under his hand to the collector" are imperative or directory only. The *primâ facie* presump-

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tion, as well under the Interpretation Act as without it, is that they are imperative. It is for the appellant to demonstrate that they are directory merely. This has not in my opinion been done. I see a great distinction between the provision as to the time of the delivery of the roll and that as to the certificate of the clerk. The first may well be directory. A failure to comply with it is in the power of the municipality to remedy and the omission does not affect the ratepayers. Such is not the case, in my opinion, as regards the want of authentication. If the object of requiring a certificate only concerned the municipality itself and its officer, and could be regarded as a mere direction to the clerk as to the course he was to pursue in performing his duty to the municipality, I should have no difficulty in holding it to be not obligatory. But is this so? Clearly not, for it concerns the taxpayers that the person to whom they pay their taxes, and who may distrain on their goods in case of non-payment, should be in possession of, and able to produce to them, proper authority for those purposes. An unauthenticated list of taxes, however formally made out in other respects, would not be such an authority, and if on such a list taxes could be collected the ratepayers might be called upon by a fraudulent collector to pay money as and for taxes never legally imposed. The roll in effect operates as a warrant, and usage and convenience alike require that such a document should bear upon its face some authentication or certificate to show that it was regular, and that it emanated from the official who had authority to issue it. I think therefore we must consider the provision as one introduced for the protection of the ratepayers and therefore obligatory. The cases of *Whitby* v. *Harrison* (1) and *Whitby* v. *Flint* (2), referred to in the judgment of the learned Chief Justice of Ontario,

(1) 18 U.C.Q.B. 603. (2) 9 U.C.C.P. 453.

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are both authorities in support of this view, though in neither of them was the point now raised actually decided. It was, however, decided by these cases that the authority of the collector to collect the taxes did not depend on his appointment but on the receipt of such a roll as the statute requires, and the language of both the Chief Justices who gave the judgments in those cases certainly implies that they considered that the roll to be valid should be certified. Then a roll not authenticated by the signature of the clerk is not such a roll as the statute requires. The case of *Vienna* v. *Marr* (1) was in my opinion well decided, and shows that the collector was not bound to act under an uncertificated roll. The case of *Welland* v. *Brown* (2), on which it was determined that the signature of the clerk without any formal certificate was sufficient, is not in any way inconsistent with this view, but on the contrary that case also implies that the court considered such a signature to be necessary. I am compelled with much respect to dissent from the view of Mr. Justice Burton that the omission of the statute to make some provision for the case of the incapacity or death of the clerk, which latter event was in the present case the reason why the omission could not be remedied, is a reason why we should not hold signing to be imperative. I think we must rather regard that as *casus omissus*, and that it is an insufficient reason for holding that the payment of taxes may be enforced under a roll which upon the *primâ facie* meaning of the words of the statute is a nullity.

The appeal must be dismissed with costs.

FOURNIER J. concurred.

TASCHEREAU J.—I am of opinion that this appeal should be dismissed. The reasoning of Hagarty C.J. and

(1) 9 U. C. L. J. 301. (2) 4 O. R. 217.

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Maclennan J. in the Court of Appeal is unanswerable. Dyer never was vested with the right to collect the taxes, for the reason that the clerk never delivered to him the roll certified under his hand as required by the statute. He was in the position of a police officer, bearer of a warrant which is not signed by the magistrate, or not evidenced by seal where that is required. *Archibald* v. *Hubley* (1); *Cotter* v. *Sutherland* (2); *Morgan* v. *Quesnel* (3); *Reg.* v. *Chapman* (4). I do not attach much importance to the word "shall" in sec. 120, c. 193 R. S. O. The definition of the words "shall" and "may" in the Interpretation Act is taken from the school books.

It is hard case law that though the statute decrees that a certain thing "shall" be done, it "may" not be done, or need not be done, and I, for one, will always restrict the application of that law within the narrowest possible limits.

I do not exactly see, however, that there is here room for the controversy raised by the parties as to the construction to be given to that word "shall" in this part of the statute. The words "and the clerk shall deliver the roll certified under his hand" are clearly imperative. As to the delivery of the roll that is not questioned, The only question that remains, then, is: What roll is it that he has to deliver? And to this question the enactment, to my mind, leaves room but for one answer, that is "the roll certified under his hand," under the hand of the clerk. Or, in other words, I read the clauses 120 and 122 simply as if they said: "The collector, upon receiving the collector's roll certified by the clerk, shall proceed to collect the taxes." So long as he has not received the roll so certified he is without authority to act. This roll, whilst in the clerk's hands, before being so certified and delivered, is not yet a "roll" as to the collector, a

(1) 18 Can. S. C. R. 116.
(2) 18 U. C. C. P. 357.
(3) 26 U. C. Q. B. 539.
(4) 12 Cox 4.

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completed roll. It is only by the certificate and delivery, that it becomes efficacious for the purpose of collecting the rates, that it gets vitality. Before that it is an inchoate document which confers no power whatever on the collector. And the genuineness of a document of this nature must be self apparent. It must bear some mark of attestation. Upon general principles a public officer who, in the name of the law, claims the right to intrude upon the private rights of his fellow citizens, and the power to force them to obey his commands, must be prepared, when required, to satisfy them of his authority. And, to my mind, an unattested document like the one delivered to Dyer in this case is not intrinsically a voucher of authenticity sufficient for that purpose in the collector's hands. It lacks what is called, in the civil law, the *solemnia probantia*, necessary to make it what it should be, *probationem probatam.*

Great stress was put by Mr. Marsh at the argument on the point, not raised in the court below I understand, that upon the true construction of section 120 this enactment as to the roll being certified applies only to cases in which taxes are being collected for provincial purposes, and not to cases, as the present one, provided for in the preceding section, where taxes are to be collected for municipal purposes only, and the appellant's factum, in a full historical review of the legislation on this particular part of the Municipal Act, has apparently established his proposition, that from the introduction of municipal institutions into the province, down to 1853, the roll was a sufficient authority for the collector, though not signed or certified by the clerk. He has failed, however, to convince me that in the statute, as it stands in the Revised Statutes of 1887, which rules this case, the provision of section 120, that the roll must be certified under the hand of the collector, does not apply to the roll mentioned in section 119, that is to say, to the roll for municipal taxes. There is

only one roll provided for, not two rolls, one for municipal taxes and another for provincial taxes, as the appellant's contention would import.

It has also been urged for the appellant, though, it seemed to me, not much relied upon, that as the provision in that same sentence of the statute as to the time within which the clerk was to deliver the roll to the collector had been held to be directory (1), therefore the provision as to the signature of the clerk should also be treated merely as a directory one. But I do not see anything in this argument. There is no objection whatever that I can see in the enacting of two provisions in the same sentence of a statute, one imperative, and the other directory, though it may lead to controversy. Here the date is immaterial. What difference does it make to the rate-payer that the roll be handed over to the collector on the second of October, instead of on the first ?

And the delivery is not a preparatory matter. It is something that happens after it is completed and signed. Whilst the attestation is, to my mind, an essential requisite of that document to confer any power on the collector (2) ; it is a condition precedent to an effectual delivery.

The holdings in the cases of *Whitby* v. *Harrison* (3), and *Whitby* v. *Flint* (4), assuming them to be law, do not support the appellant's case. I would be inclined to think that, if they bear at all on the case, it is more in the respondent's favour than in the appellant's.

SEDGEWICK and KING JJ. concurred.

Appeal dismissed with costs.

Solicitor for appellant: *H. W. Delaney.*

Solicitors for respondent Dyer: *Ostrom & Abbott.*

Solicitor for other respondents: *T. A. O'Rourke.*

(1) *Lewis* v. *Brady* 17 O. R. 377.
(2) *Vienna* v. *Marr* 9 U. C. L. J. (O. S.) 301.
(3) 18 U. C. Q. B. 603.
(4) 9 U. C. C. P. 453.

1894
*Nov. 8.
1895
*Mar. 11.

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

AND

ODILON FILION (SUPPLIANT) ..... RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Crown—Negligence of servants or officers—Common employment—Law of Quebec—50 & 51 V. c. 16, s. 16 (c).

A petition of right was brought by F. to recover damages for the death of his son caused by the negligence of servants of the Crown while engaged in repairing the Lachine Canal.

Held, affirming the decision of the Exchequer Court, Taschereau J. dissenting, that the Crown was liable under 50 & 51 V. c. 16, s. 16 (c); and that it was no answer to the petition to say that the injury was caused by a fellow servant of the deceased, the case being governed by the law of the province of Quebec in which the doctrine of common employment has no place.

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

The suppliant, by his petition of right, sought to recover damages for the death of his son who was killed by the falling of a derrick in use at the Lachine Canal where repairs were being made. The defence was a denial of negligence, and that the injury was caused by a fellow servant of the deceased. The Exchequer Court held that the injury was due to the negligence of the superintendent of the canal and foreman of the work, and that the doctrine of common employment had no place in the law of the province of Quebec where the injury complained of occurred. The Crown appealed.

Hogg Q.C. for the appellant.

Monk Q.C. and *Coderre* for the respondent.

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

(1) 4 Ex. C. R. 134.

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THE QUEEN v. FILION.

The Chief Justice.

THE CHIEF JUSTICE.—I have not prepared a judgment in this case, as I entirely agree with the reasons given by the learned judge of the Exchequer Court for the conclusion that the Crown was liable. The question of jurisdiction is precluded by the decision of this court in *The Queen* v. *City of Quebec* (1). On the merits two points were argued, first, whether or not negligence was established, and, secondly, if it was, were the suppliant and the servants of the Crown guilty of negligence in a common employment? The evidence as to negligence is clear, and I agree with the learned judge of the Exchequer Court that the doctrine of common employment has no place in the law of the province of Quebec. I therefore reject both grounds of appeal.

TASCHEREAU J.—I dissent. I would allow the appeal, and dismiss the petition of right on the ground that it is still the law of the land, as held in *The Queen* v. *McLeod* (2), that the rule *respondeat superior* does not apply to the Crown.

GWYNNE J.—It is unnecessary, in my opinion, to discuss the questions whether a petition of right could have been maintained in a case like the present prior to the passing of the Dominion statute 50 & 51 Vic. ch. 16, or how far the judgment of their Lordships of the Privy Council in the case of the *Windsor & Annapolis Railway Co.* v. *The Queen* (3), has shaken the ancient doctrine that the subject had no remedy against the Crown for torts committed by its servants, for I am of opinion that the language of the above Dominion statute is sufficient to give to persons suffering injury in person or property on any public work resulting from the negligence of any officer or servant of the Crown while acting within the scope of his duties or

(1) 24 Can. S.C.R. 420. (2) 8 Can. S. C. R. 1.
(3) 55 L. J. (P. C.) 41.

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THE QUEEN v. FILION.
Gwynne J.

employment, a right to redress, even though they may have had none before, such redress being sought for in the Court of Exchequer.

The only question raised by the argument in appeal which is necessary to be determined in the present case, in my opinion is, whether the persons whose negligence (as the learned judge of the Exchequer has, as a matter of fact found) caused the death of the young man for whose death the proceeding by petition of right has been instituted by his father, came within the description of the persons named in subsection *c* of sec. 16 of the above Act, that is to say, "officers or servants of the Crown acting within the scope of their duties or employment," and I am of opinion that they do.

I cannot see anything in the evidence which would justify me in pronouncing the judgment of the learned judge of the Exchequer Court to be erroneous upon the matter of fact found by him that the death was caused by their negligence or the negligence of one of them.

No objection was taken to the effect that to qualify the father to maintain the petition of right he should have been shown to have taken out letters of administration and have been a suppliant in the character of personal representative of the deceased, and as no objection was taken upon that point, I do not deal with it; dealing with the case as argued I am of opinion that the appeal must be dismissed.

SEDGEWICK J.—This appeal was asserted before the decision of this court in *The City of Quebec* v. *The Queen* (1). An important question involved in that case was as to the construction that was to be given to the Dominion statute 50 & 51 Vic. ch. 16, section 16, paragraph *c*, which enacts that:

The Exchequer Court shall have jurisdiction for any claim against the Crown arising out of any death or injury to the person or to property on any public work, resulting from the negligence of any officer

(1) 24 Can. S.C.R. 420.

or servant of the Crown while acting within the scope of his duties or employment.

It had been contended by the Crown that that section did not create a liability but only gave jurisdiction in claims against the Crown existing *aliunde* that statute. In *The City of Quebec* v. *The Queen* (1), as well as in several other cases, the Court of Exchequer had decided against the Crown's contention, and my learned brother Gwynne in delivering the judgment of the court (since this case was argued), says:

> The object, intent and effect of the above enactment was, as it appears to me, to confer upon the Exchequer Court in all cases of claim against the Government, either for the death of any person or for injury to the person or property of any person committed to their charge, upon any railway or other public work of the Dominion under the management and control of the Government, arising from the negligence of the servants of the Government acting within the scope of their duties or employment, upon such public work, the like jurisdiction as in like cases is exercised by the ordinary courts over public companies and individuals.

I consider myself bound by that judgment, and if so the principal ground of this appeal has disappeared.

I entirely concur in the view which was taken by the learned judge below upon the facts. In my view there was negligence on the part of the officers of the Crown in not testing the strength and capacity of the derrick which caused the injury before it was put into operation, and it is further clear, as pointed out by the learned judge in the court below, that the doctrine of collaborateur, until recently the law of England and of Ontario, does not obtain in the province of Quebec.

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

KING J.—Concurred.

Appeal dismissed with costs.

Solicitors for the appellant: *O'Connor & Hogg.*

Solicitors for the respondent: *Primeau & Coderre.*

(1) 24 Can. S. C. R. 420.

1895

*Mar. 1.

*May 6.

THE CORPORATION OF THE VILLAGE OF ST. JOACHIM DE LA POINTE CLAIRE (PLAINTIFF)..... APPELLANT;

AND

THE POINTE CLAIRE TURNPIKE ROAD COMPANY (DEFENDANT)..... RESPONDENT.

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

Statute — Construction of — Retroactive effect — Municipal corporation — Turnpike Road Co. — Erection of toll gates — Consent of corporation.

A turnpike road company had been in existence for a number of years and had erected toll gates and collected tolls therefor when an Act was passed by the Quebec Legislature, 52 V. c. 43, forbidding any such company to place a toll or other gate within the limits of a town or village without the consent of the corporation. Section 2 of said Act provided that "this Act shall have no retroactive effect," which section was repealed in the next session by 54 V. c. 36. After 52 V. c. 43 was passed, the company shifted one of its toll gates to a point beyond the limits of the village, which limits were subsequently extended so as to bring said gate within them. The corporation took proceedings against the company contending that the repeal of sec. 2 of 52 V. c. 43, made that Act retroactive and that the shifting of the toll gate without the consent of the corporation was a violation of said Act.

Held, affirming the decision of the Court of Queen's Bench, that as a statute is never retroactive unless made so in express terms, sec. 2 had no effect and its repeal could not make it retroactive; that the shifting of the toll gate was not a violation of the Act, which only applied to the erection of new gates, and that the extension of the limits of the village could not affect the pre-existing rights of the company.

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

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

judgment of the Superior Court in favour of the plaintiff.

The plaintiff municipality seeks by its action to have the defendant enjoined from continuing the toll gates erected by it within the municipality and to have the same demolished as being erected without the consent of the corporation under 52 Vic. ch. 43, which provides that—

Article 5089 of the Revised Statutes of the province of Quebec is replaced by the following :

5089. As soon as one mile of the road is made the company may put up toll gates and collect the tolls established by the board of directors, subject to the provisions of this section.

The company cannot, however, place any toll or other gate within the limits of any town or village incorporated by special charter or under the municipal code, unless the said corporation consents thereto.

2nd. This Act shall have no retroactive effect.

An Act passed in the following year, 54 Vic. ch. 36, was as follows :

Section 2 of the Act 52 Vic. ch. 43, amending the law respecting companies for stoning roads is hereby repealed.

The plaintiff claimed that the effect of such repeal was to make the former Act retroactive and so prevent the company defendant from continuing its maintenance of the toll gates and collecting tolls without the consent of the corporation. It was also contended that the Act was violated by the company shifting certain toll gates after the Act was passed to a point within the limits of the village as extended shortly before the passing of 54 Vic. ch. 36. The facts material to the decision are more fully stated in the judgment of the court.

The Superior Court held the plaintiff entitled to relief but its judgment was reversed by the Court of Queen's Bench. The plaintiff appealed.

Geoffrion Q.C. and *Charbonneau* for the appellant.

Saint-Pierre Q.C. for the respondent.

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THE VILLAGE OF ST. JOACHIM DE LA POINTE CLAIRE v. THE POINTE CLAIRE TURNPIKE ROAD CO.

Taschereau J.

The judgment of the court was delivered by—

TASCHEREAU J.—This is a very simple case. The respondent's turnpike road company for a number of years had erected and maintained toll gates under its charter within the present limits of the municipality appellant. In 1889, the legislature decreed that no toll gates should be placed within the limits of any town or village municipality without the consent of the corporation.

Did that enactment affect toll gates existing previously, or only those to be erected thereafter, is the only question raised on this appeal. The judgment appealed from determines that this legislation has no retroactive effect and consequently does not interfere with the respondent's toll gates, which had been in existence a long time before within the limits of the municipality appellant. And this, in my opinion, is clearly right. The appellant's case rests mainly on the following curious piece of legislation. To the enactment of the Act of 1889 to which I have referred was added "this Act shall have no retroactive effect." But in the following year, an Act was passed repealing these words. Now, what is the effect of this repeal? It is simply to leave the statute of 1889 as if the said words "this Act shall have no retroactive effect" had never been in it. And no Act has a retroactive effect if nothing to the contrary appears therein. So that the words "this Act shall have no retroactive effect" in the statute of 1889 were unnecessary, and their being struck out leaves the construction to be given to the statute the same as if they had never been in it, and has no other consequence.

As found by the Court of Appeal, as a matter of fact, this turnpike road company has erected no new toll gates since 1889 within the limits of the municipality

appellant. The shifting of its gates, and removal from one place to the other, did not constitute new gates. The municipality has extended its limits, but that cannot affect the respondent's pre-existing rights.

An objection to our jurisdiction to entertain this appeal was taken *in limine* by the respondent. But as we are of opinion that we should dismiss the appeal we assume jurisdiction, without determining the question raised thereupon, as we have often done in such cases, and as the Privy Council has done in many instances, amongst others, in *Braid* v. *The Great Western Railway Co.* (1).

The result is that the judgment of the Court of Appeal, which dismissed the appellant's action, is affirmed, and the appeal dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *Nap. Charbonneau.*

Solicitor for the respondent: *Saint-Pierre & Pelissier.*

(1) 1 Moo. P.C. N.S. 101.

1895
*Feb. 28.
*May 6.

THE NORTH AMERICAN GLASS COMPANY (DEFENDANT)..... } APPELLANT;

AND

MAURICE BARSALOU (PLAINTIFF).....RESPONDENT.

ON APPEAL FROM THE SUPERIOR COURT FOR LOWER CANADA SITTING IN REVIEW AT MONTREAL.

Contract—Construction of—Agreement to discontinue business—Determination of agreement.

B., a manufacturer of glassware, entered into a contract with two companies in the same trade by which, in consideration of certain quarterly payments, he agreed to discontinue his business for five years. The contract provided that if at any time during the five years any furnace should be started by other parties for the manufacture of glassware, either of the said companies could, if it wished, by written notice to B., terminate the agreement "as on the first day on which glass has been made by the said furnace" and the payments to B. should then cease unless he could show "that said furnace or furnaces at the time said notice was given could not have a production of more than one hundred dollars per day.

Held, affirming the decision of the Court of Review, that under this agreement B. was only required to show that any furnace so started did not have an actual output worth more than $100 per day on an average for a reasonable period and that the words "could not have a production of more than one hundred dollars per day" did not mean mere capacity to produce that quantity whether it was actually produced or not.

APPEAL from a decision of the Court for Lower Canada, sitting in review at Montreal, affirming the judgment in favour of the plaintiff.

The action was brought by Barsalou to recover moneys due under a contract between him and the appellant and the Hamilton Glass Co. The substance of the agreement and nature of the matters in issue be-

*PRESENT:—Fournier, Taschereau, Gwynne, Sedgewick and King JJ.

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tween the parties is sufficiently indicated by the above head-note and fully set out in the judgment of this court. The Superior Court held that plaintiff was entitled to recover and its judgment was affirmed on review.

Martin Q.C. (of the Ontario bar) and *Martin* for the appellant.

Beique Q.C. and *Geoffrion* Q.C. for the respondent.

FOURNIER J.—I am of opinion that this appeal should be dismissed for the reasons given by Mr. Justice Taschereau.

TASCHEREAU J.—The facts which gave rise to this litigation are as follows:—The parties, appellant and respondent, were, previous to the month of May, 1889, engaged in the manufacture and sale of glass and glassware, having their principal places of business in Montreal.

The Hamilton Glass Company was engaged in the said business at Hamilton, in Ontario.

On the seventh of May, 1889, an agreement was entered into between these parties, by which it was stipulated that as the appellant and the Hamilton Glass Company, in view of increasing their works and production thereof, were interested in prevailing upon respondent to discontinue the manufacture of glassware, the respondent covenanted to discontinue such manufacture of glass and glassware for a period of five years from the 15th of May, 1889, in consideration whereof the appellant agreed to pay him quarterly the sum of one thousand two hundred and fifty dollars during said period, and the Hamilton Glass Company agreed to pay him, quarterly, the sum of seven hundred and fifty dollars.

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Taschereau J.

Provision was also made in the said contract for the purchase by the appellant and the Hamilton Glass Company of the raw materials of the respondent; also for cancelling the same in case any furnace or furnaces should be started for the manufacture of glassware during the said period of five years.

This contract was carried out until the fall of 1891. In November, 1891, the appellant, learning that other firms were manufacturing glassware at or near New Glasgow, N.S., assumed to elect to cancel the contract.

Had it the right to do so, is the point in controversy.

The case turns upon the construction and interpretation of that clause of the contract by which the parties could bring the agreement to an end. It reads as follows:

> It is, however, agreed that in case at any time during said period of five years any furnace or furnaces shall be started for the manufacture of glassware, (except black beer bottles and window glass,) by any party or parties other than the said parties of the second and third parts, directly or indirectly, then the said parties of the second and third parts or either of them, if they deem it expedient may, by giving notice in writing to the party of the first part, bring this agreement to an end as on the first day on which glass has been made in said furnace or furnaces, after which notice no further payments shall be made to the party of the first part, except that it can be shown by the party of the first part to the said parties of the second and third parts that said furnace or furnaces at the time said notice was given could not have a production of more than one hundred dollars per day, calculated on present selling prices, in which case the quarterly payments shall be continued to said party of the first part.

What is the true meaning and construction to be given this clause of the contract?

The respondent contends that it means an actual production and output of manufactured goods exceeding one hundred dollars per day on an average during the whole year.

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Appellant contends that what respondent was required to show is that the furnace or furnaces, which had been started, could not have a production, or in other words a capacity, to produce one hundred dollars per day, that is to say:—What was the capacity of production of the furnaces in question, at the time the notice was given, on the 15th of November, 1891?

The Superior Court held that the parties to the contract had in view a regular, uniform and maintained production of one hundred dollars per day, during the ordinary period of running such furnaces, per year, to wit: during ten months of the year; and that judgment was confirmed in review. Hence the present appeal by the North American Glass Company.

I am of opinion, though not without some hesitation, that the appeal should be dismissed. The case is not free from doubt, but we cannot reverse upon a doubt. Reading the agreement between the parties, in the light of the surrounding circumstances, we cannot say that the courts below were wrong in holding that what the parties intended was not to provide for the case of a possible capacity of producing more than $100 worth per diem, but for an actual production to that amount.

The mere capacity of producing more than $100 per diem could not have been intended, because that alone would not have affected the appellants.

It is the actual production that would have been hurtful to their interests, and the only one which it is reasonable to assume they provided for.

As to the facts of production by the Nova Scotia Company we cannot interfere with the findings of the courts, which are entirely borne out by the evidence. The plea of illegality of the contract was declared before us to have been abandoned, as had been done in the courts below.

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The plea that this contract was in restraint of trade and null on grounds of public policy was abandoned in the courts below, and has not to be determined by us. In fact the defendant also abandoned it expressly at the hearing here.

I would dismiss with costs.

GWYNNE J.—The only question in this case is as to the construction of a clause for defeasance of an agreement bearing date the 7th day of May, 1889, by which agreement, in consideration of the plaintiff, at the request of the defendants, discontinuing his business of manufacture of glass and glassware for the period of five years from the 15th of the said month of May, the defendant promised to pay him quarterly during the said period of five years the sum of $1,250, the first payment to be made on the 15th day of August then next. The clause of defeasance contained in the agreement is to the following effect:

> It is, however, agreed that in case at any time during said period of five years any furnace or furnaces shall be started for the manufacture of glassware, except black beer bottles and window glass, by any party or parties other than the said parties of the second and third parts, directly or indirectly, then the said parties of the second or third part, or either of them, if they deem it expedient may, by giving notice in writing to the party of the first part, bring this agreement to an end as on the first day on which glass has been made in said furnace or furnaces, after which notice no further payments shall be made to the party of the first part, except that it can be shown by the party of the first part to the said parties of the second and third parts that said furnace or furnaces at the time said notice was given could not have a production of more than one hundred dollars per day, calculated at present selling prices, in which case the quarterly payments shall be continued to the said party of the first part.

The plaintiff is the party of the first part to the agreement, the defendants are the party of the second part, and a glass manufacturing company called the Hamilton Glass Company the parties of the third part

above mentioned. The object which the parties of the second and third part had in view in procuring the plaintiff to give up his business for the period of five years was to endeavour thereby to reserve to themselves as much as possible the benefit to be derived from such his retirement, and the clause of defeasance was inserted to enable them to obviate the effect of their business being interfered with by a new production of glass exceeding in value $100 per day at the then prices. The clause may not be very felicitously expressed, but it is, I think, sufficiently clear that the intention of the parties was that the parties of the second and third parts should assume the risk of all injury which should befall their business from new factories being started whose daily production should not exceed in value $100.

We cannot, I think, hold that the plaintiff was consenting that the defendants should have it in their power to evade the payments they had agreed to make to him for the consideration he had given if, for example, a stranger or strangers should erect a building supplied with a furnace or furnaces having capacity to manufacture glass of greater value than $100 per day, but in which no glass at all should in fact be produced; that very plainly was not the intention of the parties for the clause provides that upon notice of the determination of the contract being given the agreement shall be determined as on the first day on which glass has been made in the furnace. So neither could it have been the intention that the defendants could arbitrarily terminate the agreement if a new factory started having a furnace of capacity sufficient for the manufacture of glass to an amount exceeding in value $200 per day should be shown to have never exceeded in actual production $50 worth per day during the whole glass making season. Such a construction would

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be so utterly illusory and one-sided as plainly to evince that it could not have been the intention of the parties. Injury from a production exceeding in value $100 per day is what the defendants were providing against, not the capacity to produce a non-produced excess of that quantity.

Then the expression "could not have a production of more than $100 per day" plainly shows that what was intended to be guarded against was not the production of more than $100 worth upon one day—or occasionally—or upon a few days, but the interference with defendants' business by a continuous production of glass of greater value than $100 per day, that is daily for some, though undefined, continuous period, and of this opinion the defendants themselves appear to have been, for to this action which is brought to recover the quarterly payments which accrued due from the defendants upon the 15th November, 1891, and the 15th February, 1892, the defendants justify their terminating the agreement under the provisions of the above clause in the agreement by the following plea upon which is raised the only issue between the parties to this action. They say—

> that during the summer of eighteen hundred and ninety-one, two other factories were carrying on the manufacture of glass (not black beer bottles or window glass), in the county of Pictou in Nova Scotia, namely, one D. B. Humphrey & Company and another firm of Lamont Brothers, which said factories combined did have a daily production of more than two hundred dollars, and said factories continued in operation during the summer and fall of said year eighteen hundred and ninety-one, and are in operation up to the present time and are still producing more glassware of a value greater than one hundred dollars per day; that when the defendants became aware of the said facts they notified the plaintiff that they cancelled the said contract and would no longer continue the payment of the sums of money therein stipulated.

In thus construing the clause of defeasance as the defendants have here done, as pointing to a daily pro-

duction of glassware exceeding in value one hundred dollars, they have, I think, correctly construed it; and the evidence, in my opinion, justified the finding of the learned trial judge and of the learned judges in the court of review that the factories in question did not have a daily production of glassware exceeding one hundred dollars in value, and that the contingency upon which the defendants have vested their asserted right of determining the contract had not arisen when they gave the notice on the 17th November, upon which they rely. The appeal must therefore be dismissed with costs, and the judgment below affirmed.

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SEDGEWICK and KING JJ.—Concurred.

Appeal dismissed with costs.

Solicitors for the appellant: *Girouard, Foster, Martin & Girouard.*

Solicitors for the respondent: *Beique, Lafontaine, Turgeon & Robertson.*

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*Nov. 10, 12.

AND

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*May 6. THE PROVINCES OF ONTARIO AND QUEBEC..... } RESPONDENTS.

IN THE MATTER OF AN ARBITRATION RESPECTING PROVINCIAL ACCOUNTS.

ON APPEAL FROM THE AWARD OF THE ARBITRATORS.

Construction of Statute—British North America Act ss. 112, 114, 115, 116, 118—36 *V. c.* 30 *(D)*—47 *V. c.* 4 *(D)*—*Provincial subsidies—Half-yearly payments—Deduction of interest.*

By section 111 of the British North America Act Canada is made liable for the debt of each province existing at the union. By 112, Ontario and Quebec are jointly liable to Canada for any excess of the debt of the province of Canada at the time of the union over $62,500,000 and chargeable with 5 per cent interest thereon. Secs. 114 and 115 make a like provision for the debts of Nova Scotia and New Brunswick exceeding eight and seven millions respectively, and by 116, if the debts of those provinces should be less than said amounts they are entitled to receive, by half-yearly payments in advance, interest at the rate of 5 per cent on the difference. Sec. 118, after providing for annual payments of fixed sums to the several provinces for support of their governments, and an additional sum per head of the population, enacts that "such grants shall be in settlement of all future demands on Canada and shall be paid half-yearly in advance to each province, but the government of Canada shall deduct from such grants, as against any province, all sums chargeable as interest on the public debt of that province in excess of the several amounts stipulated in this Act." The debt of the province of Canada at the union exceeded the sum mentioned in sec. 112, and on appeal from the award of arbitrators appointed to adjust the accounts between the Dominion and the provinces of Ontario and Quebec.

Held, affirming said award, that the subsidy of the provinces under sec. 118 was payable from the 1st of July, 1867, but interest on

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

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the excess of debt should not be deducted until 1st January, 1868; that unless expressly provided interest is never to be paid before it accrues due; and that there is no express provision in the British North America Act that interest shall be deducted in advance on the excess of debt under sec. 118.

By 36 V. c. 30 (D), passed in 1873, it was declared that the debt of the province of Canada at the union was then ascertained to be $73,006,088.84, and that the subsidies should thereafter be paid according to such amount. By 47 V. c. 4, in 1884, it was provided that the accounts between the Dominion and the provinces should be calculated as if the last mentioned Acts had directed that such increase should be allowed from the coming into force of the British North America Act, and it also provided that the total amount of the half-yearly payments which would have been made on account of such increase from July 1st, 1867, to January 1st, 1873, with interest at 5 per cent from the day on which it would have been so paid to July 1st, 1884, should be deemed capital owing to the respective provinces bearing interest at 5 per cent and payable after July 1st, 1884, as part of the yearly subsidies.

Held, affirming the said award, Gwynne J. dissenting, that the last mentioned Acts did not authorize the Dominion to deduct interest in advance from the subsidies payable to the provinces half-yearly but leaves such deduction as it was under the British North America Act.

APPEAL from an award of arbitrators appointed to adjust the accounts between the Dominion of Canada and the provinces of Ontario and Quebec respectively.

The circumstances under which this appeal arose were the following:—

The appeal herein is taken by the Dominion of Canada, from the award made and published on the 2nd day of November, 1893, by the Honourable John Alexander Boyd, Chancellor of the province of Ontario; the Honourable George Wheelock Burbidge, Judge of the Exchequer Court of Canada; and the Honourable Sir Louis Napoleon Casault, Judge of the Superior Court of the province of Quebec, the arbitrators duly appointed under the provisions of the Act of the Parliament of Canada, 54 & 55 Vic. ch. 6; the Act of the

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Legislative Assembly of Ontario, 54 Vic. ch. 2; and the Act of the Legislature of Quebec, 54 Vic. ch. 4.

Sections 6 and 7 of the Dominion Act and of the respective Acts of Ontario and Quebec provide identically as follows:

6. The arbitrators shall not be bound to decide according to the strict rules of law or evidence, but may decide upon equitable principles, and when they do proceed on their view of a disputed question of law, the awards shall set forth the same at the instance of either or any party. Any award made under this Act shall be, in so far as it relates to disputed questions of law, subject to appeal to the Supreme Court of Canada and thence to the Judicial Committee of Her Majesty's Privy Council, in case their Lordships are pleased to allow such appeal.

7. In case of an appeal on a question of law being successful the matter shall go back to the arbitrators, for the purpose of making such changes in the award as may be necessary, or an appellate court shall make any other direction as to the necessary changes.

In pursuance of the said statutory enactments the three governments by orders in council duly approved on 15th April, 1893, referred certain matters as specified and contained in "the first agreement of submission to the arbitrators."

The following are such of the matters contained in the "agreement of submission" as were submitted in respect whereof the arbitrators made their award and on which this appeal is made.

1. (*a.*) All questions relating or incident to the accounts between the Dominion and the provinces of Ontario and Quebec.

2. The accounts are understood to include the following particulars:—

(*a.*) The accounts as rendered by the Dominion up to January, 1889.

(*b.*) In the unsettled accounts between the Dominion and the two provinces the rate of interest and the mode of computation of interest to be determined.

On the 2nd November, 1893, the arbitrators published their award, partial in respect of the matters referred.

By the last paragraph of the said award the arbitrators in pursuance of section 6 of the Acts of Refer-

ence set forth that in respect of paragraphs 1, 2 and 3 of the award, they proceeded upon their view of a disputed question of law.

Paragraphs 1 and 2 of the award, which are the subject of contention and exception in this appeal, are as follows:

1. That from the 1st July, 1867, to the passing of the Act of Parliament of Canada, 36 Vic. ch. 30, the provinces of Ontario and Quebec shall be credited with subsidy half-yearly in advance, deducting therefrom at the end of each half year their respective shares of interest as determined by the award of September 3rd, 1870, at the rate of five per centum per annum on the excess of debt of the province of Canada over $62,500,000 as actually ascertained in amount at each period, the first of such deductions to be made on the 1st day of January, 1868, and the others on the 1st day of July and January thereafter down to and including the 1st day of January, 1873.

2. That in the province of Canada account there shall be credited on the 23rd May, 1873, the sum of $10,506,088.84 remitted by the said Act, and thereafter the subsidy shall be credited in the separate accounts of Ontario and Quebec without any such deduction.

The Dominion objects to this award that it should have determined that the interest on the excess of debt should be deducted from the first half-yearly payment of subsidy on July 1st, 1867, making twelve deductions up to January 1st, 1873, instead of eleven, which would be the number under the award. The decision of such questions depends on the construction of the following sections of the British North America Act.

Section 111 of the British North America Act, 1867, is as follows:

Canada shall be liable for the debts and liabilities of each province existing at the union.

Section 112:

Ontario and Quebec conjointly shall be liable to Canada for the amount (if any) by which the debt of the province of Canada exceeds at the union sixty-two million five hundred thousand dollars, and shall be charged with interest at the rate of five per centum per annum thereon.

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Section 114:

Nova Scotia shall be liable to Canada for the amount (if any) by which its public debt exceeds at the union eight million dollars, and shall be charged with interest at the rate of five per centum per annum thereon.

Section 115:

New Brunswick shall be liable to Canada for the amount (if any) by which its public debt exceeds at the union seven million dollars, and shall be charged with interest at the rate of five per centum per annum thereon.

Section 116:

In case the public debts of Nova Scotia and New Brunswick do not at the union amount to eight million and seven million dollars respectively, they shall respectively receive, by half-yearly payments in advance from the government of Canada, interest at five per centum per annum on the difference between the actual amounts of their respective debts and such stipulated amounts.

Section 118 is as follows:

The following sums shall be paid yearly by Canada to the several provinces for the support of their governments and legislatures:

Ontario	$80,000
Quebec	70,000
Nova Scotia	60,000
New Brunswick	50,000
	$260,000

and an annual grant in aid of each province shall be made, equal to eighty cents per head of the population as ascertained by the census of one thousand eight hundred and sixty-one, and in the case of Nova Scotia and New Brunswick, by each subsequent decennial census until the population of each of those two provinces amounts to four hundred thousand souls, at which rate such grant shall thereafter remain. Such grants shall be in full settlement of all future demands on Canada, and shall be paid half-yearly in advance to each province; but the government of Canada shall deduct from such grants, as against any province, all sums chargeable as interest on the public debt of that province in excess of the several amounts stipulated in this Act.

It was further contended that if this contention should not prevail under the British North America Act, that 36 Vic. ch. 30 (D) and 47 Vic. ch. 4 (D)

authorized such deductions of interest in advance. The preamble and secs. 1 and 2 of 36 Vic. ch. 30 provided that:

Whereas by the provisions of "The British North America Act, 1867," and by the terms and conditions under which the provinces of British Columbia and Manitoba were admitted into the Dominion, Canada became liable for the debts and liabilities of each province existing at the time of its becoming part of the Dominion, subject to the provision that each province should, in account with Canada, be charged with interest at the rate of five per cent per annum on the account by which its said debts and liabilities exceeded (or should receive interest at the same rate by half-yearly payments in advance on the amount by which its said debt and liabilities fell short of) certain fixed amounts.

And whereas the amount fixed as aforesaid in the case of the provinces of Ontario and Quebec, conjointly (as having heretofore formed the province of Canada), was sixty-two millions five hundred thousand dollars ($62,500,000), and the debt of the said late province, as now ascertained, exceeded the said sum by ten million five hundred and six thousand and eighty-eight dollars and eighty-four cents, ($10,506,088.84), for the interest as aforesaid on which the said two provinces were chargeable in account with Canada.

And whereas it is expedient to relieve the said provinces of Ontario and Quebec from the charge, and for that purpose hereafter to consider the fixed amount in their case as increased by the said sum of ten millions five hundred and six thousand and eighty-eight dollars and eighty-four cents, and to compensate the other provinces for this addition to the general debt of Canada: Therefore Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

1. In the accounts between the several provinces of Canada and the Dominion, the amounts payable to and chargeable against the said provinces respectively, in so far as they depend on the amount of debt with which each province entered the union, shall be calculated and allowed as if the sum fixed by the one hundred and twelfth section of "The British North America Act, 1867," were increased from sixty-two millions five hundred thousand dollars to the sum of seventy-three millions six thousand and eighty-eight dollars and eighty-four cents, and as if the amounts fixed as aforesaid, as respects the provinces of Nova Scotia and New Brunswick, by "The British North America Act, 1867" and as respects the provinces of British Columbia and Manitoba by the terms and conditions on which they were admitted into the Dominion, were increased in the same proportion.

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2. The subsidies to the several provinces in July, one thousand eight hundred and seventy-three shall be paid in accordance with the foregoing provisions of this Act.

And the preamble and sec. 1 of 47 Vic. ch. 4, are as follows:

Whereas the subsidies payable under "The British North America Act, 1867," to the several provinces thereby united into one Dominion respectively, were readjusted and increased by the operation of the Act of the Parliament of Canada, 36 Vic. ch. 30, but the said increase was allowed only on and from the 1st day of July, 1873, and it is expedient that it should be allowed as from the day of the coming into force of the said "British North America Act, 1867," and that a proportionate increase should be made in the subsidies now payable by Canada to the provinces of British Columbia, Manitoba and Prince Edward Island respectively: Therefore Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

1. In the accounts between the several provinces and the Dominion, the amounts by which the yearly subsidy to each was increased by the Act 36 Vic. ch. 30, as explained by the Act, 37 Vic. ch. 3, as to Nova Scotia, shall be calculated and allowed to Ontario and Quebec, jointly, as having formed the late province of Canada, and to Nova Scotia and New Brunswick, as if the said Acts had directed that such increase should be allowed from the day of the coming into force of the "British North America Act, 1867," and the total amount of the half-yearly payments which would have in that case been made on account of such increase from the 1st day of July, 1867, up to and including the 1st day of January, 1873, with interest on each at five per cent per annum, from the day on which it would have been so paid, to the 1st day of July, 1884, shall be deemed capital, owing to the said provinces respectively, bearing interest at five per cent per annum, which interest shall be payable to them as part of their yearly subsidies from the Dominion, on and after the 1st day of July, 1884.

Ritchie Q.C. and *Hogg* Q.C. for the appellant.

Irving Q.C. and *Moss* Q.C. for the respondent, province of Ontario.

Girouard Q.C. and *Hall* Q.C. for the respondent, province of Quebec.

Ritchie Q.C.—One of the contentions arising here is shortly this:—Under the sections of the British North

America Act was the Dominion entitled to deduct from the first and each subsequent half-yearly payment of subsidy interest at the rate of five per cent on the excess of debt which was declared by this Act to be a charge against them? Ontario and Quebec, under the British North America Act, were declared to be conjointly liable to the Dominion of Canada for this excess of debt, and it was declared that they should be charged with interest at the rate of five per cent upon the excess of debt, and I emphasize the word "charged" because possibly something may turn upon it. There is an express statement that they shall be charged. There is no provision whatever in any of these sections for a liability on the part of Ontario and Quebec to the Dominion for this excess of debt outside of this charge. In other words, there is no statement made in the Act at all that they shall pay to them interest at the rate of five per cent per annum, but it is a charge.

There is no provision similar to 116, with respect to Ontario and Quebec, for this reason, that it was well known that the debt of the old province of Canada considerably exceeded that sum, but, as to Nova Scotia and New Brunswick, it was to some extent doubtful. It was possible it might exceed, therefore it is put in both ways. If it does exceed the stipulated amount then it was to be charged at five per cent; if, on the other hand, it falls short, the provinces should be paid and receive interest at the rate of five per cent half-yearly in advance on the sum by which the real debt fell short of the amount, as between all the parties, it was agreed the Dominion Government should assume. In other words, all these things are carved out of the subsidy.

That being so, one should ask, in the case of one whose debt exceeded the stipulated amount, what reason or what justice would there be, as to that par-

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ticular province, in saying that that province shall only pay the interest at the expiration of six months, instead of taking it out of the first payment of subsidy, when the Act expressly provided that, as to Nova Scotia and New Brunswick, if their debts fell short of the stipulated amount, they should be paid and receive in advance the interest on the difference. Clearly the intention of the Act was to place all these constituents of the new confederation in the same position. They agreed upon the relative proportion of debt to be assumed, they agreed that they should participate equally, *per capita*, in the subsidy to be granted.

Then in 1873, the different provinces were agitating for better terms, and apparently Ontario and Quebec, at all events, were urging that this deduction made half-yearly should be discontinued, and in 1873 an Act was passed. I call your Lordships' attention to the title of that Act. It is an Act to readjust the amount payable to and chargeable against the several provinces of Canada by the Dominion, so far as they depend on the debt with which they respectively entered the union. It is an Act to readjust the amounts payable to and chargeable against the provinces.

Then in 1874 was passed 47 Vic. ch. 4. I may in passing, refer to that Act as confirming the construction which I asked your Lordships to place upon the clause of the British North America Act, because apparently, in dealing with it, they regarded these deductions as being something carved out of the subsidies, as something going to increase the yearly subsidies, or the amount of subsidy payable to the provinces; the Act is declared to be an Act to readjust the yearly subsidies to be allowed by Canada to the several provinces now united in the Dominion. The recital is:

> Whereas the subsidies payable under the British North America Act to the several provinces thereby united into one Dominion were readjusted and increased by the operation of the Act of 1873.

So that the Parliament of Canada in 1884 treats that Act of 1873 as an Act increasing the subsidies. Increasing the subsidies how? By declaring that those subsidies shall not be diminished by deductions in respect of excess of debt. In other words, treating the deductions in respect of excess of debt as something carved entirely out of the subsidy itself, and throughout all the legislation, as I contend, it will be seen that the deductions and the subsidies were treated practically as being part and parcel of the same thing. The subsidies were to be increased or diminished dependent altogether upon whether the debt exceeded or fell short of the amount stipulated in the British North America Act.

Now, following on the statute for a moment, your Lordships will see that the provision is: "it is expedient to allow the increase," because we are dealing with the increase from the day of the coming into force of the Act, which is the 1st of July, 1867.

Now, if the Dominion Parliament had not construed the British North America Act as giving to the Dominion the right to deduct the first half-yearly charge in respect of the excess of debt from the first payment, to deduct it in advance, then it would be absurd to talk about allowing the increase from the 1st of July, 1867, because that would have been paid without being diminished in any way, and the proper reference would be to the payment increased from the 1st January, 1868. So that whatever may have been done by any officer of the government, clearly Parliament in construing the British North America Act acted upon the assumption that the right was vested in the Dominion to deduct from the first half-yearly payment of subsidy the first half-year's interest on the excess of debt. In other words, to deduct in advance. That is manifest also by the first clause:

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In the account between the several provinces and the Dominion the amount by which the half-yearly subsidy to each was increased by the Act.

Treating always this interest question as either increasing or diminishing the subsidy, something carved out of it, as I said before.

The Act of 1884 can only be looked upon in one of two ways. Either it is a gift out and out to the provinces upon certain terms and conditions, or else it must be treated as a settlement or agreement of disputed claims, and no matter which aspect it may be viewed in, the result must be the same, that the provinces must be estopped from contending that the Dominion are not entitled to now charge in their books the sums which they have added together in order to form the capital sum mentioned in the Act of 1884, the provisions of which Act the provinces have availed themselves of.

Hogg Q.C. follows: I do not know that I can add very much to the construction endeavoured to be placed upon the British North America Act by my learned friend, but upon the 118th section it has occurred to me there is one observation which may have some weight in its proper construction.

The observation I desire to make is this, that if the construction placed upon that section of the statute by the arbitrators is correct, then the word "deduct" is practically a meaningless word in that section, because if the amount of interest upon the excess of debt is only to be called for or charged at the end of six months then there is no deduction. A deduction is something that is to be taken from an amount now paid. If the amount is to be paid to-day, subject to a deduction, it must be the amount less the deduction, and the construction which Mr. Langton, Deputy Minister of Finance, in 1868, put upon this section, is

the correct one, and the arbitrators have not put the construction which the words themselves actually bear out.

Then, with reference to the Act of 1884, while the British North America Act dealt with the equality of all the provinces, the Act of 1884 dealt with the recoupment of the provinces of Ontario and Quebec, with the amount which it was considered might be deducted from them under the British North America Act. That is the whole object of the Act of 1884. The purport and intention of that Act was to recoup the provinces of Ontario and Quebec. Now, what were they to recoup? Putting the case in this position:—Supposing they had kept no account, because the amounts were unsettled, because it was uncertain what the excess of debt was, and supposing that that was simply kept in suspense, and no entries made in their books at all, then, upon the construction of the Act of 1884, what would be the amount which would be recouped or repaid, or allowed to the provinces of Ontario and Quebec under the construction of the Act of 1884, and Acts prior to it? Even if there were no entries, I submit to your Lordships that the only amount that would be recouped to them would be the twelve payments, which, under the British North America Act the Dominion was entitled to deduct.

What we submit to your Lordships is, that there has been an error in making up these accounts. Assuming now that we are dealing with the accounts themselves, there has been an error in making up these accounts, and the error is one of a large amount; it is the amount of $262,000, plus interest, which I understand will make it up to upwards of $400,000. And I submit that the arbitrators should have considered that position of the matter, and that they should have directed that as the accounts are now open for settlement and

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adjustment by the Act of 1891, that the accounts should be rectified by the addition of the amount of $262,000 which should have been charged.

Upon that position, treating this as an error in the accounts, the cases of *Williamson* v. *Barbour* (1), and *Gething* v. *Keighley* (2), show this:—That where accounts have been of long standing and have been settled, and it is shown that there has been an error in certain items, they may be opened, and the account rectified.

Then, upon the question of estoppel, which my learned friend has referred to, there is just one case which I desire to direct your Lordships' attention to, *In re Hercules Insurance Co.* (3).

The questions upon the statute have been so fully argued, I do not know that I can add anything that would be of great value.

Irving Q.C. for the province of Ontario.—I wish to say at the outset that in the accounts rendered to the province of Ontario only eleven half-yearly deductions of interest between 1867 and 1873 were ever claimed, and never was the idea of the twelfth payment put forward until before the arbitrators; my learned friend, for the first time, started the question. The case which they submitted to the arbitrators, which is in the blue-book, which is practically a record of the court below, and which can be brought up here, does not say one word about the twelfth payment. Our position is the converse of my learned friend's statement as to that.

Then, taking up the British North America Act, I am almost inclined to think, that we now come merely to discuss what its dry reading is. I do not know that it is necessary for me to offer any observation. My learned friend, Mr. *Hogg* applied some criticism to section 118, in which he said that the word

(1) 9 Ch. D. 529. (2) 9 Ch. D. 547.
(3) L. R. 19 Eq. 302.

"deduct" became meaningless, but it appears to me that the answer to that is, that the word "deduct" can be only applied when there is something to deduct, when there is something that has been settled and is chargeable. The word "deduct" does not necessarily assume that there must be actually something to deduct; it was to be deducted whenever it should be chargeable.

We will see, that after the passing of the Act of 1873, and up to the time of the Act of 1884, the position was that the subsidies were paid in full, and the two provinces remained liable to pay the interest upon the excess of debt between January, 1868, and the 1st of January, 1873. Now, the introduction of the Act of 1884 in no way disturbs that. There, I think, is the fallacy of the position that my learned friends, the appellants, have set up. The Act of 1884 in no way disturbs that. It in no way relieved the provinces from paying the excess of debt between those periods, but it took, as a well-settled arithmetical quantity, the figure or figures which composed the increase of debt between what had been originally allowed by the British North America Act and the increase under the Act of 1873. It took that as a well-settled figure, whatever it might have been.

The Act of 1884 in no way deals with the amount of the debt. It says simply, the increase of subsidies which have taken effect from 1873 are now to take effect from 1867, beginning at the 1st of July, 1867, ending on the 1st of January, 1873, which makes the twelve deductions, and it could not be otherwise, because at that period twelve subsidies had not been paid on their respective dates, and the increases had to relate to such dates. It would seem to me that there would be no other explanation of the Act of 1884, on its reading after having read the two first Acts. All

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that the Act of 1884 has to refer to the other Acts for is to ascertain the amount of figures which compose the increase under the Act of 1873, and that increase, no matter what it was from, became *eo nomine* a subsidy, and the Act of 1884 says that the increase which is a subsidy under the Act of 1874, is now to be multiplied by twelve.

(The learned counsel then dealt with the contention that the provinces having accepted the benefits under the Act of 1884 should be bound by its burdens, and read certain documents and correspondence to show that the province had no knowledge of the details of the adjustment under that Act long after it was passed).

The Act of 1884 was an absolute gift, increasing the subsidy up to January, 1873, inclusive.

I think that is the answer to the whole position, that the Act of 1884 took up the increase to all the provinces wholly, with reference to the amount of increases that had taken place in 1873. It did not deal with the question of interest.

Moss Q.C. follows.—Section 112 makes Ontario and Quebec jointly liable to Canada for the amount, if any, by which the debt of the province of Canada exceeds at the union the sum of $62,500,000. Now, these two provinces are jointly liable to Canada for any excess. In other words, they are to make good and pay to Canada, to recoup to Canada, in some way or another, any sum over that sixty-two millions, five hundred thousand dollars, and then there follows upon that what very naturally and very frequently certainly follows upon a liability, and that is, an obligation to pay interest upon it; "shall be charged with interest at the rate of five per cent per annum thereon." That is to say, Ontario and Quebec are to be liable for the excess and are to be charged with interest at five

per cent upon that excess. Now, when does the charge of interest begin?

Does any debt or obligation create interest until the lapse of some period of time? The interest begins to run from a certain date, and it runs from that time out, but what is the day at which interest is to begin to run on this? Could it possibly be a day before the coming into force of the Act of Confederation? The interest will begin to run from the day when this compact of confederation took effect, and not before. If this Act never took effect that obligation never took effect, and interest would never begin to run. The moment the Act comes into force, the moment the Dominion is established, that is to say, on the 1st of July, 1867, this obligation commences, interest begins to run from that day, on whatever that excess may be. Interest is chargeable, therefore, from that time, beginning at that date, and following up.

When you look at the way in which section 118 deals with it, it is perfectly clear that the provinces are to receive the amounts which are fixed by that section 118; they are to be paid these half-yearly in advance, but the government of Canada shall deduct from such grants, as against any province, all sums chargeable as interest. That is, a sum chargeable when it accrues due.

The law with regard to the right to the payment of interest is very well settled, and perhaps no observation could be clearer than that by Lord Westbury:— That interest can only be demanded by virtue of a contract, express or implied, or by virtue of a principal sum being wrongfully withheld on the day it ought to have been paid.

Then the Dominion for many years kept the accounts according to our contention and in construing statutes long usage has frequently been referred to. *Magis-*

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trates of Dunbar v. *The Duchess of Roxburghe* (1); *Attorney General* v. *Rochester* (2); *The Queen* v. *Archbishop of Canterbury* (3).

Then as to the Act of 1884, that Act, your Lordships will see, does not attempt to deal in terms, at all events, with any question of the allowance upon the excess of interest, or otherwise, but what it does say, is this: It says that the subsidies payable under the British North America Act were readjusted and increased by the operation of the Act of 1873. That is to say, the operation of the Act of 1873 was to readjust and to increase, in a certain way, the subsidies, and it was desirable that that operation of the Act should be so extended as that there should be no doubt as to its being intended to apply, not only from the date of the coming into force of the Act of 1873, but from the coming into force of the Act of 1867, the Confederation Act. Now, how does it proceed to do that? Here, as it seems to me, my Lords, is where my learned friends have not taken the right view of this Act. What Parliament has done is, not to decide or determine anything absolutely upon figures, but it says, the amount by which the yearly subsidy to each was increased shall be calculated and allowed to Ontario and Quebec conjointly, as if the said Acts had directed that such increase should be allowed, and so on; not that the Acts did do so, or that they did not do so; they do not determine anything with reference to the effect of that Act, but, at all events, they say now, in the accounts, that amount shall be computed or calculated and allowed as if these Acts had directed that such increase should be allowed from the day of the coming into force of the British North America Act. Whether it does or does not do so, at all events, the

(1) 3 Cl. & F. 335. (2) 5 DeG. M. & G. 797.
(3) 11 Q. B. 483.

amounts are to be computed and calculated and allowed as if that were so.

Girouard Q.C. for the province of Quebec.—As representing Quebec, I have very little to add to the exhaustive arguments presented by the learned counsel representing Ontario. Our interests are almost identical with those of Ontario, and whatever has been said in favour of Ontario should be accepted by the court as being an argument in favour of Quebec. I will content myself with summing up the case as I understand it.

In my humble opinion, the statute of 1884 which has been cited in support of the views contended for by the Dominion has no application whatever. The statute of 1884 provides for the case, and no court, as I understand it, should go behind the statute, to find out whether there was a mistake or not, whether there were twelve payments, or ten, or nine. The statute of 1884 has provided for a case which is complete on its face, and we have to-day to decide whether under the British North America Act the Dominion is entitled to get interest in advance. That is the sole question, as I understand it.

Now, let us look at that statute. Section 112 says that Ontario and Quebec shall jointly be liable to Canada for the amount at which the debt, &c.; nothing said about interest payable in advance or to be charged in advance.

By section 118 it says, the government of Canada shall deduct from said grants of subsidy as against any province all sums chargeable as interest on the public debt of that province, and so on; nothing is said there that the interest is to be charged in advance.

And then we come to the common law principle that interest shall only be charged as accrued or earned.

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Now, let us look at another clause of the British North America Act, which concerns Nova Scotia and New Brunswick, but which, I believe, throws light upon the intention of the legislature:

> In case the public debts of Nova Scotia and New Brunswick do not at the union amount to eight million and seven million dollars respectively, they shall respectively receive by half-yearly payments in advance from the government of Canada, interest at five per centum per annum on the difference between the actual amounts of their respective debts and such stipulated amounts.

The subsidies are to be paid in advance. The interest which should go to Nova Scotia or New Brunswick on their debt shall be payable in advance. Nothing is said as far as the interest on the excess of debt is concerned, whether that should be payable in advance or not, and we conclude, the statute being silent, that we must supply the common law rules. That is to say, the interest shall be charged as earned or accrued. That is commencing on the 1st of January, 1868, as the parties have done in the public accounts; and I wish to call the attention of the court to the agreement of the parties as far as the papers show, which are now before the court in this appeal; the court is not limited to the case as printed; the case is the same as before the arbitrators; each party has leave to refer to any of the documents and papers before the arbitrators. Looking at the public accounts for 1869, what do you find? You find that the parties charged interest to the provinces, on the excess of debt, from the 1st of January, 1868, in conformity with the opinion of the Minister of Justice at that time. Under the circumstances I do not wish to weary the court with a lengthened argument. I think the case is fully before the court. It has been argued in an able manner. Under these circumstances, I leave the case confidently before the court, that the interpretation which will be given to the Act of 1884 will not allow interest to be charged. I ask for the dis-

missal of this appeal, as we have asked in our factum; and if they lose their appeal, they should pay the costs.

Hall Q.C. follows:—I would like to emphasize the position we take, that it is for this court to lay down the view of what was the liability of the provinces of Quebec and Ontario under the British North America Act, and I would ask your Lordships to consider the question irrespective of the statutes of 1873 and 1884. Because, I presume, if there is no liability on the provinces of Ontario and Quebec under the British North America Act to be charged with that interest in advance, there is no obligation at all.

We want your Lordships to determine the question whether under the British North America Act, the Imperial Act, there is any obligation on the provinces of Ontario and Quebec to pay interest in advance on the excess of debt. I say at the threshold, that is the question which was evidently determined by the arbitrators below, and is now the question for your Lordships to determine here. Under that Imperial Act, is there a legal obligation against Ontario and Quebec to pay interest on the excess of debt in advance?

If your Lordships come to the conclusion that there was no legal obligation on the part of Ontario or Quebec to pay interest on the excess of debt in advance, let us come to the statute of 1873. Now, the statute of 1873, according to our contention, relieved the provinces from any obligation. If there was an obligation to pay interest on the excess of debt, whenever that might be, that excess of debt was removed, that was the effect of the Act of 1873: and your Lordships will see, that in that Act of 1873 the other provinces of Nova Scotia and New Brunswick were compensated for that assumption by Canada of the increased debt of Ontario and Quebec; so that the other provinces, up to that time any way, never had any cause to complain,

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because they were all brought up on the same sort of levelling process. Therefore, whatever obligation there was to pay interest on the excess of debt, that obligation was removed in 1873 by the Dominion assuming the excess of debt. Well, when you come to the statute of 1884, as my learned friends from Ontario argued so elaborately, there is nothing to show how that principal sum is arrived at. There is nothing to show that Ontario and Quebec were ever aware of the terms of that Act. It was after the Act was passed, at the conference that took place in 1884, that the treasurers of Ontario and Quebec first inquired how the principal sum was arrived at. Now, my learned friend Mr. Girouard said, and it was the point taken below, that whether that Act was good or bad, it must stand in its entirety, and on its face. It gives an increased subsidy by the operation of the Act of 1873, but it gives that not only to Ontario and Quebec, but to Prince Edward Island, British Columbia, Nova Scotia and New Brunswick. No question of inequality or injustice can come in there, because whatever was done as regards one province, or the old province of Canada, was done with reference to the other provinces in the levelling up process.

Ritchie Q.C. in reply.

THE CHIEF JUSTICE.—This is an appeal by the Dominion from certain parts of the award of the Honourable John Alexander Boyd, Chancellor of Ontario, the Honourable George Wheelock Burbidge, Judge of the Exchequer Court of Canada and the Honourable Sir Louis Napoleon Casault, Chief Justice of the Superior Court of Quebec, arbitrators appointed under the Act of the Parliament of Canada 54 & 55 Vic. cap. 6, the Act of the Legislature of Ontario 54 Vic., cap. 2, and the Act of the Legislature of Quebec 54 Vic.

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cap. 6. The object of the arbitration was the settlement of certain disputed accounts between the Dominion and the provinces. By the 6th section of the Dominion Act it was enacted:

The arbitrators shall not be bound to decide according to the strict rules of law or evidence, but may decide upon equitable principles, and when they do proceed on their view of a disputed question of law, the awards shall set forth the same at the instance of either or any party. Any award made under this Act shall be, in so far as it relates to disputed questions of law, subject to appeal to the Supreme Court of Canada and thence to the Judicial Committee of Her Majesty's Privy Council, in case their Lordships are pleased to allow such appeal.

A similar provision was contained in each of the provincial Acts. An agreement of submission was come to between the Dominion and the provinces on the 10th of April, 1893, by which certain questions were submitted to the arbitrators. This agreement was subsequently confirmed by orders in council, and under it the arbitrators on the 2nd of November, 1893, made the award, the first, second and third paragraphs of which are the subjects of the present appeal.

It is declared in the award that in respect of the findings contained in the paragraphs mentioned the arbitrators proceeded upon their view of a disputed question of law. These paragraphs are as follows:

1. That from the first of July, 1867, to the passing of the Act of the Parliament of Canada, 36th Victoria, chapter 30, the provinces of Ontario and Quebec shall be credited with subsidy half-yearly in advance, deducting therefrom at the end of each half-year their respective shares of interest as determined by the award of September 3rd, 1870, at the rate of five per centum per annum on the excess of debt of the province of Canada over $62,500,000, as actually ascertained in amount at each period, the first of such deductions to be made on the first day of January, 1868, and the others on the first day of July and January, thereafter, down to and including the first day of January, 1873.

2. That in the province of Canada account, there shall be credited on the 23rd day of May, 1873, the sum of $10,506,088.84 remitted by the said Act, and thereafter the subsidy shall be credited in the separate accounts of Ontario and Quebec without any such deduction.

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3. That on and from the first of July, 1884, the provinces of Ontario and Quebec shall be credited with the additional subsidy granted by the Act 47 Victoria, chapter 4, in the proportion determined for the excess of debt by the award hereinbefore mentioned.

The first question raised relates to interest on the excess of debt of the late province of Canada over the sum of $62,500,000, being the amount specified in the 112th section of the British North America Act. Is such interest according to the proper legal construction of this 112th section, and of the 118th section to be deducted from the half-yearly subsidies at the end of each half-year from the date of the union until the 1st of January, 1873, inclusive, or at the times when such half-yearly subsidies are directed to be paid to the provinces? In other words, is interest to be charged in advance or not until it had accrued? The learned arbitrators have determined that the interest was not to be deducted until it had actually accrued, and that consequently so far as the decision of this point depends upon the 112th and 118th sections of the British North America Act only eleven half-yearly deductions on interest on the excess are properly chargeable to Quebec and Ontario as representing the former province of Canada, and not twelve as contended for by the Dominion. In other words, the first of such deductions was chargeable at the expiration of the first half-year of the confederation, viz., on the 1st January, 1868, and the last on the 1st of January, 1873.

By section 111 of the British North America Act it was enacted that:

> Canada shall be liable for the debt and liabilities of each province existing at the union.

The 112th section is in these words:

> Ontario and Quebec conjointly shall be liable to Canada for the amount (if any) by which the debt of the province of Canada exceeds at the union $62,500,000, and shall be charged with interest at the rate of five per centum per annum thereon.

By section 118 it was enacted:

The following sums shall be paid yearly by Canada to the several provinces for the support of their governments and legislatures:

Ontario	$80,000
Quebec	70,000
Nova Scotia	60,000
New Brunswick	50,000
	$260,000

And an annual grant in aid of each province shall be made equal to eighty cents per head of the population as ascertained by the census of one thousand eight hundred and sixty-one, and in the case of Nova Scotia and New Brunswick, by each subsequent decennial census until the population of each of those two provinces amounts to four hundred thousand souls, at which rate such grant shall thereafter remain. Such grants shall be in settlement of all future demands on Canada, and shall be paid half-yearly in advance to each province; but the government of Canada shall deduct from such grants, as against any province, all sums chargeable as interest on the public debt of that province in excess of the several amounts stipulated in this Act.

Sections 114, 115 and 116 are respectively as follows:

114. Nova Scotia shall be liable to Canada for the amount (if any) by which its public debt exceeds at the union eight million dollars, and shall be charged with interest at the rate of five per centum per annum thereon.

115. New Brunswick shall be liable to Canada for the amount (if any) by which its public debt exceeds at the union seven million dollars, and shall be charged with interest at the rate of five per centum per annum thereon.

116. In case the public debts of Nova Scotia and New Brunswick do not at the union amount to eight million and seven million dollars respectively, they shall respectively receive, by half-yearly payments in advance from the government of Canada, interest at five per centum per annum on the difference between the actual amounts of their respective debts and such stipulated amounts.

This question first arose in 1869, when the then treasurer of the province of Ontario objected to the mode in which the Auditor General had charged the interest, that officer having deducted it in advance from each half-yearly payment of subsidy beginning on the 1st of July, 1867. Upon a reference to the Minister of

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Justice, the late Sir John Macdonald, this was held to be wrong and the account was rectified by making the first deduction on the first of January, 1868, instead of on the first of July, 1867, and continuing in this way to deduct the interest on the excess of debt ascertained at the date of each half-yearly payment of the subsidy down to the first of January, 1873, inclusive, and this mode of making up the account has since for a period of twenty-six years been adopted and acquiesced in by all parties. So far as this question depends upon the terms of the 118th section I am of opinion that there can be no possible doubt of the correctness of the principle adopted by the arbitrators, and that for the reasons which have been set forth in the opinions which two of them, Chief Justice Sir Louis Casault and Mr. Justice Burbidge have appended to the award. Sections 114 and 115 which apply to Nova Scotia and New Brunswick respectively are as regards interest in the same terms as section 118. Section 116 which provides for the payment by the Dominion of interest to the two provinces of Nova Scotia and New Brunswick in the event of the amount at which their debts were assumed being found to be in excess of the true amount, makes express provision for such payment being made in advance.

> They shall respectively receive by half-yearly payments in advance from the government of Canada interest at five per centum per annum on the difference between the actual amounts of their respective debts and such stipulated amounts—

are the words of the Act. From this it appears plain that in the case of these two provinces it was not the intention of Parliament that interest on any excess of the debt which might be found over the stipulated amounts, should be deducted in advance, for when it was intended that interest should be so paid it was said so in express words. Then the same result must follow

as regards the construction to be placed on section 118. No good reason can be assigned why any difference should be made as regards deducting interest on an excess of debt between the two Maritime provinces and the two provinces composing the province of Canada. The words of the 118th section are identical with those of the 114th and 115th, and if these latter did not require a deduction in advance clearly the former did not.

Further, the payment of interest before it has actually accrued due is so inconsistent with the normal mode of keeping accounts that in the absence of an express provision to that effect it is not to be inferred. There is no such thing as interest on a debt not yet due. As Chief Justice Casault well observes:

> Interest is the price of the use of money or commodity; it cannot be due before its use has been enjoyed and for the duration of the enjoyment, though stipulated at a certain rate per annum, it is never paid in advance without an express stipulation which is to be found nowhere in the British North America Act, 1867.

Then to deduct interest on the excess from the 1st of July, 1867, would be to take interest not actually accrued, for there was of course no debt due to the Dominion before the first of July, 1867, and interest could only be computed from that date. The mere provision of the 118th section that the interest was to be deducted from the grants or subsidies is not at all conclusive to show that it was to be deducted from the first payment of a subsidy and so by anticipation. These subsidies were necessarily payable in advance since the Act had transferred to the Dominion all the available means which the provinces had for carrying on the provincial governments, and they would have been absolutely without means for that purpose if the half-yearly payments of the subsidy in advance had not put them in funds. It does not follow from the

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provision that the interest is to be deducted from these half-yearly payments, that the interest is to be deducted before it accrues due. It is not said that from "each and every" half-yearly subsidy interest is to be deducted, and to give effect to the claim of the Dominion would be to interpolate those words. It is quite consistent with the terms of the 118th section and with the whole tenor of the statute that the interest should for the first time be deducted when it had accrued, and that the first deduction should be made from the half-yearly subsidy payable on the 1st of January, 1868, and so on half-yearly thereafter.

Section 112 says that the provinces of Ontario and Quebec shall be charged with interest at five per cent on the excess of debt, but to charge interest at that rate in advance as contended for by the Dominion would be to make the provinces pay more than five per cent and thus to give the Dominion a premium which would be entirely unwarranted by the terms of this section. It therefore appears to me to be very clear that under the British North America Act by itself, without regard to subsequent Dominion legislation, the decision of the learned arbitrators is entirely right, in holding that the mode of keeping the accounts and deducting the interest which has been adopted by the Dominion and acquiesced in by all parties since January, 1867, was correct, and that the accounts ought not in that respect to be now disturbed so far as the British North America Act is alone applicable.

It is said, however, that the effect of certain legislation of the Parliament of the Dominion has been to alter the liabilities of the provinces in this respect, and to impose upon them the obligation of submitting to the deduction of twelve instead of eleven payments of interest. In 1873 the statute of Canada 36 Vic. ch. 30, was passed, and received the royal assent

on the 23rd of May in that year. The object of this statute was to increase the yearly grants to the provinces, to give what were called "better terms." By the preamble, after reciting the provision of the British North America Act as to the assumption of the provincial debts, and as to the payment of interest on any excess or less amount of debt over or under the fixed amounts mentioned in that Act, it was further recited as follows:

And whereas the amount fixed as aforesaid in the case of the provinces of Ontario and Quebec, conjointly, as having theretofore formed the province of Canada, was $62,500,000, and the debt of the said late province as now ascertained exceeded the said sum by $10,506,088.84 for the interest on which the said two provinces were chargeable in account with Canada. And whereas it is expedient to relieve the said provinces of Ontario and Quebec from the charge, and for that purpose hereafter to consider the fixed amount in their case as increased by the said sum of $10,506,088.84, and to compensate the other provinces for the addition to the general debt of Canada.

By the first section it was enacted that:

In the accounts between the several provinces of Canada and the Dominion, the amounts payable to and chargeable against the said provinces respectively in so far as they depend on the amount of debt with which each province entered the union, shall be calculated and allowed as if the sum fixed by the 112th section of the British North America Act, 1867, were increased from $62,500,000, to the sum of $73,006,088.84, and as if the amount fixed as aforesaid, as respects the provinces of Nova Scotia and New Brunswick, by the British North America Act, 1867, and as respects the provinces of British Columbia and Manitoba by the terms and conditions on which they were admitted into the Dominion, were increased in the same proportion.

By the second section it was provided that:

The subsidies to the several provinces, in July, 1873, shall be paid in accordance with the foregoing provisions of this Act.

It was at first contended by the provinces of Quebec and Ontario that this Act was retrospective and authorized the payment of the increased subsidies from the date of union in 1867. This, however, was resisted by the Dominion, and rightly, for it is expressly said in

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the preamble, that "thereafter" the amount of debt fixed by the British North America Act should be considered as increased in the manner indicated by the Act.

By the Act 47 Vic. ch. 4, the preamble of which, after referring to the Act of 1873 and stating that the increase thereby allowed was only from the first of July, 1873, recited that it was expedient it should be allowed from the coming into force of the British North America Act, and that a proportionate increase should be made to the three provinces subsequently admitted to the Dominion, it was enacted by section one as follows:

In the accounts between the several provinces and the Dominion, the amounts by which the yearly subsidy to each was increased by the Act thirty-six Victoria, chapter thirty, as explained by the Act thirty-seven Victoria, chapter 3, as to Nova Scotia, shall be calculated and allowed to Ontario and Quebec, jointly, as having formed the late province of Canada, and to Nova Scotia and New Brunswick, as if the said Acts had directed that such increase should be allowed from the day of the coming into force of the "British North America Act, 1867," and the total amount of the half-yearly payments which would in that case have been made on account of such increase from the first day of July, one thousand eight hundred and sixty-seven, up to and including the first day of January, one thousand eight hundred and seventy-three, with interest on each at five per cent per annum, from the day on which it would have been so paid, to the first day of July, one thousand eight hundred and eighty-four, shall be deemed capital, owing to the said provinces respectively, bearing interest at five per cent per annum, which interest shall be payable to them as part of their yearly subsidies from the Dominion, on and after the first day of July, one thousand eight hundred and eighty-four.

Section 2 provided in the same terms for proportional allowances to Manitoba, British Columbia and Prince Edward Island.

Section 3 is as follows:

And for the avoidance of doubt under the foregoing provisions, it is declared and enacted, that the amount of the increase of the yearly subsidy and the capital on which the same is payable, to the several provinces respectively, under this Act, shall be as follows:

	Yearly increase.	Capital.
To Ontario and Quebec jointly	$269,875 16	$5,397,503 13
Nova Scotia	39,668 44	793,368 71
New Brunswick	30,225 97	604,519 35
Manitoba	5,541 25	110,825 07
British Columbia	4,155 39	83,107 88
Prince Edward Island	9,148 68	182,973 78

Of both these Acts of 1873 and 1884 it is to be said that they are not of their own force binding on the provinces. There never has been any legislation on the part of the provinces agreeing to an alteration of their rights as they existed under the British North America Act. If, however, the provinces accepted the benefits conferred upon them by Parliament in the terms of these statutes, they are, I take it, upon the principle *qui sentit commodum debet sentire et onus*, bound by any burdens and conditions to which the additional grants are made subject.

It was at one time contended by Ontario and Quebec that the effect of the Act of 1884 was not only to give the additional subsidy or yearly increase therein specified but also to authorize the crediting in the accounts of those provinces with the Dominion of all deductions made between 1867 and 1873 on account of half-yearly balances of debt in excess of $62,500,000 but under $73,006,088.84. This, however, would have been virtually to give the same benefit to the provinces twice over and being clearly not warranted by the statutes or either of them it was not insisted upon. In determining how the account between 1867 and 1873 is to be constructed the question now arises whether eleven or twelve gales of interest are to be deducted. The question of what are the proper balances on which the interest should be deducted will be considered later on. The question now under consideration is confined to the number of those half-yearly deductions of in-

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terest on the excess of debt. As already demonstrated, the 118th section of the British North America Act would have authorized the deduction between the 1st of July, 1867, and the 23rd of May, 1873, of only eleven gales of interest.

The Act of 1873 is, as has been shown, entirely prospective and does not touch this point except in so far as the amount of increase therein specified is referred to in the later Act. If then any change in this respect is to be made, warrant for it must be found in the Act of 1884.

In the first place it would be well to consider the general scope and object of this Act. This clearly was to give to the provinces of Ontario and Quebec jointly from the 1st of July, 1884, an increased subsidy of $269,875.16. It is true that it is said that this was based on an assumed capital of $5,397,503.13, but this does not affect the provinces. All they are concerned with is the grant itself. This grant cannot now be disturbed without prejudicially affecting those provinces relatively to the other provinces. It will be observed too that the language of the Act in the third section indicates that it was intended that this should be conclusive: "for the avoidance of doubt under the foregoing provisions," the words are. Surely nothing can be more absolute than this to show that whether the calculation was right or wrong the figures are to be taken as conclusive.

Then in the face of the Act itself nothing appears showing how the amount of the subsidy was arrived at. The first section of the Act does not fix the number of the deductions of interest in excess of debt, nor require any departure from the proper mode of making these deductions as prescribed by the 118th section of the British North America Act.

If then we are to say that it was intended to be attached as a condition to the acceptance of the subsidy, that the provinces in taking these accounts between 1867 and 1873 should submit to be charged with twelve instead of eleven gales of interest, it can only be because the amount of capital upon which the increased subsidy is based coincides with twelve gales of interest on an assumed excess of debt for each half-year during that time of $10,506,088.84 (contrary as regards the amount of the excess to the well ascertained fact) with five per cent from the supposed time of payment added. Are we to assume that it was the intention of the legislature to attach a submission to this mode of calculation as a condition of the subsidy when we find that it was not warranted by the law, and must have proceeded on an error either of fact or law, and when we find Parliament saying in almost so many words, as it does in the third clause, that without regard to any mistake the subsidy specified shall be paid? I agree with Sir Louis Casault that so to do would be to alter, not to expound, the law, and to compel the provinces to submit to terms they never assented to. If there has been a mistake it is apparent that it is one which is not susceptible of any judicial remedy. It would be out of the question to declare the Act either wholly or partially void. The amount of the subsidy could not be reduced without disturbing the fairness of the proportion between Ontario and Quebec and the other provinces; and to require them to surrender their legal right under the British North America Act to restrict the Dominion to eleven deductions of interest would be to compel them to submit to terms which they were never required to assent to, and in short to make a new arrangement for them. If Parliament was in error, either as to the proper calculation or as to the legal effect of the British North America Act, that can only be corrected by

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statute. This is not the case of a legislature proceeding upon an assumed construction of one of its own statutes. Parliament had no power in any way to alter the rights of the provinces under the British North America Act, nor to bind the provinces by its legislation except in so far as it made the subsidy conditional on an acceptance of the terms that twelve gales of interest should be deducted, and I fail to see that they have imposed any such condition.

Sir Louis Casault expresses the opinion that Parliament made no mistake either as to the number or amount of the half-yearly deductions of interest. The learned Chief Justice points out that though the deductions of interest were not to be made in advance the subsidies were so payable, and therefore, although twelve deductions of interest are not authorized in taking the accounts between 1867 and 1873, it is not inconsistent with this that the legislature intended that the capital specified should be based on twelve half-yearly payments of interest on the increase of debt given by the Act of 1873; and that the amount of the subsidy is by the first section of the Act of 1884 fixed with reference, not to the number and amount of the half-yearly deductions of interest, but by the amount of the subsidy granted by the Act of 1873, treated as the subsidies were declared to be by the British North America Act as payable in advance from the date of union. This receives strong support from the recitals of the statute of 1884, showing that the object of that Act was to put the provinces in the same position as if the statute of 1873 had been retrospective. I entirely agree in this view and I adopt what the learned Chief Justice says in regard to it in his judgment. If this is correct it is of course conclusive and there can be no pretense of any error in the statute, nor can it be said that there is anything in it which in any way controls

the rights of the provinces to have the deductions of interest made according to the principle required by the 118th section of the Confederation Act.

On the whole I am of opinion that the learned arbitrators were right in making only eleven half-yearly deductions of interest in the interval between 1867 and 1873, a conclusion which agrees entirely with the mode in which from 1869 the Dominion officers had kept the account.

The third point relates to a sum of $23,614.22 which the Dominion claims is by the award allowed to the provinces in excess of what they are entitled to. The arbitrators have determined by the first clause of the award:

> That from the first of July, 1867, to the passing of the Act of the Parliament of Canada 36 Victoria, chapter 36, the provinces of Ontario and Quebec shall be credited with subsidy half-yearly in advance, deducting therefrom at the end of each half-year their respective shares of interest as determined by the award of September 13th, 1870, at the rate of five per cent per annum on the excess of debt of the province of Canada over $62,500,000 *as actually ascertained in amount at each period*, the first of such deductions to be made on the first of January, 1868, and the others on the first day of July and January thereafter, down to and including the first day of January, 1873.

The objection to this on the part of the Dominion is that the deduction of interest instead of being based on the excess of debt as ascertained at each time of deduction should be based on such excess as ascertained at the time of the passing of the Act of 1873, or as actually existing at the time of the union. In other words, it is claimed on behalf of the Dominion that interest should be charged against the provinces from the 1st of July, 1867, on an excess of debt amounting to $10,506,088.84, being the excess as determined by the Act of 1873, as existing on the 1st of January, 1873, instead of on the actual excess ascertained from time to time as the amount over the sum of $62,500,000 as specified in the

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112th section of the British North America Act, whilst the same excess of $10,506,088.84 should not be credited to the provinces until the 23rd May, 1873, thus not giving the provinces the benefit of the increase for the purpose of establishing the excess of debt on which interest is to be charged whilst taking advantage of such increase as establishing against them the amount of debt at each half-yearly period from 1867 to 1873 without reference to the actual facts.

The provinces on the other hand contend that the proper mode of calculating the interest on the debt during the interval from 1867 to 1873 is to charge the provinces with interest and to deduct from each half-yearly payment of subsidy, interest at five per cent on the balance from time to time actually ascertained on the excess of the debt over the $62,500,000 as fixed by the 112th section. This principle has been adopted by the learned arbitrators in their award. A third plan has been suggested by Chief Justice Casault, viz., that the provinces should be credited with the increase of $10,506,088.84 on the 1st of July, 1867, which would result in half-yearly balances in their favour instead of against them, down to the 1st of January, 1873, inclusive; and that the benefit of the increase being thus given to the provinces from the beginning the Dominion should be at liberty to assume that there was a uniform excess of debt equal to the increase at each half-yearly period during the whole time from 1867 to 1873, and that interest should be credited and charged accordingly. The learned Chief Justice did not, however, act on this view but concurred with the other arbitrators in adopting the mode of calculation sanctioned by the award.

Little or no difference in the result would have been caused by adopting this latter mode of making up the account, as is well shown in the very able judgment of

Mr. Justice Burbidge. I see, however, considerable objection to it in a legal point of view. There is no statutory authority for such a mode of proceeding. I have already shewn in discussing the question as to the number of deductions for interest, that the Act of 1884 ought not to be considered as decisive of that question, and for the same reason it ought not to be considered as conclusive of the amount of the half-yearly balances on which interest should be calculated.

The interest account was not kept in this way by the Dominion officers, but on the plan adopted by the arbitrators.

As regards the agreement entered into at a conference held in 1888, between certain Ministers representing the Dominion and others representing the Executives of the provinces, I agree with Mr. Justice Burbidge that as these gentlemen acted under no legislative authority, their conclusions as to the proper mode of constructing the interest account can have no binding effect either on the Dominion or the provinces.

There remains to be considered the contention of the Dominion on this head. According to this the statutory increase should be treated as the uniform fixed amount of the excess of debt during the whole period from 1867 to 1873, and interest charged accordingly, whilst the provinces should not have the benefit of such increase until the 23rd of May, 1873, the deductions for interest up to that date being calculated on the half-yearly balances of the excess thus assumed over the original amount specified in section 112 of the Confederation Act ($62,500,000).

The proposition of the Dominion is that there could be no increase in the amount of the debt of the provinces for which the 111th section of the British North America Act made the Dominion liable after that Act came into force on the 1st of July, 1867, and as it was

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ascertained on the 1st of July, 1872, that the excess then amounted to $10,506,088.84, that that amount must have been due from the beginning, and interest on that amount should therefore be deducted half-yearly all along and not on the actual balances as shown in the Dominion accounts.

The answer of the provinces to this contention is that it was not intended by the provision for payment of interest on excess of debt to give the Dominion any premium or profit but simply an indemnity, and that it would therefore be unjust and unreasonable to charge interest in respect of claims or debts of the provinces not assumed by the Dominion as between it and the creditors or claimants, or even known to exist, until long after the date of confederation; that all that the Dominion could properly claim under the statute was interest on such subsequently ascertained claims or debts from the dates at which they were either paid or satisfied, or from the time at which interest upon them was paid or a liability to pay interest undertaken on the part of the Dominion.

This was the view adopted by the arbitrators in making their award. It proceeds entirely upon the principle that interest as given by section 118 was by way of recoupment only. There is nothing in the British North America Act itself indicating this, but I am of opinion that it is a fair inference from the whole scope and intention of that statute that the Dominion were merely to be recouped to the extent of interest and were not entitled to receive interest which they did not pay or become liable to pay. Further, this is in accord with the mode of keeping the accounts adopted by the Dominion officers from the beginning, and which prevailed without question for a period of some twenty-six years.

I confess I have had more doubt on this head than on any others, but I do not feel the doubt sufficiently strong to warrant me in dissenting from the award.

On the whole I am of opinion that there was no legal error in the award in respect of the matters brought under review in this appeal, which must therefore be dismissed with costs.

TASCHEREAU J.—Concurred.

GWYNNE J.—By the 104th sec. of the British North America Act, 1867, it was enacted that the annual interest of the public debts of the provinces of Canada, Nova Scotia and New Brunswick at the union should form the second claim on the consolidated revenue fund of Canada. By sec. 111 it was enacted that Canada should be liable for the debts and liabilities of each province existing at the union. But by sec. 112 it was enacted that Ontario and Quebec conjointly should be liable to Canada for the amount, if any, by which the debt of the province of Canada exceeded at the union $62,500,000 and should be charged with interest at the rate of five per centum per annum thereon. By sec. 118 it was enacted that certain sums specified therein should be paid yearly by Canada to the several provinces of Ontario, Quebec, Nova Scotia and New Brunswick for the support of their governments and legislatures and that—

> such grants shall be in full settlement of all future demands on Canada and shall be paid half-yearly in advance to each province, but the government of Canada shall deduct from such grants as against any province all sums chargeable as interest on the public debt of that province in excess of the several amounts stipulated in the Act.

The union of the provinces into the Dominion of Canada came into operation on the 1st day of July, 1867. At that time the public debt of the late province

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of Canada was known to exceed the said sum of $62,500,000 but to what amount was not ascertained.

Interest upon such excess was coming due in July, 1867. To meet such interest which the government of Canada was made liable for by the British North America Act the government deducted from the half-yearly subsidy payable respectively to Ontario and Quebec a sum calculated as the half-yearly interest upon such excess, estimating it at an amount deemed to be within the mark; this deduction was made upon the assumed authority of the British North America Act—the 118th sec. of which expressly authorized the Government of Canada to deduct from the half-yearly grants payable to each province all sums chargeable as interest on the public debt of that province in excess of the several amounts stipulated in the Act, that is to say, as regards Ontario and Quebec, all sums chargeable as interest on the public debt of the late province of Canada in excess of the said sum of $62,500,000. Like deductions were made from the half-yearly subsidies payable to Ontario and Quebec in January and July, 1868, but in 1869 it appears that upon the authority of the Minister of Justice such deductions were no longer made until the expiration of each half-year; that is to say, that so much of the interest upon the excess of the public debt of the late province of Canada over the $62,500,000 as fell due in July of each year, and which the government of Canada was bound to pay them, was not charged to the provinces until the following January, nor that coming due in January until the following July. This continued until the month of May, 1873, when an Act was passed by the Dominion Parliament intituled:

An Act to readjust the amounts payable to and chargeable against the several provinces of Canada by the Dominion Government so far as they depend upon the debt with which they respectively entered the union.

By that Act, after reciting that by the terms of the union Canada became liable for the debts and liabilities of each province existing at the time of its becoming part of the Dominion subject to the provision that each province should in account with Canada be charged with interest at the rate of five per centum on the amount by which its said debts and liabilities exceeded, or should receive interest at the same rate by half-yearly payments in advance on the amount by which its said debts and liabilities fell short of, certain fixed amounts; secondly, that the amount of Ontario and Quebec conjointly as having theretofore formed the province of Canada was $62,500,000, and that the debt of the said late province as then ascertained exceeded the sum of $62,500,000 by $10,506,088.84; and thirdly, that it was expedient to relieve the said provinces of Ontario and Quebec from the said charge and for that purpose thereafter to consider the fixed amount in their case as increased by the said sum of $10,506,088.84, and to compensate the other provinces for this addition to the general debt of Canada; it was enacted as follows:

1. In the accounts between the several provinces of Canada and the Dominion the amounts payable to and chargeable against the said provinces respectively in so far as they depend upon the amount of debt with which each province entered the union shall be calculated and allowed as if the sum fixed by the 112th section of the British North America Act of 1867 were increased from $62,500,000 to the sum of $73,600,088.84, and as if the amounts fixed as aforesaid as respects the provinces of Nova Scotia and New Brunswick by the British North America Act, 1867, and as respects the provinces of British Columbia and Manitoba by the terms and conditions upon which they were admitted into the Dominion were increased in the same proportion.

2. The subsidies to the several provinces in July, 1873, shall be paid in accordance with the foregoing provisions of this Act.

Whatever doubt may have existed as to the construction of this Act by the use of the word "hereafter"

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in the third of the above recitals in the preamble of the Act seems to me to be wholly removed by the enacting clause which in plain terms as it appears to me enacts that in all accounting and taking of accounts between the Dominion of Canada and the provinces of Ontario and Quebec such accounts should be taken as if the sum of $73,600,088.84 had been the sum inserted in the 112th section of the British North America Act instead of the sum of $62,500,000, in which case as the public debt of the late province of Canada did not at the time of the union exceed the said sum of $73,600,088.84 there would have been no deduction whatever authorized by the British North America Act to be made from the half-yearly subsidies payable by Canada to Ontario and Quebec, and if the account now being taken had been taken under that Act I cannot entertain a doubt that the provinces would have been entitled to claim and be allowed as against the Dominion so much of the several sums which had been deducted from their half-yearly subsidies with interest thereon from the time of such deductions respectively as had not been repaid; but doubts appear to have been entertained as to such being the construction of the Act for in 1884 the Dominion Parliament passed an Act to make the matter clear beyond any doubt—47 Vic. ch. 4.

By that Act, after reciting among other things that the subsidies payable under the British North America Act, 1867, to the several provinces thereby united into one Dominion respectively were readjusted and increased by the operation of the Act of the Parliament of Canada 36 Vic. c. 30, but the said increase was allowed only from the first day of July, 1873, and it was expedient that it should be allowed as from the day of the coming into force of the said British North America Act, 1867, it was enacted that:

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In the accounts between the several provinces and the Dominion the amounts by which the yearly subsidy to each was increased by the Act 36 Vic. ch. 30, shall be calculated and allowed to Ontario and Quebec (jointly as having formed the late province of Canada) as if the said Act had directed that such increase should be allowed from the coming into force of the British North America Act, 1867, and the total amount of the half-yearly payments which would in that case have been made on account of such increase from the first day of July, 1867, up to and including the first day of January, 1873, with interest on each at 5 per cent per annum, from the day on which it would have been so paid to the first day of July, 1884, shall be deemed capital owing to the said provinces respectively bearing interest at 5 per cent per annum, which interest shall be payable to them as part of their yearly subsidies from the Dominion on and after the first day of July, 1884.

And the 3rd section enacts that:

For the avoidance of doubt under the foregoing provisions it is declared and enacted that the amount of the increase of the yearly subsidy and the capital on which the same is payable to the several provinces respectively under this Act shall be as follows:

	Yearly increase.	Capital.
To Ontario and Quebec jointly.	$269,875 16	$5,397,503 13

Now what Parliament did by the Act of 1873 as regards Ontario and Quebec was to declare in express terms that in the accounts between the provinces and the Dominion the amount of the debt of the provinces should be calculated and allowed as if the sum of $62,500,000 mentioned in the 112th section of the British North America Act had been increased to $73,600,088.84, and that in July, 1873, the subsidies to Ontario and Quebec should be paid in accordance with this provision. This Act entitled the provinces of Ontario and Quebec in July, 1873, and thenceforth to receive half-yearly in advance the full amount of their subsidies ascertained under the provisions of the British North America Act without any deduction whatever as for excess of debt as provided for in the British North America Act. The only increase in the subsidies which they received in and subsequently to July, 1873, was the full amount of their half-yearly subsidies

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ascertained in the manner provided by the British North America Act without any deduction whatever as for interest upon an excess of debt of the late province of Canada over the amount of $73,600,088.84, which by the Act of 1873 was assumed absolutely by the Dominion instead of the amount fixed by the 112th section of the British North America Act. As there was not pretended to be any excess of debt of the late province of Canada over the amount by which the Act of 1873 was fixed as having been the total amount of the debt of the province of Canada at the union, assumed by the Dominion, there was no deduction to be made.

Now the Act of 1884, for the purpose as appears to me of removing all doubt as to the operation of the Act of 1873, simply provides that the benefit in increase of subsidy received by the provinces of Ontario and Quebec by the Act of 1873 in July, 1873, and thenceforward should be allowed to them as from the first of July, 1867—and to effectuate that purpose the Act provided that the whole of the amounts by which the subsidies paid from the 1st July, 1867, to 1st January, 1873, fell short of the full amounts which would have been payable if $73,600,088.84 had been the sum inserted in the 112th section of the British North America Act instead of $62,500,000 together with 5 per cent on the respective sums by which the half-yearly subsidies paid fell short of such full amounts should be capitalized, that is to say that the precise amount of the deductions made with interest upon the respective amounts of such deductions at 5 per cent from the respective dates upon which the amounts deducted would have been payable as subsidy but for the deductions should be capitalized, and the Act declares the amount so capitalized to be the sum of $5,397,508.13, which sum the Dominion acknowledges by statute to owe to the provinces and undertakes to pay 5 per cent

per annum thereon to the provinces as part of their yearly subsidies upon and from the 1st June, 1884. Now the amount so capitalized we find to be composed of twelve several half-yearly sums of $262,652.22 with interest at 5 per cent per annum upon each of such sums respectively from the respective days upon which the half-yearly subsidies from which such sums were now assumed to have been deducted were payable, the interest being calculated up to the 1st July, 1884, so that the amount allowed to the provinces by the Act as for deductions from their half-yearly subsidies between the 1st July, 1867, and the 1st January, 1873, inclusive exceeded the amount of the deductions actually made, as appears by the evidence in the appeal case, but the Act of 1884 is conclusive against the Dominion having any claim upon that ground and the Dominion Government makes no such claim. So in like manner are the provinces who have accepted the benefit conferred by the Act precluded from contesting that the capital sum of $5,397,503.13 does not include all the sums which it is plain by the Act that it does, namely, all the amounts which the payments made to them for half-yearly subsidies from the 1st July, 1867, to the 1st January, 1873, inclusive fell short of the full amounts which would have been payable if no deductions had been authorized and made.

In taking the accounts now under consideration both the Dominion and the provinces respectively must rest upon and abide by the Act of 1884, and each party does profess to rest upon and abide by such Act, but each contends that it is the contention of the other which alone departs from the provisions of the Act. I must confess that in my opinion the respondents alone are open to that imputation.

The Act in fact removes all necessity for any consideration now of the amounts of the several deductions

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or of the times when such deductions were made respectively, and an inquiry whether or not any such deductions were illegally made is not called for. In the account being taken on the arbitration no deductions were chargeable by the Dominion to the provinces, nor was any sought to be charged; and as the Act of 1884 was plainly passed for the purpose of compensating, and does compensate the provinces for all sums which the half-yearly subsidies paid to them between the 1st July, 1867, and the 1st of January, 1873, inclusive, fell short of the amounts which would have been payable to them if the sum of $73,600,088.84 had been inserted in the 112th section of the British North America Act instead of $62,500,000; and as the account between the provinces and the Dominion must be taken in conformity with the directions of said provisions of that Act; all inquiry as to the times when the several amounts deducted were so deducted, and whether any of the deductions made was made at a time not authorized by the British North America Act, is now wholly immaterial and irrelevant. The contention of the respondents is that the 118th section of the British North America Act did not authorize the deduction to have been made, which in fact was made, from the first half-yearly instalment of subsidy which was paid in July, 1867. They insist that such deduction operated as a payment of interest by the provinces to the Dominion six months in advance of its becoming due although half-yearly interest accrued due in July, 1867, upon the public debt of Canada, which the Dominion Government had to pay in that month; and further, they contend that the Act of 1884 is to be taken as compensating the provinces for eleven gales only of half-yearly interest deducted from the subsidies which, as the respondents contend, is all that could have been deducted legally between the 1st of July, 1867, and the

1st of January, 1873, inclusive, and therefore they now claim that in the account which is being taken between them and the Dominion they are entitled to charge the Dominion Government with the sum of $262,652.22 and interest thereon from the 1st of July, 1867. But as already shown the Act of 1884 in point of fact made compensation to the provinces for all that was in fact deducted, which as is not disputed, was twelve half-yearly gales of interest on excess of debt, the contention of the provinces if it should prevail would give them the return of thirteen gales of half-yearly interest with interest thereon as compensation for twelve which were in point of fact deducted. Such a construction is plainly at variance with the express intent of the Act of 1884, in accordance with the provisions of which Act, as already stated, the account must be taken. This contention could only be urged if the Act of 1884 had never been passed, but even in that case the construction of the British North America Act which is insisted upon, namely, that nothing could be deducted by section 118 of the Act from the half-yearly subsidies payable to the provinces until the expiration of six months from the 1st day of July, 1867, and then as for interest for the first time then accrued due from the provinces to the Dominion as accruing upon a debt found to be due from the provinces to the Dominion upon, and bearing interest from the 1st July, 1867, is in my opinion a narrow and erroneous construction of the Act.

In determining when first the deductions authorized by the 118th section of the British North America Act might be made, the whole scope and object of the contract contained in the treaty of union of which the British North America Act, 1867, is but the embodiment must be taken into consideration.

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By that contract the Dominion Government agreed to assume absolutely as their own debt $62,500,000 of the public debt of the late province of Canada and to pay the public creditors the interest accruing due half-yearly upon so much of that public debt as exceeded the said sum of $62,500,000. The interest so accruing due half-yearly exceeded the sum of 5 per cent per annum. The Dominion Government, however, agreed to pay the whole of such interest accruing half-yearly upon condition that they should have the right of deducting from the half-yearly grants which the Dominion agreed to pay to the provinces half-yearly in advance interest at 5 per cent per annum on so much of the public debt of the said late province of Canada as exceeded the $62,500,000 assumed absolutely by the Dominion. Now as such interest was accruing due in July, 1867, when the first half-yearly subsidy became payable it was necessary and reasonable that the deduction should be made in July, 1867, as in any other half-year. The deduction is not by the 118th section stated to be authorized as for interest upon a debt ascertained to be due from the provinces to the Dominion upon, and bearing interest from, the 1st day of July, 1867, but as interest chargeable on the public debt of (in the case of Ontario and Quebec) the late province of Canada in excess of the amount stipulated in the Act to be assumed absolutely by the Dominion, namely, $62,500,000.

The effect of the contention of the respondents prevailing would be to make the Dominion liable to the public creditors of the late province of Canada for the half-yearly interest upon the excess of debt falling due in July, 1867, and to give them no claim against the provinces of Ontario and Quebec in respect of such payment until the expiration of six months; and so likewise in respect of the interest accruing due every

half-year upon such excess of debt, and yet not a word is said of allowing interest to the Dominion upon such half-yearly advances.

But it is unnecessary to discuss the point further for as already said, in taking the account, as it must be taken under the Act of 1884, the question and the point involved in it have no relevancy.

In my opinion the appeal must be allowed with costs and a declaration be made to the effect that in the account being taken the provinces of Ontario and Quebec have no claim or demand whatsoever against the Dominion for any deductions made from their half-yearly subsidies payable to them between the 1st July, 1867, and the 1st January, 1873, inclusive, as all such claims, if ever they had any, are compensated by the provision made in favour of the provinces by the Dominion Act 47 Vic. ch. 4.

SEDGEWICK and KING JJ. concurred in the judgment of the Chief Justice.

Appeal dismissed with costs.

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*Mar. 12.
*May 6.

THE NORTHERN PACIFIC RAILWAY COMPANY (DEFENDANTS)... } APPELLANTS;

AND

JAMES L. GRANT & CO. (PLAINTIFFS)..RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Railway Co.—Carriage of goods—Carriage over connecting lines—Contract for—Authority of agent.

E., in Br. Col., being about to purchase goods from G. in Ont. signed, on request of the freight agent of the Northern Pacific Railway Company in British Columbia, a letter to G. asking him to ship goods *via* Grand Trunk Railway and Chicago & N. W. care Northern Pacific Railway at St. Pauls. This letter was forwarded to the freight agent of the Northern Pacific Railway Company at Toronto, who sent it to G. and wrote to him "I enclose you card of advice and if you will kindly fill it up when you make the shipment send it to me, I will trace and hurry them through and advise you of delivery to consignee." G. shipped the goods as suggested in this letter deliverable to his own order in British Columbia.

Held, affirming the decision of the Court of Appeal, that on arrival of the goods at St. Pauls the Northern Pacific Railway Company was bound to accept delivery of them for carriage to British Columbia and to expedite such carriage; that they were in the care of said company from St. Pauls to British Columbia; that the freight agent at Toronto had authority so to bind the company; and that the company was liable to G. for the value of the goods which were delivered to E. at British Columbia without an order from G. and not paid for.

APPEAL from a decision of the Court of Appeal for Ontario (1), affirming the judgment of the Chancery Division (2) in favour of the plaintiffs.

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

(1) 21 Ont. App. R. 322. (2) 22 O. R. 645.

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THE NORTHERN PACIFIC RAILWAY COMPANY v. GRANT.

The action was brought to recover from the defendant company the value of goods shipped by plaintiffs at Ingersoll, Ont., to Victoria, British Columbia, and improperly delivered at Victoria to one Evans, the intending purchaser, who did not pay plaintiffs the price. Evans after ordering the goods had, on request of the freight agent of the company at Victoria, written to plaintiffs as follows:—"Please deliver my shipment of bacon, ordered through Mr. James Mitchell, to be shipped as per tag below," and the said tag read "mark and ship this freight *via* Grand Trunk Railway and Chicago and North Western care Northern Pacific Railroad St. Paul. Be particular to mark in full as above." The freight agent at Victoria sent this letter and tag to one Belcher the freight agent of defendant at Toronto, who wrote to plaintiffs the following letter: "I beg to enclose order from W. W. Evans of Victoria, B. C., for shipment of bacon ordered by that firm through Mr. Jas. Mitchell. I also enclose you card of advice and if you will kindly fill up when you make the shipment send it to me, I will trace and hurry it through and advise you of delivery to consignee."

Plaintiffs shipped goods as directed delivering them to the Grand Trunk Railway Company at Ingersoll, to be delivered at Victoria to plaintiffs' own order. They were delivered to the defendant company at St. Pauls, and forwarded by it to Victoria where, without any order from the plaintiffs, they were delivered to Evans who did not pay plaintiffs for them. Plaintiffs then brought an action against the Northern Pacific Railway Co. for the value of the goods and obtained a verdict at the trial which was affirmed by the Divisional Court and the Court of Appeal.

McGregor for the appellants. The contract by the company was with Evans, who alone could sue for breach of it. *Moore* v. *Wilson* (1); *Davis* v. *James* (2).

(1) 1 T. R. 659. (2) 5 Burr. 2680.

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Belcher could only bind the company by a contract relating to its own line. *Great Western Railway Co.* v. *Willis* (1); *Mullarkey* v. *Philadelphia Railroad Co.* (2); and see *McMillan* v. *Grand Trunk Railway Co.* (3).

Wells and *W. Nesbitt* for the respondents referred to *Hately* v. *Merchants' Despatch Co.* (4); *Bristol & Exeter Railway Co.* v. *Collins* (5).

The judgment of the court was delivered by:

KING J.—Any arrangement made at Victoria, B.C., was made with Evans, who was treated as the intended consignee, and his letter of directions to plaintiffs assumes that the latter, as vendor, is to deliver the goods at Ingersoll, Ontario. He accordingly specifies (as proposed by defendants) the route by which they are to be sent, viz., *via* Grand Trunk and Chicago and N. W. R. R. care Northern Pacific R. R. St. Pauls.

This letter of direction was transmitted through defendants' contracting freight agent at Toronto to the plaintiffs with a letter in which the defendants are made in effect to say:

"Ship your goods as requested to our care, St. Pauls *viâ* our connecting lines, and we will trace and hurry them through and advise you of delivery to consignee."

They thus recognize that while Evans may be the consignee, the shipper may have rights in respect of the goods which would give him an interest in their prompt and safe carriage and delivery.

Under English law (differing in this respect from American law) a company receiving goods for carriage to a point beyond its line *primâ facie* contracts for the entire carriage. But it may limit its responsibility to acts or defaults occurring upon its own line, and where

(1) 18 C. B. N. S. 749.
(2) 9 Phil. 114.
(3) 16 Can. S. C. R. 543.
(4) 14 Can. S. C. R. 572.
(5) 7 H. L. Cas. 194.

this is done it and each carrier in succession comes under an obligation to deliver goods so received to the next carrier. An intending shipper might well feel concerned at being put (as has been expressed) "to the difficult task of ascertaining where any fault of carriage was or of resorting to his legal remedy in a distant state." This would naturally work to the disadvantage of such a route in competition with one on which through contracts are made.

As if recognizing this, defendants as an inducement to the shipper, say: "Send your goods by our connecting lines to our care St. Pauls and we will trace the shipment, expedite the carriage and advise of delivery." This certainly seems to imply some control over the carriage and delivery, at least after the goods reach the company at St. Pauls.

The plaintiffs did not ship goods in pursuance of Evans's direction, but shipped them to be carried as suggested, deliverable however to their own order at Victoria.

The shipping papers contained certain conditions limiting the responsibility of the Grand Trunk Railway, which it is assumed had the effect of confining the responsibility of that company to its own line.

From the correspondence between plaintiffs and Belcher on the day of the shipment, and upon the next day, and from Belcher's letter to the general freight agent, I think it appears that the shipment as made was treated as though Belcher's letter of 18th June was applicable to it.

Now limiting our view to what would take place when the goods reached St. Pauls; would the defendant company be then free to refuse to receive the goods or to delay in receiving them? It seems to me that what took place at Ingersoll bound the company promptly to receive the goods, and to hurry them

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through and advise of delivery. More than that, I think that the facts show a contract upon shipment at Ingersoll that when the goods so shipped should reach St. Pauls, in ordinary course, they would continue in their care.

The route tags were put into the hands of their contracting freight agents by the company to use in the diversion of traffic to their road, and the fair representation involved in them was that their company was the only one concerned in the carriage from St. Pauls onward. This is strengthened by the undertaking to advise of delivery to consignee. I am, therefore, of opinion that in the circumstances, the defendants are responsible for misdelivery.

As to Belcher's authority, it seems to me that if his office of contracting freight agent for Ontario had any significance at all, he could make contracts of this sort. Shippers in Ontario would not be apt to be concerned about local freight rates from St. Pauls to Tacoma. Besides the representation as to the goods being in care of the company after reaching St. Pauls was the direct act of the company itself.

Upon the whole therefore, I am inclined to think that the appeal should be dismissed.

Appeal dismissed with costs.

Solicitors for appellants: *Bigelow & Smyth.*

Solicitor for respondents: *Thomas Wells.*

LEVI LEWIS AND JULIA LEWIS (PLAINTIFFS) ..... } APPELLANTS;

AND

THOMAS ALEXANDER AND ROBERT W. PUDDICOMBE (DEFENDANTS) ..... } RESPONDENTS.

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*Mar. 15, 16.

*May 6.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Municipal corporation—Petition for drain—Use of drain as common sewer—Connection with drain—Nuisance—Liability of householder.

A petition by ratepayers of a township under s. 570 of the Municipal Act of Ontario, asked for a drain to be constructed for draining the property described therein. The township was afterwards annexed to the adjoining city and the drain was thereafter used as a common sewer, it being as constructed fit for that purpose. In an action against a householder, who had connected the sewage from his house with said drain, for a nuisance occasioned thereby at its outlet:

Held, affirming the decision of the Court of Appeal, Taschereau and Gwynne JJ. dissenting, that sec. 570, in authorizing the construction of a drain "for draining the property" empowered the township to construct a drain for draining not only surface water, but sewage generally, and the householder was not responsible for the consequences of connecting his house with said drain by permission of the city.

Where a by-law provided that no connection should be made with a sewer, except by permission of the city engineer, a resolution of the city council granting an application for such connection on terms which were complied with and the connection made was a sufficient compliance with said by-law.

APPEAL from a decision of the Court of Appeal for Ontario (1), reversing the judgment of the Chancery Division in favour of the plaintiffs and dismissing their action.

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

(1) 21 Ont. App. R. 613.

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The action in this case was brought to abate a nuisance to plaintiffs' property by offensive matter being deposited thereon by drainage from the dwelling houses of the respective defendants. The sewage from the house of the defendant Alexander was carried through a drain constructed when that portion of the city was a separate township, and plaintiffs claimed that such drain could not be used as a common sewer. The defendant Puddicombe had obtained connection with the sewer after the township was annexed to the city, and as to him the contention was that permission to make such connection had not been given by the city engineer as required by a by-law of the city. The facts are more fully stated in the judgments published herewith.

McCarthy Q.C. and *Fraser* for the appellants.

Gibbons Q.C. and *Cameron* for the respondents.

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

SEDGEWICK J.– The parties to this action are residents of London, Ontario. In 1883, the plaintiffs owned lots in the township of Westminster, immediately outside of the corporate limits of the city. This portion of the township was all at that time laid off in town lots, with necessary streets and sidewalks, most of the lots having a frontage of eighty-four feet on the street. In the month of July of that year, in pursuance of the provisions of the Consolidated Municipal Act of 1883, a majority in number of the owners of the property affected petitioned the council of the township of Westminster, praying that a sewer be constructed for the purpose of draining the lots on both sides of Bruce Street. This petition having been considered by the council, a by-law was passed granting the prayer of

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the petition and authorizing its construction in accordance with the report and plans of the engineer, the cost of the work to be paid by moneys borrowed in the first place by the township, but to be recouped by the proceeds of ten annual assessments upon the property benefited pursuant to the provisions of the Act. Under this by-law the drain was constructed, and it has since been paid for by the assessment referred to.

The principal question in controversy in this suit is as to whether the residents on both sides of Bruce Street have a right to connect their water-closets with the drain, or whether its use is limited to mere surface water, or in other words, whether it is a common sewer within the meaning of the statute, into which all sewage from the dwelling-houses affected may lawfully be turned, or only a drain limited in its use as above mentioned. Section 482, subsec. 15, of the Act (46 Vic. ch. 18) authorizes the council of every township to pass by-laws for opening and making drains, sewers, or watercourses within the jurisdiction of the council. Section 570 authorizes the council of a township to pass by-laws to provide for the draining of any property which may be benefited thereby, and for assessing the cost thereof upon that property by special rate, and it was under either one or other of these powers, or of both of them, that the work in question was constructed. The contention of the appellants is, that the work in question was not a sewer within the meaning of section 482 (15) but only a drain within the meaning of section 570; that the authority given by the latter section was not sufficient to enable a township council to construct a common sewer, the cost of which might be met by special assessment, and that any work done thereon was limited and confined in its purpose to surface drainage only for agricultural or other similar objects; and in support of this conten-

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tion they point out that it was by subsequent legislation only that township councils were authorized to construct sewers to be paid for by special assessment. The Municipal Act of 1883 did not particularly define the meaning to be given to the words "drain" or "sewer" as used in that Act, and we cannot of course resort to definitions given to those words in the English statutes relating to drainage, sewerage and other matters connected with public health. The question to be considered is: What is the meaning of the words "for draining of the property"? In my view these words are wide enough to include the draining of property for all purposes, whether these purposes be agricultural or sanitary. The word "drain" has no technical or exact meaning; it has, however, a much wider meaning than the word "sewer." A sewer is in every case a drain although a drain is not in every case a sewer. A sewer is, I suppose, that kind of a drain which is constructed in thickly populated areas for the purpose of carrying off, not merely inoffensive surface water, but also foul water, and all excrementitious and other filthy matter. I see no reason why the power given to the council to provide for the draining of any particular property confines that power solely to the draining of inoffensive or surface water. One area may be drained in one way for one purpose, while another area may be drained in another way for other purposes as well. Without possessing the knowledge of a hydraulic or sanitary engineer, in my view it is a matter of common knowledge that in order to properly drain an area of farm land for agricultural purposes, a drain of a cheap and simple character may be all that is necessary, whereas, if that same area is laid off and built upon as a city, town or village, altogether irrespective of the question of incorporation, a drain of a much more expensive character is necessary. In the

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first case the drain need not be a sewer; in the second case, in order to effectually drain the property it must be a sewer, that is, a structure with capacity to carry off all liquid matter the necessary concomitant of human dwellings which is usually carried off by means of a sewer. I am unable to find any satisfactory reason for narrowing the wide meaning of the word "drain." The plaintiff Levi Lewis, himself, in his evidence states that the drain was constructed "for the purpose of surface water, sewers and cellars," but not for the drainage of offensive matter from water-closets. There is no authority, it seems to me, for limiting the purposes of the drain. Who is to determine the character of the matter that may be carried off, the degree of its offensiveness or inoffensiveness? The drainage of an area covered by human habitations must, in my judgment, necessarily include the drainage or carrying off from those habitations of all matter that is usually carried off by means of drains or sewers in areas of that description. Some evidence was adduced at the trial to show that it never was intended by the petitioners that their water-closets should be connected with this drain, and this evidence not only impressed the trial judge but seems to have affected the learned judges of the Court of Appeal.

Neither the petition for the drain nor the by-law itself affords any evidence that such was the object of the drain. If it were to be so limited, either the by-law itself or the plans and specifications of the work which formed part of the by-law, should have made apparent that limited purpose, and no reliance in my view can be placed upon oral testimony, even if admissible, as to its purposes many years after the work was constructed. It appears to me, however, that the evidence is conclusive that the drain was intended to be a drain for all purposes. The petition and the bill refer to it

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as a sewer. It was precisely the same kind of a drain as had for years before been constructed within the limits of London, adjoining it, for sewage purposes. It was a glazed tile drain, fifteen inches in diameter, with facilities for connecting it with the buildings, lots and dwellings on each side of it. It was deep enough and perfect enough to carry off all the sewage of the locality, and I believe that it was constructed for those purposes—purposes for which it was perfectly adapted.

It was in 1888 that the defendant Alexander connected the water-closets in his house on Bruce Street with the drain in question, and from that time until shortly before this action commenced, January, 1894, he had enjoyed it without interruption or objection on the part of any one.

By an Act of the legislature of Ontario (chapter 89, of the Acts of 1890) the area through which the drain was built became annexed to and thenceforward formed part of the city of London. From that time until the commencement of this action the authorities of that city in all respects treated the drain in question as one of the city's common sewers. At the time of the annexation the special assessment for the drain had not been wholly paid; the city authorities collected the balance of it as sewerage rates; the city likewise collected from residents on Bruce Street, water-closet rates, which was a tax for the privilege of draining excrementitious matter through this drain. The city authorities likewise looked after the repair and sanitary conditions of this drain. They flushed it. In addition to this they connected the water-closets in their public buildings with it as well as constructed a new sewer, the outlet of which was this drain. In every respect, so far as I can see, they dealt with it in exactly the same way as they dealt with any other common sewer in the city.

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All this shows, in my judgment, conclusively, that the drain in question having become the property of the city by virtue of the annexing Act, was considered by it and dealt with as a common sewer, and not as a structure of the limited character and purpose contended for by the appellants; and in my view the judgment of the court below was perfectly right in holding that as between the defendant Alexander and the city, it was a common sewer.

There is, however, a by-law of the city which prohibits the property owner from connecting his buildings with a common sewer without the written consent of the city engineer. This by-law can in no way affect the defendant Alexander. There was no such by-law in the township of Westminster either at the time when the drain was built or at the time when he made connection with it. If that connection was lawfully made in 1888, as I think it was, his rights in that regard could not in any way be affected by the by-law referred to. In my judgment, therefore, the defendant Alexander is entitled to succeed upon two grounds: in the first place, because he was lawfully using the drain under his original rights as a property owner; and secondly, because having regard to the action of the city authorities it was at the time of the grievances complained of *de facto* a common sewer of the city of London and subject to its supervision and control.

The case of *Ferrand* v. *Hallas Land and Building Company* (1), is an express authority, in support of the defence. Lord Justice Smith there says:

> It appears to me that if the sewer be vested in the local authority, and the defendants have the sanction of that authority to do what they have done, then this action is not maintainable against them, for if it were, every householder whose house is drained into a sewer, which is vested in, and is under the control of the local authority, would be liable to be proceeded against for what the local authority might do

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with the sewage which flowed out of the mouth of the sewer, although the householder is unable to direct as to how and in what way such sewage is to be dealt with. It is immaterial who originally constructed the sewer. When once the sewer was vested in the local authority, they are the persons liable for injury caused by the effluent from the sewer, and not the persons who drain into the sewer.

The case of the defendant Puddicombe is stronger even than that of the defendant Alexander. The city had constructed a sewer about July, 1892, on Henry Street which emptied into the Bruce Street drain. City by-law number 759 had provided that every lot abutting on a street through which a common sewer ran should be drained into it, and that it should be the duty of the owner to keep the connecting drain between his premises and the common sewer in good repair. It, however, further provided, that no person should connect with such sewer except on previous application in writing to and permission from the city engineer; and it appeared that as a matter of fact no actual application in writing had been made to the city engineer, nor had express permission been given by him to the defendant Puddicombe to make connection with this drain, and the plaintiffs contended that Puddicombe, at all events, had therefore no right to drain his premises into that sewer. But the evidence shows that he applied to the city council for leave to make the connection, and that the city council passed a resolution granting him such permission upon certain terms therein specified. These terms were complied with, and the connection was made, and he has since, as was proved, paid sewage rates and closet rates. I think the by-law has been substantially complied with, and it is not for the plaintiffs at all events to assert the contrary.

It is not necesssary in this case to discuss at length the question of the liability of the city for the injury of which the plaintiffs complain. If the amount of

sewage which overflows upon their property has been appreciably increased by reason of the connection of the Henry Street drain with the Bruce Street drain, and they have sustained damage beyond that which must be deemed to have been within the contemplation of the township authorities and the plaintiffs themselves at the time of the original construction of the latter drain, then doubtless they have either a cause of action or a claim for compensation against the city, but it does not appear to me necessary to do more than reserve this point.

As the case at present stands, in my judgment, the appeal should be dismissed as against both the defendants.

I have referred to the contention that because, subsequent to the Act of 1882, the Ontario Legislature has by express enactment given to township councils authority to build sewers, the cost of which might be defrayed by special assessment imposed upon the property benefited, the drain in this case cannot be held to be a sewer. But this contention is nothing more than an argument depending for its force upon the circumstances in each case. If we think that the statute of 1882 covers the case, the fact that the legislature has made certain what might before, to some minds, have been doubtful, cannot effect an alteration of that opinion, nor compel us to decide that that opinion must necessarily be erroneous. The amending Act is not declaratory. It has no retroactive operation and while it may indicate some doubt in the mind of the draftsman and even of the legislature as well as to the breadth of the Act amended, it can in no way alter its meaning, and we are bound to give it what we consider its meaning is, independently of and uninfluenced by that doubt.

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TASCHEREAU J.—I concur in the judgment of Mr. Justice Gwynne.

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GWYNNE J.—The appeal of the plaintiffs, as against the judgment of the Court of Appeal for Ontario in favour of the defendant Puddicombe, must in my opinion be dismissed with costs. At the time of the passing by the municipal council of the corporation of the city of London, in the month of July, 1892, of the by-law 659 for the construction of a tile drain upon and along that part of Henry Street which lies between James Street and Bruce Street both Henry Street and Bruce Street were within the limits of the city of London, and were under the jurisdiction and control of the municipal council of the city corporation. By that by-law the municipal council authorized the construction of a tile drain on Henry Street, between James Street and Bruce Street, at the cost of the parties benefited thereby, under the provisions of sections 612, 616 and 618 of the municipal Act, ch. 184 of the Revised Statutes of Ontario of 1887. The drain so authorized was constructed in the manner usual in the construction of common sewers in the city, and for the purpose of being used as a common sewer, and when constructed was the property of the city corporation and wholly under the control of the city council. By the municipal Act then in force, R.S.O. ch. 184, sec. 466, subsec. 49, *et seq.* jurisdiction was absolutely vested in the city council to regulate the construction of cellars, sinks, water-closets, privies, and private vaults, and the manner of draining the same, and to make any regulation for sewerage or drainage that might be deemed necessary for sanitary purposes, and to charge all persons owning or occupying property which is drained into a common sewer (or which is required by any by-law to be so drained) with a reasonable rent

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for the use of such sewer. A Mr. Abraham Puddicombe, father of the defendant, R. W. Puddicombe, owns property on Henry Street which is benefited by the Henry Street sewer, and as a person so benefited was assessed for the construction thereof under the provisions of the said sections of the municipal Act in that behalf. The defendant, R. W. Puddicombe, occupies a house situate, not on Henry Street, but on the corner of James Street and a road called the Wortley Road, adjoining his father's property situate on Henry Street, and he applied to the city council for permission to connect a drain from his house with the sewer on Henry Street through his father's drain, the one opening from the drain on his father's property into the Henry Street sewer serving for both of them, and he deposited with the city treasurer the sum of ten dollars for such permission to connect with his father's drain, undertaking at the same time to the effect mentioned in a receipt given to him by the city treasurer for such sum which is in the terms following:

$10. London, Ont., Sept. 15th, 1892.

Received from R. W. Puddicombe the sum of ten dollars (being nominal rental commuted) for the use of Henry Street sewer for the property leased by him on the Wortley Road, Mr. Puddicombe agreeing not to oppose the construction of a sewer on Wortley Road opposite the property occupied by him, if at any future time the property owners in that neighbourhood petition for one.

Sgd. JNO. POPE,
Treasurer.

This receipt would seem to have been given in pursuance of a report of a committee of the city council adopted by the city council on a day not stated in the appeal case, but the report is given, and is as follows:

Report No. 2 Committee City Council.—That Mr. R. W. Puddicombe be granted permission to connect with Henry Street drain from his property on Wortley Road on agreeing to pay a nominal rent for said privilege to be fixed by city engineer and on promising not to oppose the construction of a drain on Wortley Road fronting property at present occupied by him.

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Upon the 9th of January, 1893, the city council passed another by-law No. 759, "relating to sewerage and draining, and to provide for an annual sewer rental in certain cases," whereby it was enacted—

1. Every lot or parcel of land abutting on any street in the city through which a common sewer runs and which is opposite to such common sewer shall be drained into it, and it shall be the duty of the owner and occupier of every lot or parcel of land which is drained into such common sewer to cause the connecting drain between his premises and such common sewer to be in good repair. 2. No person shall connect any drain from his premises with any common sewer now made or constructed within the city, or with any private drain whereby his premises will be drained into any such common sewer, except on previous application in writing to and permission by the city engineer, and except there is first placed in the hands of the city treasurer a deposit of ten dollars in case of a macadamized street and fifty dollars in case of a paved street, as a guarantee to be used in the repair of the sewer or street, providing the work is not done without injury thereto. Such deposit to remain in the treasurer's hands for six months, and all such excavations and connections shall be made under the supervision of the city engineer or such other officer or person as committee No. 2 shall appoint, and if such officer or person be other than the city engineer, he shall be paid for his services by the person on whose behalf the said connection is made.

Now, upon the assumption that for the consideration of ten dollars so paid by way of commutation of rental the defendant Puddicombe had the permission of the city council to connect a drain from his house with his father's said drain, he did make such connection, and thereby water-closet matter was conveyed into his father's drain. Whether the connection was made in such a manner as to be binding upon the corporation as between them and the defendant is a matter with which the plaintiffs had nothing to do, and with which we are not at present concerned. When the connection was made does not appear; it was made, however, before the 17th November, 1893, upon which day the injury of which the plaintiffs complain was committed in manner following. Upon that day the officers

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of the city corporation flushed certain drains within the city; and among those the drain in Bruce Street with which their sewer in Henry Street was as aforesaid connected and thereby washed clean the Bruce Street drain, and in so doing forced a great quantity of water-closet filth down the drain and deposited it upon property of the plaintiffs near to their dwelling-house, thus causing a grievous and offensive nuisance to the plaintiff. Now the whole contention of the plaintiffs as regards the defendant Puddicombe, is that neither the corporation of the city of London, nor any individual had any right to cause water-closet filth to pass into and through the Bruce Street drain, and that as the defendant Puddicombe's drain connects a water-closet on his premises with his father's drain, which connects with the Henry Street drain which was constructed by the corporation so as to connect with the Bruce Street drain, the defendant is a person who is liable to the plaintiffs as a party contributing to the wrong done to them by the flushing of the drains by the corporation officers on the 17th November, 1893, and by the stuff falling into the Henry Street drain being still carried down through the Bruce Street drain upon the premises of the plaintiffs, so as to cause a nuisance to them. The whole damage of which the plaintiffs complain, in so far as Puddicombe is concerned, is caused by the act of the city corporation alone in connecting as they have done by by-law their Henry Street drain with the drain in Bruce Street, and for that act, if it be wrongful, the corporation alone are responsible. The defendant was no party to it and is under no responsibility in respect of it. In view of the constitutional character of these municipal institutions, and the absolute jurisdiction and control given to city municipalities over sewage and drainage within their several municipalities, the corporation of

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the city of London can alone be made responsible for the connection, so as aforesaid authorized by by-law, and if in the exercise of their jurisdiction they have been guilty of any actionable wrong by making the connection, they and not the defendant Puddicombe must answer for it. There is no connection between the wrongful act of the corporation, assuming it to be wrongful, and the act of the defendant Puddicombe in connecting his drain with his father's drain, which in the circumstances under which that connection was made as aforesaid was, in so far at least as the plaintiffs are concerned, perfectly lawful. There needs no authority to be cited in support of this proposition, but if any be necessary the principle laid down in *Ferrand* v. *Hallas Land & Building Co.* (1), upon which the Court of Appeal in Toronto proceeded is sufficient. As against the defendant Puddicombe, therefore, the appeal must be dismissed with costs.

The case of the defendant Alexander gives rise to somewhat different considerations. He has a drain which connects a water-closet on his premises on Bruce Street directly into the Bruce Street drain; that drain was constructed in 1883, in the township of Westminster, outside of the city of London, under a by-law of the municipal council of the township, passed under secs. 570 and 571 of 48 Vic. ch. 18, upon the petition of the plaintiffs and others, owners of land to be benefited by the drain. The drain authorized by the by-law was expressed to be a sewer for draining the lots on both sides of Bruce Street, which lots, by the engineer's report incorporated in the by-law, were shown to be 59 building lots, whose frontages on Bruce Street were of dimensions varying from 42 to 84 feet in width. The locality, although in the township of Westminster, just outside of the city of London, was then a suburb of the

(1) [1893] 2 Q. B. 135.

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city, and has since by an Act passed in 1890 been made part of the city. The drain so authorized was a 15-inch glazed tile drain, with 14 gully holes in the street itself, and was of a character and dimensions in every respect suitable and proper for a public and common sewer in a street in a city, save only that it wanted the most essential requisite, namely, a suitable and proper outlet of a sewer into and through which the offensive and nuisance creating matter from sinks and water-closets and such like filth is intended to pass. It is upon the evidence clear, I think beyond all doubt, that notwithstanding the capacity of the sewer, it never was contemplated by the persons petitioning for it, nor intended by the municipal council which authorized its construction, that it should be the receptacle of filth proceeding from water-closets. The plaintiffs, who were among the petitioners, never contemplated consenting, and in point of fact never did consent, to their premises being made a place of deposit of such filth. Moreover, when constructed, the sewer was the property of the township municipality, and the township council had not vested in them the jurisdiction which by 46 Vic. ch. 18, sec. 496, subsecs. 39 and 40, was vested in the councils of cities, towns and incorporated villages for regulating sinks, water-closets, privies, and privy vaults, and the manner of draining the same. That jurisdiction was first vested in township municipalities by ch. 184, sec. 489, subsec. 47, R. S. O., 1887, and, indeed, assuming township councils to have had such jurisdiction in 1883 over water-closets, &c., and the manner of draining them, they would not have been authorized, even by by-law, to commit the wrong to the plaintiff of depositing filth from water-closets upon his premises in such a manner as to create a nuisance to him. We need not go further back than

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Humphries v. *Cousins* (1), for the doctrine that it is *primâ facie* the right of every occupier of a piece of land to enjoy that land free from all invasion of filth or other matter coming from any artificial structure on land adjoining. He may be bound by prescription or otherwise to receive such matter, but the burthen of showing that he is so bound rests upon those who seek to impose the easement upon him. Now there is nothing in the municipal institutions Acts of Ontario, or any Act, which ever authorized the committal of such a nuisance as that of which the plaintiff complains. In *Attorney General* v. *Colney Hatch Lunatic Asylum* (2), Lord Hatherley said that he entertained a very strong opinion, that when a nuisance is established all the court has to do is to say that it must cease, unless at least that be physically impossible, in which case the party must be left to his remedy by an action for damages. In *Charles* v. *Finchley Local Board* (3), the law is approved as it is laid down in the last edition of Addison on Torts, by Mr. Justice Cave, in these words:

> Where a person who is entitled to a limited right, exercises it in excess so as produce a nuisance, and the nuisance cannot be abated without obstructing the enjoyment of the right altogether, the exercise of the right may be entirely stopped until means have been taken to reduce it within its proper limits. "Thus if a man," says Baron Alderson, "has a right to send clear water through my drain and chooses to send dirty water, every particle of water may be stopped because it is dirty."

And in that case a local board was restrained by injunction from discharging or permitting to be discharged sewage or other offensive matter into a watercourse, so as to create a nuisance to the plaintiff, although it appeared that the nuisance was in fact caused by a person not a party to the action, who had

(1) 2 C. P. D. 239.
(2) 4 Ch. App. 157.
(3) 23 Ch. D. 775.

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passed the sewage from his house into a watercourse opposite the plaintiff's house, by a pipe which by agreement with the defendants he was only entitled to use for surface or rain water.

In *Lewis* v. *The City of Toronto* (1), the Court of Queen's Bench in Ontario held, that it is not in the power of a municipal corporation to pass a by-law which would legalize the acts complained of in that case in the manner in which they were done, namely, the piling large quantities of filthy rubbish so near to a cellar of the plaintiff as to cause filthy water, earth and stuff to flow into his cellar and into his well.

In *Van Egmond* v. *Seaforth* (2), the municipal corporation of the town of Seaforth were restrained by injunction from letting foul water from salt-works of a third person to pass through a sewer constructed by the corporation into a stream passing through the plaintiff's land.

Now, it cannot be doubted that a person aggrieved has his remedies against all persons contributing to causing him the injury of which he complains. It is necessary, therefore, to consider whether the defendant Alexander contributes in any, and if any what, manner to the injury of which the plaintiffs complain. In 1885 he purchased one of the lots on Bruce Street for the benefit of which the Bruce Street drain was constructed. In 1888 he apparently made some arrangement with the city of London Waterworks Company under the provisions of 45 Vic. ch. 25, sec. 28, for the supply of water to his dwelling-house, and he applied that water supply to a water-closet in his house, and carried the filth therefrom into the Bruce Street sewer, for which disposal of such filth he had no authority in law, and he thereby no doubt in some measure contributed to the nuisance caused to the

(1) 39 U.C.Q.B. 352. (2) 6 O. R. 599.

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plaintiffs by the flushing of the sewer by the city corporation in 1893. By an Act of the legislature of Ontario, passed on the 7th April, 1890, 53 Vic. ch. 89, that part of the township of Westminster whereon was the locality for draining which the Bruce Street sewer had been constructed in 1883, was incorporated with and made part of the city of London, and thereby the sewer in Bruce Street became the property of the city of London in the same condition and character as it was held by the municipality of the township of Westminster, but subject for the future to the exercise by the municipal council of the city of London of their legal jurisdiction over it as conferred by statute. They have passed no by-law since having the effect of subjecting the sewer to an obligation to which it was not subject when the property of the municipality of the township of Westminster, namely, to be the receptacle of water-closet filth, nor have they done any act to remove the nuisance to the plaintiffs which the passing of such filth through it creates with its outlet as at present existing. The conduct of the defendant Alexander therefore in using the sewer for the purpose of carrying off the filth from his water-closet is still as illegal as it was while the property in the sewer was vested in the municipality of the township of Westminster, and although the damage done thereby to the plaintiff may be, and no doubt is, very trifling as compared with the damage caused by the connection by the city corporation of other sewers in the city with the Bruce Street sewer, as the conduct of the defendant Alexander is not shown to be authorized by any law and contributes to the nuisance caused to the plaintiffs, the plaintiffs are entitled to the injunction against him as granted by the learned trial judge. The appeal must therefore be allowed with costs, and that judgment as against the defendant Alexander restored; while for their substan-

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tial redress of the wrongs of which the plaintiffs complain they must be left to their remedy against the city corporation.

Appeal dismissed with costs.

Solicitors for the appellants: *Fraser & Fraser.*

Solicitors for the respondent Puddicombe: *Gibbons, McNab & Mulkern.*

Solicitors for the respondent Alexander: *Meredith, Cameron, Judd & Dromgole.*

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*Mar. 28.

*May. 6.

THE TORONTO RAILWAY COMPANY (DEFENDANTS)..... } APPELLANTS;

AND

ALBERT GRINSTED (PLAINTIFF) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Negligence—Street railway—Wrongful ejectment from car—Exposure to cold—Consequent illness—Damages—Remoteness of cause.

In an action for damages from being wrongfully ejected from a street car, illness resulting from exposure to cold in consequence of such ejectment is not too remote a cause for damages; and where the evidence was that the person ejected was properly clothed for protection against the severity of the weather, but was in a state of perspiration from an altercation with the conductor when he left the car and so liable to take cold, the jury were justified in finding that an attack of rheumatism and bronchitis which ensued was the natural and probable result of the ejectment, and in awarding damages therefor. Gwynne J. dissenting.

APPEAL from a decision of the Court of Appeal for Ontario (1), affirming the judgment of the Divisional Court (2) in favour of the plaintiff.

The action in this case was for damages in consequence of plaintiff being ejected from a street railway car to which he had been transferred from another car where he had paid his fare. After being ejected he went back to the transfer agent and had to wait some time for another car in order to reach his destination, and on leaving the latter car he called at a hotel on a matter of business and then walked home, the walk occupying twenty minutes. It was a very cold night and the next day he had an attack of bronchitis and

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

(1) 21 Ont. App. R. 578. (2) 24 O. R. 683

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rheumatism which confined him to the house for some weeks.

At the trial the jury, under the direction of the judge, severed the damages, allowing $200 for the ejectment and $300 for the subsequent illness. The defendant company paid the $200 and appealed against the other assessment, contending that there was not sufficient evidence of the illness being the natural and probable result of the ejectment and that it was too remote a cause of damage. The verdict was sustained by the Divisional Court and the Court of Appeal.

Bicknell for the appellants, argued that the damages were too remote, citing *Williamson* v. *The Grand Trunk Railway Co.* (1); *Hobbs* v. *London & South Western Railway Co.* (2); *The Notting Hill* (3).

McWhinney for the respondent, referred to *Brisbane* v. *Martin* (4); *McMahon* v. *Field* (5); *Town of Prescott* v. *Connell* (6); *York* v. *The Canada Atlantic Steamship Co.* (7).

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

KING J.—The question in this case is as to the remoteness of damages. The plaintiff sued to recover damages for having been wrongfully put off a street car in the city of Toronto. The defendants' line has connecting branches. Plaintiff took a car on the main division and paid his fare, which entitled him to travel over the entire route. At the point where the branch line intersects, he got off and the servant of the company stationed there for the purpose of effecting transfers directed him into the car on the branch line.

(1) 17 U. C. C. P. 615.
(2) L. R. 10 Q. B. 111.
(3) 9 P. D. 105
(4) [1894] A. C. 249.
(5) 7 Q. B. D. 591.
(6) 22 Can. S. C. R. 147.
(7) 22 Can. S. C. R. 167.

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After starting upon the new route and proceeding several blocks, the conductor demanded his fare, and disputed his statement that he had been duly transferred. This led to an altercation, the conductor charging plaintiff with cheating, and the plaintiff in reply using very strong language. He had other tickets in his pocket, but he stood upon his rights, and finally was required by the conductor and driver to leave the car. He alleges that by reason of what had occurred, he was before leaving the car in a state of profuse perspiration. The night was one of extreme severity, but it is not suggested that plaintiff was inadequately clothed and the inference is otherwise, as he contemplated being upon the road twenty minutes after reaching the end of the car route.

When put off the car he went back to the point where he had taken the branch car, and complained of what had been done, and waited for the next car. He says that after waiting in the open air (the company providing no shelter at the point of transfer) for about twenty minutes, the branch line car came along and he was allowed to get in it as a transfer passenger and so travelled to the end of the route without further pay. There he left the car and after going to a hotel on business walked home. This occupied twenty minutes, and by the time he got home it was about 11 o'clock. He then felt that he had caught a severe cold. The next day he was feverish and went to his work but was not able to remain, and on the day following was found to be affected with bronchitis and rheumatism, by which he was confined to the house for several weeks and kept from work for a period considerably longer. As to the origin of his illness, he stated that he caught cold during the affair, and the physician who attended him being examined as to the effect of what took place, said that a person excited and over-

heated and going out into the cold air would be apt to suffer from some inflammatory trouble, and that such condition and exposure together would be sufficient to induce chronic bronchitis and rheumatism.

Upon the trial the learned judge asked the jury to separate between the damages for the assault and expulsion and the damages in respect of the illness, telling them that they might give damages of the latter kind if they should think that the illness was the natural or probable result of defendants' act. The jury found for the plaintiff, awarding $200 for the assault, &c., and $300 in respect of the illness. The Divisional Court upheld the verdict as did the Court of Appeal, Hagarty C.J. dissenting, the learned Chief Justice basing his dissent upon the case of *Hobbs* v. *London & South Western Railway Co.* (1).

The only question in this appeal is as to the damages in respect of the illness. Two questions appear to be involved: First, whether the recovery is precluded by reason of any established rule of law; and secondly, whether the conclusion of fact is so entirely without substantial support from the evidence as to be wholly unreasonable. As to the first point, the appellant contends that the right that was interfered with was one of contract, and that as the illness was not reasonably contemplated by the parties at the time of entering into the contract as a probable consequence of the breach, it was not a subject of compensation.

When one, whether in performance of a contract or not, takes charge of the person or property of another, there arises a duty of reasonable care. *Foulkes* v. *Metropolitan District Railway Co.* (2). And if by his own act he creates circumstances of danger and subjects the person or property to risk without exercising reasonable care to guard against injury or damage, he is re-

(1) L.R. 10 Q.B. 111. (2) 4 C. P. D. 267.

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sponsible for such injury and damage to the person or property as arises as the direct or natural and probable consequence of the wrongful act.

It would indeed be startling to learn that bronchitis and rheumatism follow as a natural and probable result upon the putting a man suitably clothed off a car in the streets of Toronto in any kind of weather. The natural and probable result would not be different whether he is put off or gets off of his own accord, or whether he gets off during the trip or at the end of the route. But whatever of strength there is in plaintiff's case lies in this, that, according to him, he was at the time he was put off the car, and as the result of the defendants' conduct, in a bodily state which predisposed him to receive physical injury as the result of his being suddenly exposed to the very low temperature that then prevailed.

The circumstances intervening between the act complained of and the illness are all in evidence, and there is the uncontradicted statement of the physician that the act of exposure operating upon a person in an excited and overheated state would be sufficient to induce such an illness. If this is so, it follows that the plaintiff was subjected to the risk of such illness by the unlawful act of the defendants. They created the circumstances of damage for him and subjected him to the risk. Then as to the connection between their act and plaintiff's illness, it was for the jury to examine the entire circumstances, in order to see if there was any intervening independent cause. Finding none, sufficient to satisfy them, they were entitled to refer the illness to the only thing referred to in the evidence as a sufficing cause.

There was in such case, evidence from which they might conclude either that the act of the defendants was the direct cause or that it was the efficient cause,

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the *causa causans* followed by the illness as the natural and probable result without the intervention of any independent cause.

I share in the doubts that have been expressed by the Court of Appeal in England, respecting the conclusiveness of the reasoning in *Hobbs* v. *London & South Western Railway Co.* (1), but this case does not rest upon like facts and admits of decision independently of it.

I therefore think that the appeal should be dismissed.

GWYNNE J.—The plaintiff's cause of action, as stated in his statement of claim, is that upon the night of the 10th January, 1893, which was an intensely cold night, he became a passenger, for a fare duly paid, upon the Toronto Street Railway to be carried along Queen Street to Spadina Avenue, and thence by Spadina Avenue to King Street, and along King Street to the corner of Simcoe Street which was his destination; that by the regulations of the company and by virtue of their agreement with the corporation of the city of Toronto, subject to which they enjoyed their franchise, he was entitled, by notifying the conductor of the car which he had entered on Queen Street of his desire, to be transferred at the corner of Queen Street and Spadina Avenue into a car going south along Spadina Avenue and King Street to Simcoe Street; that he did so notify such conductor of the car on Queen Street; that such conductor upon arriving at Spadina Avenue placed the plaintiff in charge of an agent of the defendants stationed there for the purpose of looking after the passengers requiring to be transferred there, from one line to the other; that such transfer agent did duly transfer the plaintiff to a Spadina Avenue car running south, and advised the conductor of that car that the plaintiff was a transfer passenger; that the conductor of this lat-

(1) L. R. 10 Q. B. 111.

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ter car, notwithstanding, demanded a fare from the plaintiff, and upon the plaintiff informing him that he was a transfer passenger refused to recognize him as such, and upon the plaintiff persisting that he was and refusing to pay a fare assaulted the plaintiff and ejected him from the car; that thereupon he returned to the transfer agent at the corner of Queen Street and Spadina Avenue, who told the plaintiff that he had informed the conductor of the car on Spadina Avenue which the plaintiff had entered that he the plaintiff was a transfer passenger; that owing to having been so wrongfully removed from the car he was compelled to stand in the street and wait for another car for nearly half an hour, and in so doing contracted a severe cold which resulted in an attack of bronchitis and rheumatism, by which he was kept in-doors for several weeks.

Now the evidence given by the plaintiff upon this claim is that upon paying his fare by handing to the conductor one of several railway tickets of the defendants which the plaintiff had he told him that he wanted to be transferred at Spadina Avenue to a car going south; that upon getting off at Spadina Avenue the conductor signalled to the transfer agent that the plaintiff was a transfer; that plaintiff waited ten minutes before a car going south came down, when being told by the transfer agent that this was his car he got on to it, and there met a person with whom he was well acquainted who was also a passenger, and they spoke to each other; that in conversation with his friend the plaintiff said to him that he, the plaintiff, was a transfer; that the conductor who was standing close by thereupon said to plaintiff, "No, you are not," to which plaintiff replied, "I am," whereupon a discussion arose between plaintiff and the conductor who threatened plaintiff to put him off the car unless he should pay his fare, which plaintiff refused to do; that

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the conductor then took him by the arm, and turned him round saying that he, plaintiff, would have to get off; that they continued in discussion, but eventually as the plaintiff says, wishing to avoid a row, he thought he had better get off, and he went out of the car. The conductor of this car unfortunately had gone to England, so that we have not his testimony of what occurred. We have, however, the evidence of the plaintiff's friend whom he met upon the car, whose account of what occurred is as follows. He says that while the car was in motion crossing Queen Street on its course south, the plaintiff came in to the car seemingly in a great hurry and cold, and seeing witness said to him, "How are you;" the car went on and when they got close to Adelaide Street, that is the next street west north of King Street, the conductor came collecting tickets. Witness then said to plaintiff, "I am a poor unfortunate and have only five cents or I would pay your fare," to which the plaintiff replied, "That is all right, old man, I am a transfer," whereupon the conductor said to him, "You are not," to which he replied "I am," and the conductor again replied, "You are not," and said that he would have to stop the car and put him off; witness said that then the plaintiff looked to him and asked him what he should do, and witness told him that he should pay his fare, take the numbers of the car and the conductor and report the matter to the company. He says thereupon there was a little talk, the car was stopped and plaintiff went off it himself—this is all, he says, that occurred. Now it is to be borne in mind that at this time the plaintiff, by his own evidence, had at least three railway tickets one of which would have paid his fare.

As to what took place when he left the car the plaintiff's evidence is that he went back to the transfer agent and told of his being turned off the car and

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asked him, "Did you tell that conductor there were no transfers, no passengers" and that he said he did not. That plaintiff then waited 20 minutes for a car going south upon which he was put by the transfer agent and was taken to the corner of King and Simcoe Street, where he left the car and went to the Avondale Hotel, which is on Simcoe Street. As to this evidence all that is necessary to say is—that it is wholly contradicted by the transfer agent, who says never to his knowledge did he see the plaintiff until he saw him in court at the trial, and that certainly he never came and conversed with him as the plaintiff said he did on the said 10th January—he denied it utterly, saying that if any such a thing had occurred as stated by the plaintiff he certainly would have remembered it, and he added that there never was such a delay as 20 minutes interval between the cars running on Spadina Avenue crossing Queen Street, that at the time in question, January, 1893, they arrived there every six minutes. This is the whole of the evidence as to the alleged assault and eviction from the car and upon it the jury have rendered a verdict for $200 damages. This verdict illustrates in a significant manner what little consideration companies like the defendants receive at the hands of juries, when an individual, even upon the most trifling and conflicting evidence, brings an action upon the ground that a servant of the company even innocently commits to the prejudice of the plaintiff the slightest infraction of law, but it may be added that even in cases of this description a plaintiff is seldom so fortunate as to succeed in realizing the sum of $200 out of the saving of a few cents. However, the defendants have submitted to this verdict so far and have paid the $200, but what the defendants appeal against is that the jury have given a further sum of $300 for the illness which the plaintiff complained of

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as having been suffered by him. Upon this point the learned judge who tried the case charged the jury that if they should find that the plaintiff's illness was the natural and probable result of his having been turned out of the car on that night, they should give the plaintiff damages upon that ground as well. He said that whether or not he was entitled to such damages might be a question of law and he therefore directed them, in order to avoid the necessity for a new trial, to keep the two heads separate and divide the damages, if any, they should give as follows:—1st. For the plaintiff having been turned out of the car and the trouble and inconvenience in waiting for the second car. 2nd. For the plaintiff's illness and his having to incur expenses in order to recover from the illness. Now, the evidence upon which this charge was given as effects the $300 awarded by the jury, besides the evidence of the plaintiff of his having walked back from the place where he was put off the car near Adelaide Street to Queen Street, and of the conversation which he said he had there with the transfer agent, but which the latter denied, and of his having waited there in the street for 20 minutes for another car going south, he further said that the car on which he then got took him to the corner of King and Simcoe Streets, where he got out as he wanted to call at the Avondale Hotel on Simcoe Street for letters, that finding none there he walked home to Toronto Street, which occupied he says 20 minutes more. Then the doctor who attended him during his illness says that what he was suffering from was chronic bronchitis and rheumatism, and he added that a little inflammation or severe cold might ensue upon exposure to cold upon the night of the 10th January, 1893, as spoken of by the plaintiff, that the effect would be different on different persons, that the exposure as spoken of by the plaintiff might be sufficient

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to induce chronic bronchitis and rheumatism, that a person who was very much excited and thereby overheated going out into the cold air would be apt to suffer from some inflammatory trouble. This was the whole of the evidence upon which the learned judge charged the jury that if they should be of opinion that the illness of the plaintiff was the natural and probable result of his eviction from the car in the manner above detailed in evidence, they might give damages independently of and apart from the damages they should give for the plaintiff being obliged to leave the car under the circumstances in evidence. Upon this charge the jury have given the $300 in addition to the $200, and it is against the recovery of this sum of $300 by the plaintiff that this appeal is taken, the verdict of the jury having been maintained by all the courts in Ontario.

I entirely concur in the dissenting judgment of the learned Chief Justice of Ontario in the Court of Appeal for Ontario, to the effect that this case is governed by *Hobbs* v. *London & South Western Railway Co.* (1), which is as good law now as ever it was, and is not nor was intended to be overruled by *McMahon* v. *Field* (2), and is conclusive that damages of the nature of that for which the jury have accorded the $300 were altogether too remote to be recoverable in this action. To what is said by the learned Chief Justice of Ontario, I desire merely to add that there is nothing in the evidence which in my opinion at all warranted the submission of the case to the jury in the manner in which it was submitted, or their finding upon the matter as so submitted. The medical expert gave no evidence to the effect that, nor could any reasonable person conscientiously say that, the illness of the plaintiff was the natural and probable result of the conduct of the

(1) L. R. 10 Q. B. 111. (2) 7 Q. B. D. 591.

defendants' servant in requiring the plaintiff to leave the car if he would not pay his fare when demanded, which, apart from the technical assault committed, according to the plaintiffs' own evidence, was all that the defendants' servant did, any more than that the illness was the natural and probable result of the plaintiff's own perverse, wilful and insensate conduct in electing, contrary to the advice of his own friend, to leave the car in preference to parting with one of the street railway tickets which he had in his possession wherewith he could have paid the five cents demanded, and in exposing himself to the intense cold of the night for full fifty minutes according to his own evidence—first in walking back from Adelaide Street to Queen Street, then in standing there for 20 minutes and spending further 20 minutes in walking home from Simcoe Street where he left the car which conveyed him there. This choice of the plaintiff so to expose himself to the cold of that severe night in preference to parting with a five cent railway ticket is an element in the case which cannot be, although it has been, overlooked. The appeal must, in my opinion, be allowed with costs, and the judgment left to stand for the $200 damages against which the defendants have not appealed.

Appeal dismissed with costs.

Solicitors for the appellants: *Laidlaw, Kappele & Bicknell.*

Solicitors for respondent: *McWhinney, Ridley & Co.*

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*Mar. 29.

*May 6.

THE TORONTO RAILWAY COMPANY (DEFENDANTS) ..... } APPELLANTS;

AND

EDWARD GOSNELL (PLAINTIFF) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Negligence—Street railway car—Collision with vehicle—Excessive speed—Contributory negligence.

Persons crossing the street railway tracks are entitled to assume that the cars running over them will be driven moderately and prudently, and if an accident happens through a car going at an excessive rate of speed the Street Railway Company is responsible.

The driver of a cart struck by a car in crossing a track is not guilty of contributory negligence because he did not look to see if a car was approaching if, in fact, it was far enough away to enable him to cross if it had been proceeding moderately and prudently. He can be in no worse position than if he had looked and seen that there was time to cross. Gwynne J. dissenting.

APPEAL from a decision of the Court of Appeal for Ontario (1), affirming the judgment of the Divisional Court in favour of the plaintiff.

The action in this case was brought in consequence of a street railway car having run into plaintiff's cart which he was driving across the track whereby he was thrown out and hurt, and the cart badly damaged. The company denied the negligence charged in the driving of their car, and alleged that plaintiff was himself negligent in not looking to see if a car was approaching before going on the track. There was evidence that the car which struck the plaintiff's cart was going at an excessive rate of speed, and the jury so found and they found that plaintiff could have

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(1) 21 Ont. App. R. 553.

crossed if the car had been driven moderately, and that he was not guilty of contributory negligence. The verdict was sustained by the Divisional Court and by the Court of Appeal.

Osler Q.C. and *Laidlaw* Q.C. for the appellants.

Fullerton Q.C. for the respondent.

THE CHIEF JUSTICE concurred in the judgment of Mr. Justice King.

TASCHEREAU J.—The appeal in this case is from the unanimous judgment of the Court of Appeal, upholding a unanimous judgment of the Common Pleas Division, which maintained the verdict and judgment obtained against this company. The appellants would contend that they are not bound by any particular rate of speed, that they can go as fast as they please, that persons entering upon, crossing, or otherwise using portions of any roadway covered by their tracks do so at their own peril, *caveat viator.* These astounding propositions, it is not surprising, have not found the assent of a single judge out of the eight who had to pass on the case in the courts below, and it is not complimentary to this court, that the appellants must be assumed to have believed that we might here countenance their contentions. They were wrong, however, and they will have to abandon such unreasonable claims, and act accordingly in the future.

There was ample evidence for the jury that the cars were going at an unreasonable rate of speed. In fact, I should say, the evidence is overwhelming on the point. Their finding that the plaintiff was not guilty of contributory negligence is also one that we cannot interfere with, more especially after the concurrent approval of those findings by the two courts below. These street railway companies must remember that

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they have not the exclusive right of way, and that the private traveller in the streets of the city is justified in assuming that the cars will be kept under control and driven moderately and prudently.

GWYNNE J.—The impression left upon my mind from the consideration of this case is, that if this judgment should be maintained and should this become a precedent to govern future cases it is quite illusory for the defendants to expect to be able to set up a successful defence to any action brought against them for injury to an individual sustained by collision with one of their cars in motion. With the judgment of the learned Chief Justice of Ontario I entirely concur that there was no case to go to a jury apart from the evidence of the witness who testified that in his opinion immediately before the accident and at the distance of about 80 or 90 yards from where it occurred, the railway car which came into collision with the plaintiff's wagon was going at the rate of twenty miles an hour—and I must say that I find it difficult to understand how any jury should adopt the evidence of that witness, who admits that he neither saw the accident occurring, nor the plaintiff with his wagon upon the track at all, in the face of all the other testimony in the case given by persons who had the best possible opportunity of observing and who did observe the movements of the plaintiff and of the defendants' car from the moment of the plaintiff entering with his wagon upon the railway track until the accident. But while I so concur in the judgment of the learned Chief Justice of Ontario, I am of opinion that this case does not turn upon a question as to the rate of speed at which the railway car was going immediately preceding the occurrence of the accident, but rather upon the conduct of the plaintiff himself in entering upon the railway track at the time he did;

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and indeed the rate of speed at which the railway car was moving, assuming it to have been excessive, would seem to me to make the conduct of the plaintiff in entering upon the railway track just in front of a car going at such excessive speed only the more inexcusable. The evidence is, I think, overwhelming and uncontradicted upon the point that when the plaintiff entered upon the railway track with his wagon the car which came into collision with him was coming down the railway at the distance of 70 or 80 feet behind him. If he had looked in that direction he must have seen it and had he seen it, whatever its rate of speed, his entering upon the track just in front of it would have been inexcusable; and if it was moving at such a rate of speed as is suggested by the one witness who estimated it at thirty miles an hour, that would have supplied a stronger reason why the plaintiff should not have entered upon the railway. As, however, there was but that one witness of several who saw the car in motion who estimated its rate of speed at thirty miles an hour, it is not likely that the plaintiff would have formed such an estimate if he had looked in the direction of the car, but he did not look in that direction at all but blindly incurred the risk, and so he cannot, I think, claim to be in any better position than if he had looked and had seen the car coming down as the other witnesses who have testified did, one of whom swears that immediately upon the plaintiff entering upon the track he called out to him to look out—that the motor was coming, and he adds that as the plaintiff was trying to get off the track and go round a buggy in front of Mr. Prettie's store, either the horse had not energy enough to get off, or the plaintiff had not energy enough to drive him, and so the car struck the hind wheel of the plaintiff's wagon before he got off and thus the accident occurred. The evidence upon

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this point of several witnesses who saw the accident occurring may be said to be uncontradicted, and being so establishes, I think, beyond all question that the accident was due to the very inconsiderate, to say the least, conduct of the plaintiff in having entered upon the railway track just in front of a moving railway car—and the more excessive the speed of that car is shown to be the indiscretion of the plaintiff becomes greater in having entered upon the railway track just in front of it. The plaintiff cannot excuse himself by saying that he did not look in the direction of the coming car. Between his not looking, and his entering upon the railway track having seen the car coming as he must have if he had looked, I can see no difference as regards the liability of the defendants in this action. I am of opinion therefore that the appeal should be allowed and the action dismissed as one which under the circumstances should not have been submitted to the jury.

SEDGEWICK J.—I am of opinion that this appeal should be dismissed for the reasons given in the judgment of Mr. Justice King.

KING J.—At the time that a collision appeared imminent the position of things was this: The plaintiff's vehicle, a loaded coal cart, had gone in upon the street railway track for the purpose of passing a team that had just turned into Yonge from Scollard street. The electric car was coming up behind and distant about sixty or seventy feet. According to the defendants' witnesses, the motor-man in charge of the electric car then put on the brakes and did his best to stop the car. But before the car could be stopped it struck the hind wheel of the plaintiff's cart which was just about leav-

ing the track. It is manifest that in a few moments more the cart would have gone entirely clear. It is proved by defendants' witnesses that a car going at the usual rate of speed can be stopped within a space of about thirty-two feet. How then did it happen that this car was not stopped in double that distance although the man in charge was doing his best to stop it? The rail was indeed wet, but, as against this, there was an up grade. The answer is to be found in the evidence of plaintiff's witnesses that the car was going at an excessive rate of speed and so the jury have found. There is therefore a finding of negligence upon sufficient evidence.

Then it is contended that there is conclusive proof of contributory negligence on plaintiff's part. This is said to consist in his not having looked back before going upon the track. But he can be in no worse position than if he had looked back and had seen the car.

In the case from the State of New York *Hegan* v. *Eighth Avenue Railroad Co.* (1) cited by Mr. Justice Osler, it is well said:

> It is not unreasonable for the private traveller to assume that the car will be driven moderately and prudently. He can calculate distance and the time required to effect his own change of position in order to prevent injury in such cases.

The excessive speed of the car would not be readily discernible by one directly in front and in plaintiff's position. If he had looked and had seen the car behind him, can we say upon the facts proved that he might not reasonably have calculated that, with the car going at a moderate speed, as he might fairly assume was the case, he would be able to quit the track in time?

But further, in cases of this sort, where the public use of a street is concerned, we are to be careful not to fetter the public right by rules of law as to what

(1) 15 N.Y. 380.

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specifically constitutes reasonable care or the want of it. The matter is essentially one for the jury, and in this case they have negatived want of care on plaintiff's part.

The appeal should therefore be dismissed.

Appeal dismissed with costs.

Solicitors for appellant: *Laidlaw, Kappele & Bicknell.*

Solicitors for respondent: *Fullerton, Neville & Wallace.*

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AND *Mar. 28, 29.
*May 6.

THE CORPORATION OF THE CITY OF TORONTO..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Negligence—Obstruction of street—Accumulation of snow—Question of fact—Finding of jury.

An action was brought against the City of Toronto to recover damages for injuries incurred by reason of snow having been piled on the side of the streets, and the Street Railway Company was brought in as third party. The evidence was that the snow from the sidewalks was placed on the roadway immediately adjoining by servants of the city and snow from the railway tracks was placed by servants of the railway company upon the roadway immediately adjoining the track without any permission from the city, thus raising the roadway next to the track, where the accident occurred, to a height of about twenty inches above the rails. The jury found that the disrepair of the street was the act of the railway company, which was therefore made liable over to the city for the damages assessed. The company contended on appeal that the verdict was perverse and contrary to evidence.

Held, affirming the decision of the Court of Appeal, that under the evidence given of the manner in which the snow from the track had been placed on the roadway immediately adjoining, the jury might reasonably be of opinion that if it had not been so placed there the accident would not have happened, and that this was the sole cause of the accident.

APPEAL from a decision of the Court of Appeal for Ontario affirming the judgment of the Queen's Bench Division in favour of the City of Toronto.

The action in this case was brought against the City of Toronto by one Langstaff who claimed compensation

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for injuries alleged to have been received by him in consequence of one of the streets of the city being out of repair, and the Street Railway Company was brought as third party, the city claiming recourse over against the company for any damages assessed against it in the action. By the evidence at the trial the disrepair of the street was caused by snow having been placed on the roadway from the street railway tracks, and it was shown that snow from the sidewalks was also placed on the roadway. The jury found that the want of repair was caused by the act of the company and plaintiff having obtained a verdict against the city judgment was given for the city against the company for the amount of such judgment. The company appealed and the judgment was sustained by the Divisional Court and the Court of Appeal.

Laidlaw Q.C. and *Bicknell* for the appellant.

Fullerton Q.C. for the respondent.

The judgment of the court was delivered by:

GWYNNE J.—This was an action against the City of Toronto for injuries sustained by the plaintiff by reason of a street in the city of Toronto, upon which there is a street railway of the appellants, having been suffered to be in a dangerous condition, arising from a quantity of snow which fell during the winter of 1892-3, having from time to time been taken from the railway track and piled upon the roadway between the railway track and the sidewalk, and the railway company as parties against whom the city corporation if liable claim to have remedy over, have been made defendants as third parties under the provision of the municipal Act in that behalf. The action of the plaintiff against the City of Toronto, and the claim of the City of Toronto over against the railway company were tried

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together by the same jury. The plaintiff recovered judgment against the City of Toronto, who recovered judgment of indemnity over against the railway company, and it is only against this latter judgment of indemnity that this appeal is taken, and the ground upon which it is rested is, as follows: Among the questions submitted to the jury was the following, which related to the claim of the city to remedy over against the railway company, namely:

"Was the disrepair caused by the act or acts of either or both of the defendants? If by either, by which of them."

To which the jury answered that it was caused by the street railway company. The appellants now contend that this finding of the jury upon the issue between the City of Toronto and the appellants is ambiguous, perverse, and contrary to the evidence, upon the ground that, as the appellants contend, the evidence in the action established beyond all doubt that the accumulation of snow upon the portion of the street where the accident occurred was caused by the joint acts of the city by the snow thrown from the sidewalk, and of the railway company by the snow from the railway track, and that in such a case, although the railway company could offer no defence to an action by the plaintiff if they had been sued by him, the appellants are not responsible over to the City of Toronto.

Now by the appellants' Act of incorporation, 55 Vic. ch. 99, sec. 25, (O.) it is enacted that the company shall not deposit snow, ice or other material upon any street, square, highway or other public place in the city of Toronto, without having first obtained the permission of the city engineer of the said city or the person acting as such.

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The evidence showed that the space between the railway tracks and the sidewalks was fourteen feet, and that the width of the railway tracks was sixteen feet, and that the railway company had during the winter upon the occasion of every fall of snow piled upon the roadway adjoining the railway track on either side, the snow taken from the railway tracks and thereby raised the roadway immediately adjoining the railway track to the height of about twenty inches above the railway which was kept clear of snow. It was also proved that this piling of the snow by the railway company upon the roadway adjoining the railway track was without any leave of the engineer for that purpose first obtained. It was upon this part of the roadway immediately adjoining the railway track that the accident from which the plaintiff sustained injury happened. It is now contended that as snow from the sidewalk was also put upon the roadway between the sidewalk and the railway track, the snow from the sidewalk together with the snow from the railway track must be regarded as one inseparable accumulation of snow which caused the roadway to be out of repair, and from this it is argued that the finding of the jury that the disrepair which caused the accident was caused by the street railway company was perverse and contrary to the evidence; but in view of the evidence as to the manner in which the railway company removed the snow from their track and placed it upon the roadway immediately adjoining, the jury may, I think, not unreasonably have been of opinion that if the snow from the railway track had not been placed where it was the accident could not have happened, notwithstanding that the snow from the sidewalk had also been spread on the roadway; and as it was the height of the snow to the elevation of about twenty inches above the railway track immediately adjoining

to it which caused the accident, they not unreasonably concluded that the piling of the snow upon the roadway by the railway company was the sole cause of the accident to the plaintiff; and so the appellants' sole ground of appeal against the finding of the jury upon the above question is removed. The appellants, however, further contend that even admitting the piling of the snow upon the roadway by the railway company to have been the sole cause of the accident to the plaintiff, still they are under no obligation in law to indemnify the city, because they say that the railway company by their solicitors upon the 27th February, 1893, addressed a letter to the city engineer, making proposals which were accepted by the city engineer, as to the removal of snow, ice, &c., from the streets so as to make them reasonably safe for public travel. The effect of this contention is that by the acceptance of such proposals by the city engineer, the city assumed the burthen of removing the snow, &c., so as to make the streets reasonably safe for public travel, &c. The question thus raised is a pure question of law, namely, whether the acceptance by the city engineer of such proposals as were contained in the railway company's solicitor's letter could have the effect in law of relieving the railway company from liability to the city arising out of acts then already committed by the railway company in violation of their statutory obligations; but it is unnecessary to consider this question, or to enter into the nature of the proposals so accepted by the city engineer, because it is expressly provided for in the letter itself that nothing contained in it should affect or prejudice the rights or liabilities of either party under the terms of the original agreement, which was made part of the company's Act of incorporation; it could not, therefore, relieve the railway company from their liability to

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indemnify the city from the consequences of acts then already due by the railway company in violation of the terms of their charter. The appeal must therefore, in my opinion, be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellants: *Laidlaw, Kappele & Bicknell.*

Solicitor for the respondents: *T. W. Caswell.*

LOUIS LABERGE (PLAINTIFF).....APPELLANT; 1895

AND *Feb. 21, *May 6.

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES (DEFENDANTS). } RESPONDENTS.

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

Contract—Insurance Co.—Appointment of medical examiner—Breach of contract—Authority of agent.

The medical staff of the Equitable Life Assurance Society at Montreal consists of a medical referee, a chief medical examiner and two or more alternate medical examiners. In 1888 L. was appointed an alternate examiner in pursuance of a suggestion to the manager by local agents that it was advisable to have a French Canadian on the staff. By his commission L. was entitled to the privilege of such examinations as should be assigned to him by, or required during the absence, disability or unavailability of, the chief examiner. After L. had served for four years it was found that his methods in holding examinations were not acceptable to applicants, and he was requested to resign, which he refused to do, and another French-Canadian was appointed as an additional alternate examiner, and most of the applicants thereafter went to the latter. L. then brought an action against the company for damages by loss of the business and injury to his professional reputation by refusal to employ him, claiming that on his appointment the general manager had promised him all the examinations of French-Canadian applicants for insurance. He also alleged that he had been induced to insure his own life with the company on the understanding that the examination fees would be more than sufficient to pay the premiums, and he asked for repayment of amounts paid by him for such insurance.

Held, affirming the decision of the Court of Queen's Bench, that by the contract made with L. the company were only to send him such cases as they saw fit, and could dismiss him or appoint other examiners at their pleasure; that the manager had no authority

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to contract with L. for any employment other than that specified in his commission; and that he had no right of action for repayment of his premiums, it being no condition of his employment that he should insure his life, and there being no connection between the contract for insurance and that for employment.

APPEAL from a decision of the Court of Queen's Bench (appeal side) (1), reversing the judgment of the Superior Court (2) in favour of the plaintiff.

A motion to quash this appeal for want of jurisdiction was refused by the court (3).

The material facts of the case on the merits are sufficiently set out in the above head-note and fully stated in the report of the case in the Court of Queen's Bench and the Superior Court.

Greenshields Q.C. for the appellant.

Macmaster Q.C. for the respondent.

THE CHIEF JUSTICE.—The facts are fully stated in the notes of Mr. Justice Hall. As regards the appellant's claim to recover the premiums he has paid on the policy he effected with the society on his own life, a claim which has been repelled by both the Superior Court and the Court of Queen's Bench, he clearly has no right of action. That was a contract wholly collateral to his appointment as medical examiner; it was no condition of his employment as such that he should insure his life, and there is no connection between the two contracts.

Mr. Stearns had no authority to enter into any additional or other verbal contract entitling the appellant to employment other than that provided for by the commission from the society. He is therefore restricted to the terms of the contract embodied in that document, and it is out of the question to say that there

(1) Q. R. 3 Q. B. 513. (2) Q. R. 3 S. C. 334.
(3) 24 Can. S. C. R. 59.

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has been any breach of them. It was consistent with the commission that the society should refer to him just such cases as they thought fit and no others, and they had power to dismiss him at their will and pleasure whenever they thought fit to do so.

The by-laws and rules of the society are for the governance of their own officers only and do not enter into the contract between the society and the appellant, or in any way control it.

I need not discuss the case at any greater length, as Mr. Justice Hall's judgment is very full and clear, and I entirely concur both in his reasons and conclusions.

The appeal must be dismissed with costs.

FOURNIER J.—I am of the same opinion.

GWYNNE J.—There is no foundation whatever for this appeal. There was no contract of the nature contended for by the learned counsel for the appellant involved in the appellant's appointment as a medical examiner for the respondents. The appeal therefore must be dismissed with costs.

SEDGEWICK and KING JJ. concurred.

Appeal dismissed with costs.

Solicitors for the appellant: *Greenshields & Greenshields.*

Solicitors for respondents: *Macmaster & McLennan.*

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*Mar. 20, 21.

*May 6.

THE HAMILTON BRIDGE COMPANY (DEFENDANTS)..... } APPELLANTS;

AND

JOSEPH O'CONNOR (PLAINTIFF) .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Negligence—Use of dangerous machinery—Orders of superior—Reasonable care.

O. was employed in a factory for the purpose of heating rivets and one morning, with another workman, he was engaged in oiling the gearing, &c., of the machinery which worked the drill in which the rivets were made. Having oiled a part the other workman went away for a time, during which O. saw that the oil was running off the horizontal shaft of the drill and called the attention of the foreman of the machine shop to it and to the fact that the shaft was full of ice. The foreman said to him, "Run her up and down a few times and it will thaw her off." The shaft was seven feet from the floor and on it was what is called a buggy which could be moved along it on wheels. Depending from the buggy was a straight iron rod into the hollow end of which was inserted the drill secured by a screw, and attached to the buggy was a lever over six feet long. O. when so directed by the foreman tried to move the buggy by means of the lever but found he could not. He then went round to the back of the spindle and not being able then to move the buggy came round to the front, put his two hands upon a jacket around the spindle and put the weight of his body against it; it then moved and he stepped forward to recover his balance, when the screw securing the drill caught him about the middle of the body and he was seriously injured. In an action against his employers for damages it was shown that O. had no experience in the mode of moving the buggy and that the screw should have been guarded.

Held, affirming the decision of the Court of Appeal, Gwynne J. dissenting, that the jury were warranted in finding that there was negligence in not having the screw guarded; that as the foreman knew that O. had no experience as to the ordinary mode of doing

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what he was told he was justified in using any reasonable mode; that he acted within his instructions in using the only efficient means that he could; and that under the evidence he used ordinary care.

APPEAL from a decision of the Court of Appeal for Ontario (1), affirming the judgment of the Divisional Court (2) in favour of the plaintiff.

The material facts of the case sufficiently appear from the above head-note and the judgments of the court.

Bruce Q.C. for the appellants. There was no defect either in the construction of this drill or neglect in using it which would make the employers liable for negligence. *Walsh* v. *Whiteley* (3); *Wild* v. *Waygood* (4).

The fact that the screw was not guarded would not be ground for an action. *Finlay* v. *Miscampbell* (5).

This case is distinguishable from *Grand Trunk Railway Co.* v. *Weegar* (6), in that here the employee was told to do a particular thing which could only properly be done in one way.

Staunton for the respondent. This case is directly within the principle of *Grand Trunk Railway Co.* v. *Weegar* (6), and *Barber* v. *Burt* (7).

As it was reasonably practicable to have the screw guarded it was the duty of the respondents to do it. *Smith* v. *Baker* (8); *Webster* v. *Foley* (9).

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

KING J.—The fair result of the evidence is that the set screw projecting from a swiftly revolving spindle was a contrivance that subjected persons brought into proximity to it to unnecessary danger. That it was

(1) 21 Ont. App. R. 596.
(2) 25 O. R. 12.
(3) 21 Q. B. D. 371.
(4) [1892] 1 Q. B. 783.
(5) 20 O. R. 29.
(6) 23 Can. S. C. R. 422.
(7) 10 Times L. R. 383.
(8) [1891] A. C. 325.
(9) 21 Can. S. C. R. 580.

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dangerous any one would know; whether it was unnecessarily so would depend upon circumstances. The machine had been in the workshop but a short time and was manufactured by a firm of high standing, and this afforded a fair presumption of fitness. On the other hand a witness for plaintiff, who had been mechanical foreman in the Grand Trunk Railway shops for thirty years, stated that the projecting screw had long before been discarded in England and the screw set flush with the spindle adopted as being safer because not liable like the other to catch in the clothing. He gives as the reason for the use of the projecting screw its cheapness and the ease of getting at it. He further said that it might readily be guarded by a collar put on at the time of manufacture or afterwards. At the same time, however, he said, partly as a statement of a fact and partly as a matter of opinion, that the projecting screw was an ordinary reasonable device in this country. The defendants did not produce any witnesses at all to explain the mechanical reasons that led to the adoption of the contrivance used by them. In view of their manifest avoidance of attempted justification of the construction and use of this part of their machinery, and of the obvious danger of it, I cannot say that the several courts who have dealt with it are wrong in concluding that the jury were warranted in their conclusion that there was negligence in not having the screw guarded. They probably thought that any one reasonably acquainted with machinery would not need the occurrence of an accident to see the probability of some harm coming from the projecting screw if not properly guarded. This, considering the way the matter was left by the learned Chief Justice of the Queen's Bench, meant that the defendants had not taken reasonable care to provide proper appliances, and so to carry on their operations

as to subject those employed by them to no unnecessary risk.

But, it is said that the plaintiff had no reason to be where he was. This depends on whether the mode he took to move the buggy was one that he might reasonably suppose to be necessary in order to carry out his orders. He was told to run the buggy up and down a few times, but was not told how he was to do this. It is said that this amounted to a direction to do it in the ordinary way, and that he was not warranted in doing it in any other way. But the foreman who gave the order knew that the plaintiff had no experience of any ordinary way, for he had only a few minutes before called him from his usual work of heating rivets in another part of the building to act as a helper in the operating of this machine. For the plaintiff, therefore, any reasonable way was an ordinary way. But further, I fail to see upon the evidence that the ordinary way of moving the buggy backwards and forwards on its track was by means of the lever. This had a distinct use, viz., by its vertical action to raise or lower the drill. Force applied at the end of a long arm and at a considerable angle to the line of motion, is poorly adapted for the pushing or the pulling of a heavy body. The evidence shows that when Gearing, the principal workman, started the buggy a foot or two along its track that morning in the presence of plaintiff, he used a crowbar. Archibald, the witness already referred to as having been for many years mechanical foreman in the Grand Trunk Railway shops, was asked by the learned judge how he would move the buggy backwards and forwards, and replied that he would take it by the centre and pull it. What the plaintiff did, after trying to move it by the lever, without success, was to take the machine by the centre and push it. And indeed there would seem to be less danger in pushing a heavy

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body that is apt to yield suddenly than in pulling it towards you. I would only add as further showing that the foreman's direction could not be carried out by the plaintiff merely by his using the lever, that the foreman, in denying that he gave any orders at all to run the buggy backwards and forwards says :—

I would not tell him to do that, it takes two men to do it and I would not tell a boy to do it.

It manifestly appears, therefore, that if the plaintiff was told to run the buggy backwards and forwards a few times (as is found by the jury) he was clearly acting within his instructions in resorting to the only efficient means he could use. There would of course still remain the obligation to take reasonable care, but although he knew that the spindle was revolving he did not know of the projecting screw. Here is his account :—

I said to Kempster (the foreman) that the shaft was all ice and the oil was running off as fast as he put it on, that is the horizontal shaft : he says to me, "Run her up and down a few times and it will thaw it off," he walked away and I started to pull her up and down. The buggy was about in the middle of the shaft, I caught the lever and pulled her up about a foot or two towards the end of the shaft but could not get it any freer ; I went around back and tried to shift it again, and I came around to the front and put my two hands upon the jacket around the spindle ; I put my weight against it and it started ; I stepped forward to catch myself, when the set screw caught me about the middle * * * ..... I did not expect there was anything in it, and no one told me there was a set screw.

The jury have negatived want of due care on plaintiff's part, and whatever doubts I might myself have had upon the point of defendants' negligence in not taking reasonable care in providing proper appliances, a doubt, however, which does not exist respecting the failure to acquaint the plaintiff of the dangerous character of the work he was directed to do and which was out of the usual course of his employment, I have

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not the slightest doubt whatever, either as to the way in which the plaintiff sought to carry out his instructions, or as to his use of ordinary care in doing so.

For these reasons I think the appeal should be dismissed.

GWYNNE J.—The action in this case was brought under the Workman's Compensation for Injuries Act for injuries sustained by the plaintiff as alleged from the following causes: 1st. By reason of defect in certain machinery used by the defendants in their business as bridge and ship builders. 2nd. By reason of the negligence of a person in the service of the defendants to whose orders the plaintiff was bound to conform and did conform; and, 3rd. By reason of the defendants having negligently set plaintiff to work at a drill without instructing him in the management of the drill, of which to the knowledge of the defendants the plaintiff was ignorant. The plaintiff's own statement of the manner in which he received the injury, as alleged in his statement of claim and in his evidence, is that at the time when the accident occurred which occasioned the injury he was employed as a labourer by the defendants for the purpose merely of heating rivets used in their business; that upon the morning of the 22nd December, 1892, the plaintiff together with one Gearing (whose business was to work a drill in the defendants' factory for drilling rivet holes in large iron plates) was engaged in oiling the gearing, shaft, &c., of the machinery which worked the drill. The plaintiff and Gearing having oiled the arms of the shaft and a track along which a part of the machinery called a buggy moved, Gearing went to the machine shop, taking with him the oil cans with which they had been oiling the machinery. While Gearing was thus away the plaintiff observed that the

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oil was all running off the horizontal shaft; when oiling it he had observed that the shaft was full of ice; while Gearing was absent with the oil cans one Kempster, who was foreman in the machine shop, happened to be walking around picking up drills that were lying about and the plaintiff mentioned to him that the oil was all running off the shaft and that it was full of ice, and Kempster replied, "Run her up and down a few times and it will thaw her off," that thereupon the plaintiff went and took hold of the lever used for moving the buggy backwards and forwards along the shaft. The buggy at this time was in the middle of the shaft, whither it had been drawn by the united force of the plaintiff and Gearing applied at the lever, before they had commenced to oil the machinery. When, then, the plaintiff alone went to the lever for the purpose of running the buggy backward and forward on the shaft, as Kempster had suggested, he found he could not move it more than a foot; he then upon his own suggestion, thinking that he could move it by taking hold of the spindle, went round to the back of the spindle and took hold of it, and, as he says, tried to shift it, then came round to the front, put his two hands upon the jacket around the spindle, put the weight of his body against it and it moved, he stepped forward to catch himself when the set screw caught him about the middle of his body; what caught him was the square head of a screw by which the drill was kept tight within the spindle and which projected a little on the outside of the spindle; the machine having been put in motion by Gearing when they commenced oiling it the plaintiff was caught by the machinery in motion and received, no doubt, very serious injuries before he was released.

Now upon this evidence it is, I think, apparent that the lever which the plaintiff took hold of to move the

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buggy was the proper means designed to be used for that purpose and that no one directed the plaintiff to take hold of the spindle, thereby to move the buggy, as it appears that he did. The evidence, however, is that any person who understood the business could have moved the buggy by taking hold of the spindle without incurring any danger of being caught in the machinery. The plaintiff unfortunately knew nothing of the machinery, and he through ignorance and without any directions to take hold of the spindle at all took hold of it as he did upon his own suggestion and thereby occasioned the injury which he suffered. He was not employed by the defendants for any purpose save as a labourer to heat rivets. He knew nothing of the working of the machinery further than that he knew that the lever which he took hold of to move the buggy was designed and used for that purpose, for Gearing and he had together that morning so used it. His taking hold of the spindle in the manner in which he did cannot be attributed to any direction given by the defendants or by any person in their service whose orders or direction the plaintiff was bound to obey and was obeying. The plaintiff therefore cannot recover upon the ground, alleged in the statement of claim, that the injury was occasioned by reason of his obeying any such order. Neither do I think the action can be maintained upon the ground of defect in any part of the machinery used by the defendants in their business. The case of *Walsh* v. *Whiteley* (1) is, I think, conclusive that the projection of the head of the screw in the spindle, which was not intended to be taken hold of at all in the manner in which the plaintiff took hold of it, and which could, without any danger whatever of damage, have been taken hold of in a different manner by any person who understood the business

(1) 21 Q. B. D. 371.

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for which the machine was used, cannot be held to be any defect in the machinery for which, under the Act, negligence can be imputed to the employer, at least by a person who had no business whatever to lay hold of the spindle as the plaintiff did. In fine, the evidence clearly, as I think, establishes that the injury which the plaintiff sustained was occasioned wholly by his attempting to deal with the machinery in a manner never contemplated by the defendants, and in his undertaking upon his own mere motion to exercise his discretion in a matter which he did not understand and in his attempting to handle machinery which he was never employed by the defendants to handle at all, and in a manner not directed by any person in the service of the defendants to whose orders or directions he was by reason of his employment bound to conform. Kempster's suggestion as to moving the buggy backwards and forwards in order to thaw the ice on the shaft, even if it could be regarded as such an order, cannot be extended beyond a direction to effect the purpose by the use of the lever which was used for that purpose.

I am, for these reasons, of opinion that, however much to be lamented are the very serious injuries which the plaintiff has sustained, the defendants cannot reasonably or legally he held to be responsible therefor. The appeal therefore must, I think, be allowed and the action in the court below dismissed.

Appeal dismissed with costs.

Solicitors for the appellants: *Bruce, Burton & Bruce.*

Solicitors for the respondent: *Staunton & O'Heir.*

THE VICTORIA HARBOUR LUMBER COMPANY (DEFENDANTS)..... } APPELLANTS;

AND

JAMES M. IRWIN (PLAINTIFF) ..... RESPONDENT.

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*Mar. 27, 28.

*May 6.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Contract—Sale of timber—Delivery—Time for payment—Premature action.

By agreement in writing I. agreed to sell and the V. H. L. Co to purchase timber to be delivered "free of charge where they now lie within ten days from the time the ice is advised as clear out of the harbour so that the timber may be counted * * * Settlement to be finally made inside of thirty days in cash less 2 per cent for the dimension timber which is at John's Island."

Held, affirming the decision of the Court of Appeal, that the last clause did not give the purchaser thirty days after delivery for payment; that it provided for delivery by vendor and payment by purchasers within thirty days from the date of the contract; and that if purchasers accepted the timber after the expiration of thirty days from such date, an event not provided for in the contract, an action for the price could be brought immediately after the acceptance.

APPEAL from a decision of the Court of Appeal for Ontario, affirming the judgment of the Divisional Court in favour of the plaintiff.

The only question raised on this appeal was whether or not the plaintiff's action was premature and that question depended on the construction to be placed on the following agreement between the parties.

"Memorandum of agreement, in duplicate, entered into this second day of May, 1883."

"Between James M. Irwin, of the town of Peterborough, of the first part, and"

"The Victoria Harbour Lumber Company, of the city of Toronto, of the second part."

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

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"The party of the first part sells and the parties of the second part purchase the following dimension timber, as per schedule annexed, now lying at John's Island in care of Henry Colclough, to be delivered by the party of the first part to the parties of the second part free of charge where they now lie within ten (10) days from the time the ice is advised as clear out of the harbour, so that the timber may be counted, at a price of nine dollars and fifty cents ($9.50) per thousand feet in accordance with the schedule hereto attached, which purports to be a condensed specification of Mr. Cochrane's measurement of the same, who scaled the timber and whose scale is accepted between the parties."

"Settlement to be finally made inside of thirty (30) days in cash less 2 per cent for the dimension timber which is at John's Island."

The defendant company contended that the second clause of this agreement meant that payment was not to be made until thirty days after the delivery was completed and it not having been completed until July 1st, 1893, the action which was commenced on July 12th, 1893, was premature. The trial judge agreed with this contention and dismissed the action. His decision was reversed by the Chancery Division, whose judgment was affirmed by the Court of Appeal.

Laidlaw Q.C. and *Bicknell* for the appellants.

McCarthy Q.C. and *Edwards* for the respondent.

The judgment of the court was delivered by:

GWYNNE J.—The sole question upon this appeal is whether or not the plaintiff's action was prematurely brought. I concur in the argument of the learned counsel for the appellants that nothing was by the contract made payable for the timber expressed to be lying at John's Island until delivery thereof. The true

construction of the first paragraph of the contract if it had stood alone was, as I think, that the appellants undertook to pay $9.50 per thousand feet of that timber delivered free of charge, but in that contract if it had so stood no time was fixed for the delivery of the timber further than that it was agreed that it should take place "within ten days from the time the ice is advised as clear out of the harbour," the second paragraph was therefore inserted in the contract which provides that, "settlement to be finally made inside of 30 days in cash less 2 per cent for dimension timber which is at John's Island."

This is the paragraph which was relied upon as giving to the appellants 30 days of grace for payment of the price after delivery of the timber, but it does nothing of the kind; what the paragraph was introduced for was manifestly to define more precisely the time for delivery of the timber than by the expression "within ten days from the time the ice is advised as clear of the harbour," and it expresses the mutual agreement of both parties to the contract, namely, that everything necessary to a final settlement of the contract by both parties, namely, delivery by the one and payment by the other, shall be made inside of 30 days from the date of the contract. For delivery after that date, and consequently for payment in the event of delivery after that date, the contract makes no provision. If the non-delivery within the 30 days was by reason of the respondent's default the appellants had their action for breach of contract; but having accepted a delivery of the timber after the expiration of the 30 days named in the contract within which it was to be delivered, for which event the contract made no provision, it is preposterous to hold that the appellants had by the contract 30 days after delivery, after the expiration of the time named in the contract for

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delivery, for payment of the price of the timber delivery of which was so accepted. For such an event it is plain that the contract made no provision, so no question as to the action having been premature within the terms of the contract could arise.

The appeal must be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellants: *Laidlaw, Kappele & Bicknell.*

Solicitors for the respondent: *Edwards & Murray.*

GEORGE D. ROBERTSON (PLAINTIFF)..APPELLANT; 1895

*Mar. 18, 19.
*June 26.

AND

THE GRAND TRUNK RAILWAY COMPANY OF CANADA (DEFENDANTS) ..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Construction of statute—Railway Act, 1888 *s.* 246 (3)—*Railway Co.—Carriage of goods — Special contract — Negligence — Limitation of liability for.*

By. s. 246 (3) of the Railway Act, 1888, (51 V. c. 29 [D]) "every person aggrieved by any neglect or refusal in the premises shall have an action therefor against the company, from which action the company shall not be relieved by any notice, condition or declaration, if the damage arises from any negligence or omission of the company or of its servants."

Held, affirming the decision of the Court of Appeal, that this provision does not disable a railway company from entering into a special contract for the carriage of goods and limiting its liability as to amount of damages to be recovered for loss or injury to such goods arising from negligence. *Vogel* v. *Grand Trunk Railway Co.* (11 Can. S. C. R. 612), and *Bate* v. *Canadian Pacific Railway Co.* (15 Ont. App. R. 388) distinguished.

The Grand Trunk Railway Co. received from R. a horse to be carried over its line and the agent of the company and R. signed a contract for such carriage which contained this provision: "The company shall in no case be responsible for any amount exceeding one hundred dollars for each and any horse," &c.

Held, affirming the decision of the Court of Appeal, that the words "shall in no case be responsible" were sufficiently general to cover all cases of loss however caused, and the horse having been killed by negligence of servants of the company, R. could not recover more than $100, though the value of the horse largely exceeded that amount.

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

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ROBERTSON v. THE GRAND TRUNK RAILWAY COMPANY.

APPEAL from a decision of the Court of Appeal for Ontario (1), affirming, by an equal division of opinion, the judgment of the Divisional Court (2) in favour of the defendant company.

The appellant, the plaintiff in the action, issued a writ on the 3rd day of November, 1891, against the defendants indorsed to recover damages for the loss of a valuable trotting horse known as "Henry R," shipped by him at Windsor for St. Catharines on the 15th day of September, 1891, upon the Southern Division of the defendants' railway.

In consequence of a collision between two of the defendants' freight trains, at a point near Stoney Creek, a short distance west of St. Catharines, on defendants' said line, the plaintiff's horse was killed.

The defendants, in answer to said action, set up a special contract signed by the plaintiff at the time of shipment whereby they contended he was limited in his recovery, if any, even in case of negligence, to the sum of $100, and they paid that sum into court with their amended statement of defence.

The special contract so set up contained the following provision:

"And in consideration of said agreement to transport at said special rate it is hereby mutually agreed by and between the parties hereto that the said Grand Trunk Railway shall not be liable for any loss or damage which the shipper or owner of said live stock may suffer by reason of delay. * * * And the said company shall in no case be responsible for any amount exceeding one hundred dollars for each and any horse or head of cattle, (10) dollars each for sheep, hog or calf transported."

The plaintiff contended that even if the company could limit its liability for damage caused by negli-

(1) 21 Ont. App. R. 204. (2) 24 O. R. 75.

gence, the terms of this contract were not comprehensive enough to cover such cause of loss. But he also relied on section 246 (3) of the Railway Act, 1888, as preventing a railway company from so protecting itself from liability. Section 246 of said Act is as follows:

"246. All regular trains shall be started and run as near as practicable at regular hours, fixed by public notice, and shall furnish sufficient accommodation for the transportation of all such passengers and goods as are within a reasonable time previously thereto offered for transportation at the place of starting, and at the junctions of other railways and at usual stopping places established for receiving and discharging way passengers and goods from the trains."

"2. Such passengers and goods shall be taken, transported to and from, and discharged at such places, on the due payment of the toll, freight or fare lawfully payable therefor."

"3. Every person aggrieved by any neglect or refusal in the premises, shall have an action therefor against the company, from which action the company shall not be relieved by any notice, condition or declaration, if the damage arises from any negligence or omission of the company or of its servants."

At the trial of the action the defendants admitted that the collision occurred through the negligence of their employees, and the learned judge left to the jury simply the question of damages and reserved all questions of law. The jury assessed the damages at $5,000, and judgment was entered for the plaintiff for that amount, with costs

Upon appeal by the defendants to the Common Pleas Divisional Court the judgment of the trial judge was reversed, and the action dismissed with costs. The plaintiff then appealed to the Court of Appeal and

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that court affirmed the judgment of the court below by an equal division of opinion, the Chief Justice and Mr. Justice Osler agreeing with the Divisional Court, and the Chancellor and Justice Maclennan being in favour of the plaintiff.

Moss Q.C. and *Collier* for the appellant. *Vogel* v. *The Grand Trunk Railway Co.* (1), decided that under precisely the same legislation as that in section 246 (3) of the Railway Act, 1888, a railway company could not contract itself out of liability for negligence. Then if it is to be held that it can limit the pecuniary amount of its liability that would be practically to effect what Vogel's case said it could not do.

Even if the amount of liability can be so limited the contract in this case would not cover loss by negligence which must be expressly mentioned to cause an exemption. See *Nicholas* v. *The New York Central Railroad Co.* (2).

Osler Q.C. and *W. Nesbitt* for the respondents referred to *Dixon* v. *The Richelieu Navigation Co.* (3); *Barnard* v. *Faber* (4).

THE CHIEF JUSTICE.—I refer to the judgment of Mr. Justice McMahon in the Divisional Court for a full statement of the facts. Two questions call for decision. First, did the special contract set out in the amended statement of defence, according to the fair meaning of the language used, cover the case of negligence?

Secondly, if liability for negligence was, by the terms of the contract, limited as to the amount of damages to be recovered, was such a stipulation legal and was it one which it was competent to the respondents to enter into, having regard to the provisions of the statute (51

(1) 11 Can. S. C. R. 612.
(2) 89 N. Y. 370.
(3) 15 Ont. App. R. 647.
(4) [1893] 1 Q. B. 340.

Vic. chap. 29, sec. 246, subsec. 3) and to what was decided in *Vogel's Case* (1)?

I am of opinion that both these questions must be answered in the affirmative.

The words of the special contract material to the present question are, that the "said company shall in no case be responsible for an amount exceeding $100 for each or any horse or head of cattle, or $10 each for sheep, hog, or calf transported."

Mr. Justice Maclennan, who was of opinion that the statute did not interfere with the respondents' *primâ facie* right to enter into a contract limiting their liability to ascertained damages, gave judgment in favour of the appellant, upon the ground that the terms of the agreement were not sufficiently comprehensive to embrace a case of loss or damage occasioned by the negligence of the respondents' servants.

I am unable to agree in this conclusion. The valuation fixed upon in consideration of the special rate was general, and no distinction is made between the value to be assumed in a case of negligence and in a case of accident. There would be no reason for presuming such a discrimination between the value in one case and the other, and the language used "shall in no case be responsible" is sufficiently general to cover all cases of loss, however caused, as they undoubtedly were intended to do. In the case of *Hart* v. *Pennsylvania Railroad Co.* (2), the agreement was certainly not more specific in its terms than in that before us; the same argument was used that these general terms did not apply when there was a loss by negligence, but the court held the contrary. Secondly, it appears to me, that nothing decided in *Vogel's Case* (1) touches the points raised in the appeal now before us. In *Vogel's*

(1) 2 O. R. 197; 10 Ont. App. R. 162; 11 Can. S. C. R. 612.

(2) 112 U. S. R. 331.

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Case (1) the question was as to exemption from all liability, and nothing there decided established, or tended to establish, that it was not competent to the respondents to enter into an agreement for pre-ascertained damages, or for limited liability, if that term is preferred. The subsection which is invoked by the appellant is worded as follows:

> Every person aggrieved by any neglect or refusal in the premises, shall have an action therefor against the company, from which action the company shall not be relieved by any notice, condition or declaration, if the damage arises from any negligence or omission of the company or of its servants.

This is an enactment which ought not to be extended beyond its literal meaning, and that is plainly confined to the prohibition of any contract relieving the company from liability for negligence. To say that it is to shut out the company from limiting its liability for damages by an agreement fixing a value on goods carried, would be to extend its language by implication to a case which does not appear from any part of the Act itself to have been within the contemplation of the legislature. So far indeed from this being so, we may reasonably infer that the legislature never intended to enact a provision which would most assuredly have the result so forcibly pointed out in the judgment of the learned Chief Justice of Ontario, viz., that, when it was sought to compel the company to carry property of great value for rates which would not cover the equivalent of a fair premium for insuring, we should find the company refusing to carry, and thus, on a calculation of profit and loss, preferring to pay damages for such refusal to incurring a risk without adequate compensation. The case relied on by Mr. Justice McMahon in his elaborate judgment is, in my opinion, in point and entirely supports the learned judge's conclusions. In that case of *Hart* v. *Pennsylvania Railroad*

(1) 11 Can. S. C. R. 612.

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Co. (1), the question presented was identical with that now before us. The only difference existing between the two cases is, that, whilst in the present case the power of contracting themselves out of liability for negligence is taken away from the railway company by statute, in the case of *Hart* v. *Pennsylvania Railroad Co.* (1) the same prohibition was derived from the common law prevailing in the state by the law of which the contract was governed. Blachford J., in delivering the unanimous judgment of the Supreme Court, says:

> It is the law of this court that a common carrier may, by special contract, limit his common law liability, but that he cannot stipulate for exemption from the consequences of his own negligence or that of his servants.

The case therefore, although of course not binding upon us, is one which, having regard to the high authority of the great court from which it emanated and to the admirable reasoning by which its conclusions are supported, we may safely follow.

Adopting the reasons there given, we find every difficulty which had been or possibly could be suggested in the present case completely answered.

Some reference was made in the judgments in the Court of Appeal and also on the argument here to the case of *Bate* v. *Canadian Pacific Railway Co.* (2). I may say at once, that that case was not decided on the authority of Vogel's case, but on a totally different point there arising on the findings of the jury, viz., that the appellant had not read, and could not (in the state of her eyesight) have read, the conditions on the ticket, and that she was misled as to the effect of those conditions by the answers she received in reply to her inquiries addressed to the ticket clerk of the defendants. In short it was decided upon the authority of *Henderson* v. *Stevenson* (3), which was followed in preference

(1) 112 U. S. R. 331.
(2) 15 Ont. App. R. 388.
(3) L. R. 2 H. L. Sc. 470.

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to *Watkins* v. *Rymill* (1), and the choice thus made between two apparently conflicting authorities, seems now to be confirmed by the very late case of *Richardson Spence & Co.* v *Rowntree* (2), which is a decision to to the same effect as *Bate* v. *Canadian Pacific Railway Co.* (3) on facts very similar.

The appeal must be dismissed with costs.

TASCHEREAU J.—I adopt Chief Justice Hagarty's reasoning in the Court of Appeal, as reported in 21 Ont. App. R. 204. This appellant saw no objection whatever to have his horse valued at one hundred dollars when he benefited from the undervaluation, but when the horse is killed he would repudiate his submission to the undervaluation. A horse that is worth one hundred dollars when shipped cannot be worth five thousand dollars when killed next day.

If it is not true that it was worth only one hundred dollars when shipped it does not lie in the appellant's mouth to say so. I would dismiss the appeal.

GWYNNE J.—I am of opinion that this case is not concluded by the judgment of this court in *Vogel* v. *Grand Trunk Railway Co.* (4). Subsequently to that judgment being rendered the company, with the view I presume of protecting themselves from what appeared to them to be the severity of that judgment, procured the assent, under the provisions of the statute in that behalf, of the Governor in Council to a new tariff, with which alone we have to deal in the present case.

The clause of the statute upon which the judgment in *Vogel* v. *Grand Trunk Railway Co.* (4) proceeded was the same in terms as the clause of the statute now in force, namely, ch. 109, sec. 104, ss. 2 and 3 R. S. C.

(1) 10 Q. B. D. 178.
(2) [1894] A. C. 217.
(3) 15 Ont. App. R. 388.
(4) 11 Can. S. C. R. 612.

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By that section it is provided that goods shall be taken, transported and discharged by the company on due payment of the toll, freight or fare lawfully payable therefor, and that every person aggrieved by any neglect or refusal in the premises shall have an action therefor against the company, from which action the company shall not be relieved by any notice, condition, or declaration, if the damage arises from any negligence or omission of the company, or of its servants. Now that there should be any toll or freight lawfully payable for the carrying of goods by the company must depend upon the terms of the tariff of tolls or freight approved under the provision of the statute, by order of the Governor General in Council, for sec. 16 ss. 9 of ch. 109 R.S.C., enacts that no tolls shall be levied or taken until approved by the Governor in Council, &c.

In Vogel's case this court held that this section applied to prevent the company from relieving themselves by contract from an action for the loss of horses received by them for transportation, such loss having arisen from the negligence of the servants of the company, and that the fact that what the defendants had done was merely to let to the plaintiff a car which he loaded with horses and which the defendants undertook to draw did not prevent the application of the section. The *ratio decidendi* therefore, as it appears to me, was that the section, prohibiting, as it was held it did, the company from contracting against liability from loss by negligence, applied, by reason of the defendants having been by their tariff then in existence under an obligation to carry the horses delivered to them at a rate provided for in such tariff. But by the new tariff, which has been adopted since the judgment in Vogel's case, and which, approved in the manner required by the statute, has been substituted for the one which was in force when

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Vogel's case was before the court, and has become a lawful tariff confirmed by the provisions of the statute in that behalf, the defendants are under no obligation whatever to carry racers, although they do by that tariff, so approved and made valid in law, undertake to carry them at the same rate as they do carry horses of ordinary value, subject however, to the condition that the owner shall incur all risk of loss or damage from any cause whatever including negligence. Such a condition, besides being perfectly reasonable and fair to be made in a contract for the carriage of animals which the defendants are under no obligation to carry, is made perfectly free from all doubt as to its validity by the tariff approved as required by the statute; the section therefore of the statute which declared that the railway company could not relieve themselves from an action for loss or damage, arising from negligence, of goods which the defendants were bound to carry by their tariff, has no application in the present case, which is an action for the loss of a race horse which they were not under obligation to carry, and which by their tariff, approved as required by statute, and so given the force of law, they only undertook to carry upon condition that the owner should bear the risk of all loss or damage from whatever cause arising.

Now as to the facts of this case, the plaintiff, well knowing the terms of this tariff, which may be said to be the statutory tariff, brought his horse to the defendants, but did not disclose to them the fact that he was a race horse, and he asked the defendants' servants for and procured from them their bill of lading for an ordinary horse and signed it and thereby in effect, as I think, under the circumstances, represented the value of his horse to be no more than $100, which sum and no more the defendants by the bill of lading so obtained by the plaintiff undertook to pay in the

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event of loss. The plaintiff now claims $5,000, which he alleges to be the value of his horse as a race horse, although he neither represented the animal to be such, when delivered to the defendants, nor did they undertake to carry him as such.

To hold this case to be governed by Vogel's case and that the plaintiff is entitled to recover herein, besides being, as I conceive it would be, a judgment unwarranted by the *ratio decidendi* in that case, would be to construe that case so as to enable the plaintiff to commit a fraud upon the defendants. The question in the present case, but for the payment by the defendants of $100, which they agreed to pay in the event of loss from any cause, would more properly, in my opinion, have been whether the plaintiff, he not having shipped the horse as a race horse, but upon the form used for the transportation of horses of ordinary value, had not by such deception lost all right even to the $100.

The appeal should in my opinion be dismissed with costs.

SEDGEWICK J. concurred.

KING J.—I am of opinion that this appeal should be dismissed with costs for the reasons given in the judgment of the Chief Justice.

Appeal dismissed with costs.

Solicitors for appellant: *Collier & Shaw.*

Solicitor for the respondents: *John Bell.*

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*Mar. 22, 23.

*June 26.

THE MUNICIPAL CORPORATION OF THE TOWNSHIP OF COLCHESTER SOUTH (DEFENDANTS).. } APPELLANTS;

AND

DOMINIQUE VALAD (PLAINTIFF.).....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Practice—Reference—Report of referee—Time for moving against—Notice of appeal—Cons. Rules 848, 849*—Extension of time—Confirmation of report by lapse of time.*

In an action by V. against a municipality for damages from injury to property by the negligent construction of a drain, a reference was ordered to an official referee "for inquiry and report pursuant to sec. 101 of the Judicature Act and rule 552 of the High Court of Justice." The referee reported that the drain was improperly constructed, and that V. was entitled to $600 damages. The municipality appealed to the Div. Court from the report, and the court held that the appeal was too late, no notice having been given within the time required by Cons. Rule 848, and refused to extend the time for appealing. A motion for judgment on the report was also made by V. to the court on which it was claimed on behalf of the municipality that the whole case should be gone into upon the evidence, which the court refused to do.

Held, affirming the decision of the Court of Appeal, that the appeal not having been brought within one month from the date of the report, as required by Cons. Rule 848, it was too late; that the report had to be filed by the party appealing before the appeal could be brought, but the time could not be enlarged by his delay in filing it; and that the refusal to extend the time was an exercise of judicial discretion with which this court would not interfere.

Held also, Gwynne J. dissenting, that the report having been confirmed by lapse of time and not appealed against, the court on the motion for judgment was not at liberty to go into the whole case upon the evidence, but was bound to adopt the referee's findings and to give the judgment which those findings called for. *Freeborn* v. *Vandusen* (15 Ont. P. R. 264) approved of and followed.

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

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THE TOWNSHIP OF COLCHESTER SOUTH v. VALAD.

APPEAL from a decision of the Court of Appeal for Ontario, affirming the judgment of the Divisional Court in favour of the plaintiff.

The action was brought against the municipality for damages for injury to plaintiff's land and crops from the negligent construction of a drain by the defendants. When the action came on for trial it was referred to the official referee under sec. 101 of the Judicature Act, and rule 552 of the High Court of Justice, and the questions raised for decision on this appeal were: Was the Divisional Court right in holding that an appeal from the referee's report was too late not having been brought within one month from the date of the report as required by Consolidated Rule 848, and in refusing to extend the time for appealing? Could the court, on a motion for judgment on the referee's report, go into the whole case on the evidence, or was it bound to give judgment on the findings in the report? The Divisional Court held that it could not go into the whole case, and its decision on that ground, as well as on the ground that the appeal was too late, was affirmed by the Court of Appeal.

Wilson Q.C. for the appellants. We can appeal against the report notwithstanding it is conclusive as to matters of fact. *Raymond* v. *Little* (1).

On the merits the learned counsel referred to *Corporation of Raleigh* v. *Williams* (2); *Cowper Acton* v. *Essex* (3); Cripps on Compensation (4).

Douglas Q.C. and *Langton* Q.C. for the respondent referred to *Geddis* v. *Bann Reservoir* (5); *Suskey* and *Township of Rowney, in re* (6).

(1) 13 Ont. P. R. 364.
(2) [1893] A. C. 540.
(3) 14 App. Cas. 153.
(4) 3 ed. pp. 160, 162.
(5) 3 App. Cas. 430.
(6) 22 O. R. 664.

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The Chief Justice.

THE CHIEF JUSTICE.—I am of opinion that there was no error in the judgment of the Court of Appeal and that it ought not in any way to be interfered with.

First, the appeal to the Divisional Court from the referee's report was properly held by Mr. Justice Falconbridge to be too late, it being indisputable that notice of appeal was not given within the time prescribed by Consolidated Rule 848. By Consolidated Rule 849 an appeal against a report must be brought on to be heard within one month from the date of the report. It is for a party appealing to file the report before he brings his appeal. It is not, however, within the power of an appellant, by delaying the filing of the report, to enlarge the time for appealing allowed him by Consolidated Rules 848 and 849. The practice thus prescribed for proceedings in the High Court was adopted from the former practice of the Court of Chancery, where it had prevailed under the authority of a general order of the court for a considerable time. (Chancery General Order 253).

As regards any extension of the time for appealing by way of indulgence, that was entirely for the discretion of the learned judge of the Divisional Court who did not think fit to grant it. This being so the Court of Appeal refused to interfere, and this court certainly ought not to entertain an appeal on any such grounds. We have held in several cases, that this court will not interfere with the decisions of the Court of Appeal of the province of Quebec in matters of practice, and I see no reason why the same principle should not apply to the adjudications of the Court of Appeal for Ontario.

Then coming to the question as it was presented on the motion for judgment upon a report which we must assume to have become absolutely confirmed by the lapse of time and the appellants' failure to appeal against

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it, we have to consider what was the effect of the report thus confirmed. Was it open to the Divisional Court on that motion to go into the whole case upon the evidence, or was it at liberty to take the facts stated by the referee on the face of his report and to inquire if those facts justified his conclusion that the defendants had been guilty of negligence, or was the court bound, upon the report standing undisturbed by an appeal, to adopt the referee's findings and merely to give the judgment which those findings called for? I am clearly of opinion that the latter was the proper course. In the case of *Freeborn* v. *Vandusen* (1), the learned Chancellor of Ontario treats the report of a referee and the mode of appealing from it and proceeding upon it as being regulated by the same practice as that which applies to a master's report. This was evidently the intention of the judges who framed the Consolidated Orders, as appears from the heading which precedes Consolidated Order 848.

The case of *Freeborn* v. *Vandusen* (1) has never been reversed or overruled, and it therefore stands as an authoritative decision as to the procedure of the High Court of Justice upon the point in question. Moreover, its weight as an authority is greatly enhanced by the consideration, that it is the judgment of the chief judge of that branch of the High Court which until recently exclusively dealt with these questions as to the reports of masters and referees, and a judge who had himself had great experience as a master in chancery. I should not therefore, for these reasons alone, be disposed to overrule it, even if I could do so consistently with our own rulings against interfering with mere matters of procedure before referred to. I am, however, of opinion that the Chancellor's judgment was a correct construction of Consolidated Rules 848, 849 and

(1) 15 Ont. P. R. 264.

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850, and that this practice, which is founded on the old Chancery General Order 253, and was established by the Consolidated Rules of 1888 in lieu of the prior practice, is more reasonable and convenient than that which has been established in England under cognate orders. *Freeborn* v. *Vandusen* (1) decides that a referee's report, like a master's report, stands absolutely confirmed when the time for appealing has elapsed, just as under the old practice of the Court of Chancery a master's report did after the order absolute to confirm. In the words of the Chancellor referring to the report of a referee, "the course of the court is to treat it, if not appealed from, as a finality." Where a party does not appeal the evidence taken before the referee is not before the court on a motion for judgment, any more than the depositions taken before the master were under the former practice before the court when the cause came on to be heard on further directions. Under the English practice the report amounts to nothing final; on the motion for judgment the court go behind the referee's report and discuss the merits. The provision for an appeal from the referee, just as in the case of the master, is designed, and can only have been designed, to shut out all such discussion on the motion for judgment, when the court adopts the findings of the referee or master as final, and bases its judgment on those findings as *res judicatæ*. The English practice, on the other hand, makes no provision for such an appeal; the review of the referee's finding and the judgment of the court thereon are both included in the motion for judgment.

By the alteration in the practice effected by the rules of 1888, such cases as *Longman* v. *East* (2), and *Cumming* v. *Low* (3), have become inapplicable, and to ascertain how a report of a referee which has become absolutely

(1) 15 Ont. P. R. 264. (2) 3 C. P. D. 142.
(3) 2 O. R. 499.

confirmed is to be proceeded upon we must have recourse to the former practice of the Court of Chancery applicable to the reports of the master.

These authorities show that except in cases where the master exercised his power of stating special circumstances, leaving the court to draw its own conclusions therefrom, which was not the course pursued by the referee here, the court could only have regard to the conclusions arrived at, and would not enter into any discussion of facts or reasons which the master might have stated in the report.

The result is that the appellants, not having appealed from the report, and the referee having found in the plaintiff's favour that there had been actionable wrong on the part of the defendants, and that the plaintiff had suffered damages to the amount of $600, the Divisional Court had no alternative but to pronounce the judgment which the Court of Appeal have affirmed and which is now the subject of the present appeal. A contrary decision as to the right of the defendants to go into the merits on the facts stated on the face of the report would do great injustice to the respondent, who would thus be debarred from going into the evidence at large and who was not called upon to appeal from a finding in his favour. Arriving at this conclusion I am not called upon to discuss the merits, or to go into the evidence; I may say, however, that I have read the evidence twice, and I am of opinion, that not only was there some evidence of negligence, but that it establishes a strong case of negligence, both as regards the cutting of the embankment and as regards the Richmond drain. In the case of the latter, tested by the principle laid down by the Privy Council in *Williams* v. *Raleigh* (1) as to the distinction between compensation under the statute for lands injuriously affected and

(1) [1893] A. C. 540.

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damages for negligence, indemnity for the former being recoverable only under the statute, whilst the proper remedy for negligence is by action, I am of opinion that there was evidence of actionable negligence. The appellants were warned by their own engineer that the mouth of the Richmond drain as planned would be insufficient to carry off the water, and yet they persisted in carrying out the work. This, surely, comes within the language of the judgment of the Judicial Committee in the passage from it quoted by the Chief Justice of Ontario.

The embankment was not a statutory work at all, it was no part of the original plan for the Richmond drain. There is evidence that the cuttings in this embankment caused damage to the respondent (see the extracts from the depositions in respondent's factum); for this the respondent's only remedy was by action.

I cannot part with this case without characterizing the litigation as extravagant and wasteful in the extreme, and I must express the hope that some check may be placed by legislation on appeals to this court in such cases as the present.

The appeal must be dismissed with costs.

TASCHEREAU J. concurred.

GWYNNE J.—This is an action instituted in the Queen's Bench Division of the High Court of Justice for Ontario against the Municipal Corporation of the Township of South Colchester, for damage alleged to have been caused to the plaintiff and his land by reason of the negligence of the defendants in the construction of certain drains, for the construction of which by-laws had been duly passed by the council of the municipality in conformity with the provisions of the Acts of the province of Ontario in relation to the construction of drains.

In order to understand the case it will be convenient to set out, in an abbreviated but substantial form, the material part of the plaintiff's statement of claim.

The plaintiff, who is the owner of the north half of lot no. 7, in the 5th concession of South Colchester, containing 100 acres, alleges that in the years 1883 and 1884 the defendants undertook to construct a drain within the limits of the municipality of South Colchester, called the Richmond drain, upon plans, specifications and a by-law adopted and passed by the municipality for the construction thereof, under the provisions of the Municipal Acts of Ontario. That the drain commenced at a point in lot no. 8, near the line between the 1st and 2nd concessions, and passed northerly, intersecting in its course three or four other tap drains and other small drains connecting them, and thence north by a deep cut across the 4th concession to about the middle of lot no. 8, in the 5th concession, where it turned at right angles to the east to an outlet several miles distant at a creek called Cedar Creek. That at the point where it so turned east it is intersected by a drain called the McLean drain, the waters in which flow northwesterly across plaintiff's farm to an outlet several miles distant in a river called Canard River, and that this drain had also been constructed by the defendants under the drainage Acts. That from the point where the McLean drain and the Richmond drain so intersect, the latter drain was never large enough to carry off the volume of water brought from the south of the 4th concession and to drain the lands assessed for its construction. That because the McLean drain intersected the Richmond drain at the point aforesaid, and because the Richmond drain from thence to its outlet in the east was insufficient, water rushed down the McLean drain in greater volume than its

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capacity could carry off, and the plaintiff's said land and the lands even in the adjoining township of North Colchester became flooded thereby, and that in consequence thereof, the defendants made a settlement by arbitration with the municipality of North Colchester, and in pursuance thereof built an embankment along the north and west sides of the Richmond drain at the point where it was intersected by the McLean drain, thereby filling up the McLean drain at such point of intersection, and thereby preventing the flow of waters from the Richmond drain into the McLean drain. That the defendants during the years 1887 and 1888 caused that part of the McLean drain which lies north of the Richmond drain and between it and the township of North Colchester to be cleared out, but refused to enlarge it to any greater size than was sufficient to drain the lands in the township north of the Richmond drain. That at every heavy rainfall large volumes of water, brought by the Richmond drain with great force against the embankment, washed the same away, whereby plaintiff's land became flooded, and that the defendants caused and permitted ditches to be cut into the embankment in several places, whereby the water flowed on to plaintiff's land and destroyed his crops in 1889 and 1890. That extra water has been brought and kept on plaintiff's farm and crops to his damage, that would not have been so brought and kept but for the said Richmond drain. That the defendants were guilty of gross negligence in constructing the said drains and embankment and leaving them incomplete and insufficient, and in refusing to enlarge the McLean drain, and in building an embankment instead which was imperfect and useless to prevent overflow of water on plaintiff's farm.

Now here it may be observed, that this last paragraph contains the whole gist of the plaintiff's cause of action,

which is thus stated to consist merely in gross negligence in the construction of drains, constructed, as is admitted, upon plans, specifications and by-laws adopted and passed by the municipality under the provisions of the Acts of the legislature relating to the construction of drains by municipalities. And for this alleged negligence the plaintiff in conclusion claims nine hundred dollars for loss of crops, and the use of his land for crops, owing to their having been drowned and destroyed by water diverted from its natural course and brought on the plaintiff's farm by means of the Richmond drain in the years 1889 and 1890.

To the plaintiff's cause of action so stated, the defendants by their statement denied the charge of negligence made by the plaintiff, upon which the plaintiff joined issue, and the issue was brought down for trial at Sandwich in October, 1890, when the learned judge presiding at the trial made the order following:

This action coming on for trial at Sandwich on the 20th October, 1890, and the same being, on the application of the plaintiff, postponed until the 21st day of October, 1890, and the said action coming on, on the said 21st day of October, in the presence of counsel for all parties and the jury notice having been struck out and the jury dispensed with; upon opening of the matter and hearing read the pleadings and what was alleged by counsel aforesaid, and consideration of the appointment of a referee having been postponed to, and disposed of, this day.

It is ordered that all questions arising in this action be, and the same are, hereby referred to Frank E. Marcon, Esq., Official Referee, for inquiry and report pursuant to sec. 101 of the Judicature Act and rule 552 of the High Court of Justice, and the said referee may inspect the locality and works in question; and such evidence as may be offered by the parties, or as the referee may require, may be taken in short hand by the stenographer and need not be signed by the witnesses.

2. That the costs and proper charges of such examination, reference, report, stenographer and type writing of the evidence for the court and parties shall be costs in the cause herein.

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Now upon the true construction of the above sec. 101, under the authority of which this order was made, and upon the authority of the judgment of the Court of Appeal in England, in the three cases of *Longman* v. *East*; *Pontifex* v *Severn*; and *Mellin* v. *Monico* (1), it must be held, that neither the action, nor the issue joined therein between the parties, was by the above order referred to the referee to determine.

Commenting upon sec. 56 of the English Judicature Act of 1873, from which sec. 101 of the Ontario Judicature Act is taken almost verbatim, Bramwell L. J., at p. 149 of the above report, says:

> Under sec. 56 any question arising in the cause may be referred by the court or a judge for inquiry and report to an official or special referee. He is not to dispose of the action, and I do not think he is even to determine any matter in issue between the parties. * * * His duty is, instead of determining issues of fact or of law, to find the materials upon which the court is to act. Clearly, under sec. 56 an action cannot be referred to him to decide facts and law.

Brett L. J. at p. 152, says:

> I think it convenient before I proceed to the construction of the Judicature Acts to consider the kinds of references that existed previously to the passing of those statutes, and afterwards to consider the effect of the Judicature Acts on the then existing law. Before the Judicature Acts there were several modes in which disputes were remitted to the decision of third persons and which might be called references. There was the common law reference to an arbitrator constituted by the consent of the parties. There was the compulsory reference to an arbitrator under the provisions of the Common Law Procedure Act, 1854. There was the reference to the master to report in the common law courts as to matters of discipline and similar questions, and in the Court of Chancery there was the reference into chambers. It was not intended by the Judicature Acts to interfere with these references, and they at present exist with all their incidents. But it was thought that further powers ought to be given to the Divisional Courts, and I think that sec. 56 gives to the Chancery Division a new tribunal, that is to say, instead of referring certain questions for a report into chambers, that court may, if they think fit, refer questions to an official referee, an officer newly appointed with

(1) 3 C. P. D. 142.

limited duties and also with defined powers. Section 56 therefore gives to that Division a new tribunal in addition to their own chambers; but it gives to the common law Divisions a new power as well a new tribunal; it gives them power to do what the Court of Chancery had done in a suit or cause. The common law courts had no power previous to the passing of sec. 56 to refer matters in a cause for report, but only to refer for report of the master matters of discipline; these matters the courts themselves were bound to decide upon the facts, but they sometimes delegated the duty to a master. This section, however, gives them power to remit questions in a cause for report in the same way as a question was referred in the Court of Chancery into chambers, and afterwards the report was brought back from chambers to the court.

And again at p. 155, after commenting on the powers conferred by sec. 57, he says:

I should say that, in the case of a report to the court or judge under sec. 56, the court or judge may differ from the official referee as to any finding which is an inference from the facts that the referee has reported, they may deal with his report generally in the same way as the courts do with a report of the master upon a matter of discipline. But with regard to the finding of a referee of issues of fact sent to him under sec. 57, either by consent of the parties or without consent, I think the appeal is of the same nature as the appeal from the finding of a judge when he tries without a jury, or as the appeal from the finding of a jury, that is to say, the court must accept the finding of the referee, unless they can set it aside, according to the ordinary rules which would be applicable to the finding of a jury, or to the finding of a judge trying a cause without a jury.

And Cotton L. J. at p. 159, says:

Before I proceed to deal with the three appeals which are before us, I will first consider the sections of the Act of 1873. Secs. 56 and 57, on the face of them, relate to very different matters. Sec. 56 provides for cases which frequently occurred in the Court of Chancery, where on some question being raised either of a scientific or other nature requiring special knowledge, the evidence was conflicting, or the witnesses differed, (as for instance, as to what would be the result of a certain act sought to be restrained by injunction, or as to what ought to be done in order to remedy a particular state of things, or as to what timber was fit to be cut), it was not unusual to direct a reference to some expert or scientific man to report to the court upon the question as to which there was a conflict of evidence, or as to which for any other reason the court desired to have information. These cases,

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by sec. 56, may be referred to an official referee, who is not to find the issues between the parties, but to make a report, and that report is for the assistance of the court, as is shown by this, that it may be adopted wholly or partially by the court, and when adopted may be enforced as a judgment of the court.

Section 57 provides for a different matter. As I understand it, it is to enable certain issues of fact arising in a cause, which the court or judge thinks cannot be conveniently tried before the court or judge either with or without a jury, to be referred to another tribunal, and that really is acting upon what formerly was constantly the practice in the Court of Chancery.

These observations of the Lords Justices in relation to secs. 56 and 57 of the English Judicature Act of 1873, have precise application to secs. 101 and 102 of the Ontario Judicature Act, which are taken almost verbatim from the said secs. 56 and 57.

In the action before us the only material question in issue is, whether the defendants were or were not guilty of negligence in the construction of the Richmond and McLean drains, in the plaintiff's statement of claim mentioned; the legality of the construction, that is to say, the authority to construct those drains, was not questioned. Now, whether the defendants were or were not guilty of negligence in their construction, thereby causing damage to the plaintiff, was a mixed question of law and of fact. First, of fact, namely, as to the matters of fact relied upon as constituting the alleged negligence, and, secondly, of law, namely, whether matters of fact, when ascertained, constituted negligence in point of law. This latter question, or part of the material question, was not at all submitted to the referee; he had no authority whatever except to take evidence and to report his findings upon the matters of fact relied upon as constituting the alleged negligence, and to report the evidence with his findings thereon to the court, whose duty and right it was, upon the authority of the judgment of the Court of Appeal in England in the cases

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above cited when arriving at a judgment in the action on the issues joined therein, to consider the evidence and upon consideration of it to differ, if they should think fit, from any finding of the referee which was an inference from the facts reported by him, and to render judgment according to the court's view of the law, as applicable to the matters of fact submitted to the referee to inquire into and report upon; and in case of any of the findings of the referee upon the matters of fact submitted to him to inquire into and report upon appearing to be inferences drawn by him from the evidence, then to exercise their own judgment from such evidence, and, if they should differ from the inference drawn by the referee, to act upon their own judgment.

Now the referee by his report, which together with the evidence upon which it is founded has been filed in the Divisional Court in which the action was pending, has reported in paragraphs distinctly as follows:

1. That the plaintiff in 1888 and 1890 was and still is owner of the lot in his statement of claim mentioned.

2. That in 1877 the defendants passed several by-laws for drainage of lands south of the 4th concession, respectively called Aikman's drain, Ferris drain, Shepherd drain and Long-marsh, the three former emptying into Long-marsh drain, which, however, was not of sufficient capacity to carry off to its outlet the waters so brought into it.

3. That through the 4th concession of the township of Colchester there is a ridge of land of sufficient height to separate the waters in the Long-marsh in the 2nd, 3rd and 4th concessions from the waters in Roach's or Walker's marsh in the 5th concession, which lies about 15 feet lower than the Long-marsh, but in times of very high water a little water would flow northerly from the Long-marsh to Roach's or Walker's marsh.

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4. That in 1868 the defendants constructed a drain called the McLean drain from a point a little south-east of plaintiff's land to the River Canard, and in 1879, cleaned out and enlarged that drain under the Municipal Act; that this drain was intended to drain the plaintiff's land and other lands in the 5th concession, and would have done so effectually but for the interference of the defendants as hereinafter mentioned.

5. That in or about the year 1870, but without any by-law therefor, the defendants cut a small drain across the 4th concession, which carried a small quantity of water into the 5th concession and Roach's marsh, but which was found ineffective, and on the 12th January, 1884, the defendants passed a by-law for the construction of the Richmond drain to provide an additional outlet for the waters of the Long-marsh to Cedar Creek, and that by an award under an arbitration and agreement come to with the township of Colchester North, an embankment, about three feet high and about three-quarters of a mile in length from above the McLean drain around the elbow or turn easterly to Cedar Creek, was erected on the north side of the Richmond drain for the express purpose of preventing water from the Richmond drain flowing into or being carried therefrom by the McLean drain or overflowing the plaintiff's land or other lands theretofore drained sufficiently by the McLean drain.

6. That the defendants had due notice while constructing this drain that the outlet at Cedar Creek was insufficient, partly owing to the want of sufficient fall, and that the same should be enlarged in order to prevent the water brought down to it from the south overflowing plaintiff's land and other lands in the fifth concession.

7. That the plaintiff was assessed for a cut off by the defendants for the Richmond drain, and was therefore

entitled to have his lands protected from the water coming down the Richmond drain.

8. That subsequent to the award mentioned in the above paragraph 4, and to the making of the said embankment, the defendants caused, or permitted and allowed, a cut to be made in the said embankment at the point where the McLean drain came up to that portion of the embankment separating it from the Richmond drain, thereby causing a large body of water from the said Richmond drain to flow into and surcharge the McLean drain, which it otherwise would not have done in a state of nature, if such cut in said embankment had not been made, thereby overflowing the plaintiff's lands during the years 1889 and 1890 and destroying and injuring the crops on about 50 acres of his land; that the plaintiff's land, after the construction and after the cleaning out on two occasions of the McLean drain, was dry and fit for cultivation until the construction of the Richmond drain and the cutting of the said embankment, whereby the said McLean drain became overcharged as aforesaid.

9. That the plaintiff's crops and lands were damaged by water during the years 1889 and 1890 by waters from the Richmond drain being allowed and permitted to enter the McLean drain, thereby causing an overflow of the latter drain, and that such flooding was not from the skies, and that the lands and crops were so injured was solely due to the waters coming from the Richmond drain as aforesaid.

10. That the McLean drain was ample and sufficient to carry off the waters from the plaintiff's lands if the waters from the Richmond drain had not surcharged it during the years 1889 and 1890.

11. That the defendants were guilty of negligence, 1st, in constructing the Richmond drain, and diverting and carrying water across the 4th concession which

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would not have come there in a state of nature, and providing no sufficient outlet therefor at Cedar Creek, as recommended by their engineer, thereby causing the overflowing of lands in the 5th concession and amongst others those of the plaintiff. 2nd. In cutting or permitting the said embankment to be cut, thereby causing the McLean drain to be connected with the Richmond drain and allowing the waters from the said Richmond drain to flow into and overcharge the said McLean drain, thereby overflowing the plaintiff's lands. 3rd. In bringing down through the Richmond drain such a large volume of water and with such velocity to the 5th concession as to overflow the McLean drain to such a height as to overflow the plaintiff's lands.

12. That the plaintiff has sustained damages in the years 1889 and 1890 by the negligence and wrongful acts of the defendants at the sum of $600, and that he is entitled to recover that sum from the defendants.

Now upon this report it is to be observed, that in so far as the McLean drain is concerned the referee has found, as a mere matter of fact, by the 10th paragraph of his report, that it was ample and sufficient to carry off the waters from plaintiff's lands, if the waters from the Richmond drain had not surcharged it during the years 1889 and 1890, so that as matter of fact the plaintiff's damage is wholly attributable to such surcharging of the McLean drain by the Richmond drain. Then as to the Richmond drain, it is admitted in the plaintiff's statement of claim that the drain was constructed upon plans, specifications and a by-law duly prepared, adopted and passed by the muncipal council of the township of South Colchester under the provisions of the municipal Acts of Ontario in that behalf, and that the plaintiff himself was one of the parties assessed under such provisions in respect of his said

land for the construction of the drain. Then by the 11th and 12th paragraphs it is apparent, that the referee assumed and erroneously assumed a jurisdiction which the order of reference (it having been made merely for inquiry and report to assist and inform the conscience of the court) did not vest in him, in assuming to adjudicate upon and determine the action itself and the sole material issue joined between the parties therein, namely, that the defendants were guilty of the negligence wherewith they were charged in the statement of claim, qualifying however the conclusion at which he had so arrived by basing it upon the reasons stated in the 11th paragraph of his report, the sufficiency of which reasons to support a judgment in the action against the defendants it was for the court in which the action was pending alone to adjudicate upon and determine, as already shown by the judgment of the Court of Appeal in England in the report of the cases cited (1).

Against this report the defendants moved by way of appeal, upon grounds of the reception of improper evidence, the finding being contrary to law and evidence, and several other grounds which I do not think it necessary to set out here, because I think that every material objection taken before us on this appeal to the plaintiff's right to recover in the action was open to the defendants upon the plaintiff's motion for judgment which came on for hearing in the Divisional Court of Queen's Bench upon the same day as the above motion of the defendants by way of appeal from the referee's report.

Upon the 20th May, 1893, judgment was rendered in the Divisional Court upon both of the said motions as follows, so far as is material:

Upon motion made on the 26th day of November, 1892, unto this court, on behalf of the plaintiff for judgment herein, upon and in ac-

(1) 3 C. P. D. 142.

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cordance with the report made by Frank E. Marcon, Esq., referee herein, dated 17th day of February, 1892, and filed the 5th day of September, 1892, and upon motion also made on the same day, on behalf of the defendants by way of appeal from the said report, and for judgment for the defendants, or that the report be varied, or that the questions referred by the order of reference made in this cause * * * be referred back to the said or some other referee to inquire and report, * * * * * and upon hearing read the pleadings, the judgment bearing date the 24th day of February, 1891,(this is the order of reference) the report of the said referee, the evidence, depositions and exhibits taken and put in at the trial and before the said referee * * * * and upon hearing counsel for both parties, and judgment having been reserved until this day, it is ordered that the said appeal be and the same is hereby dismissed with costs to be paid to the plaintiff by the defendants and that the defendants do pay to the plaintiff the sum of $600 damages with interest from the date of said report, and that the defendants do pay to the plaintiff his costs of this action including the costs of the reference forthwith after taxation thereof.

This judgment upon its face appears to me to show (although it is said to be made upon hearing read the pleadings in the action, the referee's report and the evidence, depositions and exhibits taken or put in at the trial and before the said referee), that the learned judge by whom the judgment was pronounced dealt with the motion for judgment as if the order of reference had vested in the referee jurisdiction to adjudicate upon and determine the action and the issues joined therein, or as if the order had been made under sec. 102 and not under sec. 101 of the Judicature Act.

In so far as the question arising upon the present appeal is concerned it may be admitted, that (no notice of appeal having been served within fourteen days from the filing of the referee's report) that report became absolute at the expiration of the fourteen days as to the mere matters of fact referred to the referee to inquire into and report upon for the information of the court and to enable it to adjudicate upon and determine the action and the issue joined therein, and that

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therefore the defendants were too late in moving against the report, whether for the improper rejection or reception of evidence, or for a reference back to the same or another referee, and so that the motion of the defendants by way of appeal from the report was properly dismissed; but neither that dismissal, nor rule 848, nor rule 40, as amended by 1288, nor any other rule, had the effect of extending the jurisdiction of a referee to whom a reference was made under sec. 101 of the Judicature Act one iota beyond what was contained in that section itself; or relieved the court in which the action was pending from the duty of primarily adjudicating upon and determining the action and the issue therein, or from perusing and considering the evidence for the purpose of determining whether any of the findings of the referee upon any matter affecting the proper determination of the action and the issue therein appeared to be inferences drawn by him from the evidence, or (in case they should so appear to be) of relieving the court from the duty of drawing the inference which should appear to the court to be the proper inference to be drawn, irrespective of the findings of the referee in relation to such matters. Those rules are adopted for carrying into effect the purposes of the Act and do not extend the jurisdiction conferred by the Act.

From the above judgment the defendants appealed to the Court of Appeal for Ontario.

The majority of the learned judges of that court, as appears by their judgment pronounced by the Chief Justice, plainly dealt with the case as if the action and the issue therein had been referred by the order of reference to the referee to adjudicate upon and determine; they seem to have felt themselves bound by the finding of the referee, not only upon the existence of the matters of fact from which he has drawn the infer-

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ence that the defendants were guilty of the negligence charged in the statement of claim, but they treat as conclusive the inference drawn by him that these matters of fact existing constitute the negligence charged by the plaintiff in the action and denied by the defendants, the sole material issue in the action. They thus adopt the finding of the referee, 1st, as in the 1st subsection of the 11th paragraph of his report is found, namely, that the construction of the Richmond drain and the diverting thereby and carrying water across the 4th concession which would not come there in a state of nature, and providing no sufficient outlet at Cedar Creek, as recommended by their engineer, constituted negligence of which the defendants were guilty and for which they were liable to a judgment being rendered against them in this action, although the statement of claim admits that the said Richmond drain was constructed upon plans, specifications and a by-law made, adopted, and passed respectively under the provisions of the Municipal Acts of Ontario in that behalf. Now the finding, that the not providing a sufficient outlet as recommended by their engineer for a drain so constructed constituted negligence for which the defendants were responsible in this action, is plainly an inference drawn as an inference of law, the correctness of which can only be tested by considering the nature of the alleged recommendation of the engineer and the time of its being made. Mr. Justice Burton, who dissents from the judgment of the majority, points out that the nature of the recommendation, and the time of its being made, were such that it is impossible to hold that negligence of the defendants is a just, proper and legal inference to be drawn from the facts from which it was drawn, and indeed there can, I think, be no doubt upon this point, for the matters of fact upon which the referee proceeded in drawing this in-

ference of negligence were all before the court for their consideration upon the question whether the negligence of the defendants was or was not a proper and legal inference to be drawn from them, and these facts appear to have been as follows:—

Upon the 8th August, 1885, the engineer reported to the council of the defendant municipality that the contractor on the contract for the Cedar Creek outlet of the drain had performed the work in conformity with the by-law, and that he was entitled to the full amount of the contract money under the terms of his contract, except one item of extra work, a certificate for which would be given when completed.

Then upon the 2nd November, 1885, the same engineer made a report to the council recommending them to pass another by-law for certain work, which he suggested should be performed at a cost of $2,500, whereby the drain as then almost completely constructed under the by-law passed for its construction would, in the opinion of the engineer, be much improved.

Then upon the 2nd January, 1886, he made another report to the council, whereby he reported that the contractor for the construction of the Richmond drain (the same contractor as was named in his report of the 8th August, 1885) had performed all the work on the Richmond drain, "required by the plans and specifications for the construction of the same as adopted by the council of the township," and in this report he adds: "The drain in the whole is a success and I think will eventually fulfil all the advantages claimed for it." How, under these circumstances, the non-action of the council upon their engineer's report of the 2nd November, 1885, can be held in law to constitute negligence of the defendants in the construction of the Richmond drain, which was then already almost completed and by the 2nd November, 1886, was actually completed as

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required by the plans and specifications for the construction of the same as adopted by the council, is, I confess, to my mind inconceivable. The majority of the Court of Appeal appear to me to have construed this part of the referee's report as a finding, that in point of fact the defendants left the outlet of the drain in Cedar Creek insufficient, contrary to the recommendation of their engineer, as appearing in the plans and specifications adopted by the by-law for the construction of the drain, and to have considered themselves bound by that finding so construing it, but with great deference this view cannot be supported either in point of law or as being stated in the referee's report as a matter of fact so found by him to be. Then again, 2nd, the judgment of the majority of the Court of Appeal approves of the inference of negligence of the defendants as charged in the statement of claim as a fair and legitimate inference from the matter stated by the referee in the second subsection of the 11th paragraph of his report as his second reason for the finding the defendants to be guilty of negligence and liable to the plaintiff therefor in this action, namely, that the defendants " in cutting or permitting the said embankment to be cut, thereby causing the McLean drain to be connected with the Richmond drain and allowing the waters from the said Richmond drain to flow into and overcharge the said McLean drain, thereby overflowing the plaintiff's land." As to this reason for holding the defendants to be liable in this action as for the negligence with which they are charged by the plaintiff in his statement of claim, it is to be observed that the embankment was not, and in point of fact was not claimed, or found, to have been, part of the plan adopted for the construction of the Richmond drain or of the McLean drain ; on the contrary it is by the statement of claim stated to have

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been, and by the referee's report found as matter of fact to have been, erected in pursuance of an agreement entered into between the municipalities of North and South Colchester, to which agreement it is not found or suggested that the plaintiff was a party, and the object of its erection was to try and prevent thereby damage to lands in North Colchester which the Richmond drain after its completion was found to be insufficient to prevent. Whether the defendants' cutting or permitting to be cut an embankment so erected, assuming it to be established as matter of fact that they did so, constituted negligence of the defendants as charged against them in the plaintiff's statement of claim, or indeed any wrong giving to the plaintiff a right in law to recover in this action, or in any action, involves a question of law which cannot by possibility be determined without reference to the evidence in relation to the erection of the embankment and to the alleged cutting or permitting the same to be cut, all of which was before the courts, both the Divisional Court and the Court of Appeal, and thereby it appears that the embankment was erected without any authority in law for its being erected across the land of one Hiram Walker, who was one of the persons assessed for the construction of the Richmond drain, and that by its erection he was prevented from draining his land, as he had a right to do, into the said drain, and for that reason he, in successful assertion of his right in law so to do, cut through the embankment upon his own land, whereby and by the washing away of a part of the embankment as stated in the plaintiff's statement of claim, by force of the waters in the Richmond drain in heavy rains, that drain became again connected with the McLean drain, as by the original design and plan for the construction of the Richmond drain was intended and effected, as indeed sufficiently appears in the plaintiff's

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statement of claim. Now it is impossible to hold in point of law, that, assuming it to be established as matter of fact that the defendants did cut through such an embankment, their so doing could be pronounced to be negligence, either in the construction of the Richmond drain or of the embankment itself, for which the defendants would be liable in this action, or that their so doing would constitute any actionable wrong whatever to the plaintiff.

Then as to the third reason given by the referee for the conclusion arrived at by him, as stated in the 11th paragraph of his report, namely, that the defendants were guilty of the negligence charged against them in the plaintiff's statement of claim, the judgment of the majority of the Court of Appeal does not deal with it in particular, but in dismissing the appeal of the defendants from the judgment of the Divisional Court, which proceeded upon the adoption of the referee's report, they seem also to have adopted that report *in omnibus*, both in point of law and of fact, yet it cannot, I think, admit of a doubt that the referee's third reason is no more than finding, as matter of fact by implication, that the Richmond drain, constructed according to its design and plan of construction, brought down such a volume of water and with such velocity into the 5th concession as to overflow the plaintiff's land therein, which is neither the cause of action alleged in the statement of claim, nor is it an actionable wrong done to the plaintiff by the defendants, so that it is impossible that the judgment in favour of the plaintiff in this action can be sustained for the reason stated in the third subsection of the 11th paragraph of the referee's report; and upon the whole, for the reasons I have given, I am of opinion that the judgment of the Divisional Court in favour of the plaintiff cannot be sustained, and that this appeal must be allowed with costs and

judgment be ordered to be entered for the defendants in the Divisional Court in the action with costs.

The enormous delay which has taken place, and the frightful expense which has been incurred in the prosecution and defence of this action, is deplorable in the extreme, but I cannot help saying that I think this delay and expense have been due to an inconsiderate reference to a referee of matters which, in view of the statements made in the statement of claim, and the single matter of defence pleaded in answer thereto upon which issue was joined, now appear to have been very simple, and which, if tried before a judge, with or without a jury, could have been disposed of in a very short time and at a comparatively insignificant expense. The reference to a referee has, on the contrary, resulted in the production of a printed volume containing upwards of 450 pages of evidence, of which I think it may safely be said that nine-tenths is irrelevant and never could have been admitted, if the issue in the action had been tried before a judge with or without a jury.

As to the case of *Freeborn* v. *Vandusen* (1), upon the authority of which the learned judge of the Divisional Court proceeded, it is to be observed, that the matters referred there were of a very different character from those referred by the order in the present case; they were not in truth matters referable under section 101 at all, although by what appears to have been a singular mistake the first paragraph of the order refers to that section. It must be obvious, that such reference to the section could not make the reference to be within the section, if the essential matter referred was of a nature not within the section, which was the case in *Freeborn* v. *Vandusen* (1). The action was to remove a defendant, who had been appointed by the court jointly with the

(1) 15 Ont. P. R. 264.

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plaintiff a trustee of an estate, from his office as such trustee, and for an account of his dealings with the estate. The court made an order the second paragraph of which contained the whole gist and substance of the order, which was in the nature of a decretal order and comprehended within itself a judgment upon every matter involved in the action, and a reference to the master as in the ordinary case of a reference after judgment, to carry it into effect. The paragraph ordered as follows:

> That it be referred to the master to take the accounts of the defendant, and to appoint a trustee to act with the plaintiff, James S. Freeborn, in the place and stead of the defendant, who was to be removed upon the new appointment, such appointment not to take effect until confirmation of the report.

Now plainly such a reference was not at all one coming under section 101, and, with deference, it was in my opinion quite a mistake in such an order, which involved in itself a judgment upon the whole matter involved in the action, to have inserted anything in relation to section 101, as was done in the first paragraph of the order.

Now the learned Chancellor's judgment, that the master's report upon the matter so as above referred was to be regarded in the same light, and to have the same effect, as any other report of the master upon a reference after judgment, to give effect to the judgment, that is a truism which may readily be conceded, and it must I think be to the matters so expressly referred by the order that the judgment of the Chancellor is to be construed as applying and not to the case of a simple regular reference merely for inquiry and report under section 101.

If the learned Chancellor had ruled that in the case of such a simple reference like the present under section 101, if the referee should assume to report upon

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and to find and determine matters beyond the scope of the reference, and should assume the functions of a judge by affecting to adjudicate upon and determine the action and the issues therein, as was done in the present case, that such report is to be regarded in the same light, and of like effect as the report of a master upon a reference after judgment, or as a report upon a reference made under section 102, and should be binding upon the court, I must say that, in my opinion, such a judgment would have been quite erroneous and should be reversed as subversive of the plain intention of the legislature in enacting the clauses of the Judicature Act in relation to the different kinds of references thereby authorized; but the special character of the reference in *Freeborn* v. *Vandusen* (1) removes all necessity of construing the Chancellor's judgment therein as having any application to the case of a simple reference like that in the present case for inquiry merely and report for the information of the court under section 101, to aid the court in rendering judgment on the action.

SEDGEWICK J.—I concur in the judgment of the Chief Justice. The appeal should be dismissed.

KING J.—I am of opinion that this appeal should be dismissed with costs for the reasons stated in the judgment of the Chief Justice.

Appeal dismissed with costs.

Solicitor for the appellants: *A. H. Clarke.*

Solicitor for the respondent: *D. Rogest Davis.*

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(1) 15 Ont. P. R. 264.

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*April 1, 2.

*June 26.

LENORE LUNDY AND OTHERS (PLAINTIFFS) ..... } APPELLANTS;

AND

JOSEPH LUNDY (DEFENDANT) .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Will—Devise—Death of testator caused by devisee—Felonious act.

No devisee can take under the will of a testator whose death has been caused by the criminal and felonious act of the devisee himself, and in applying this rule no distinction can be made between a death caused by murder and one caused by manslaughter. Taschereau J. dissenting.

APPEAL from a decision of the Court of Appeal for Ontario (1), reversing the judgment of the Divisional Court (2), in favour of the plaintiffs.

The action in this case was brought to obtain a declaration of title to land and the only question raised on the appeal was as to defendant's title, he claiming under a deed from his brother who was devisee of the land under his wife's will and who had been convicted of manslaughter and sentenced to imprisonment for killing his wife. The Court of Appeal held that the brother did not forfeit his devise by the crime as the conviction for manslaughter negatived an intent to kill.

S. H. Blake Q.C. for the appellants. There is no distinction between murder and manslaughter in a case like the present. *Riggs* v. *Palmer* (3); *New York Mutual Co.* v. *Armstrong* (4).

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

(1) 21 Ont. App. R. 560 sub nom. *McKinnon* v. *Lundy*.
(2) 24 O. R. 132.
(3) 115 N. Y. 506.
(4) 117 U. S. R. 591.

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The principle upon which a devise fails in such a case is that one cannot profit by his own wrong. *Cleaver* v. *Mutual Reserve Fund Life Association* (1).

Aylesworth Q.C. and *Murphy* for the respondent. A devise will not lapse in a case such as this unless the devisee had the intention of hastening the operation of the will. Here the crime was manslaughter which negatives felonious intent. Harris on Criminal Law (2); and see *Clark* v. *Hagar* (3).

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

THE CHIEF JUSTICE.—The facts are fully set forth in the judgment of Mr. Justice Ferguson, which has been reversed by the Court of Appeal.

In the view I take it will not be necessary to consider the question of the construction of the will, which was one of the subjects discussed in the courts below.

I am of opinion that Mr. Justice Ferguson was entirely right in holding that the respondent, Joseph Lundy, who claims as assignee of James B. Lundy, is not entitled to the benefit of a devise contained in the will of Clementina, the wife of James B. Lundy, made in favour of her husband. The testatrix was killed by her husband, who was convicted of manslaughter therefor and sentenced to twenty years imprisonment. Subsequently to the commission of the felony for which he was so convicted and condemned James B. Lundy conveyed the land now in question, which had been devised to him by his wife, to his brother, the present respondent, Joseph Lundy.

Mr. Justice Ferguson was of opinion, that no devisee could take under the will of a testator whose death had been caused by the criminal and felonious act of

(1) [1892] 1 Q. B. 147. (2) 5 ed. p. 197.
(3) 22 Can. S. C. R. 510.

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the devisee himself, and that in applying this rule no distinction can be made between a death caused by murder and one caused by manslaughter, both offences having been formerly felonies.

The Court of Appeal drew a distinction between murder and manslaughter, and held that whilst the devisee would forfeit any gift under the will of the person whose death he had caused by an act which amounted to the crime of murder, he still might take in the case of manslaughter.

I cannot agree in the conclusion of the Court of Appeal, nor in the reasoning by which that conclusion was arrived at. The reasoning of the court would seem to me rather to apply to a case of justifiable or excusable homicide than to a case of manslaughter. The principle upon which the devisee is held incapable of taking under the will of the person he kills is, that no one can take advantage of his own wrong. Then surely an act for which a man is convicted of manslaughter and sentenced to a long term of imprisonment was a wrongful, illegal and formerly (when felonies were recognized as forming a particular class of offences) a felonious act. I can see no principle on which to rest the decision of the Court of Appeal, and I can find no authority in support of it. On the contrary, the case of *Cleaver* v. *Mutual Reserve Fund Life Association* (1), proceeds upon reasons which admit of no such distinction as has been made by the judgment appealed against in the present case. That was itself a case of murder, but the Lord Justices lay no stress on the crime being a premeditated one, and indeed Lord Justice Fry uses language which indicates, as the ground of his decision, a principle which would include all wrongful acts, not merely felonies but misdemeanours, and this sound

(1) [1892] 1 Q.B. 147.

principle of universal jurisprudence the Lord Justice states in the following language:

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> No system of jurisprudence can with reason include among the rights which it enforces rights directly resulting to the person asserting them from the crime of that person. If no action can arise from fraud, it seems impossible to suppose that it can arise from felony or misdemeanour.

Taking the principle thus expounded as my *ratio decidendi*, I am of opinion that the judgment of Mr. Justice Ferguson was right and must be restored.

The appeal is allowed with costs.

TASCHEREAU J.—I would dismiss this appeal. I adopt the reasoning of the learned judges of the court *a quo* who unanimously concurred in the opinion that this case does not fall under the maxim that *nullus commodum capere potest de injuriâ suâ propriâ*, no one can profit by his own wrong, or get a benefit from his criminal act. The fallacy of the appellants' case is, it seems to me, apparent. They assume that it is from the homicide that Lundy, the husband, derives, or attempts to derive any benefit. Now, first, I do not see any evidence of it in the record. It may be that his wife, after being wounded, lived for weeks or months, in a perfect state of ability to make a new will, and if that was so, I do not see upon what principle her previous will in favour of her husband would not be perfectly valid. For it cannot be denied, I presume, that a will by any one in favour of the person who killed him is good, if made in the interval between the wound and the death. And, if she could have altered her will and did not do it, she must have persevered in her intention to bequeath her estate to her husband, though she knew his crime. So that the appellants here cannot succeed except upon the assumption that she did not have time to change her

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will after being wounded, and that, for there is no evidence of it, I do not see why we should assume.

But leaving that aside, and taking it for granted that she was killed on the spot, the appellants want us to assume that she would have altered her will if she could have done so. Upon what principle of law we can so assume I fail to see. She did not revoke her will, and how can we say that she would have revoked it had she been able to do it?

A life insurance fund is on a different footing. There it is the death that creates the fund, if I may use that expression. But here it is not rights resulting directly from his crime, to use the words of Fry L. J. in the Cleaver case, that Lundy gets under his wife's will.

If Lundy, the husband, had died before trial or conviction, and left a will, would not his will be good and valid to transmit his wife's estate that he came to under her will?

Under the civil law the rules on the subject are quite different. Articles 610 and 893 of the Quebec code, and 727 of the Code Napoléon re-enact the common law upon it. Demolombe (1). But, under the English law, the appellants have failed to convince me that there is room here for the application of the doctrine they invoke.

And, it may not be amiss to remark, the rule of the civil law is not applicable to a will based on the maxim that *nemo ex suo delicto meliorem suam conditionem facere potest*, but on the presumption that the deceased would have disinherited his slayer or revoked his will, if he had had time to do so, and on grounds of public policy.

The Cleaver case does not help the appellants' contentions. It is a totally different case. The learned judges in the Court of Appeal have pointed out the

(1) Success. Vol. 1, nos. 217 *et seq.*

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distinctions between the two cases. The American cases cited appear to be somewhat favourable to the appellants' contentions, but they are not law here, and were it necessary, they might easily be distinguished from this one.

One additional remark. This case is governed by the law as it stood before the Criminal Code, art. 965. And though there was no "inquest of office, or office found" have the appellants a *locus standi?* They have no right to the personal estate, I assume. *Reg.* v. *Whitehead* (1). However, these points are not here in issue, and have not been argued.

Appeal allowed with costs.

Solicitors for the appellants: *Guthrie & Watt.*

Solicitors for the respondent: *T. & W. Morphy.*

(1) 2 Moody C. C. 181.

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*Mar. 27.
*June 26.

JAMES J. BELL AND J. V. TEETZEL..APPELLANTS;

AND

WALTER H. WRIGHT AND OTHERS.RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Solicitor—Lien for costs—Fund in court—Priority of payment—Set-off—Jurisdiction of master—General directions.

In a suit for construction of a will and administration of testator's estate, where the land of the estate had been sold and the proceeds paid into court, J. J. B., a beneficiary under the will and entitled to a share in said fund, was ordered personally to pay certain costs to other beneficiaries.

Held, reversing the decision of the Court of Appeal, that the solicitor of J. J. B. had a lien on the fund in court for his costs as between solicitor and client in priority to the parties who had been allowed costs against J. J. B. personally.

Held also, that the referee before whom the administration proceedings were pending had no authority to make an order depriving the solicitor of his lien not having been so directed by the administration order and no general order permitting such an interference with the solicitor's *primâ facie* right to the fund.

APPEAL from a decision of the Court of Appeal for Ontario (1), reversing the ruling of Rose J. that the solicitor of J. J. Bell had a prior lien on the fund in court for his costs.

The only question for decision on the appeal was whether or not the appellant, Teetzel, as solicitor of James J. Bell had a first lien for his costs as between solicitor and client on a fund in court arising from the sale of land belonging to the estate in administration of which, and in litigation to ascertain the construction of the will of the former owner, the said

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

(1) 16 Ont. P. R. 335.

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costs arose. The prior lien was contested on the ground that J. J. Bell had been ordered to pay costs personally to other parties to the litigation and that the lien could only attach to the balance remaining after these other parties were paid.

The referee before whom the administration proceedings were pending decided against the solicitor's priority. His decision was reversed by Mr. Justice Rose, but restored by the Court of Appeal.

Armour Q.C. and *McBrayne* for the appellants. For the purposes of the lien the fund in court is in the same position as if it were in the solicitor's possession. *Savage* v. *James* (1).

The solicitor has a lien in priority to his client and must have priority over other parties. *Haynes* v. *Cooper* (2).

We cannot be deprived of our lien unless *Ex parte Cleland* (3) is overruled.

Lefroy for the respondents the Wrights, and *Beck* for Houghton and Clarke, referred to *Pringle* v. *Gloag* (4); *Canadian Bank of Commerce* v. *Crouch* (5); *Brown* v. *Nelson* (6).

The judgment of the court was delivered by:

THE CHIEF JUSTICE.—I am of opinion that this appeal must be allowed, and the judgment of Mr. Justice Rose, who reversed the decision of the referee, must be restored.

In the first place, the referee had no jurisdiction to make the order or ruling which he states in his certificate, depriving the solicitor of James J. Bell of his lien for costs, and of his right to payment in virtue of that lien out of the share of his client payable under the ad-

(1) Ir. Rep. 9 Eq. 357.
(2) 33 Beav. 431.
(3) 2 Ch. App. 808.
(4) 10 Ch. D. 676.
(5) 8 Ont. P. R. 437.
(6) 11 Ont. P. R. 121.

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ministration decree. The authority of the referee to make such an order must be derived either under the administration decree or under some general order. I find no such direction in the administration order made by Mr. Justice Ferguson, which was reinstated by the judgment of this court and under which the referee was proceeding. Neither do I find any general order authorizing such an interference with the *primâ facie* right of the solicitor to a fund which he had recovered for his client. The parties should have asked that the payment of costs should be provided for in this way by the decree. The general directions as to the powers and functions of the master, or referee, contained in the general order defining the jurisdiction of the master in taking accounts, does not, in my opinion, extend to a case like the present. It is not within the general direction to make just allowances.

The parties who are entitled to recover costs against James J. Bell are in no other or better position than any other creditors of his, and general creditors could not enforce an execution against this fund in court, which is just as much in the solicitor's hands as if it had been paid to him directly and personally instead of into court, except by way of execution by means of a charging or stop order. Had the fund actually gone into the solicitor's hands, it is out of the question to say that it could be taken from him by a judgment creditor to the prejudice of his lien.

Whatever general observations of learned judges in some of the cases cited may seem to discountenance the view which I take, Lord Cairns L. J., in his considered judgment in *Ex parte Cleland, In re Davies* (1), points out, that to order a set off in such a case as that before him, and in such a case as the present, would be to disregard that principle of

(1) 2 Ch. App. 808.

mutuality which is the essential basis of set off. In the present case, as soon as the fund in court was recovered a lien was by operation of law immediately attached to it in favour of the solicitor of James J. Bell. Therefore, if we are to regard this as a case of set off, it would be a set off against money in the hands of the court due to James J. Bell and his solicitor conjointly of money due by James J. Bell alone. It cannot be said that the solicitor's lien is subject to the rights of all creditors of the client before any set off is ordered. Take the simple case of a debt recovered in an action at law, the money being paid into the hands of the solicitor of the plaintiff, no creditor can touch that money until the solicitor's lien is first satisfied. Then, as I have before stated, the rights of a solicitor as to money in court are exactly the same as if it was in his own hands (1).

In the case of *Ex parte Cleland* (2), Lord Cairns gives expression to the principle I have propounded in the following short passage in his judgment:

> The debt or claim, therefore, for costs is not the debt or claim of Cleland alone, it is in the view of a court of equity, and upon the principles of a court of equity, a debt or claim which has been assigned or encumbered, and the persons entitled to it are not Cleland alone, but Cleland and his solicitor, the claim of the solicitor being paramount to that of Cleland. That consideration, in my opinion, renders it impossible that the costs can be set off against the debt.

I should say that this case of *Ex parte Cleland* (2) does not appear to have been cited to the Court of Appeal.

This, it is true, is not strictly speaking a case of set off, but one in which execution against, or satisfaction out of, a fund is sought by creditors in priority to the solicitor, who recovered it, but viewed in that light, whilst the principle applied by Lord Cairns is also applicable here, its application is *a fortiori*.

(1) *Savage* v. *James* Ir. Rep. 9 Eq. 357. (2) 2 Ch. App. 808.

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The appeal must be allowed and Mr. Justice Rose's order of the 8th of May, 1894, must be restored with costs to the appellants both here and in the Court of Appeal.

Appeal allowed with costs.

Solicitors for the appellants: *Teetzel, Harrison & McBrayne.*

Solicitors for the respondents the Wrights: *Lefroy & Boulton.*

Solicitors for the respondents Houghton and Clarke: *Beck & Code.*

LOOP SEWELL O'DELL (PLAINTIFF) ... APPELLANT; 1895

AND *May 7.
*June 26.

M. L. L. GREGORY (DEFENDANT).....RESPONDENT.

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

Appeal—Jurisdiction—Future rights—R. S. C. c. 135, s. 29 (b)—56 V. c. 29 (D).

By R. S. C. c. 135 s. 29 *(b)*, amended by 56 V. c. 29 *(D)* an appeal will lie to the Supreme Court of Canada from the judgments of the courts of highest resort in the province of Quebec, in cases where the amount in controvery is less than $2,000, if the matter relates to any title to lands or tenements, annual rents and other matters or things where the rights in future might be bound.

Held, that the words "other matters or things" mean rights of property analogous to title to lands, &c., which are specifically mentioned and not personal rights; that "title" means a vested right or title already acquired though the enjoyment may be postponed; and that the right of a married woman to an annuity provided by her marriage contract in case she should become a widow is not a right in future which would authorize an appeal in an action by her husband against her for *séparation de corps* in which if judgment went against her the right to the annuity would be forfeited.

MOTION to quash appeal for want of jurisdiction.

The action in the case was brought by the appellant for *séparation de corps* from his wife, the respondent. By the Superior Court the separation asked for was granted, but on appeal to the Court of Queen's Bench that decision was reversed and the action dismissed. The plaintiff then sought to appeal to this court and a motion was made to quash such appeal.

Fitzpatrick Q.C. for the motion.

McCarthy Q.C. and *Lemieux* Q.C. contra.

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

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The Chief Justice.

The judgment of the court was delivered by:

THE CHIEF JUSTICE.—This action was instituted in the Superior Court by the present appellant against his wife, the respondent, for *séparation de corps*. The cause was heard by the Honourable Chief Justice of the Superior Court, Sir Louis Casault, who rendered judgment granting the conclusions taken by the appellant. From this judgment the respondent took an appeal to the Court of Queen's Bench, which court allowed the appeal, reversed the judgment of the Superior Court, and dismissed the action. From that judgment the present appeal has been taken. This the respondent has moved to quash for want of jurisdiction.

Appeals to this court from the province of Quebec are regulated by section 29 of the Supreme Court Act. Neither in this section, nor in any other part of the Act, is there any specific reference to actions of this class.

The first paragraph of section 29 prohibits appeals when the matter in controversy does not amount to $2,000. Here the matter in controversy is not in the nature of a pecuniary demand. It is true, that the respondent's claim to certain furniture specified in an inventory attached to the marriage contract of the parties (under which they were married with a stipulation that they should be separate as to property) might incidentally be affected by the result of the action if that should be ultimately decided against the respondent. It is also true, that her contingent right to an annuity provided by the marriage contract as a provision for the respondent during widowhood in case she should survive her husband, would also be forfeited by a judgment adverse to her. The jurisdiction cannot, however, be founded on the claim relating to the furniture, for the reason that it does not appear to be of the value of $2,000.

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Subsection (*b*) of section 29 is as follows:

> Unless the matter, if less than that amount ($2,000), relates to any fee of office, duty, rent, revenue or any sum of money payable to Her Majesty, or to any title to lands or tenements, annual rents and other matters or things where the rights in future might be bound.

If an appeal is admissible in the present case the jurisdiction can only be referred to something contained in this sub-clause. The first part of the subsection relates to appeals in the case of claims by the Crown. It is out of the question to say that this appeal involves any title to land, or to any annual rent. There only remains the words "and other matters or things where the rights in the future might be bound." I cannot hold that this confers jurisdiction. The other matters or things referred to must, on the ordinary rule of construction *noscitur a sociis*, be construed to mean matters and things *ejusdem generis* with those specifically mentioned. Then these are "title to lands and tenements and annual rents." We must therefore interpret the words "other matters and things" as meaning rights of property analogous to title to lands and annual rents, and not personal rights however important. Nothing of this kind is however involved here. I take the word "title" to mean a vested right or title, something to which the right is already acquired, though the enjoyment may be postponed. Then there is no vested right to the annuity during widowhood in case the respondent should survive her husband, that is an eventual right which might or might not come to be acquired by the respondent, according to the happening or not happening of the contingency. I conclude therefore that there are no matters or things involved in the action *ejusdem generis* with those particularly enumerated.

Had there been some actual right or title to lands or rents, or other similar matters or things, incidentally

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involved in the action, I should think it very doubtful if even that ought to have been sufficient to support the jurisdiction. To hold that there was jurisdiction for that reason in such a case as the present would be making an appeal, in a most important action in which the legislature had not thought fit to confer jurisdiction by a direct enactment, depend on subordinate incidents, in other words, invert the usual order which requires that the accessory should follow the principal.

It is sufficient, however, for the present purpose to say that the appeal does not come within any of the provisions of section 29, inasmuch as the action does not involve an amount equal to $2,000, nor does it relate to any matters or things in the nature of vested property rights, which alone and not personal rights are intended by section 29 subsection (*b*) to be made the test of the right to appeal.

The appeal is quashed with costs.

Appeal quashed with costs.

THOMAS LIGGETT (DEFENDANT) .....APPELLANT; 1895

AND *May 9.
*June 26.

HENRY HAMILTON (PLAINTIFF) .....RESPONDENT.

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

Partnership—Dissolution—Winding-up—Extra services of one partner—Contract to pay for.

If the business of winding up a partnership concern is apportioned between the partners and each undertakes to perform the share allotted to him, one of them cannot afterwards claim to be paid salary or other remuneration merely for the reason that his share of the work has been more laborious or difficult than that performed by his co-partner, in the absence of any express agreement to that effect or one to be implied from the conduct of the parties.

APPEAL from a decision of the Court of Queen's Bench for Lower Canada (appeal side) affirming the judgment of the Superior Court in favour of the plaintiff.

The material facts of the case are sufficiently set out in the above head-note.

Davidson Q.C. for the appellant.

Geoffrion Q.C. for the respondent.

The judgment of the court was delivered by :

THE CHIEF JUSTICE.—I am of opinion that this appeal must be dismissed. The parties were formerly in partnership in a business which was carried on in two departments, the carpet branch and the fancy goods branch. This partnership was dissolved and the appellant, who was to continue the carpet branch of the

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

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business, undertook the winding up of that portion of the partnership affairs, and the respondent the winding up of the fancy goods part, which business he was to continue.

The agreement for winding up was verbal. Nothing was said expressly about remuneration for extra services. Now the appellant seeks to make the respondent liable for salary and commission, alleging that his services in the winding up were much more laborious and onerous than those of the respondent.

It is a rule of the law of partnership, that a partner cannot charge for extra services rendered during the continuance of the partnership, but this rule does not apply to extra services performed after a dissolution, in closing up the affairs of the firm (1). By extra services, however, I understand to be meant work more than the partner claiming the allowance undertook to perform. If the business of the winding up is apportioned between the partners and each undertakes to perform the share allotted to him, I take it to be clear that one of them cannot afterwards claim to be paid salary or other remuneration merely for the reason that his share of the work has been more laborious or difficult than that performed by his co-partner. The question here is therefore purely one of fact: Was there an agreement or understanding that the appellant should give his time and attention to the matters which he actually did attend to and for which he now claims to be paid? No such agreement in express terms is proved, but it is not necessary that there should have been an express agreement; if one can be implied from the conduct of the parties that is enough. In the present case I think it is undoubtedly to be inferred that the appellant did take upon himself the exclusive management of all that portion of the business relating

(1) Lindley, 5 ed. p. 381.

to the carpet branch, and, that being so, he must be understood as having so undertaken it on the implied understanding that he was to do this gratuitously. It was no doubt an advantage to the appellant, who was to continue the carpet business, that he should have the sole control of all the relations with the customers who had dealt with the old firm in that department. Then the financial management for which the appellant claims extra remuneration was to a great extent connected with the carpet branch, and at all events, I think the appellant must be taken to have agreed to attend to all the financial business connected with the winding up. If this was not his intention he should have expressly stipulated for remuneration. I cannot see any error in the judgment appealed against. The Court of Queen's Bench, acting on the rule *de minimis non curat lex*, refused to allow the appeal for the $25, part of the arbitration fees, and *a fortiori* we ought to do the same.

The appeal must be dismissed with costs.

Appeal dismissed with costs.

Solicitors for appellants: *Davidson & Ritchie.*

Solicitors for respondents: *Geoffrion, Dorion & Allan.*

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*Feb. 22, 23.

*May 6.

PETER SARSFIELD MURPHY (PLAINTIFF) ..... } APPELLANT;

AND

GEORGE BURY (DEFENDANT) ..... RESPONDENT.

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

Signification of transfer—Condition precedent to right of action—Partnership transaction in real estate—Act of resiliation, effect of.

The signification of a transfer or sale of a debt or right of action is a condition precedent to the right of action of the transferee or purchaser against the debtor, and the necessity of such signification is not removed by proof of knowledge by the debtor of the transfer or sale.

The want of such signification is put in issue by a *défense au fonds en fait.*

M. and B. entered into a speculation together in the purchase of real estate the title to which was taken in the name of B. and the first instalment of purchase money was acquired from a brother of M. to whom B. gave an obligation therefor and transferred to M. a half interest in the property. As each subsequent instalment of purchase money fell due a suit was taken by the vendor against B. and the judgments in such suits as well as the obligation for the first instalment were transferred to M. but without any signification in either case. Subsequently by a formal act of resiliation B. and M. annulled the transfer of the half interest in the property made by B. to M. and formally relieved M. of all further obligation as proprietor *par indivis* for further advances toward the balance due the vendor and threw the burden of providing it entirely upon B.

Held, affirming the judgment of the Court of Queen's Bench for Lower Canada (appeal side), that the act of resiliation and the replacement of the title which it effected into the name of B. was a virtual abandonment on the part of M. of all previous investments made by him in the property or in the claims of others against that property of which he may have taken transfers.

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

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judgment of the Superior Court at Montreal (Gill J.), by which an incidental demand made by the appellant Murphy was dismissed.

The difficulties which gave rise to the litigation between the parties originated in two distinct transactions or real estate speculations, one called "the Barsalou transaction," on lot 615 in St. Mary's Ward, in the city of Montreal, and the other known as the "Hall transaction" and relating to property at the corner of St. Catherine Street and Papineau Road in the same city.

In his factum and argument before the Supreme Court, the appellant abandoned that part of his claims which related to the Barsalou transaction, and confined his demand to the sums due him by the respondent upon the Hall property venture.

The facts of the case, which are somewhat complicated, are very clearly set out in the following reasons given by the Honourable Mr. Justice Hall of the Court of Queen's Bench, when delivering the judgment of that court:

"The two parties to this litigation were possessed of certain rights and interests in a property known as part of lot no. 615 in St. Mary's Ward, in this city. The title, which prior to 18th November, 1882, had been standing in the name of Bury, was transferred on that day to Murphy, the appellant, and the respective rights of the parties in the property were determined and expressed by means of a written memorandum signed by both. * * * * * * The property was sold by Murphy for the sum of $13,382.60, most of which remained in the purchaser's hands, under stipulations and conditions which Bury considered only as concerted methods on the part of Murphy to deprive him of his rights in the proceeds. Bury thereupon took an action against Murphy and the purchaser, asking that

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the imputation of payment in the deed be declared fraudulent, and that the purchaser be ordered to retain all the balance of purchase money in his hands until the court should determine the precise amount of Bury's interest therein. A subsequent action was taken by Bury against Murphy, for an account. The first action was dismissed in the Superior Court upon the ground that Bury, having trusted Murphy with his interest in the property for the purpose of selling it, had no longer an actual right of property in the land, or its proceeds, but only a recourse against Murphy in the nature of an action to account. That judgment was confirmed by the Court of Queen's Bench upon the ground that if Bury's right were a '*jus ad rem*,' the '*motif*' of the judgment was correct, while if it were a '*jus in re*,' Bury had no right, under the procedure of this province, to attach even his own property once out of his possession, without an attachment *saisie revendication*, or *saisie-arrêt* based, in either case, upon affidavit, and hence that his action should, under any circumstances, be dismissed. The Supreme Court, considering apparently that the only point in litigation was the question as to whether Bury's right was a '*jus ad rem*' or a '*jus in re*' ranged itself upon the side of the latter contention and reversed the judgment, without reference to the point of procedure upon which this court had principally relied (1). In the meantime Murphy, after first disputing his liability, had eventually been condemned to render the account called for by this second action, had rendered it and had been found liable toward Bury in the sum of $5,343 under the terms of the '*contre-lettre*.' In connection with and diminution of his account, Murphy had brought forward certain claims against Bury to the extent, including interest, of $15,593.30 principally arising out of another transac-

(1) See 22 Can. S. C. R. 137.

tion. These claims had been ruled out by the court as inadmissible under the order to render an account in connection with Murphy's *contre-lettre*, but his right had been reserved to urge the same claims by means of an incidental demand, a right of which he hastened to avail himself. That incidental demand having been contested by Bury was eventually dismissed by the judgment from which the present appeal has been taken. The items of which it is composed are based upon transactions relating to two separate properties, in connection with which these two parties Bury and Murphy had most intimate and complicated relations extending over a long term of years, one called the 'Hall property' at the corner of St. Catherine Street and Papineau Road, the other called 'lot 615' St. Mary's Ward, already referred to. These properties were acquired in the year 1874, in the name of Bury, but it is apparent and is indeed admitted that the transactions were speculations in which Bury and Murphy were equally interested. It is alleged by Bury that the terms of the agreement between them were that he, Bury, should devote his attention to the selection, purchase, management and sale of these properties while Murphy should provide the capital necessary for securing and holding them until sales should be effected, a delay which both expected to be only temporary, but owing to a collapse in the real estate 'boom,' the speculation proved a protracted burden and in the end a serious loss."

[The learned judge, after dealing with the lot 615 transaction, continued as follows]:

"All the other items of the appellant's incidental demand are based upon the transaction in regard to the Hall property speculation. The title to that property had also been taken in the name of respondent Bury and the first instalment of the purchase money had

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also been acquired in a similar way from P. A. Murphy, the appellant's brother, to whom an obligation for $4,000 was given by Bury. On the succeeding day Bury transferred a half interest in the property to the appellant Murphy who thereby became liable for one-half the amount of the mortgage to his brother, and also for the same proportion of the balance of the purchase money still due to the original vendor Miss Hall. As the instalments of the latter obligation fell due suits were taken by Miss Hall against Bury, with whom alone she had contracted, but as fast as these demands assumed the form of a judgment, the appellant Murphy advanced the requisite amount and took a transfer of them as he did also of P. A. Murphy's obligation against Bury, but without any signification in either case, thereby confirming to a certain extent Bury's pretensions that the appellant undertook the financial burden of carrying the properties as his contribution to the partnership speculation. On the 10th March, 1879, by a formal act the two parties Bury and Murphy annulled the transfer of a half interest in the property which Bury had made to Murphy on the 22nd of July, 1875. This resiliation by its terms formally relieved Murphy of all further obligation as proprietor *par indivis* for further advances toward the balance of about $12,000 still due to Miss Hall and threw the burden of providing it entirely upon Bury.

"What were the liabilities, if any, of Bury to Murphy after this resiliation for advances previously made by the latter in connection with the Hall property? Recognizing even the transfer to appellant of P. A. Murphy's claim for the first instalment toward the purchase money, and adding to it the four judgments in favour of Miss Hall for other instalments, which appellant paid, the total amounted to about $6,500, and as under the terms of their agreement,

appellant assumed one-half the cost, his total advances on this property on Bury's account only reached the sum of $3,250. At the time when this resiliation took place, 1879, real estate was very much depressed in value and the speculation was admittedly a losing one. Respondent says that appellant voluntarily surrendered and abandoned what he had already paid on the property as an inducement to respondent to take it over and relieve him from any further liability upon it, and it seems to us, as it did to Mr. Justice Gill, a much more reasonable assumption than the pretension of appellant that Bury not only relieved him without any consideration whatever from further liability in a disastrous speculation, but actually undertook to return to him (appellant) not only the $3,250, which he had advanced for Bury, but a like amount which he (Murphy) had paid on his own account. The transactions between the parties were of the most complicated description. If any plain, satisfactory and incontrovertible interpretation of their meaning and effect were possible, the courts would not have been called upon to adjudicate upon them. As it is we are compelled to draw the most reasonable conclusion possible from a series of transactions which seem for some purpose or other to have been purposely or at least unnecessarily complicated and the solution which most commends itself to our judgment is that for which the respondent contends and which was adopted by the learned judge who adjudicated upon the case in the court below, viz., that the act of resiliation of the 10th March, 1879, and the replacement of the title, which that effected, into the name of the respondent, was a virtual abandonment on the part of the appellant of all previous investments made by him in the property or in the claims of others against that property of which he may have taken transfers, for the consideration

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therein expressed, viz.: 'In order to be acquitted and discharged of the several obligations by him assumed by virtue of said sale.' It is true that afterwards the appellant again advanced to Miss Hall the amount of another judgment, $702.50, against Bury for another instalment of interest upon the unpaid balance of the purchase money, but although paid subsequently it was for interest, one instalment of which had matured before the act of resiliation and the other was about to mature within a very few days of that date, and its subsequent payment by appellant was to the extent of one-half only the discharge of his personal obligation and for the other half, undoubtedly in fulfilment of his very natural undertaking to relieve Bury from all prior or then maturing interest, in consideration of the latter's taking the property and relieving Murphy from all future liability either for principal or interest.

"The result is that the judgment dismissing appellant's incidental demand in the Superior Court is confirmed. A majority of the court see no reason to differ from the conclusion of Mr. Justice Gill that the lack of signification of the different transfers under which appellant claimed to have acquired obligations and judgments against the respondent Bury, without signification upon the latter, would alone have been a valid defence against any legal demand based thereon, and the judgment '*a quo*' might have been confirmed upon this *considérant* alone, treated as a preliminary objection, without investigation of the facts and respective pretensions of the parties, but the whole case having been carefully considered, we have deemed it best to state our views at length upon the merits of the issues and only incidentally upon the legal objection founded upon lack of signification.

"Mr. Justice Bossé concurs in the above notes except in regard to signification, which under the special circumstances of this case he thinks was unnecessary."

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The portions of the judgment of the Superior Court, more particularly relating to the Hall transaction, are as follows :

" Considérant * * * 2o. Que quant aux autres item qui ont rapport à la propriété Hall, il y eut une société formée entre les parties pour la dite propriété, et que Murphy s'était obligé de payer la moitié de l'obligation que son frère, P. A. Murphy, avait sur la dite propriété, c'est-à-dire l'item susdit de $4,000 et la moitié de l'hypothèque de Melle Hall, et qu'en payant à ses créanciers il acquittait sa propre dette quant à la moitié et ne pouvait obtenir de subrogation contre Bury pour cette moitié, ni contre personne autre, mais qu'il y avait confusion en lui-même et que pour l'autre moitié il obtenait transport ou subrogation contre la dite société et non contre Bury individuellement, et que pour faire valoir cette prétendue réclamation il faudrait une action *pro socio*, entre eux ;

" 3o. Que, par l'acte du 10 mars 1879, entre les dites parties, devant Mtre L. O. Hétu, notaire, qui a mis fin à la dite société, Murphy a abandonné tout recours contre Bury pour les créances qu'il pouvait avoir contre la dite société et par suite contre Bury par le fait qu'il annulait l'acte par lequel il était devenu propriétaire de la moitié indivise de la dite propriété Hall associé en icelle afin d'être déchargé des obligations qu'il avait assumées en y entrant, sans faire aucune réserve quant aux paiements qu'il pouvait avoir faits pour acquitter la propriété, abandonnant le tout parce qu'il voyait qu'il ne pouvait y faire que des pertes ;

" 4o. Qu'à tout événement Murphy ne peut demander paiement à Bury d'aucune de ses dites prétendues créances hypothécaires acquises par transports et subrogations, parce qu'il n'a jamais fait signifier ces transports et subrogations au dit Bury ;

" Considérant en effet qu'en effectuant les dits paiements, Murphy acquittait sa propre dette pour la

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moitié, et pour le surplus ne pouvait qu'être subrogé contre la société, et le moyen de faire valoir ses droits contre son associé serait par l'action *pro socio ;*

" Considérant qu'en tenant compte des faits de la cause et les circonstances sous lesquelles se trouvaient les spéculations de terrain en ce temps et endroit-là, et d'après le texte de l'acte lui-même l'interprétation à donner au dit acte du 10 mars 1879 est bien que Murphy a abandonné tous droits à la dite propriété Hall en perdant ce qu'il y avait mis ;

" Considérant que s'il n'y a pas eu société, et encore qu'il y aurait eu société, elle n'affecterait pas le dernier item en date du 22 novembre, 1880, et postérieur à la dissolution, il est certain que le demandeur incident ne peut réussir pour aucun des dits items parce que ses transports et subrogations n'ont jamais été signifiés au défendeur incident, ainsi que l'exigent les articles 1571 et 2127 du C. C. et la jurisprudenee de la Cour d'Appel, avant de pouvoir former sa demande en justice.

" Pour ces motifs maintient les défenses du défendeur incident, comme bien fondées et déboute le demandeur incident des conclusions de sa dite demande incidente avec dépens, etc."

Beique Q.C. and *Monk* Q.C. for appellant.

Barnard Q.C. for respondent.

The judgment of the court was delivered by :

TASCHEREAU J.—This appeal must fail. Upon the facts of the case, as well as upon the construction of the deed of March, 1879, I adopt in its entirety the reasoning of Hall J., in the Court of Appeal, and the *considérants* of the Superior Court. The appellant's incidental demand was rightly dismissed.

It is proper, however, that we should also sanction the law laid down by the two courts below on the

necessity of the signification of a transfer or sale of a debt or right of action, as a condition precedent absolutely required to vest the transferee or purchaser with the full right of action against the debtor, the necessity of which signification is not removed by proof of knowledge by the debtor of the transfer or sale; and it is when he issues his writ that all of a plaintiff's right of action, in any case, must have fully accrued. We also hold that the want of such signification is put in issue by a *défense au fonds en fait.*

A repetition here of all the controversy, or a review of the authorities on the question, would be useless. It has been done in so many cases that I could add nothing now to it. When at the bar, I succeeded years ago as the attorney of the defendant, in the case of *Mignot* v. *Reeds* (1) in getting an action upon a transfer dismissed on demurrer for want of an allegation of the signification of the transfer. The jurisprudence has since been far from uniform, though the case of *Charlebois* v. *Forsyth* (2) should have put an end to any controversy.

We hold with the two courts below, that the appellant's incidental demand could not in any case have been maintained, for want of signification of the deeds of transfer and sale upon which his claim is based. There is undoubtedly great weight in the appellant's contention that there is no room for the application of that doctrine to the present case, for the reason that his claim is based on legal subrogation (3). But as on the merits his action must fail, it becomes unnecessary to further investigate that part of the case.

Appeal dismissed with costs.

Solicitor for appellant: *F. D. Monk.*

Solicitors for respondent: *Barnard & Barnard.*

(1) 9 L. C. Jur. 27.
(2) 14 L. C. Jur. 135.
(3) Sirey C. C. under art. 1250, nos. 31, 32.

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*May 9.
*June 26.

LOUIS ARTHUR BÉLANGER (DEFENDANT) .... } APPELLANT;

AND

LOUIS CHARLES BÉLANGER (PLAINTIFF) ..... } RESPONDENT.

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

Contract—Proprietor of newspaper—Engagement of editor—Dismissal—Breach of contract.

A. B. and C. B. who had published a newspaper as partners or joint owners entered into a new agreement by which A. B. assumed payment of all the debts of the business and became from that time sole proprietor of the paper, binding himself to continue its publication and, in case he wished to sell out, to give C. B. the preference. The agreement provided that:

3. Le dit Charles Bélanger devient, à partir ce ce jour, directeur et rédacteur du dit journal, son nom devant paraitre comme directeur en tête du dit journal, et pour ses services et son influence comme tel, le dit Arthur Bélanger lui alloue quatre cents piastres par année, tant par impressions, annonces, etc., qu'en argent jusqu'au montant de cette somme, et le dit Arthur Bélanger ne pourra mettre fin à cet engagement sans le consentement du dit Charles Bélanger.

The paper was published for some time under this agreement as a supporter of the Liberal party, when C.B., without instructions from or permission of A. B., wrote editorials violently opposing the candidate of that party at an election and was dismissed from his position on the paper. He then brought an action against A. B. to have it declared that he was "*rédacteur et directeur*" of the newspaper and claiming damages.

Held, reversing the decision of the Court of Queen's Bench, that C. B. by the agreement had become the employee of A. B. the owner of the paper; that he had no right to change the political colour of the paper without the owner's consent; and that he was rightly dismissed for so doing.

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

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APPEAL from a decision of the Court of Queen's Bench for Lower Canada (appeal side) affirming the judgment of the Superior Court in favour of the plaintiff.

The facts of the case are sufficiently set out in the above head-note and in the judgment of the court.

White Q.C. for the appellant.

Brown Q.C. for the respondent.

The judgment of the court was delivered by :

TASCHEREAU J.—The controversy between the parties in this case relates to the control and editorship of a certain newspaper, called *Le Progrès de l'Est*, published in the city of Sherbrooke. To avoid confusion, owing to the similarity of names, I will call the plaintiff, respondent, simply Charles, and the defendant, appellant, Arthur.

The document upon which Charles sues Arthur, is dated the 24th February, 1890, and reads as follows: The parties, plaintiff and defendant who had heretofore published the said newspaper as partners, or joint owners :

Se donnent mutuellement quittance de tous comptes et demandes pour toutes les affaires qu'elles ont fait ensemble comme éditeurs et propriétaires du journal *Le Progrès de l'Est*, et imprimeurs, depuis l'entrée du dit Arthur Bélanger à l'atelier jusqu'à ce jour, et ce dernier s'engage à acquitter seul les dettes contractées au nom de Bélanger et Compagnie, de manière que le dit Charles Bélanger n'en soit point recherché.

2. Le dit Arthur Bélanger prend à lui seul, à partir de ce jour, l'atelier d'imprimerie et le journal à titre de propriétaire et d'imprimeur, et s'engage à continuer la publication du dit journal et à donner la préférence au dit Charles Bélanger, dans le cas où il voudrait vendre ;

3. Le dit Charles Bélanger devient, à partir de ce jour, directeur et rédacteur du dit journal, son nom devant paraître comme directeur en tête du dit journal et pour ses services et son influence comme tel, le

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dit Arthur Bélanger lui alloue quatre cents piastres par année, tant par impressions, annonces, etc. qu'en argent jusqu'au montant de cette somme, et le dit Arthur Bélanger ne pourra mettre fin à cet engagement sans le consentement du dit Charles Bélanger.

Taschereau J.

After carrying on the business for a time under this agreement, and publishing the paper as a supporter of the Liberal party, a dispute arose in 1891 between the parties as to the support to be given to the Liberal candidate in Sherbrooke, at an election then pending, and Arthur, not pleased at the stand Charles intended to take and actually took in relation thereto, dismissed him from the editorship.

Hence the present action by Charles, who asks by his conclusions, that he be declared to be the "rédacteur" and "directeur" of the newspaper in question, to have his name inserted in the paper, as such, and that he be declared to be entitled to the editorial control of the paper, and that defendant be ordered to grant him editorial control of the paper, and to deliver to him the exchanges; that he be held thereto by all legal means, and that he be condemned to pay $5,000 as damages to him, the plaintiff.

Arthur pleaded to this action that he had a right to dismiss the plaintiff as he had done. That plea, in my opinion, has been conclusively established. It cannot be questioned that under the agreement between the parties, above mentioned, Arthur was vested with the full ownership of this paper, with power to sell it at any time, and that Charles became thereafter the salaried employee and editor of and for Arthur, the owner. The document says so in plain terms, and no surrounding circumstances can be admitted to make it say the contrary.

That being so, the respondent's contention that he was in a position of absolute independence towards Arthur is utterly untenable. It is true that by the last

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part of art. 3 of the said agreement, Arthur bound himself not to put an end to Charles's employment as editor, without Charles's consent. But to contend that, in virtue of this stipulation, Charles's rights in the editorial share were above his employer's rights, is a proposition I cannot accede to, though he was "directeur" besides being editor. This stipulation is, of necessity, impliedly accompanied by and subject to the understanding that the owner's responsibility and interests should be respected in the columns of the paper and the owner was the sole judge of the manner in which that was to be done. The respondent would contend, forsooth, that he was even at liberty to direct his writings against his employer. That is what his contentions virtually amount to. The paper had always, or for a long time, been known as an organ or supporter of the Liberal party. On the eve of the election I referred to, Charles as editor wrote an article, unknown to Arthur, in which he abused the Liberal party in unmistakeable terms, concluding by saying that in Sherbrooke the Liberals were "*rari nantes in gurgite vasto*," which is cruelly translated in Sherbrooke French by: "*Ils sont comme les pois dans une soupe claire.*" Such conduct on the part of Charles deserved dismissal, and he cannot complain if he got it. When an editor finds that his opinions are not in accord with those of the proprietor he must either submit or quit. And if he takes advantage of the confidence that is reposed in him to abuse his proprietor's political friends, and in the midst of a political battle turns traitor to the party he is paid to support, his conduct cannot be too severely censured.

In the present case Arthur, the owner, would have had a perfect right to change the political colour of his paper, and Charles the editor would have had to follow him, and obey his orders, or abandon the

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Taschereau J.

editorial chair. But the interversion of these relative rights and duties, that Charles contends for, cannot be sanctioned. He certainly, also, had a perfect right to change his political views, but he had not the right to change the political colour of Arthur's newspaper, without Arthur's consent.

I would allow the appeal and dismiss the action, with costs in the three courts against respondent.

Appeal allowed with costs.

Solicitors for the appellant: *White, Cate & Wells.*

Solicitors for the respondent: *Brown, Morris & McDonald.*

CATHERINE DONOHOE (DEFENDANT)..APPELLANT; 1895

AND

*April 2.
*June 26.

HULL BROS. & CO. AND OTHERS (PLAINTIFFS) .. .. RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF THE NORTH-WEST TERRITORIES.

Husband and wife—Purchase of land by wife—Re-sale—Garnishee of purchase money on—Debt of husband—Practice—Statute of Elizabeth—Hindering or delaying creditors.

D. having entered into an agreement to purchase land had the conveyance made to his wife who paid the purchase money and obtained a certificate of ownership from the registrar of deeds, D. having transferred to her all his interest by deed. She sold the land to M. and executed a transfer acknowledging payment of the purchase money, which transfer in some way came into the possession of M.'s solicitors, who had it registered and a new certificate of title issued in favour of M., though the purchase money was not, in fact, paid. M.'s solicitors were also solicitors of certain judgment creditors of D., and judgment having been obtained on their debts the purchase money of said transfer was garnisheed in the hands of M. and an issue was directed as between the judgment creditors and the wife of D. to determine the title to the money under the garnishee order, and the money was, by consent, paid into court. The judgment creditors claimed the money on the ground that the transfer of the land to D.'s wife was voluntary and void under the statute of Elizabeth and that she therefore held the land and was entitled to the purchase money on the re-sale as trustee for D.

Held, reversing the decision of the Supreme Court of the North-west Territories, that under the evidence given in the case the original transfer to the wife of D. was *bonâ fide;* that she paid for the land with her own money and bought it for her own use; and that if it was not *bonâ fide* the Supreme Court of the Territories, though exercising the functions and possessing the powers formerly exercised and possessed by courts of equity, could not, in these

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

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statutory proceedings, grant the relief that could have been obtained in a suit in equity.

Held further, also reversing the judgment appealed from, that even if the proceedings were not *bonâ fide* the garnishee proceedings were not properly taken; that the purchase money was to have been paid by M. on delivery of deed of transfer and the vendor never undertook to treat him as a debtor; that if there was a debt it was not one which D., the judgment debtor as against whom the garnishee proceedings were taken, could maintain an action on in his own right and for his own exclusive benefit; that D.'s wife was not precluded, by having assented to the issue and to the money being paid into court, from claiming that it could not be attached in these proceedings; and that the only relief possible was by an independent suit.

APPEAL from a decision of the Supreme Court of the North-west Territories reversing the judgment for defendant at the trial.

The facts of the case are thus stated in the judgment of the court:

On March 23rd, 1887, Edward Donohoe, the husband of the appellant, agreed to purchase from one George K. Leeson certain lands in the town of Calgary, North-west Territories, for the sum of $1,100 payable in one year. Before the expiration of the year an arrangement was entered into by which Leeson made the transfer of the land, not to Edward Donohoe but to his wife the present appellant, she paying him. from her own moneys, as she contends, but from her husband's as the respondents contend, the $1,100 purchase money. The husband subsequently transferred to her, for the nominal consideration of one dollar, all his interest and such proceedings were thereafter taken that on the 16th of March, 1889, a certificate of ownership was issued in her favour under the Territories Real Property Act by which it was certified that she was then the owner in fee simple of the property in question, subject to certain encumbrances.

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She so continued the registered owner until the 1st of September, 1892, a period of more than three years. On or about that date she, with the concurrence of her husband, entered into an agreement with one Joseph H. Millward by which she agreed to sell to him the property for $1,800 cash, the purchaser to assume a mortgage of $3,000 that had in the meantime been placed upon it.

A transfer dated 1st September, 1892, was executed (in which the payment of the $1,800 was acknowledged) and placed in the hands of the solicitor of the Donohoes. In some unexplained manner this document found its way into the possession of the purchaser Millward's solicitors and it was thereupon registered and a new certificate of title issued in his (Millward's) favour, the certificate in favour of Mrs. Donohoe being cancelled. This registration took place before and without payment of the $1,800 purchase money, and so far as appears in the absence of any agreement on the part of the vendors that credit was to be given for the purchase money, and notwithstanding the fact that the evidence showed that the payment of that money and the delivery of the title deeds were to be contemporaneous acts. But it so happened that the solicitors of Millward were likewise the solicitors of five firms or individuals who had claims against Mrs. Donohoe's husband amounting in the aggregate to about $1,168, and the idea was conceived that the $1,800 purchase money might be resorted to to pay off the claims of these five creditors. Consequently the purchase money was not handed over to Mrs. Donohoe. Five actions at law were instituted against the husband for the recovery of the debts mentioned, and before judgment (which was subsequently obtained) garnishee summonses were issued (as might be done under the special provisions of the Judicature ordinance) on the five

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actions against Millward. Upon the return of these summonses (it appearing that Mrs. Donohoe claimed the $1,800 in Millward's hands and that judgments by *nil dicit* had in the meantime been entered up) an order was made consolidating the five actions and directing an issue as between the five judgment creditors as plaintiffs and Mrs. Donohoe as sole defendant, as to whether these moneys in the hands of the garnishee were at the time of the service of the garnishee summonses the moneys of the plaintiffs (the judgment creditors) or any of them as creditors of Edward Donohoe as against the defendant. A consent order was subsequently made under which the purchase money in Millward's hands was paid into court where it still is. Upon the trial of the issues before Mr. Justice Rouleau it appeared that the only ground upon which the plaintiffs in the first instance based their right to the purchase money was that the transfer from Leeson and Edward Donohoe to the defendant, Mrs. Donohoe, in 1889 was void as against creditors under the statute 13 Elizabeth, ch. 5, having been as was alleged a voluntary transfer and having been made for the purpose of defrauding creditors; that she therefore held the land and the purchase money arising from its sale as a trustee for him; that these moneys were consequently his moneys and that they were due and owing not to his wife but to himself, and were therefore attachable by garnishee process at the instance of his (judgment) creditors.

Mr. Justice Rouleau, without then determining whether the transfer in question was voluntary or whether it was executed for the fraudulent purpose alleged, held that it could not be attached by garnishee proceedings but only by a direct suit in court, and he therefore dismissed the proceedings with costs. Upon appeal to the Supreme Court in banc, McGuire J. in a

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most elaborate judgment held that the transfer was voluntary and, being fraudulent, was void as against not only existing but subsequent creditors, and he further held that the purchase money was attachable in Millward's hands by the plaintiffs. In this, Richardson J. concurred. Wetmore J. came to the conclusion that the moneys were not attachable, but inasmuch as in his view the transaction impeached was a fraudulent one, and as the purchase money had at the instance of Mrs. Donohoe been paid into court as if proper proceedings had been taken in the first instance, and as these moneys in a proper suit brought for the purpose would have been declared to be the moneys of her husband for distribution amongst his creditors, the court was seized of jurisdiction to rightly distribute them to the proper parties: and he consequently concurred in the opinion of McGuire and Richardson JJ. that the appeal should be allowed.

Rouleau J. on the other hand adhered to the opinion expressed at the trial and further held that upon a review of the evidence the original transfer to Mrs. Donohoe was neither voluntary nor entered into with a fraudulent purpose.

The appeal was therefore allowed, and it is from that judgment that an appeal is asserted to this court.

Armour Q.C. for the appellant. The *bonâ fides* of the transfer to Mrs. Donohoe cannot be inquired into in garnishee proceedings. *Vyse* v. *Brown* (1).

There was no debt for which Donohoe could have sued alone, and if there was one due to him and his wife jointly it could not be attached on a judgment against him alone. *Macdonald* v. *Tacquah Gold Mines Co.* (2).

Gibbons Q.C. for the respondent referred to *Masuret* v. *Stewart* (3); May on Fraudulent Conveyances (4).

(1) 13 Q. B. D. 199.
(2) 13 Q. B. D. 535.
(3) 22 O. R. 290.
(4) 2 ed. pp. 61 to 69.

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The judgment of the court was delivered by:

SEDGEWICK J.—In my view the first, the fundamental, question to be considered upon the present appeal is as to whether the garnishee proceedings in question were properly taken, assuming for the purpose of this inquiry that the transfer impeached was, and might have been, declared to be void as against creditors in a suit properly instituted for that purpose.

The provisions of the Judicature Ordinance sections 305–312 are, so far as any questions involved in this case are concerned, identical with the corresponding sections of the English Common Law Procedure Act, 1854, secs. 60–67 now incorporated in the rules of the Supreme Court 1883, Order XLII., Rules 32 and 34 and Order XLV. as well as with corresponding enactments in Ontario and Nova Scotia where the provisions of the English Judicature Act have been substantially enacted, and the cases decided in England, and in Canada as well, as to the meaning of these provisions, may usefully be examined in determining the questions in controversy here.

Now one elementary principle runs through all these cases, viz., to enable a judgment creditor to obtain an order compelling a third person (the garnishee) to pay to him a debt which he would otherwise have to pay the judgment debtor, the debtor must be in a position to maintain an action for it against the garnishee, and the debt must be of such a character that it would vest in the debtor's assignee or trustee in bankruptcy if he became insolvent. There are cases where, even with both of these conditions present, garnishee process will not lie, but these cases do not concern us now. There must in all cases be the beneficial interest, as well as the right of action against the garnishee, in the judgment debtor. Further, the claim of the debtor

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must be a debt: it must arise *ex contractu* not *ex delicto*. Now apply these principles to the present case. Was there here a contractual obligation between Millward on the one hand and Edward Donohoe on the other, which the latter in his own right and for the exclusive benefit of himself or his estate could enforce in an action at law or a suit in equity? In my opinion there was not, and that for two reasons. First: There was no agreement or understanding between the parties that Millward should have any time—a period of credit—to pay the $1,800. The agreement was that that money was to be paid upon delivery of the transfer. In the absence of any explanation on the subject I must assume that the transfer was without authority treated as delivered and so registered. Under such circumstances the Donohoes might have brought one of several forms of action in order to obtain redress; they might have brought a common law action to recover damages by reason of the conversion of the instrument of transfer. If as a matter of fact there had been a delivery of the deed and it contained an acknowledgment of the payment of the purchase money, they could not at law, in the absence of fraud, maintain an action for it. They would be estopped by their deed. They might, however, have elected to accept the delivery and then sue in equity, not upon their contractual rights but to assert a lien on the land sold by reason of the purchase money not having been paid and obtain a decree giving effect to that lien. Still, all the while they might have stood upon their rights and demanded back their deed. They never undertook with Millward that he was to become their debtor for a single moment, and until they elected so to treat him he was only a wrong doer in his relations with them and liable to be treated accordingly. But secondly, assuming that there was a debt of some

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kind, to whom was that debt due so far as Millward was concerned? Could Edward Donohoe in his own name and for his own benefit have recovered it? As between the husband and the wife the conveyance to her even if voluntary was a perfectly valid one. So, too, as between him and her assigns. If he could not claim against her he could not against them. The deed is void as against creditors only (1), and the land as between her and him being hers, she had a right to sell to Millward without intervention or interference on her husband's part. The land therefore being hers, the contract being made with her, Millward was bound to pay her, her husband having no possible right to the price or any part of it. It is clear then that he could not, without at least joining his wife as plaintiff, sue Millward in his own name, and if not the debt was not, under the authorities attachable in his hands at the instance of Donohoe's creditors. The case of *Vyse* v. *Brown* (2) is on this point exactly analogous to this (assuming here that, as in that case, the instrument was voluntary):

> Even supposing, said Vaughan Williams J., that the plaintiff had taken the proper steps to set aside the settlement as void, and had succeeded in doing so, even then Brown could never have been placed in the position of being obliged to pay over the money to Vyse; the settlement would still be valid and subsisting between the parties; and, although in such a suit Brown might be directed to pay over the whole or a sufficient part of the settled fund to the creditor that could never be by reason of his becoming indebted to the judgment debtor.

And see *Webb* v. *Stenton* (3) and *Boyd* v. *Haynes* (4). I am unable to find any English or Canadian case at variance with the case from which this extract is taken, and I think it is directly in point in favour of this appeal. If then there is nothing more than this in

(1) See May on Fraudulent Conveyances, 2 ed. pp. 316, 317, 325 and cases cited.

(2) 13 Q. B. D. 199.

(3) 11 Q. B. D. 518.

(4) 5 Ont. P. R. 15.

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the case, if the alleged debt is not attachable, then the proceedings, being taken without authority, must fail.

But the argument is that Mrs. Donohoe has precluded herself from claiming the advantage of this lack of jurisdiction by reason of the non-attachability of the debt, because in the first place she assented to the issue in its present form, and because in the second place she did not move to set aside the proceedings, but asked that the money in Millward's hands should be paid into court, thereby, it is said, consenting that that court should have absolute power to deal with it as might be thought right. I must confess I cannot appreciate the force of either of these contentions.

The issue settled upon by both parties was in effect this: "Was the purchase money in Millward's hands the money of Donohoe's judgment creditors as against Mrs. Donohoe?" Perhaps the issue should have taken the form of an inquiry as to whether the money in question was a debt due from Millward to the husband or a debt due to the wife, but what substantial difference is there between the two statements? The real question to be determined was as to the attachability of the money. Determine that fact in the negative and the plaintiffs' case must fail. Besides if Mrs. Donohoe is to be estopped from asserting her rights because of words that counsel have used in the pleadings, she can surely be allowed to insist upon a strict interpretation of the language creating that estoppel. If so, the answer to the question as framed in the issue must be in the negative. The moneys garnisheed were never at any time the moneys of the judgment creditors. They might become so but they certainly were not at the time of the service of the garnishee summonses. Nor could they though "bound" by the attaching process ever become their moneys until, after due course of law, payment over had been made to

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them. But, waiving this point, the issue was substantially a proper one. Bear in mind that the deed of transfer to Millward was executed by both husband and wife and it might well be that there was a contractual obligation between all parties that as between the husband and wife the money was to be paid to the husband, and if so then the moneys in that event would be attachable. But all that was a matter to be determined on the trial of the issue, a thing of the future, and in my view some such question as that is just as likely to have been within the contemplation of the parties when the issue was settled as an issue to determine whether certain dealings between Donohoe and his wife four or five years previously were fraudulent and void under the statute of Elizabeth.

As I view the case it was the plaintiffs, not the defendant, who sought to give evidence upon an issue not raised. The issue raised was property or no property; the issue upon which the case was decided upon appeal was fraud or no fraud; and that too, notwithstanding the universal rule that where an action is brought with the express purpose of setting aside a settlement, there must be an allegation in the statement of claim that the settlement is fraudulent. *Richardson* v. *Horton* (1); *Holderness* v. *Rankin* (2); *Davy* v. *Garrett* (3); *Wallingford* v. *Mutual Society* (4); Kerr on Fraud and Mistake (5). I entirely agree with the trial judge in the view that the whole inquiry as to the circumstances under which Mrs. Donohoe became possessed of the property in question was irrelevant,—foreign to the issue agreed upon by the parties.

Then as to the question whether Mrs. Donohoe is to be estopped from claiming that these moneys are non-

(1) 7 Beav. 112.
(2) 6 Jur. N. S. 903, 928.
(3) 7 Ch. D. 473.
(4) 5 App. Cas. 685.
(5) 2 ed. pp. 425 and 509.

attachable because she with Millward's consent obtained an order directing the moneys attached to be paid into court. The statute authorizes payment into court by the garnishee. The order directing payment expressly renders the money subject to the issue. If the issue is decided in favour of the defendant, the money according to the terms of the order is to go to her. By what process of reasoning can it be made to appear that, because the person claiming the money asked that for her own protection the person holding the money in the exercise of his statutory privilege should pay it into court, the issue of property or no property in the money, which without such request must be decided one way, must because of such request be decided the other way? A person's rights are ordinarily determined as they stand at the time of the institution of proceedings against him. If these rights are to be minimized or absolutely taken from him by subsequent acts or omissions of his own, there surely should be conclusive evidence of them. How can the payment of this money into court at her request make that money which otherwise would be hers, the money of strangers?

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The questions still remain: Were the instruments under which the defendant acquired the property in Calgary, voluntary within the meaning of the statute of Elizabeth, (although the expression "voluntary" is not there used) and if so, were they executed for the purpose of hindering, defeating, delaying or defrauding her husband's creditors? In considering these questions all the circumstances at the time the instruments were made must be looked at and not subsequent events, except such as must be taken to have been in the contemplation of the husband at the time of transferring the property and from which a fraudulent

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intention at that time may be gathered. *Mackay* v. *Douglas* (1); *Ex parte Russell* (2); *In re Maddever* (3). After a repeated perusal of all the evidence I have come to the conclusion that the transaction was a *bonâ fide* one, the property having been purchased by the wife and paid for with her own money. The husband never owned the land. His only interest was an agreement for purchase from one Leeson for $1,100. According to the evidence of himself and his wife he never paid one dollar of this money, but the whole of it was paid by the wife, he transferring for a nominal consideration his interest, and Leeson transferring the fee simple for the expressed consideration of $1,100. This was in March, 1889. Now what was the condition of affairs at this time? The husband was a blacksmith and had been working at his trade at Anthracite from 1887, but had never otherwise carried on or contemplated carrying on business there. He appears to have been a thriftless person, while his wife appears to have been a good business woman—everything that her husband was not. Anthracite coal had been discovered there and was being largely worked, bringing a considerable population to the place. It has been conclusively proved that she in her own name, for her own benefit, entered into a partnership with one Gorman, for the purpose of carrying on at Anthracite an hotel business (articles of partnership being duly executed); that they together purchased an hotel, the instruments of purchase being produced in evidence; that they together conducted an hotel business on a pretty large scale on the premises so purchased; that all this time the husband was working at his trade, taking no part in the management of the hotel except as the occasional messenger of his wife, and not pretending to have any

(1) L. R. 14 Eq. 120. (2) 19 Ch. D. 588.
(3) 27 Ch. D. 523.

interest in it; that after a time she and Gorman dissolved partnership (the written articles of dissolution being produced) and that she went on with the business on her own account and for her own benefit until long afterwards, when the coal mines were shut down; that while engaged in the business she had 45 or 50 permanent boarders; that she sold liquors (although a prohibitory liquor law was then in force) and that her net profits averaged five or six hundred dollars a month. All this is undisputed. And it was with the money so earned that as she says she paid to Leeson the $1,100 for the Calgary property and with her husband's assent took from him a deed in her own name. Now both husband and wife were examined by the plaintiffs; they were both made their witnesses and such is the evidence they gave. I have searched most diligently to see if there is any evidence which casts suspicion upon it but in vain, and I agree with the opinion of the trial judge as expressed in his final judgment that the transaction was one entered into in the most perfect good faith and without reference to the husband's creditors whether present or future, and when it appeared that all his debts (they were few and of small amount) had been paid off by her long before the institution of the present proceedings additional weight is added to the oral and documentary testimony in support of the contention that the original transaction was in all respects a *bonâ fide* one.

In coming to these conclusions I have not been uninfluenced by the consideration that the onus of proving *mala fides* was strongly on the plaintiffs in the present case. They have in my view signally failed in showing that the transaction was a voluntary one, while the evidence both documentary and oral points almost conclusively the other way.

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It does not, it seems to me, in the view of the case that I have taken so far, appear necessary to discuss at length the question as to whether the present plaintiffs, all being subsequent creditors, have a *locus standi* to attach Leeson's transfer to Mrs. Donohoe of the 24th of March, 1888, or her husband's transfer of 2nd March, 1889. It has been proved as already stated that all Donohoe's debts existing at these dates were wholly paid off long before the institution of the present proceedings, and it has not been shown that there was any connection between the debts now in existence and the old debts. Had such connection been shown, that is, had it been proved that these debts were contracted for the purpose of obtaining funds to pay off the old ones, or had it been shown that the transfers were made with express intent to "delay, hinder or defraud" future creditors, or that at that time Donohoe was about to engage in trade and the transaction was entered into in contemplation of possible future indebtedness, had facts such as these been proved, then I would suppose that the plaintiffs had such a *locus standi*. But in my view on all these points they have signally failed to adduce evidence.

There remains to be considered one other point upon which the respondents rely in support of the judgment below. Section 8, subsections 1, 4 and 5 of the North-West Territories Judicature Ordinance enact in effect that in the administration of justice in the Territories effect shall be given to equitable principles, that equitable estates rights, titles, duties, liabilities, &c., shall be recognized and enforced, and that too, whether these rights, &c., appear incidentally or are set up as the substantial ground of action or relief.

Mostyn v. *West Mostyn Coal & Iron Co.* (1); *Salt* v.

(1) 1 C. P. D. 145.

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Cooper (1); *Re Tharp* (2); *McDougall* v. *Hall* (3); *Hedley* v. *Bates* (4); *Searle* v. *Choat* (5); *Howe* v. *Smith* (6); *London, Chatham & Dover Railway Co.* v. *South-Eastern Railway Co.* (7); *Western Waggon & Property Co.* v. *West* (8); are all cited in support of the contention that in the present proceedings, inasmuch as the evidence shows that the transfers now impeached are void under the statute of Elizabeth and would so be declared by an English court exercising chancery jurisdiction, the Supreme Court of the Territories was bound in these proceedings to make a like declaration and as a consequence order payment to the judgment creditors. I have no fault to find with the principles laid down in all of these cases, but none of them support the position contended for. It may be admitted that the Supreme Court of the Territories has all the jurisdiction formerly exercised by the common law and chancery courts in England—that it is a court of equity as well as a court of law, and that it is bound in cases where common law and equity principles come in conflict to give effect to the latter. But the question remains: Would a court of equity in England before the Judicature Act or since, in a case such as the present where the proceedings are purely statutory —fixed and defined by express enactment and interlocutory as well—give the relief claimed? There is no precedent or authority for such a proposition. Here the plaintiffs relied upon the garnishee provisions of he Ordinance for relief. Had they succeeded in bringing themselves under those provisions the money in dispute would have been theirs. But so far as this position is concerned they admit they are outside, but they say "on general equity principles the money is

(1) 16 Ch. D. 544.
(2) 3 P. D. 81.
(3) 13 O. R. 166.
(4) 13 Ch. D. 501.
(5) 25 Ch. D. 727.
(6) 27 Ch. D. 96.
(7) [1892] 1 Ch. 152.
(8) [1892] 1 Ch. 277.

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ours, therefore give it to us." The patent answer surely is: "The money may be yours, but equity has devised a machinery to determine that. Bring your suit in the ordinary way. File your bill. Join all necessary parties. Bring in the husband. He has a right to show that his wife's property shall not be appropriated to pay his debts. Bring in the custodian of the fund. He has a right to insist that the money in his hands is paid to the proper party. Bring in all persons claiming under the wife and other parties in interest. Let the issues be defined and a trial on those issues be had and so let equity prevail." That, as I understand it, is equity. It is upon principles such as these that courts of equity act. Thus is the Supreme Court of the Territories, bound as it is to administer equity, to act. To dismiss this appeal would be to give to the court a jurisdiction and authority hitherto unasserted by any court of equity whether in England or here.

I am of opinion that the appeal should be allowed and the judgment of Mr. Justice Rouleau restored, the whole with costs, both in this court and the court below.

Appeal allowed with costs.

Solicitors for appellant: *Costigan, McCaul & Bangs.*

Solicitors for respondents: *McCarthy & Harvey.*

CALDWELL *v.* KENNY.

1894

Title to land—Boundaries—Road allowance—Evidence.

*Oct. 19, 20.

1895

*Jan 15.

APPEAL from a decision of the Court of Appeal for Ontario (1), reversing the judgment of the Divisional Court in favour of the defendant.

The action in this case was for possession of land, the parties being at issue as to the boundaries between their adjoining properties. The decision of the issue depended upon the existence or non-existence of a road allowance between the lots, and the trial judge held that proof of certain monuments having been placed on the lots by early surveyors was incompatible with its existence. His decision was reversed by the Court of Appeal.

The Supreme Court held that the evidence was sufficient to show that there was a road allowance and that the decision of the trial judge was rightly overruled.

Appeal dismissed with costs

Robinson Q.C. and *Hewson* for the appellant.

McCarthy Q.C. and *Pepler* Q.C. for the respondent.

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

SEGSWORTH *v.* ANDERSON.

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Insolvency—Assignment in trust for creditors—Sale of estate to insolvent's wife—Guarantee by creditor and inspector—Trustee—Account for profit.

*Oct. 16, 17.

1895

*Jan. 15.

APPEAL from a decision of the Court of Appeal for Ontario (2), reversing the judgment of the Divisional Court (3) in favour of the plaintiffs.

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

(1) 21 Ont. App. R. 110. (2) 21 Ont. App. R. 242.
(3) 23 O. R. 573.

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SEGSWORTH v. ANDERSON.

The plaintiffs (appellants) in this case were creditors of the insolvent estate of one Jorgenson who had assigned under the Act relating to assignments and preferences to creditors. The defendant Anderson was also a creditor, and the defendant Lee an inspector of the estate. The assets of the estate were offered for sale by tender and purchased by the insolvent's wife who gave as security for payment notes indorsed by defendant Anderson. After the tender of the purchase had been approved by the inspectors, Anderson induced the defendant Lee to join him in securing the payment, and they took a chattel mortgage on the stock so purchased to protect themselves. The estate paid a small dividend, and the plaintiffs brought an action to have defendants account for any profit they may have made out of the sale of the stock.

On the trial judgment was given for the plaintiff and a reference ordered to ascertain what profit the defendants had received The Divisional Court varied this judgment by declaring that plaintiffs should receive the difference between their claims against the estate and what they would have received in common with the other creditors by way of dividend, with liberty to apply to the court if the amount could not be agreed upon. The Court of Appeal reversed the decision of the Divisional Court and dismissed the action, holding that no loss to the estate had been proved.

The Supreme Court allowed the appeal and restored the judgment of the trial judge, Taschereau J. dissenting. The court held that the defendant Lee, as inspector, could not obtain an advantage for himself from his position and that the creditors were entitled to a reference to ascertain what profit, if any, he had derived from the transaction.

Appeal allowed with costs.

Moss Q.C. and *Parker* for the appellants.

S. H. Blake Q.C. for the respondents.

CONNOR *v.* VROOM.

1895

*Feb. 20.

Trustee—Power to borrow money—Promissory note—Charge on estate—Exercise of power.

APPEAL from a decision of the Supreme Court of New Brunswick, reversing the judgment of the Judge in Equity in favour of the appellant.

The defendant Vroom was trustee of the estate of one Simonds, and the action was brought to recover money lent to a former trustee, one Lee. The trust deed to Lee gave him power to borrow money on mortgage. He obtained from the plaintiff $2,000 which he represented was for the use of the estate, giving him a promissory note signed "G. H. Lee, trustee of E. I. Simonds," and indorsed by G. H. Lee.

The Judge in Equity gave judgment for the plaintiff holding that Lee having power to borrow on mortgage, was acting within his powers in borrowing from plaintiff, but if not he got the money on the promise that he would exercise the power. The Supreme Court of New Brunswick reversed this judgment, holding that there was no evidence of such promise, and the estate never having had the benefit of the money the trustee would not have been entitled to indemnity, and the plaintiff's right was only to be placed in the same position as the trustee.

The Supreme Court of Canada, after hearing counsel for appellant, dismissed the appeal without asking counsel on the other side to be heard.

Appeal dismissed with costs.

Palmer Q.C. and *Baxter* for the appellant.

Milledge Q.C. and *Coster* for the respondent.

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

1894

BRITISH COLUMBIA MILLS CO. *v.* SCOTT.

*Oct. 16.

1895

*Mar. 11.

Negligence—Master and servant—Employers' Liability Act—Evidence—New trial.

APPEAL from a decision of the Supreme Court of British Columbia, reversing the judgment at the trial by which the action was dismissed.

Scott, a workman in defendants' mill, brought an action for damages in consequence of being injured while passing over a set of cogs which were left uncovered, and upon which he slipped and had his leg dragged in by the cogs before they could be stopped. The jury found that there were other passage ways besides the cogs for plaintiff to use in fulfiling his duties, but that none of them was sufficient and the way used was more expeditious; that the non-covering of the cogs was a defective way; and that plaintiff was not unduly negligent. The trial judge held that Scott voluntarily incurred the risk and dismissed the action. His decision was reversed by the full court and a verdict entered for plaintiff with damages as assessed by the jury.

The Supreme Court ordered a new trial, being of opinion that it was not sufficiently established that plaintiff had of necessity (reasonable and practical necessity) to pass over a set of cogs which being uncovered were in a dangerous and defective state as charged in the statement of claim.

Appeal allowed with costs.

Robinson Q.C. for the appellants.

W. Cassels Q.C. for the respondent.

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

FERGUSON *v.* INNES.

1894
*Oct. 23.
1895
*Mar. 11.

Title to land—Boundaries—Evidence—Prescription.

APPEAL from a decision of the Court of Appeal for Ontario (1), reversing the judgment of the Divisional Court in favour of the appellants.

The plaintiffs (respondents) were the Rector and Wardens of St. Paul Church, London, Ont., and brought the action for possession of land fenced in by defendants who pleaded title to a part of said lands and a right of way over the remainder. The Court of Appeal reversed the decision of the Chancery Division and gave judgment for plaintiffs who, however, were not satisfied as they claimed a greater width of land than the judgment allowed and they brought a cross-appeal to defendant's appeal from such judgment.

The appeal and cross-appeal were dismissed with costs, the court adopting the reasoning of Mr. Justice Maclennan in the Court of Appeal.

Appeal and cross-appeal dismissed with costs.

Purdom for the appellants.

Bayly Q.C. for the respondents.

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

FRENCH RIVER TUG CO. *v.* THE KERR ENGINE CO.

1894
*Oct. 24.
1895
*Mar. 11.

Contract—Building of engine and boiler—Time for completion—Damages —Construction of contract.

APPEAL from a decision of the Court of Appeal for Ontario (1), reversing the judgment of the Divisional Court in favour of the appellants.

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

(1) 21 Ont. App. R. 323

(1) 21 Ont. App. R. 160.

1895

FRENCH RIVER TUG COMPANY v. THE KERR ENGINE CO.

The action in this case was for the contract price of building an engine and boiler for defendants (appellants), and the defence was that the work was not done within the delay provided for in the contract and that defendants were entitled to deduct $20 a day for each day's default in completion as the agreement allowed. They paid the balance into court.

The trial judge held plaintiffs entitled to recover finding that the delay was occasioned by defendants, but he deducted a small amount as damages for delay for a time attributable to plaintiffs. The Divisional Court reversed this judgment and dismissed the action. The Court of Appeal restored the original judgment and allowed plaintiffs the amount deducted at the trial.

The Supreme Court was of opinion that the delay was caused by the defendants themselves, and that the Court of Appeal rightly held plaintiffs entitled to recover the full contract price.

Appeal dismissed with costs.

Moss Q.C. for the appellants.

McCarthy Q.C. for the respondents.

1894

*Nov. 6.

1895

*Mar. 11.

CHISHOLM *v.* ROBINSON.

Title to land—Crown grant—Possession.

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

The action was for possession of land, plaintiffs claiming title by possession and defendants through a grant from the Crown in 1892 and a conveyance from the owner of adjoining land. It was shown that the

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

(1) 27 N. S. Rep. 74.

1895

CHISHOLM v. ROBINSON.

Crown had granted this land before the beginning of the present century.

The Supreme Court affirmed the decision appealed from, holding that the Crown had nothing to grant in 1892, having by the prior grant parted with its title and never resumed it, and there was nothing to show that the owner of the adjoining land had any title to the locus.

Appeal dismissed with costs.

Russell Q.C. for the appellants.

Harrington Q.C. for the respondent.

BARTRAM *v.* VILLAGE OF LONDON WEST.

1895

*Mar. 13.

Appeal—Per saltum.

MOTION for leave to appeal direct from a decision of the Divisional Court.

The action in this case was brought to replevy from appellant the books which he held as clerk of the corporation, he having been dismissed from the office. He refused to give up the books, on the ground that his dismissal was illegal. Judgment was given for the corporation at the trial and affirmed by the Divisional Court, and an application for special leave to appeal was refused by the Court of Appeal.

The motion was first made to the registrar in chambers for leave to appeal *per saltum* and was dismissed. An appeal from this order to a judge in chambers was dismissed, and a further appeal was taken to the full court.

The court held that appellant had failed to show sufficient cause to justify the order asked for.

Motion refused with costs.

Bartram, appellant, in person.

Christie for respondent.

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

1895

*Mar. 13.

FORAN *v.* HANDLEY.

Appeal—Dismissed for want of appearance—Application to reinstate.

MOTION to reinstate appeal which had been dismissed because no counsel had appeared for appellant when the case was called.

The only ground stated for asking the indulgence of the court was that counsel had been present not long before the case was called and had felt satisfied that it would not be reached that day, but that the cases before it had been unexpectedly disposed of.

The court refused to reinstate the appeal.

Motion refused with costs.

Ritchie for the motion.

Orde contra.

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

1895

*Mar. 18.

WILSON *v.* THE COUNTY OF ELGIN.

By-law—High school district—Townships detached.

APPEAL from a decision of the Court of Appeal for Ontario (1), affirming the decision of Mr. Justice Robertson, who refused to quash a by-law of the corporation.

The appellant moved to quash by-law no. 522 of the county of Elgin, passed January, 1894, to detach certain townships from the high school districts to which they had been attached up to that time. The grounds upon which the by-law was attacked were that it was *ultra vires* of the county council; that the districts

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

(1) 21 Ont. App. R. 585.

1895

WILSON v. THE COUNTY OF ELGIN.

could only be changed by consent of the municipalities interested; and that it did not provide for the continued liability of the municipalities detached for debts previously incurred.

The motion to quash was made before Mr. Justice Robertson, who dismissed it with costs, and his decision was affirmed by the Court of Appeal.

After hearing counsel for the respective parties the Supreme Court dismissed the appeal without reserving judgment.

Appeal dismissed with costs.

Tremear and *Macdonald* for the appellant.

Glenn for the respondent.

GIBSON *v.* THE TOWNSHIP OF NORTH EASTHOPE.

1895

*Mar. 22.

By-law—Drainage Act—Petition for drain—Withdrawal of name from—Improper construction.

APPEAL from a decision of the Court of Appeal for Ontario (1), reversing the judgment of the Divisional Court and restoring that of the trial judge in favour of the corporation.

The action was brought by Gibson to have a by-law of the corporation quashed, or, in the alternative, for damages for injury to his property, resulting from improper construction and want of repair of a drain made under said by-law. The ground upon which said by-law was attacked was that the plaintiff had withdrawn from the petition and there were not sufficient names on it without him.

The trial judge held that plaintiff had not withdrawn from the petition, and refused to quash the

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

(1) 21 Ont. App. R. 504.

1895

GIBSON v. THE TOWNSHIP OF NORTH EASTHOPE.

by-law. He also held that plaintiff had failed to prove his allegations in the statement of claim on which his right to damages was founded. The Divisional Court reversed this decision on the first ground, and held the by-law invalid. The Court of Appeal restored the original judgment.

The Supreme Court, after hearing counsel for the respective parties, dismissed the appeal without reserving judgment.

Appeal dismissed with costs.

Wilson Q.C. for the appellant.

Idington Q.C. for the respondents.

1895

*April 2.

T. EATON CO. *v.* SANGSTER.

Negligence—Infant—Contributory negligence.

APPEAL from a decision of the Court of Appeal for Ontario (1), affirming the judgment of the Divisional Court (2) in favour of the plaintiff Sangster.

The action was brought by plaintiff, as next friend to his infant son, to recover damages for injuries sustained by the son from a portable mirror falling upon him when in defendants' store in Toronto with his mother. The trial judge found that there was no evidence of negligence by defendants to be submitted to the jury, and dismissed the action. The Divisional Court reversed his decision and ordered a new trial, and its judgment was affirmed by the Court of Appeal.

The Supreme Court, after hearing counsel for the appellants, dismissed the appeal without calling upon counsel for the other side.

Appeal dismissed with costs.

Shepley Q.C. for the appellants.

McGregor for the respondent.

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

(1) 21 Ont. App. R. 624. (2) 25 O. R. 78.

BANK OF NOVA SCOTIA *v.* FISH.

1894
*Nov. 9, 10.
1895
*May 6.

Promissory note—Consideration—Accommodation—Evidence—New trial.

APPEAL from the decision of the Supreme Court of New Brunswick varying the verdict at the trial, pursuant to leave reserved.

The appellant bank brought an action against respondent on a number of promissory notes indorsed by the latter and bills accepted by him. The defence was that the bills and notes were accepted and indorsed for the accommodation of the bank, and that defendant had been induced to accept and indorse them by fraud and misrepresentation. It was proved at the trial that Morrison, the agent of the bank, had represented to defendant that the transactions were in the business and for the interest of the bank, which was engaging in matters forbidden by the Bank Act and had to adopt the course pursued by the agent.

The trial judge rejected evidence of conversation between a third party, who was on some of the paper in suit, and the agent who succeeded Morrison, as to what had taken place between such third party and Morrison in regard to some of the notes. The ground of his rejection was that the evidence was irrelevant and that it only arose out of cross-examination. He admitted other objectionable evidence, ruling that only the answer had been objected to.

A verdict was given for plaintiffs for the amount of one note and of an overdrawn account, and for defendant in respect to all other claims. The Supreme Court of New Brunswick gave the bank judgment for

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

1895

BANK OF NOVA SCOTIA v. FISH.

another and a larger note and defendant judgment for all the rest, including that on which he failed at the trial. Both parties appealed.

The Supreme Court of Canada ordered a new trial on the ground that the evidence rejected at the trial should have been admitted, as it related to a matter relevant to the issue, and that the trial judge was wrong in ruling that only the answer to another question was objected to, as there was a general objection to all the evidence at the time.

Appeal allowed with costs and new trial ordered. Cross-appeal dismissed with costs.

Borden Q.C. and *Coster* for the appellants.

Pugsley Q.C. for the respondent.

1894

*Nov. 9.

1895

*May 6.

ST. STEPHEN'S BANK *v.* BONNESS.

Promissory note—Consideration—Accommodation—Discharge—Agreement.

APPEAL from a decision of the Supreme Court of New Brunswick affirming, by an equally divided court, the verdict for defendant at the trial.

The action in this case was on a promissory note indorsed by defendant, who pleaded that it was indorsed on the express understanding that he was not to be called upon to pay it and that he was discharged by the bank subsequently taking security from the makers. At the trial the defendant had a verdict, the jury finding that the bank, on taking security, had agreed that the note in suit should be paid out of the proceeds. On motion, pursuant to leave reserved, for judgment for plaintiffs or a new trial, the court *en banc* was equally divided and the verdict stood.

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

The Supreme Court, Gwynne J. dissenting, ordered a new trial on the ground that the finding of the jury did not warrant the verdict for defendant.

Appeal allowed and new trial ordered.

1895

ST. STEPHEN'S BANK v. BONNESS.

Weldon Q.C. for the appellants.

Pugsley Q.C. for the respondent.

FAIRBANKS *v.* THE QUEEN.

1895

Petition of right—Public work—Injury to property by—Obstruction of canal—Use of canal.

*Feb. 19.
*May 6.

APPEAL from a decision of the Exchequer Court of Canada (1) in favour of the Crown on a petition of right.

The appellant, claiming to be owner of the Shubenacadie Canal in Nova Scotia, brought suit by petition of right to recover damages from the Crown for expropriating part of his property in construction of public works and for obstructing the use of the canal. The learned judge of the Exchequer Court, without deciding as to the title of appellant, which was disputed, held that expropriation had not been proved and refused damages for obstruction on the ground that the canal was not open for traffic. The judgment included a declaration that appellant was entitled, whenever it should be so opened and the traffic obstructed by the public work, to have the obstruction removed.

The Supreme Court affirmed the judgment of the judge of the Exchequer Court.

Appeal dismissed with costs.

The appellant in person.

Parker for the respondent.

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

(1) 4 Ex. C. R. 130.

1895

*Feb. 23.
*May 6.

CURRIE *v.* CURRIE.

Will—Action to annul—Capacity to make—Evidence of capacity—Parties.

APPEAL from a decision of the Court of Queen's Bench for Lower Canada (appeal side) (1), reversing the judgment of the Superior Court in favour of the appellant.

The action was brought for annulment of a will in favour of appellant the execution of which was procured by him when, as the declaration alleged, the testator was not capable of making it. The Superior Court dismissed the action because all necessary parties had not been summoned. The Court of Queen's Bench reversed this decision and also held that the execution of the will had been procured by undue influence, and annulled it.

The Supreme Court affirmed the decision of the Court of Queen's Bench as to parties holding that the Superior Court should itself have summoned the parties deemed necessary. It also affirmed the judgment as to the will on the ground that the onus was on the party procuring the execution to prove capacity, and that he had not only failed to do so but the evidence was overwhelming against him.

Appeal dismissed with costs.

Robidoux Q.C. and *McCormick* Q.C. for the appellant.

deMartigny for the respondent.

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

(1) Q. R. 3 Q. B. 552.

THE QUEEN *v.* THE CANADIAN AGRICULTURAL, COAL AND COLONIZATION CO.

1895
*Mar. 1.
*May 6.

Crown lands—Patent—Reservation of coal—Order in Council—Agreement.

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

Certain Crown lands in Quebec had been granted to the suppliants, as assignees of one Kaye, the applicant for said lands, from which the Crown contended the coal thereon was reserved, which was the sole question in issue. The learned judge of the Exchequer Court held that there being no express or implied agreement to the contrary the suppliants were entitled to a grant conveying such mines and minerals as would pass without express words.

The Supreme Court affirmed the judgment of the Exchequer Court.

Appeal dismissed with costs.

Hogg Q.C. for the appellant.

Gormully Q.C. and *Campbell* for the respondents.

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

WIGLE *v.* WILLIAMS.

1895
*Mar. 25.
*May 6.

Partnership—Retired partner—Continuance of firm name—Promissory note.

APPEAL from a decision of the Court of Appeal for Ontario, affirming the judgment for the plaintiff Williams at the trial.

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

(1) 3 Ex. C. R. 157.

1895

WIGLE v. WILLIAMS.

The action was against the defendant, S. Wigle, as a member of the firm of S. Wigle & Son, on promissory notes made by said firm in favour of plaintiff. The defence was that the defendant had retired from the firm long before the notes were given, and although his son had carried on the business under the name of S. Wigle & Son, he had no interest in it; also that at the most he could only be liable in respect to the business of a general country store, which was the business of the firm before he withdrew, and not for that of buying and selling real estate and investing in securities, which his son alone had carried on and in respect of which the notes in question were given.

The courts below held that public notice of dissolution of the partnership between defendant and his son had not been given; that defendant was aware that his name still appeared as a member of the firm on the bill-heads and in other ways; and that he was aware of the general nature of the new business carried on by his son in the firm name; defendant was, therefore, held liable on the notes.

The Supreme Court affirmed the judgment of the Court of Appeal.

Appeal dismissed with costs.

McCarthy Q.C. and *Fleming* for the appellant.

Cowen for the respondent.

1895

*Mar. 19, 20.
*May 6.

COLLIER *v.* WRIGHT.

Maritime law—Collision—Negligence—Rule of the road—Steamer.

APPEAL from a decision of the Court of Appeal for Ontario, affirming the judgment for the plaintiff Wright at the trial.

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

(1) 19 Ont. App. R. 298.

1895

COLLIER v. WRIGHT.

The action was for damages incurred by a collision on the Bay of Quinté between plaintiff's schooner and a steamer belonging to defendant. In the marine protest by the captain of the schooner the cause of the action was alleged to be that the steamer's wheel was put to port when it should have been put to starboard just before the collision. The action was twice tried, the first trial having been set aside on the ground that the judge, by adopting the opinion of assessors, had delegated his judicial functions (1). The second trial resulted in a verdict for plaintiff which was affirmed by the Court of Appeal.

The Supreme Court affirmed the judgment of the Court of Appeal sustaining plaintiff's verdict.

Appeal dismissed with costs.

S. H. Blake Q.C. and *Holman* for the appellant.

Alcorn Q.C. for the respondent.

TORONTO RAILWAY CO. *v.* BOND.

1895

Negligence—Street railway—Defective plant.

*May 14.
*May 15.

APPEAL from a decision of the Court of Appeal for Ontario, affirming the judgment of the Divisional Court in favour of the plaintiff Bond.

The plaintiff was a motorman in the employ of the defendant company and his action was brought under the Workman's Compensation Act to recover damages for injuries sustained while coupling together a street car and a trailer. The main ground of negligence charged was the absence of buffers to protect the official from injury in coupling. The plaintiff had a verdict at the trial which was affirmed by the Divisional Court and the Court of Appeal.

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

1895

TORONTO RAILWAY COMPANY v. BOND.

The Supreme Court held that negligence on the part of the company in not having proper appliances to prevent injury was clearly proved and a new trial properly refused.

Appeal dismissed with costs.

Bicknell for the appellants.

McGregor for the respondent.

1895

*May 16.

STEPHENS *v.* GERTH *et al.* *In re* THE ONTARIO EXPRESS AND TRANSPORTATION CO

Appeal—Winding-up-Act—Amount in controversy—Joint or separate liability.

APPEAL from a decision of the Court of Appeal for Ontario, reversing the order of the master in ordinary who settled the respondents on the list of contributories of the Ontario Express and Transportation Co. under the Winding-up Act.

An appeal will only lie to the Supreme Court in proceedings under the Winding-up Act where the amount involved is $2,000 or over. In this case there were six persons placed on the list by the master, one for $1,000, and the others for $900 each, and all were released from liability by the decision of the Court of Appeal from which this appeal was brought.

The Supreme Court held that the aggregate amount for which the respondents were sought to be made liable exceeding $2,000 did not give it jurisdiction but that the position was the same as if proceedings had been taken separately against each.

Appeal quashed with costs.

Aylesworth Q.C. for the appellant.

Clark and *McPherson* for the respondents.

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

HAMILTON STREET RAILWAY CO. *v.* MORAN.

1895

*May 20.

Negligence—Street railway—Accident to workman on track—Contributory negligence.

APPEAL from a decision of the Court of Appeal for Ontario, reversing the decision of the Divisional Court in favour of defendant company and ordering a new trial.

The plaintiff was a workman in the employ of the company and was injured by a car striking him while working on the track. His action was to recover damages for such injury, and the company defended on the ground that he could have escaped being struck if he had been reasonably careful in looking out for cars passing the track. The trial judge gave judgment for the company holding that plaintiff was the cause of his own misfortune and could not hold defendants liable therefor. This judgment was affirmed by the Divisional Court but reversed by the Court of Appeal, which ordered a new trial.

The Supreme Court, without reserving judgment, affirmed the decision of the Court of Appeal, Gwynne J. dissenting, and on counsel for the company stating that a new trial was not desired, judgment was ordered to be entered for plaintiff with $500 damages, the amount assessed by the jury at the trial.

Appeal dismissed with costs.

W. Nesbitt for the appellants.

Staunton for the respondent.

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

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