REPORTS

— OF THE —

SUPREME COURT

— OF —

CANADA

REPORTER

GEORGE DUVAL, Advocate.

ASSISTANT REPORTER

C. H. MASTERS, Barrister at Law.

PUBLISHED PURSUANT TO THE STATUTE BY

ROBERT CASSELS Q. C. Registrar of the Court.

Vol. 13.

OTTAWA
PRINTED BY THE QUEEN'S PRINTER.
1887.

ERRATA.

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

Page 515—In note at foot of page.—Omit "Taschereau."

" 573—line 10 from bottom.—Instead of (Nos.) read "Pages."

" 695—line 15 from bottom.—Instead of (4) read (3).

" " " 13 " " " " (3) " (4).

JUDGES

OF THE

SUPREME COURT OF CANADA.

DURING THE PERIOD OF THESE REPORTS.

The Honorable SIR WILLIAM JOHNSTONE RITCHIE, Knight C. J.

" " SAMUEL HENRY STRONG J.

" " TÉLÉSPHORE FOURNIER J.

" " WILLIAM ALEXANDER HENRY J.

" " HENRI ELZÉAR TASCHEREAU J.

" " JOHN WELLINGTON GWYNNE J.

ATTORNEYS-GENERAL OF THE DOMINION OF CANADA:

The Honorable SIR ALEXANDER CAMPBELL K.C.M.G., Q.C.

" "JOHN S. D. THOMPSON Q.C.

A TABLE

OF THE

NAMES OF THE CASES REPORTED

IN THIS VOLUME.

TABLE OF CASES CITED.

A.

B.

C.

G.

H.

M.

Mc.

N.

O.

P.

Q.

R.

S.

T.

The following reported cases have been appealed to the Privy Council since the issue of Cassels's Digest. In future the cases in each volume of the Supreme Court Reports will be similarly noted:—

MOFFATT *v.* THE MERCHANTS BANK OF CANADA. Vol. xi, 75.
(Leave to appeal was refused.)

WEST *v.* PARKDALE. Vol. xii, 250.
(Judgment of the Supreme Court affirmed, 12 App. Cas. 602.)

WADSWORTH *v.* McCORD. Vol. xii, 446.
(Leave to appeal was granted, but the case has not been argued.)

BEATTY *v.* THE NORTH WEST TRANSPORTATION CO. Vol. xii, 598.
(Judgment of the Supreme Court reversed, 12 App. Cas. 589.)

SWEENY *v.* BANK OF MONTREAL. Vol. xii, 661.
(Judgment of the Supreme Court affirmed, 12 App. Cas. 617.)

DUMOULIN *v.* LANGTRY. Vol. xiii, 258.
(Leave to appeal refused. 57 L. T. N. S. 317.)

ST. CATHARINES MILLING AND LUMBER CO. *v.* THE QUEEN. Vol. xiii, 577.
(Leave to appeal was granted and the case now stands for argument.)

CASES

DETERMINED BY THE

SUPREME COURT OF CANADA

ON APPEAL

FROM

THE COURTS OF THE PROVINCES

AND FROM

THE EXCHEQUER COURT OF CANADA.

JAMES H. BEATTY, HENRY BEATTY AND JOHN D. BEATTY (Plaintiffs) ..... } APPELLANTS.

AND

SYLVESTER NEELON, JOHN C. GRAHAM AND GEORGE CAMPBELL (Defendants) ..... } RESPONDENTS.

1886

*March 27.

*Nov. 8.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Joint Stock Company—Misrepresentation by promoters of—Action by individual shareholders—Delay in bringing action—Parties.

Individual shareholders in a joint stock company cannot bring an action against the promoters for damages caused by alleged misrepresentations by the latter as to the prospects of the company when formed, the injury, if any, being an injury to the company, not to the respective shareholders. (Strong J. dissenting).

If the shareholders could bring such action a delay of four years, during which they suffered the business of the company to go on with full knowledge of the alleged misrepresentations, would disentitle them to relief. (Strong J. dissenting.)

---

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

1886

BEATTY v. NEELON.

APPEAL from a decision of the Court of Appeal for Ontario (1) reversing the judgment of Wilson J. in the Chancery Division (2).

This was a suit brought by certain shareholders in the North-West Transportation Company against other shareholders who had been the promoters of the company. The bill was filed after the company had been in operation for some four years, and alleged that the plaintiffs and defendants had been owners of rival lines of steamers and the defendants proposed to the plaintiffs that the two lines be amalgamated and a joint stock company formed to run them; that the proposition was carried out and the company formed, the stock being divided between the two lines, plaintiffs receiving the larger share; that the defendants had represented that their line had a four years' contract with the Government to carry the mails from Windsor to Duluth, for which the subsidy was $2,500 a year, and that they also received a bonus from the town of Windsor of $2,000 a year; that the representation as to the mail contract was false, the defendants only having a contract from year to year, which was discontinued after the company was formed; that the plaintiffs would not have agreed to the distribution of shares that was made if they had known the true state of affairs as to this contract; that the defendants had received the Windsor bonus for one year and the plaintiffs were entitled to this amount and the amount of the mail contract for three years as damages. The defendants denied the alleged misrepresentations, and claimed that the plaintiffs, by their delay and conduct in permitting the business to proceed for so long a time without making any claim for relief, they having, the defendants alleged, full knowledge of the true state of affairs from the time the company was formed, were not enti-

(1) 12 Ont. App. R. 50. (2) 9 O. R. 385.

tled to claim relief now.

The cause was heard before Wilson J. in the Chancery Division and resulted in the plaintiffs obtaining judgment for $9,500, being the amount of the postal subsidy for three years and the Windsor bonus for one year. The Court of Appeal reversed this judgment, holding that the plaintiffs, by their delay and conduct, were disentitled to relief. The plaintiffs then appealed to the Supreme Court of Canada.

McCarthy Q.C., and *McDonald* Q.C. for the appellants.

Previous to the formation of the company the plaintiffs were in partnership under the agreement. They had at that time a right to sue or they could not sue now. The company had no rights by contract but only by assignment. *Kelner* v. *Baxter* (1); *Scott* v. *Lord Ebury* (2); *Willmott* v. *Barber* (3). If the company should sue the action would be because they had not received property worth $9,500, and the shareholders guilty of the deceit would participate in the benefits of the action.

We say that we have a right to maintain a common law action for deceit; if not, we have a right to relief in equity. In the first we have to establish moral fraud; in the other misrepresentation is sufficient, though not made intentionally. *Arkwright* v. *Newbold* (4); *Rawlins* v. *Wickham* (5); *Urquhart* v. *MacPherson* (6).

As to what will amount to misrepresentation see *Smith* v. *Kay* (7); *Cater* v. *Wood* (8); *Boswell* v. *Coaks* (9); *Redgrave* v. *Hurd* (10).

This court should consider the evidence in this case and are not bound by the decision of the court below

(1) L. R. 2 C. P. 174.
(2) L. R. 2 C. P. 235.
(3) 16 Ch D. 105.
(4) 17 Ch. D. 301.
(5) 3 DeG. & J. 304.
(6) 3 App. Cas. 831.
(7) 7 H. L. Cas. 750.
(8) 19 C. B. N. S. 286.
(9) 27 Ch. D. 424.
(10) 20 Ch. D. 1.

1886

BEATTY v. NEELON.

Ritchie C.J.

where it is contradictory. *Grasett* v. *Carter* (1).

We submit that there has not been such delay as to disentitle the plaintiffs to recover.

Robinson Q. C. and *W. Cassels* Q C. for the respondents.

This court should not reverse the decision of the Court of Appeal on matters of evidence. *Hale* v. *Kennedy* (2); *Smith* v. *Chadwick* (3); *Sanderson* v. *Burdett* (4).

The plaintiffs cannot maintain this action as the money, if recovered, would belong to the company. I do not admit that the company could not sue on the contract with the promoters. See Brice on *ultra vires* (5).

In order to succeed plaintiffs must prove fraud. *Kennedy* v. *The Panama Mail Co.* (6).

McCarthy Q.C. in reply cited Holdsworth's case (7); Brice on *ultra vires* (8); Pell's case (9).

SIR W. J. RITCHIE C.J.—I do not feel called upon to express any opinion as to the objection (assuming the case was sustained by evidence) that the proceedings should have been by and in the name of the North West Transportation Company, because I think the evidence did not warrant the conclusion at which the learned Chief Justice in the court of first instance arrived.

As to the question of the contract for carrying mails from Windsor to Duluth once a week at the rate of $100 a trip, the learned Chief Justice says:—

The parties are as much opposed to each other upon that part of the case as it is possible for them to be.

Again he says:—

I am, upon the whole, led to adopt the plaintiffs' account of what

(1) 10 Can. S. C. R. 105.
(2) 8 Ont. App. R. 157.
(3) 9 App. Cas. 187.
(4) 18 Gr. 417.
(5) P. 676.
(6) L. R. 2 Q. B. 580.
(7) 5 App. Cas.
(8) P. 747.
(9) 5 Ch. App. 11.

took place at the time of the negotiations with respect to the $100 a week subsidy, rather than that of the defendants, although I do so with some degree of doubt as to the Windsor bonus.

1886

BEATTY v. NEELON.

Ritchie C.J.

I think the burthen was on the plaintiff of making out his case without leaving any reasonable doubt. I agree with the observations of the learned Chief Justice of Ontario:—

That this suit was brought, after great and wholly unexpected delay, after the company had been four years in full operation, and with full knowledge on plaintiffs' part of the alleged misrepresentations almost from the beginning. That it was a case, under all the extraordinary circumstances, which a court of justice should have required to be proved with undoubted clearness.

I take it there is no proposition better established than that fraud must be distinctly and clearly proved; that the law will presume in favor of honesty and against fraud. As Parke B. said in Shaw appellant and Beck respondent (1):—

Defendants who seek to set an instrument aside as fraudulent must establish fraud, upon the universal principle that every transaction in the first instance is assumed to be valid, and the proof of fraud lies upon the person by whom it is imputed.

Therefore, unless the alleged fraud is established beyond a reasonable doubt, the presumption in law would be that the proceeding on the part of the defendants was fair and honest. The agreement is a fair and valid one on its face, and has been accepted and acted on for years after notice by all parties of the alleged grievances; by which acting, if the plaintiffs' contention is right, they were, from time to time, receiving less, and the defendants more, in the way of dividends than they were respectively entitled to, and this without, apparently, any complaint or remonstrance or effort to have the alleged wrong rectified.

The evidence is most contradictory, and there were material discrepancies, on several points, on both sides, the defendants most distinctly denying that the repre-

(1) 8 Ex. 392.

1886

BEATTY v. NEELON.

Ritchie C.J.

sentations sworn to by the plaintiffs were ever made. It then, in my opinion, becomes most important to look at the conduct of the parties, and their dealing with the subject matter in dispute, with a view of ascertaining with which side such conduct has been most consistent.

On the 29th of December, 1876, the agreement was entered into between the plaintiffs and the defendants and one Graham, since deceased. A company was formed and incorporated, and a charter obtained, on the 5th of March, 1877. Some time in May, 1877, James Beatty says that he discovered the alleged misrepresentations as to the Windsor contract and bonus and brought it before the board meeting of the company in the next month of June. Though thus aware of what the plaintiffs alleged was the true state of the case immediately after the incorporation, no steps whatever were taken by either the plaintiffs or the corporation (the latter the party really damnified by the misrepresentations, for the injury, if any, was clearly to the joint adventure) for a rescission of the contract or the dissolution of the company, and a re-conveyance of the property conveyed to the joint adventure.

On the contrary, the business of the company was carried on in the ordinary course in the seasons of 1877-8-9 and 1880 and subsequently, and it was not until the 21st of February, 1881, that this suit was commenced, in which plaintiffs obtained a decree, and in which suit, before the Court of Appeal, plaintiffs sought to support a decree giving them the two items of $7,500 and $2,000, to be paid to them personally, which, it is abundantly clear, they could by no possibility be entitled to receive, because, if the representations had been true, these sums would not have belonged to the plaintiffs, but would have been received by the corporation, to be dealt with as the other assets of the

company, and out of which they, the plaintiffs, could only receive, by way of dividends, their proportionate shares. How, then, is it possible that these plaintiffs could be entitled to what the decree gives them, namely, the whole extent of these items or assets as their own in undisputed right? The items, then, as said by the Chief Justice of Ontario, are not damages to which the plaintiffs are entitled, and none other are claimed or shown.

If the plaintiff's statement be the true version of the conversations, is it reasonable to suppose that a matter resting on the recollection of transactions and conversations which took place seven or eight years ago would be allowed to remain so long unsettled? Or is it reasonable to suppose that the plaintiffs, with the knowledge they possessed, would have sought no redress, but, on the contrary, have gone on with the business, allotted the shares on a basis they now claim to have been entirely wrong, and have allowed the defendants to deal with shares to some of which they now claim the defendants were not entitled? Or is it reasonable to suppose they would have allowed the defendants, or whoever held the stock, to receive from year to year large dividends to which they were not entitled, and by which their own dividends were diminished, and not until after four years' business institute these proceedings, and then remain three or four years longer before bringing such proceedings to a hearing?

I do not put forward these considerations as anything in the nature of a bar, but simply as matters worthy of consideration in determining as to the credit to be given to the conflicting statements, and as showing that the contract as acted on was considered by the parties as valid and binding. At any rate, as establishing a fair inference that the profits had been divided

1886

BEATTY v. NEELON.

Ritchie C.J.

on the basis originally agreed on.

Under all these circumstances, I think the conduct of the parties is entirely consistent with, and confirms, the views presented by the defendants, and is equally inconsistent with, and discredits, those of the plaintiffs; and therefore I think the Court of Appeal was right, on the merits and facts of the case (apart from any legal question as to the right of the plaintiffs to sue) in allowing the appeal and dismissing the action, and therefore this appeal, in my opinion, should be dismissed with costs.

STRONG J.—This is a suit in equity to compel the defendants to make good certain representations, upon the faith of which the plaintiffs were induced to enter into a preliminary partnership with the defendants and subsequently to constitute with them a joint stock company.

The alleged representations were that the defendants had a contract with the Government for carrying the mails weekly from Windsor to Port Arthur, Lake Superior, for which they were to receive $100 per trip, and of which contract two years were to run, and further, that they were entitled to a bonus from the town of Windsor of $2,000 a year, of which one year was yet unexpired. These contracts were to form part of the defendants' contribution to the partnership and company.

In my opinion the evidence establishes beyond all controversy that such representations were in fact made, that they were so made to induce the plaintiffs to enter into an agreement, that the plaintiffs acted on the faith of them, and that they were untrue. But it is sufficient to say that the plaintiffs' witnesses proved the case made by the bill, and that it was for the learned Chief Justice of the Queen's Bench, who

presided at the trial, to determine whether their statements or those of the defendants were most entitled to credit. The Chief Justice having found in favor of the plaintiffs, that finding ought to be conclusive as regards the facts.

It is, therefore, to be considered now as decisively established that the defendants made the representations in question and that their statements have since turned out to be untrue. It results that they must either have been made by Campbell, who was the chosen spokesman on behalf of the defendants, with consciousness of their untruth, or recklessly without having taken the pains to make enquiries and to verify his assertions from sources of information which were obviously within his reach. In either point of view the plaintiffs are entitled to a remedy for that which was a direct and proximate cause of the injury resulting to them from having put faith in the representations of the defendants. That proximate and direct injury and damage, was the loss of such a proportion of the monies which would have arisen from the contract and bonus (had these sums been received) as would have been allotted to the plaintiffs as holders of $\frac{1}{25}$ of the capital stock of the company. I think the conclusion drawn by the Chief Justice of the Queen's Bench from the evidence before him, that the payments under the contract of $100 a week should be estimated at 25 weeks for each year, was correct. This estimate would make the gross receipts from that source $7,500 for the three years. The Windsor bonus amounting to $2,000 being added, the aggregate amount which ought to have been received by the company in order to carry out the representations made to the plaintiffs, was $9,500 of which amount would have been the plaintiffs' share. If any deduction was to be made from this in respect of extra expenditure or loss in per-

1886

BEATTY v. NEELON.

Strong J.

forming the service required to fulfil the contract and earn the bonus the defendants should have proved it as reduction of damages, but this they have failed to do.

That the plaintiffs were entitled to an equitable remedy to compel the defendants to make good their representations cannot, in my opinion, be a matter of the least doubt.

That a representation not true in fact made to induce another to enter into a contract and which is an element in inducing the contract entitles the party who has acted upon it to a decree compelling the other party to make his representations good or, to put it more plainly and directly, to substantial damages, is, I think, clear upon authority; and it makes no difference whether the representation be made with conscious falsehood or only with reckless and careless disregard of the obligation of ascertaining the real facts before hazarding any assertion upon which the opposite party is to act. To deny such a proposition would be to overrule at least three cases of the highest authority, in all of which this principle was most distinctly propounded and acted upon, viz: *Burrowes* v. *Lock* (1); *Slim* v. *Croucher* (2); *Rawlins* v. *Wickham* (3). It is said that these cases have been overruled by *Redgrave* v. *Hurd* (4). But in the first place I do not construe the language of the Master of the Rolls in that case as importing any intention to overrule the long series of cases which has settled this principle of liability in courts of equity, and, secondly, I deny that it was competent for a single judge in a court of first instance to overrule the cases already cited, all of which were decisions of appellate tribunals.

In *Barry* v. *Croskey* (5) Wood V.C. says that it is essential to entitle a party, complaining of a misrepre-

(1) 10 Ves. 470.
(2) 1 DeG. J. & F. 518.
(3) 3 DeG. & J. 316.
(4) 20 Ch. D. 1.
(5) 2 Johns. & H. I.

sentation, to relief that he should be able to show (1st) that the representation is false; (2nd) that he has acted upon the faith of it; and (3rd) that he has been damnified from so acting; and, further, that the damage so resulting was not remote but immediate. Here, I am of opinion that we have all these elements of liability. The statements of Campbell were made with the intention on the part of the defendants that they should be acted upon by the plaintiffs, and they were so acted upon, and immediate, and direct injury resulted to the plaintiffs in this that they did not receive or get the benefit of moneys which they would have received and have had the benefit of if the representations had been true. The case is, therefore, in my judgment, eminently one for equitable relief and indemnity. As I have already said, the objection that some deduction ought to be made in respect of increased expenditure in performing the service under the contract and to give a title to the bonus, is met by the consideration that for all that appears the profits and earnings on freight of goods and fares of passengers earned by the vessels which would have been employed on this mail service would have more than recouped the expenditure. If this were not so, it was for the defendants to have proved there would have been a loss entitling them to a reduction of damage. But there is no such proof, and in the absence of it it is to be presumed that the whole amounts represented to be payable under the contract and bonus would have been net profit to be carried to the credit of the profit and loss account, undiminished by any charge for losses.

I cannot, however, agree with the Chief Justice of the Queen's Bench, that the measure of damages which the plaintiffs are entitled to receive is the whole amount of $9,500. I think they must be restricted to a share of it, proportioned to the amount of their shares

1886

BEATTY v. NEELON.

Strong J.

in the capital stock of the company, namely, $\frac{12}{25}$, which would amount to $7,220, for which amount, together with costs, I am of opinion, the plaintiffs were entitled to a decree. This appeal should, therefore, be allowed with costs.

FOURNIER J.—The evidence is clear and sufficient that the plaintiffs are entitled to no relief. The Court of Appeal have unanimously so declared and I concur in dismissing the appeal with costs.

HENRY J.—I agree with the conclusion of the learned Chief Justice, and I am further of opinion that Beatty was not, in any way, misled, that he had an opportunity of knowing, or of ascertaining, by inquiry, as to the true state or position of the subsidy, and I think, that the suit, to be successful, should have been instituted in the name of the company The contract was with the company, not with Beatty, and it was a failure of representation to the company, and it was the company that was injured and not Beatty alone, and it being the company the action should have been brought in the name of the company. I cannot understand how a mere stockholder can bring an action for a wrong alleged to have been done to the company. It was the company's stock that was affected and I think the injury, if any, was to the company.

I am of opinion also from the evidence, and I think there is evidence to sustain the position, that no injury was done. I think it was shown that to carry out the services would cost more than would be realized from them.

Taking all these matters into consideration I think the appeal should be dismissed.

GWYNNE J.—In no view which can be taken of this case can the action, in my opinion, be maintained.

1886

BEATTY v. NEELON.

Gwynne J.

The action is in the nature of the old common law action of deceit, although instituted in the Court of Chancery before the passing of the Judicature Act. The plaintiffs undertake to prove :

1st. That the representation which is made the foundation of the action was made by the defendants.

2nd. That it was made falsely and fraudulently.

3rd. That the plaintiffs were thereby induced in the agreement which they entered into with the defendants, and set out in the bill, to consent that the defendants should respectively have allotted to them, in the joint stock company which they agreed to form, a greater number of shares than, but for such representation they would have agreed should have been allotted them ; and,

4th. That the plaintiffs have suffered actionable damage from such false and fraudulent representation.

Now to be actionable the damage must not be remote, but must be shown to be the natural, reasonable and necessary result to the plaintiffs and occasioned by the act complained of.

The casue of action as stated in the plaintiffs' bill of complaint is that the plaintiffs being owners of a line of steamers running from the town of Sarnia to Duluth, on Lake Superior, and the defendants being owners of a line of steamboats running from the town of Windsor to Duluth, upon the 29th day of December, 1876, entered into an agreement executed under their hands and seals whereby they agreed to form themselves into a joint stock company for the purpose of carrying on the business theretofore carried on by their said respective lines of steamers, and also extending their operations to such other places as might be deemed advisable. That the stock of the said company should be the sum of $250,000 in five hundred shares of $500 each, distributed among the plaintiffs and defendants severally and

1886

BEATTY v. NEELON.

Gwynne J.

respectively in certain proportions in the agreement stated. That the plaintiffs thereby agreed to transfer to the company so to be formed three steamers then used by them, namely: The "Quebec," the "Ontario" and the "Manitoba," together with the good will of their said business and all their interest in any contracts into which they had entered in respect of said vessels, and all the boats, tackle, rigging, furniture, &c., &c., belonging to the said vessels and used therewith, and the defendant Neelon agreed to transfer to the said joint stock company the steamer "Sovereign" and all the boats, tackle, rigging, furniture, &c., belonging to her, and the defendants Graham and Campbell agreed to transfer to the said joint stock company the steamer "Asia" and all her boats, tackle, rigging, furniture, &c., &c., and all the defendants agreed that all the good-will of the business carried on by the defendants with the said steamers, and all contracts and connections of them and by them in connection with the said line of steamers should be included in such transfer; and it was further agreed that a charter of incorporation should be applied for with all reasonable despatch, and in the meantime the parties agreed to enter into and to form a partnership under the name and style of the North-West Transportation Company and to carry on the said business theretofore carried on by the said respective lines of steamers, and to become partners in the said business, until they should procure the said charters of incorporation, and that the rights and liabilities of the said partners, respectively, should be in the proportions represented by the different shares therein mentioned as allotted, or to be allotted, to them respectively in the said proposed joint stock company. And the said parties to the said agreement thereby further agreed that the said steamers, &c., &c., and all and every matter and thing which they had agreed,

1886

BEATTY v. NEELON.

Gwynne J.

should form the capital stock and become the property of the said proposed company, and should, until the said act of incorporation should be obtained, be and become the property of the said co-partnership, and that as soon as a company should be incorporated for the purposes aforesaid, then and immediately thereafter all and every part of the property, stock and assets of the said partnership should forthwith, and by proper and suitable deeds of conveyance, be transferred to and become the property of, and be possessed and enjoyed by, the said incorporated company; but so as to secure to each of the partners parties thereto an allotment of paid-up stock in the said incorporated company in value, and in such proportions as therein set forth, and that the said copartnership into which they had thus by the said agreement entered should thereupon be dissolved, and the said joint stock company should stand in the place thereof, both as to ownership of assets, assumption of liabilities, and fulfilments of contracts and engagements. The bill then alleges that the mail contracts of each of the said lines was discussed and considered, and was a most material and important element in determining the proportions in which the capital stock of the said proposed joint stock company should be distributed between the plaintiffs and defendants respectively, and that the defendants, well knowing this, and for the purpose of misleading and deceiving the plaintiffs, and for the purpose of increasing the value to be placed on their steamboats and other property to be contributed by them to the said company, falsely and fraudulently represented to the plaintiffs that they, the said defendants, had a written contract with the Government of the Dominion of Canada for the carrying of Her Majesty's mail on their said steamboats from Windsor to Duluth, aforesaid, for four years from the spring of one thousand eight hun-

1886

BEATTY v. NEELON.

Gwynne J.

dred and seventy-six, under which they were receiving, and would receive, and would be entitled to receive, during said period of four years, for each and every trip of each of their said steamboats from Windsor to Duluth, the sum of one hundred dollars, and that the plaintiffs, relying on the said statements of the said defendants as to the said mail contract, as the defendants well knew, and believing the same to be true, entered into the said agreement, whereby the said capital stock was agreed to be distributed as follows, namely, 380 shares to the plaintiff and 120 shares to the said defendants. The bill then alleges that the said joint stock company was formed and incorporated by letters patent of the Dominion of Canada under the name of the North-West Transportation Company upon the 5th day of March, 1877, and that subsequent to the date of the said agreement, and before the issue of the said letters patent, the plaintiffs and defendants agreed between themselves that the stock of the said company should consist of 600 shares of $500 each, which should be distributed between them in the proportions to which they were by the said agreement to receive the said 500 shares, and that at the time of the issuing of the said letters patent the said stock was allotted and distributed between the plaintiffs and defendants, as follows:

To the plaintiff, James H. Beatty, 205 shares.

To the plaintiff, Henry Beatty, 120 shares.

To the plaintiff, John D. Beatty, 52 shares.

To the defendant, Sylvester Neelon, 103 shares.

To the defendant, John C. Graham, 60 shares.

And to defendant, George Campbell, 60 shares.

But that said distribution and allotment was made having regard to the original basis of distribution of stock as set forth in the said agreement. The bill then alleges that the plaintiffs and defendants were the first

directors of the said company until the 3rd March, 1878, when the defendant Campbell ceased to be a director, and thereafter the plaintiffs and the defendants, other than Campbell, have continued to be and still are at the time of the filing of the bill of complaint, namely, on the 21st February, 1881, directors of the company and the defendant Neelon the president thereof.

The bill then alleges that the plaintiffs contributed to said company everything required from them by the said agreement of the 29th December, 1876, and among these things a mail contract which the plaintiffs had to carry mails from Sarnia to Duluth, under which the said joint stock company had been in the receipt of $7,000 per annum, and have received in all therefrom the sum of twenty-one thousand dollars. And that after the formation of the said company, and the issuing of the said letters patent, and after the defendants had received their said stock, the plaintiffs for the first time learned that the said defendants had no written or binding mail contract with the Government as represented by them as aforesaid, but had merely a verbal agreement with said Government from year to year, and that the government after the formation of the company refused to continue said verbal agreement or to pay said sum of one hundred dollars per trip as represented by the said defendants in respect of said mails, and that although the said steamboats entitled thereto have continued to run from Windsor to Duluth aforesaid, the said company have wholly lost the said sum of one hundred dollars per trip, whereby also the plaintiffs have suffered loss as such shareholders by reason of the said misrepresentations. The bill then alleged that the defendants had a contract with the town of Windsor to receive from that corporation the sum of $6,000 for running a steamer

1886

BEATTY v. NEELON.

Gwynne J.

once a week during the season of navigation for three years, one year of which had yet to run when the agreement of December, 1876, was entered into, and that although the defendants had received the whole of the sum of $6,000, and although the service for the third year was performed by the said joint stock company, yet the defendants refused to pay, or to account to the said company for the sum of $2,000, the proportion applicable to the service during such third year, or any part thereof.

Assuming the representations to have been made as alleged, it is nevertheless apparent from this bill that the material substance of the agreement of December, 1876, was that the defendants as promoters jointly with the plaintiffs of the contemplated joint stock company would transfer their steamships, &c., &c., and the goodwill of their business and all contracts, &c., &c, to the said joint stock company when formed, for which they were respectively to be allotted and receive the number of shares in the paid-up capital stock of the company in the bill mentioned, and that, until the company should be formed, the plaintiffs and defendants should jointly possess and enjoy the said steamships, &c., &c., &c., in partnership for the purpose of carrying on the business together for their joint benefit in like proportions to the number of shares agreed to be allotted to each in the company. This agreement enured to the benefit of the company when formed. Now the company was formed on the 5th of March, 1877, before ever the season of navigation had commenced, before therefore the business could have been carried on by the plaintiffs and defendants in partnership, and before the plaintiffs could have derived any benefit from the contract assuming it to have been in existence, and the company on the said 5th of March became absolutely entitled, under the terms of the said agreement of

December, 1876, to a transfer of all the property, rights and contracts and assets, agreed by the instrument to be transferred to them, including the said contract and all benefit to be derived therefrom.

Now, when the deeds, which, by the said instrument had been agreed to be executed, transferring to the company the said property, rights, contracts and assets by the plaintiffs and defendants respectively, were, in fact, executed, or in what terms they were drawn, does not appear, but we must, on the statements of the bill, take it that they were executed so as to pass to the company every thing, which by the articles of agreement as set out in the bill was agreed to be transferred, so that if the defendants had, as is alleged, obtained shares allotted to them in the capital stock of the company based upon the allegation of their having such a mail contract as is alleged in the bill and for a greater amount than, but for such allegation, would have been allotted to them and than they would have been entitled to receive, all recompense, indemnity and satisfaction of whatsoever nature, in respect of such excess in said allotment must needs be made to the said joint stock company as the only party entitled to receive the same. That recompense, indemnity or satisfaction could have been obtained, as it appears to me, in one or other of two ways only, namely, either 1st. By the defendants giving up the shares so allotted to them respectively in excess of the number of shares they should have received, or 2nd. By making good the representation by paying over to the company the $100 per trip, which the steamer which should have performed the service, if the contract had existed would have received. But by the bill it appears that while the plaintiffs and defendants were the directors of the company, and in fact the only shareholders therein, it was in May, 1877, discovered there was no such mail

1886

BEATTY v. NEELON.

Gwynne J.

contract in existence as the plaintiffs now allege the defendants, for the unjust purpose of increasing the amount of the shares in the capital stock of the company to be allotted to them, represented that they had, and of this fact the plaintiffs, and the company, were thenceforth well aware; yet it appears that out of the profits of the business in the years 1877-8-9 and 1880, the defendants were in each year paid by the company dividends upon the shares alleged to have been allotted to them in excess of what they should have received, in which payment the plaintiffs, as directors of the company and the only shareholders therein besides the defendants, must have concurred. The company thereby, and the plaintiffs as directors thereof and as shareholders therein, having the controlling voting power, with full knowledge of the alleged misrepresentation and the alleged wrongful allotment of shares, recognised and affirmed in the most unequivocal manner the correctness of the allotment and the right of the respective defendants to receive such dividends. The plaintiffs further in their bill allege, as in fact and in law must be admitted to be true, that the loss, whatever it is, if any there be, which has been sustained, has been sustained by the company. The allegation is in the 16th paragraph of the bill, where it is alleged that, by reason of the premises, "the said company have wholly lost the "said sum of one hundred dollars per trip," and the plaintiffs add, "whereby also the plaintiffs have suffered loss as such shareholders by reason of such misrepresentation." All the loss that the plaintiffs have sustained is thus alleged to have been sustained, as indeed under the circumstances it could only be, as shareholders in the company, such loss arising by reason of the loss which the company in which they are shareholders are said to have sustained, but no action lies at the suit of shareholders in a company for a loss

1886

BEATTY v. NEELON.

Gwynne J.

sustained by the company, although in such loss the shareholders must necessarily partake. In this respect the action is unprecedented and unmaintainable. Moreover, the loss which in such a case the shareholders sustain is the several loss of each shareholder and is proportionate to the number and amount of the shares held by each, and for such loss, if it were actionable, each must sue for his own loss.

The learned counsel for the appellants, in his argument before us, was obliged to admit that for any loss as shareholders in the company the plaintiffs could not maintain this action; and to get over this difficulty he contended that the plaintiffs, the moment the instrument of December, 1876, was executed, had sustained the loss for which this action is brought, in this that, inasmuch as in point of fact the defendants had not such a contract as they are alleged to have represented that they had, the shares of the plaintiffs in the interim partnership constituted by the instrument were depreciated in value and less saleable. The answer to this contention is twofold: 1st. That no such case is made by the bill. 2nd. Nor could have been successfully, for the agreement in the instrument of December, 1876, is that the partnership between the plaintiffs should continue only until the joint stock company should be formed, and that all the property of the plaintiffs and defendants respectively and their respective rights, contracts and assets agreed to be transferred should continue to be the property of the partnership until the company should be formed, when all should be transferred to the company, and the co-partnership should become dissolved; so that in the interim there were no shares capable of being disposed of or whose intrinsic value could be depreciated, nor could any change whatever in the partnership or its assets or effects have been made without the con-

1886

BEATTY v. NEELON.

Gwynne J.

sent of all the partners. If the partnership had continued in existence, and the business been carried on in partnership by reason of delay in the formation of the company, for the space, say, of a year, during which profits were being made, still the plaintiffs would have sustained no damage necessarily resulting from the misrepresentation; for as the fact of the non-existence of the mail contract was ascertained at the commencement of the season before any profits could have been made, when the profits accruing from the season's business, which, until divided, would be in the possession and control of the partners jointly, should come to be ascertained and divided the plaintiffs had in their own hands the power of protecting themselves by refusing to let the defendants have any profits in respect of the shares in the partnership, if any there were, which the defendants had acquired in excess of what they were entitled to, or would have had, but for their alleged fraudulent representation of the existence of this mail contract. If, with knowledge of the facts, the plaintiffs had agreed to a distribution of profits to the defendants upon the full amount of an interest in the partnership capital, which they were to have only on the faith of the truth of their representation, the plaintiffs could not complain that they had suffered any damage attributable to the alleged misrepresentation. The matter, in such a case, would have been simply one of account between the partners, to be taken under the direction of the court if the parties should differ among themselves. It is plain, therefore, that no loss could have arisen until the defendants received the shares allotted to them by the company, and that the loss, if any there was, was, as stated in the plaintiffs' bill, the loss of the company. This view of the case I have already disposed of. Finally, I am of opinion that it is impossible for us to

say that the Court of Appeal for Ontario, in reversing the finding of the learned judge who tried the case, have come to an erroneous conclusion on the facts of the case. It is impossible to regard the case as turning simply on the degree of credibility to be attached to the testimony of, or upon the weight to be given to the memory of, persons speaking to conversations which had taken place six years previously. There is a mass of other evidence bearing on the material point in issue; in fact, the whole of the dealings and conduct of the parties constitute most important evidence, which must be taken into consideration in order to arrive at a just conclusion upon the point in issue, which is whether any and, if any, what sum of money, or any and, if any, what number of shares, was agreed to be and was allowed and allotted to the defendants as the value of the alleged mail contract. The question is one depending upon the proper inference to be drawn from the whole of the evidence, and, to my mind, the proper inference to be drawn is that there was not. I am of opinion, therefore, that the judgment of the Court of Appeal, in reversing the judgment of the learned judge who tried the case, must be maintained.

Prior to the year 1876 the plaintiffs had received $9,000 per annum for the mail service, for which, by their contract of 1876, they were only to receive $7,000. The service to be rendered under this last contract was that a steamer should leave Sarnia twice a week, namely, on Tuesdays and Fridays, calling at Southampton and Fort William only *en route* to Duluth. The $2,000 per annum so deducted from the amount which the Sarnia line had in previous years received was applied by the Postmaster General in procuring an additional mail service by the Windsor line starting a steamer from Windsor every Thursday, calling at eleven places on the way to Duluth, thus giving

1886

BEATTY v. NEELON.

Gwynne J.

enlarged benefit to the public and serving numerous additional places on the route. For this service the defendants received in 1876 $100 per trip, and there is no reason to suppose that they would not have received the like sum in the following year if they should have rendered the like service.

Now, the plaintiffs admit that their own contract was terminable at any moment at the will of the Postmaster General, and that they knew that whatever contract the defendants had must have been terminable in like manner. The plaintiffs also knew that in carrying out their mail contract a steamer of the defendants' line had to leave Windsor every Thursday. Now it was this competition and expense caused by this excess of steamship accommodation to do the work that was for them to do, that constituted the motive of bringing about the amalgamation of the two interests into the one joint stock company, and it is admitted by the plaintiffs that to run a separate steamer from Windsor on Thursday, as had been done by the defendants, while other steamers should leave Sarnia on Tuesdays and Fridays, as was necessary under the plaintiffs' contract, would not have at all paid the amalgamated company, and no such steamer could have been run by them; so that we must come to the conclusion that no such thing had been contemplated in forming the amalgamation, as that a steamer should leave Windsor on Thursday additional to their leaving Sarnia on Tuesdays and Fridays and performing the service which the defendants' steamer had performed.

Then, again, we see that what the plaintiffs and defendants used all their influence to obtain for the company when formed was that the Postmaster General would give the $100 per trip to the company to carry a mail from Windsor by a steamer of the company's line leaving Sarnia on Tuesdays or Fridays, for

1886

BEATTY v. NEELON.

Gwynne J.

which such steamer would call at Windsor. In fact, that the company should receive $9,000 per annum instead of $7,000 for the additional service of one of the company calling at Windsor for and carrying a mail from there in one of the steamers that by the contract of 1876 with the plaintiffs they were obliged to start from Sarnia. This would not suit the Postmaster General, whose object in subsidizing the defendants' line was to get the additional service, and on a different day from those on which the steamers of the plaintiffs' line were obliged to leave Sarnia; but a service otherwise than in the manner proposed by the plaintiffs and defendants on behalf of the company would not suit the company. The amalgamation plainly was effected for the express purpose of doing away with the three trips per week which the separate lines had between them made, and so the loss of the benefit of the contract, whatever might have been its terms which the defendants had in 1876, must, as it appears to me, have been foreseen and contemplated as a necessary consequence upon the formation of the joint stock company. All the efforts of the parties to procure the Post Office Department to give the subsidy of $100 per trip, for a totally different service from that for which it had been given to the defendants, supports this view.

Now, although the plaintiffs whose interest it was to get allowed to themselves shares to the amount of the capitalised value of their contract, assuming it to continue in existence for its full period, although it was, in fact, terminable at any moment at the will and pleasure of the Post Office Department, did obtain for themselves this advantage, it by no means follows as a just inference, that the defendants should receive a like benefit in respect of a contract, the terms of which the plaintiffs and the company they were forming could not and would not have fulfilled. The conduct also of

1886

BEATTY v. NEELON.

Gwynne J.

the parties in giving to the defendants yearly their dividends upon the whole number of the shares allotted to them in which the plaintiffs, as directors of the company and as shareholders therein, must be taken to have concurred, is quite inconsistent with the idea that a portion of these shares had been allotted to them only upon the faith of a consideration which had wholly failed. The whole weight of the evidence leads to the opposite conclusion, and the appeal must, in my opinion, be dismissed with costs.

Appeal dismissed with costs.

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

Solicitors for respondents: *Miller, Cox and Yale.*

1877

Oct. 17.

1883

*Feb. 22.

*May 1.

1885

*Dec. 9, 10, 11 & 12.

1886

*Dec. 7.

F. X. BERLINQUET, *et al*, (SUPPLIANTS), APPELLANTS;

AND

THE QUEEN.....RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Petition of Right—Intercolonial Railway Contract—31 *V. c.* 13 *s.* 18—*Certificate of engineer a condition precedent to recover money for extra work—Forfeiture and penalty clauses—Setting down Exchequer appeal.*

The suppliants agreed, by contracts under seal, dated 25th May, 1870, with the Intercolonial Railway Commissioners (authorized by 31 V. c. 13) to build, construct and complete sections three and six of the railway for a lump sum, for section three of $462,444, and for section six of $456,946.43.

The contract provided *inter alia*, that it should be distinctly understood, intended, and agreed that the said lump sum should be the price of, and be held to be full compensation for, all works embraced in or contemplated by the said contract, or which might be required in virtue of any of its provisions or by-laws, and the contractors should not, upon any pretext whatever, be

---

*PRESENT—Sir W. J. Ritchie C.J., and Fournier, Henry, Taschereau and Gwynne JJ. (On the application to set down the appeal for hearing Strong J. was present.)

entitled, by reason of any change, alteration or addition made in or to such works, or in the said plans or specifications, or by reason of any of the exercise of any of the powers vested in the Governor in Council by the said Act intituled, "An Act respecting the construction of the Intercolonial Railway," or in the commissioners or engineers by the said contract or by law, to claim or demand any further sum for extra work, or as damages or otherwise, the contractors thereby expressly waiving and abandoning all and every such claim or pretension, to all intents and purposes whatsoever, except as provided in the fourth section of the contract relating to alteration in the grade or line of location; and that the said contract and the said specification should be in all respects subject to the provisions of 31 Vic. ch. 13; that the works embraced in the contracts should be fully and entirely complete in every particular and given up under final certificates and to the satisfaction of the engineers on the 1st of July, 1871 (time being declared to be material and of the essence of the contract), and in default of such completion contractors should forfeit all right, claim, &c., to money due or percentage agreed to be retained, and to pay as liquidated damages $2,000 for each and every week for the time the work might remain uncompleted; that the commissioners upon giving seven clear days' notice, if the works were not progressing so as to ensure their completion within the time stipulated or in accordance with the contract, had power to take the works out of the hands of the contractors and complete the works at their expense; in such case the contractors were to forfeit all right to money due on the works and to the percentage returned.

On the 24th May, 1873, the contractors sent to the commissioners of the Intercolonial Railway a statement of claims showing there was due to them a large sum of money for extra work, and that until a satisfactory arrangement was arrived at they would be unable to proceed and complete the work.

Thereupon notices were served upon them, and the contracts were taken out of their hands and completed at the cost of the contractors by the Government.

In 1876 the contractors, by petition of right, claimed $523,000 for money *bonâ fide* paid, laid out and expended in and about the building and construction of said sections three and six, under the circumstances detailed in their petition.

The Crown denied the allegations of the petition, and pleaded that the suppliants were not entitled to any payment, except on the

1877

BERLINGUET v. THE QUEEN.

certificate of the engineer, and that the suppliants had been paid all that they obtained the engineer's certificate for, and in addition filed a counter claim for a sum of $159,982.57, as being due to the Crown under the terms of the contract, for moneys expended by the Commissioners over and above the bulk sums of the contract in completing said sections.

The case was tried in the Exchequer Court by J. T. Taschereau J., and he held that under the terms of the contract the only sums for which the suppliants might be entitled to relief were, 1st, $5,850 for interest upon and for the forbearance of divers large sums of money due and payable to them, and 2nd, $27,022.58, the value of plant and materials left with the government, but that these sums were forfeited under the terms of the clause three of the contract, and that no claim could be entered for extra work without the certificate of the engineer, and that the Crown were entitled to the sum of $159,953.51, as being the amount expended by the Crown to complete the work.

An appeal to the Supreme Court of Canada having been taken by the suppliant, it was

Held, affirming the judgment of the court below, Fournier and Henry JJ. dissenting, 1st. That by their contracts the suppliants had waived all claim for payment of extra work. 2nd. That the contractors not having previously obtained from, or been entitled to, a certificate from the Chief Engineer, as provided by 31 Vic. ch. 13 s. 18, for or on account of the money which they claimed, the petition of the suppliants was properly dismissed. 3rd. Under the terms of the contract, the work not having been completed within the time stipulated, or in accordance with the contract, the Commissioners had the power to take the contract out of the hands of the contractors and charge them with the extra cost of completing the same, but that in making up that amount the court below should have deducted the amount awarded for the value of the plant and materials taken over from the contracts by the Commissioners in June, 1873, viz: $27,022.58.

The circumstances under which this appeal was set down for hearing in 1883, although judgment in the Exchequer was delivered in 1877 appear in the judgment of Strong J. hereinafter given (1).

APPEAL from the judgment of J. T. Taschereau J., in the Exchequer Court of Canada. The petition of right, the pleadings, and facts are fully set out in the judgments hereinafter given.

(1) See also Cassels' Digest p. 393.

1877

BERLINGUET v. THE QUEEN.

Taschereau J. in the Exchequer.

The suppliants were represented in the Exchequer Court by *M. A. Hearn*, Q.C., *G. Irvine*, Q.C., *F. Langelier* Q.C., and the respondent by *A. McLennan* Q.C., *J. Bell* Q.C., *F. X. Lemieux*, *A. F. McIntyre* and *E. Lareau*.

The following is the judgment of the Exchequer Court delivered by

J. T. TASCHEREAU J.—"The petitioners, François Xavier Berlinguet, architect, and Charlotte Mailloux, his mother, associates and carrying on business under the name and firm of F. X. Berlinguet & Co., made on the 25th of May, 1870, with Her Majesty the Queen, represented by the commissioners appointed in virtue of the act of the parliament of Canada 31st Vic. ch. 13, two contracts for the building of sections Nos. 3 and 6 of the Intercolonial Railway, in consideration of the sum of $462,444 for section No. 3 and the sum of $456,946 for section No. 6. Section No. 3 is represented in the contract as having 24 miles in length or thereabout and section No. 6 as having a length of 21 miles.

"The petitioners having given up their contracts for the reasons mentioned in their petition, obtained from Her Majesty the permission to present this petition against the government of the Dominion of Canada. The indemnity they claim amounts to $523,000.

"Her Majesty, by and through her Attorney General for the Dominion of Canada, answered this demand by the pleadings which are contained in a document annexed to the present.

"The complaints of the petitioners are numerous, but they can be reduced to the following:—

"1. That there were no valid contracts between Her Majesty and the petitioners; that if ever such contracts existed, they were annihilated or modified by the fact that the petitioners had no communication of the plans

1877

BERLINGUET v. THE QUEEN.

Taschereau J. in the Exchequer.

and profiles nor of the bill of works; and, also, that the schedule of prices agreed upon was increased by orders in council;

"2. That the petitioners were compelled by the engineers employed by the commissioners to execute works quite different from those mentioned in the contracts, much more costly and much above the stipulations of the contracts:

"3. That the monthly estimates of progress made by the engineers were not carefully made and did not represent the quantity of work executed on the two sections, and that consequently their monthly payments were much below the amounts to which they were entitled;

"4. That they complained frequently to the Minister of Public Works and to the Commissioners and that in consequence of these complaints, the Minister of Public Works promised to indemnify them if they continued the works, assuring them that the abandonment of their works would be a great damage to the government as well as to the petitioners themselves;

"5. Moreover the petitioners claimed the said sum of $523,000 under the form of general *indebitatus assumpsit* for money advanced, materials furnished, labour supplied, &c., &c.

"In reply to the various complaints contained in the petition, Her Majesty produced the defence which has just been read and which can be reduced to a general denegation in fact and in law, with certain special allegations which I will mention later on, when I will discuss the complaints of the petitioners.

"1. The first question raised in the pleadings of the petitioners, and which I consider a very important one, is that of the existence or modification of the contracts, and also that of knowing whether without these contracts the petitioners have any right whatever against

1877

BERLINGUET v. THE QUEEN.

Taschereau J. in the Exchequer.

Her Majesty. I do not see any difficulty in deciding these first points.

"2. In fact, without being formally admitted by the petitioners as the basis of their petition of right, these contracts are nevertheless mentioned several times in this same petition as having been signed by them and are not actually repudiated by them, but upon the principle that they have not signed the plans which they consider as forming an essential part of these contracts. They nevertheless signed these contracts on the 25th of May, 1870, in presence of witnesses; the principal petitioner, Mr. Berlinguet, examined under oath, acknowledges his signature and that of his mother. Besides this the petitioners, in the whole course of their correspondence with the commissioners and the executive, have never repudiated these contracts nor pretended to repudiate them; they have never complained that the plans had not been signed by them and the commissioners; on the contrary, reference is constantly made to these contracts and these plans in stating that more was exacted from them than these contracts and these plans required.

"3. In the receipts which they gave upon the increase of the monthly estimates, they acknowledged that what they received should not be considered as conferring upon them a right to a final amount exceeding the price mentioned in their contract. They accepted the orders in council to that effect, and touched the amounts without any protest or reservation whatever. All the officers, from Mr. Brydges in his capacity of one of the commissioners of the road, to the Minister of Public Works, the Hon. Mr. Langevin, Mr. Fleming, Chief Engineer, and others, agree in maintaining that it is out of the question to say that the contracts were extinguished or even modified, and that on the contrary they were always considered by themselves and

1877

BERLINGUET v. THE QUEEN.

Taschereau J. in the Exchequer.

by the petitioners as in full force.

"4. It is quite possible that the plans were not signed by the petitioners, or even by the commissioners. But this would not be a cause of nullity of the contracts; for it has been proved to my satisfaction by the evidence of Mr. Fleming himself, that these plans were lithographed and copied *in extenso* in Book B. Mr. Berlinguet himself testified that he used these lithographed copies to prepare his tender and acted accordingly. All these copies were distributed on the line deposited at the various stations and consulted by the petitioners. They (the petitioners) admit by their tender that they had seen those plans, the contracts they signed expressly mentioned that they signed them. They were bound to sign them, and if through negligence, forgetfulness or any other motive on their part, they have not done so, they have no right to allege this fact as voiding the contract.

"5. It is established that the originals of these plans were accidentally destroyed by fire in the office of the engineer-in-chief at the same time as many other public documents. By not signing the plans, the petitioners committed an act of negligence which they covered by accepting the lithographed copies of these plans, by consulting these copies and by using them not only to prepare their tenders and obtain their contracts, but also to execute the greatest part of their contracts. They formally overlooked this slight irregularity and have no interest nor right to take advantage of their own negligence. I therefore consider the contracts as in full force.

"6. If these contracts have been annulled, by what law, I ask, could the petitioners expect to succeed in the present case? The Public Works Act, 31st Vic. ch. 12, could not help the petitioners, for section 7 of this statute declares that "no deeds, contracts, documents or

writings shall be deemed to be binding upon the department or shall be held to be acts of the said minister, unless signed and sealed by him or his deputy and countersigned by the secretary." The Act 31st Vic. ch. 13 secs. 16, 17 and 18 requires by a formal contract and enacts that no money shall be paid to any contractor until the chief engineer shall have certified that the work for or on account of which the same shall be claimed, has been duly executed nor until such certificate shall have been approved of by the Commissioners."

"7. The few conversations that the petitioners or their agents and bondsmen may have had with the Hon. Mr. Langevin, Minister of Public Works, cannot be interpreted as constituting new contracts or as modifying the contracts already existing, and especially as conferring a right to a claim in the form of *quantùm meruit.* I will refer further on to these conversations with the Hon. Mr. Langevin. The circumstances that at a certain time the prices of certain works were increased by an order in council cannot be considered as a renunciation to the same modification, because this increase was only made to come temporarily to the help of the contractors and not at all with the view ot changing or modifying the contracts, for it is said in this order in council dated the 28th July, 1871, that the total price of the contracts cannot be affected by this apparent increase.

"8. To give to this order in council the signification which the petitioners give to it, would be to place myself in manifest opposition to the Intercolonial Railway Act.

"And I say that the Governor in Council, even with the consent of the commissioners, could not increase the schedule of prices of the contracts and that any order in council in this direction would be illegal and

1877

BERLINGUET v. THE QUEEN.

Taschereau J. in the Exchequer.

unconstitutional. In fact the object of these two statutes, the Public Works Act and the Intercolonial Railway Act, is to prevent any useless expense, to protect government against any possible fraud and to prevent government from binding themselves in any other way than by the observance of certain formalities. Under such conditions only is the opening of the public chest permitted

"In consequence, I consider that I must decide against the petitioners this first point of the annulling of the contracts or even of their mere modification.

"9. The second question to be considered is whether the contractors were victims of prejudice on the part of the engineers of their ill-will, and of the fact that these engineers exacted from them not only extra but even useless works, and much above the conditions and provisions of the contracts, and if the petitioners were retarded in their works by the refusal on the part of the government officers and engineers to furnish them the plans and specifications of certain works.

"According to the evidence given by Mr Berlinguet himself, and of several witnesses heard on his behalf, it would at first sight appear that the petitioners have, at least in equity, great reasons for complaint if this evidence is not contradicted, and if the recourse of the petitioners is not taken away from them by the severe stipulations of the contracts and by the law which must govern these matters. I was at first so much impressed by the equitable appearance of the case of the petitioners, and by the peculiar conduct towards them of the district engineer and of several others, that I found in the conduct of the latter something shocking which required refutation and even explanation. I thought that there had been committed against the petitioners what the writers call a tortious breach of contract, even in a case where Her Majesty is interested

1877

BERLINGUET v. THE QUEEN.

Taschereau J. in the Exchequer.

as on a petition of right, such as refusing the plans, wilfully retarding the petitioners in the execution of the works, and exacting from them extravagant and useless works, and that was the reason why I refused to decide the case of the petitioners in as summary a manner as the defendant demanded by the motion of non suit presented to me nearly at the beginning of the case.

"10. I have not regretted the decision that I then gave, and do not regret it now. The authority which I followed in giving that decision is that which is to be found in the case of *Churchward* v. *Queen* (1), where Lord Cairns, representing Churchward in his petition of right, said: "The cause of action alleged is the "breach of the contract by refusing to employ, and is "not a mere tort, and the distinction is clear that though "for a tort, strictly so called, you cannot sue the crown, "yet for a tortious breach of contract a petition of "right may be maintained, and the cases of *Tobin* v. "*Regina* (2) and *Feather* v. *Regina* (3) are consistent "with this view. The distinction between tort and "tort founded on contract has always been kept up." To these remarks Sir Alexander Cockburn, Chief Justice, added that with the exception of all that the Attorney-General might say, the court did not wish any other argument on this question. Evidently Chief Justice Cockburn acknowledged by those words a distinction to exist between the action for tort and the action for unjust execution or violation of a contract.

"11 I have now to decide the question of the unjust exaction of works and the charges brought against all the engineers, and particularly against Mr. Marcus Smith, who, from 1870 to the month of March, 1872, was district engineer for the sections No. 3 and No. 6,

(1) 1 L. R. Q. B. p. 186. (2) 16 C. B. N. S. 310.
(3) 12 L. T. N. S. 114.

1877

BERLINGUET v. THE QUEEN.

Taschereau J. in the Exchequer.

which are the subject of this case.

I have studied the present case with great care in its minutest details, and I confess that I had at first against Mr. Smith a strong prejudice which was equalled only by the deep sympathy which I felt for the petitioners. To-day I am happy to say that in my belief the charges of flagrant partiality, of ill-will and of personal interest brought against Mr. Smith are not founded, or rather, that these charges are greatly exaggerated.

Marcus Smith is an old engineer, having in railway building an experience of thirty years, acquired in Europe, Africa and America. He is (according to an irreproachable witness, Mr. Fleming), and according to Mr. Brydges and several others, a clever engineer, enjoying the confidence of his chiefs and incapable of giving himself up to the base and shameful acts imputed to him. All the engineers heard in this case, and even those examined on behalf of the petitioners, agree on this point. He is represented as an irascible but good hearted man. "His bark is worse than his bite," said one of the witnesses. Marcus Smith denied with an appearance of truth which I could not forget, the accusations of ill-will and partiality brought against him.

"12. He had to fulfil a duty involving an immense responsibility and on the conscientious execution of the works under his superintendence depended not only his character as an honest man and his reputation as a clever engineer, but perhaps the lives of several hundred persons, and being under this impression he probably thought it his duty to have the stipulations of the contract in question in this case carried out to the letter. He was bound to obey the orders of his chief, Mr. Fleming, with regard to the execution of all the works, and I have remarked and seen with pleasure in the voluminous correspondence which passed between

1877

BERLINGUET v. THE QUEEN.

Taschereau J. in the Exchequer.

him and his chief, Mr. Fleming, and his sub-engineers, the care which he took not only to foresee what work could be saved to the contractors, but also his desire to carry out the orders of his chief, Mr. Fleming, against whom, as I have already said, the petitioners have not a word of reproach. Mr. Fleming shows his appreciation of Mr. Marcus Smith, as follows: "A zealous, "faithful officer, as much so as any one in the service "of the government. I am aware he endeavored to "help the contractors as far as he legitimately could do. "His integrity is beyond question." And at page 51 D of his evidence Mr. Fleming, speaking of the difficulties between the contractors and Marcus Smith, says in substance: "He did not satisfy them, but he satisfied me. "I found no reason of complaint against him. I am "aware he endeavored to help them in many ways and "was not trying to oppress, destroy or break down the "contractors."

"13. It is established by the great majority of the engineers whether employed or not on these two sections, and by Mr. Brydges himself, that as a general rule contractors always complain that much more than what the specifications and contract require is demanded of them. There would be nothing wonderful that under the circumstances in which the contractors were placed during the first six months of their works with their expenditures exceeding their receipts, they should have thought that they were victims of the ill-will of Mr. Smith. Having no experience in such gigantic enterprises as that which they had just undertaken, they may have been blinded by fear when they began to realise their financial position and the losses they might incur on their contracts. Later on, on the 26th June, 1872, they sent to the commissioners a letter in which they completely made known their sad position I will by and by refer to this letter.

1877

BERLINGUET v. THE QUEEN.

Taschereau J. in the Exchequer.

"14. But as their reproaches from the commencement, were particularly directed against Mr. Smith, I must say that although it is pretty clearly established that Mr Smith had but little sympathy for the contractors, nevertheless the misunderstanding between them is not to be attributed to this lack of sympathy, but to quite another cause. My impression, or I should rather say my conviction, is that the cause of the lack of sympathy displayed by Mr. Smith towards the contractors may be attributed to the well settled opinion which he had formed of the inability of Mr. Berlinguet to execute two contracts undertaken by a man without practical experience and at a very low price. As an experienced engineer, he saw at a glance the false position occupied by Mr. Berlinguet. And as these same contracts had already been abandoned, he easily foresaw the impossibility for Mr Berlinguet to do better than his predecessors; he may have feared that in his capacity of district engineer the fault might be attributed to him Hence these frequent declarations of Mr. Smith: "The contracts will have to be re-let." If Mr. Smith exacted too much, the chief engineer and commissioners could and should have remedied this state of things.

"15. However, we see that Mr. Fleming and Mr. Brydges, who was more particularly charged with the superintendence, did not blame Mr. Smith, and agree in stating that the work was as well done as elsewhere, but is not better than on other sections; that in no way does the execution of the works by the contractors surpass what the contracts required, and Mr. Brydges states that several culverts are under what the specifications prescribed, and it is sufficient to say that the number of culverts was considerably reduced and modified, to the great profit of the contractors; to show that if Mr. Smith had wished to exercise an undue pressure on the contractors he only had to insist on the building

of all these culverts. And we see in a letter of Mr. Fleming's, dated the 23rd May, 1870, and addressed to Mr. Smith, that the latter should not suppress one single culvert without having the written permission of Mr. Fleming.

"16. Mr. Fleming swears that the contractors gained $178,000 by divers reductions. These figures are eloquent and show that the engineers desired to favor the contractors. It is proved by Mr. Fleming, page 47 of his evidence, that he ordered the culverts to be built which were mentioned in the bill of works and which Mr. Smith had suppressed With regard to the culvert called "Robinson's culvert," about which there was so much trouble, Mr. Fleming insisted several times that it should not be suppressed, although the appearances were against its necessity, and in speaking of this culvert Messrs. Fleming and Smith cited a precedent nearly similar, where the suppression of a culvert was the cause of a very lamentable accident. Mr. Fleming swears that he ordered this "Robinson's culvert" after mature reflection, and would never consent to its suppression, and gave as his reason for so doing that the nature and conformation of the ground, being a gentle slope, might, as in the case above cited, absorb all the water after a heavy storm and thereby produce a ground slide to the destruction of the road and the great danger of travellers.

The opinion of Mr. Fleming is to be accepted as law in this, as in any other similar case. There can be no appeal from his decision to the detriment of Her Majesty. The contractors submitted to this condition in their contract, where it is expressed in very clear words in section No. 2 of this contract.

If Mr. Fleming acted in bad faith, there might probably be a recourse against him, and against him alone. Having by their contract accepted Mr. Fleming as their

1877

BERLINGUET v. THE QUEEN.

Taschereau J. in the Exchequer.

judge in the last resort, they cannot, in the present case, invoke that bad faith as against Her Majesty.

Such a stipulation in a contract may appear at first sight exorbitant, but upon consideration it becomes evident that without such a stipulation for the building of a railway of the proportions and importance of the Intercolonial, it could never be brought to a conclusion, as it would be stopped every moment by a dispute of some sort or other. The authorities found in the books, and of which a list is annexed to the present judgment, leave no doubt on this point.

"17. Mr. Smith has also been reproached with having exacted from the contractors a finish of the work in the preparation of the stone for the foundation of certain culverts and other structures, of first class instead of second class, requiring that for these structures cut stone should be used instead of hammer dressed. I confess that on this head the evidence is conflicting and may, at first sight, appear unfavorable to the engineers. But the engineers have explained and proved that stone cutters often prefer to use the chisel rather than the hammer in dressing stone for second class masonry, and, also, that certain kinds of stone for second class masonry is dressed with more facility with the chisel than with the hammer, and that these modes of dressing stone may lead to believe that first class masonry was exacted when second class masonry only should have been required. All the engineers state that this reproach is not grounded and that they never required first instead of second class masonry, and that if, now it were possible to discover the difference, it is to the stone cutters employed by the contractors and under their exclusive control that this reproach should be made and not to the engineers. Mr. Fleming and the commissioners saw these works and neither considered nor declared them to exceed the quality or class

of work required by the contract—their opinion is law in this matter and must be accepted as such.

"18. Other subjects of reproach to the engineers have been their conduct in regard to the choice of the stone, the depth of the excavations necessary for the construction of arch-culverts and bridges, the inutility of break waters, the condemnation of the cement which the contractors desired to use, the building of fences, crossings and sideways; and a mass of more or less contradictory evidence is fyled in this case to prove how, in such cases, testimonial evidence can vary. On the one hand, we have seen the contractors with their friends and bondsmen supplying on these points testimony diametrically opposed to that of the engineers. Against the contractors, it may be said and believed that the immense interest they had in the final success of their case may have prejudiced and influenced them, while against the engineers it may be urged that they may have been influenced by the *esprit de corps* and the fear of being exposed to censure by their superiors. All things being equal, I must place more confidence in the testimony of educated men, having at heart the honor of their profession and, strictly speaking, no pecuniary interest at stake, than in that of the contractors and of their securities, however honorable these persons may be, for the most of them are interested, and it is well known that interest blinds the most honest and the most truthful.

"19. As regards the choice of the stone in the quarries, the depth of the excavations required for the masonry works of bridges and arch-culverts, the inutility of breakwaters, and the condemnation of the cement which the contractors desired to use, I must in preference believe the man of art, the engineer, whose noble profession has placed him in a position better to appreciate the requirements of the execution of such works

1877

BERLINGUET v. THE QUEEN.

Taschereau J. in the Exchequer.

as to the durability and security of the road. Now what do these engineers say? They say that all the complaints of the contractors on these heads are groundless, and, according to me, the engineers have completely justified their opinion. Moreover, the 2nd clause of the contract is there to remind us that the judgment of the commissioners and engineer-in-chief, having approved of the execution of the works, is final. It appeared to me that the choice of the stone, the depth of the excavations, the quality of hydraulic cement, the necessity for the breakwaters, are matters of the highest importance, and are subject to the exclusive control of the engineers in charge of the different sections, acting under the instructions of the chief engineer: any deviation from their instructions might be fatal to the safety of the road, give rise to accidents, considerably increase the expense of repairs and occasion injurious delays to traffic.

"20. I understand that an engineer, rather rough, relying on his superior position, would not easily condescend to a discussion in order to convince a contractor of the necessity of such or such a work mentioned in the bill of works by the engineer-in-chief; on the contrary, he would give his orders in a peremptory manner, without appeal and almost in military style; hence, most probably, arose in the minds of the contractors, the idea that Mr. Smith wished to ruin them. I cannot deny that this man was overbearing and imperious in ordering even the most ordinary work, but there is a great distance between this and the guilty and well determined desire imputed to him of ruining poor contractors, and all because they were French-Canadians. There is no doubt that Mr. Smith was very hard towards the contractors as regards the building of the fences, cross-roads and avenues to the line. However, these fences, cross-roads and avenues were

not beyond the specifications of the contract, since neither the engineer-in-chief nor the commissioners listened with favor to the complaints of the contractors on these points, but declared that none of the works done were in excess of the specifications, and that, on the contrary, there were culverts the backing of which was built of stone of a quality inferior to that mentioned in the specifications. It is true that on some other sections of the Intercolonial section-engineers tolerated things which Mr. Smith and his subordinates would not accept, as regards fences, cross-roads and avenues of the line; this excess of liberality may have been justified by extrinsic circumstances; they may have been blamed. Therefore it may be said that Mr. Smith had not to take for his guidance what was done elsewhere, but that having to superintend the execution of a written contract, for which he was responsible to his superiors, he was justifiable in having it executed to the letter.

"21. The contractors have laid great stress on the fact that in consequence of their complaints to the Commissioners one Mr. Schrieber was appointed to enquire into them, and that this gentleman, after visiting the line, made a report, in consequence of which an Order in Council was passed to increase the schedule of prices of certain works and an additional sum of $20,000 above the preceding estimates was paid to the contractors, who inferred from that that Mr. Schrieber had decided in their favor. But they did not then see Mr. Schrieber's report, and it was only lately, after the publication of the printed correspondence, that they discovered their error, and that Mr Schrieber explains the cause of the disappointment of the contractors with regard to the difference between the outlay they incurred and the monthly estimates to which they were entitled.

Here is an extract from Mr. Schrieber's report, which

1877

BERLINGUET v. THE QUEEN.

Taschereau J. in the Exchequer.

is to be found at page 110 of the printed correspondence, dated the 11th March, 1871:—

"The contractors appear to be willing to do what "they can; but I fear unless they employ a thoroughly "experienced agent to manage the details for them, and "take general charge, they will plunge themselves into "difficulty. The work in the quarries, it is only too "transparent, is being carried on at an extravagant "cost, many men who are cutting stone evidently "having never before handled a tool, whereas others "whom I know to be good for stone cutters are em-"ployed upon granite and *vice versâ*. Besides this, there "are other irregularities, all tending to enhance the "cost of the work. This certainly is not an indication "of sound economical management. The certificates "of the cost of stone cutting and building masonry "upon these sections hereto attached are rather start-"ling documents and tend to explain in some measure "how it is the expenditure is so far in excess of the "engineers' monthly certificates. Unless all this is "changed I fear it would be vain to hope for the con-"tracts being carried through satisfactorily. There is "no margin in the price to allow for this management. "It is only by the most stringent economy the work "could be carried out. The contractors by stating they "can complete the work in time expose their want of "knowledge of such works, and, I think, lay themselves "open to the charge of want of experience in such "works. I, however, believe them to be thoroughly "honest in their intentions and ready to do all in their "power to complete the contracts; but, I repeat, they "need to employ a thoroughly competent honest man "as agent; one who is prepared to devote his whole "time and attention to their interest and conduct the "work with economy. It is a large piece of work, "requiring a man of considerable capacity to manage

"it."

The same opinions are again expressed by Mr. Schrieber in his letter of the 23rd of March, 1871, No. 255 of the printed correspondence, where he foresees that the contractors having neglected their works and masonry, will soon be embarrassed and that years must still elapse before they can complete their contracts.

"22. As can be seen, this report explains to a great extent the losses suffered and the expenses incurred by the contractors during the short period of six months, dating from the commencement of the works. If this report was not immediately communicated to the contractors, I say that it was a very regrettable omission; but it is hardly credible that the Commissioners did not do so. However, we see that after this report the contractors received pretty considerable sums without the formality of the certificate of the chief engineer, and these sums were over and above the monthly estimates.

"23. The contractors have also reproached the engineers with having compelled them three successive times to lay deeper foundations for a considerable and costly structure destined to support an immense weight. They make this reproach as if the engineer charged with the superintendence of the building of that structure could have at first sight finally determined the necessary depth. Common sense teaches that it is only by degrees and by feeling his way that the engineer can arrive at a degree of certainty with regard to the sufficiency of the depth of the foundations. I even say that if he had at first been mistaken, and believed that he had found a sufficient foundation and ordered the building of the structure on such foundation, he had a right to set his first decision aside, order the works done to be removed and the contractors to increase the depth. The stipulations of the contract justify this view and also justify the engineers. I may

1877

BERLINGUET v. THE QUEEN.

Taschereau J. in the Exchequer.

even say that the engineers were obliged to act in this manner if they were convinced that the depth was not sufficient. I find nothing in the evidence to induce me to say that the engineers acted in bad faith in this case. As professional men and as engineers, they had a right to act in this way with regard to such important structures. I say the same with regard to breakwaters, the building of which at some places, is by some of the witnesses considered as to be perfectly useless, and as putting the contractors to very great expense.

"24. With regard to the cement which the contractors desired to use for their works, a long, very contradictory, and for the court, a tolerably embarrassing investigation took place. On several works, the contractors were obliged to use a great quantity of hydraulic cement, an article which fills an important place in the construction of solid foundations destined to bear an immense weight. On its good or bad quality depends the security of those structures. Section 37 of the stipulations of the contract requires that this cement shall be "fresh ground, of the best brand, and must be "delivered on the ground and kept, till used, in good "order. Before being used, satisfactory proof must be "afforded the engineer of its hydraulic properties, as "no inferior cement will be allowed." The contractors submitted to all these conditions, and according to the contracts, the opinion of the engineers was to settle all difficulties between the contractors and the government with regard to the quality of the cement and to its use. Notwithstanding the conflict of evidence, I do not see that the engineers have in this regard committed any evident injustice. On one occasion the order, or rather the advice, given by the engineer to throw into the water a great number of barrels of this cement, appeared to me rather arbitrary

till I had heard the explanations of the defendant, tending to show that after trying several barrels of this cement the engineers were convinced of its bad quality and that notwithstanding the order not to use it, the contractors persisted in doing so, and that in consequence of this, in order to avoid any difficulty, it was suggested to them to throw away this cement, which was already old, having been brought to the spot by the former contractors, and that as an easy way to do it, these barrels of cement were thrown into the water by the contractors themselves. Let us remark that the cement so thrown into the water was not the property of the petitioners, but the property of their predecessors, who had given up their contract. In fact this cement might also be considered as the property of the government according to the stipulations of the contract.

The contractors desired to use this cement and purchase it at a cheap price and the government would have sold it, had it not been dangerous to use it. Strictly speaking, the petitioners did of their own accord follow the advice or order to throw away this cement. Nothing obliged them to cast it into the water; they could have put it outside of the line of neutral ground, with the right of using it later on, one way or another. By destroying it as they did, they justified the opinion which the engineers had formed of its bad quality It is proved that it is better not to use hydraulic cement at all than to use such cement of bad quality.

25 The petitioners have not forgotten to allege that they did extra works; but, besides the fact that I do not consider these extras as proved, there is against them on this point an insuperable obstacle found in sections 4 and 9 of the contract, which declare expressly that no extra shall be admitted in their favor, unless it was demanded in writing and certified and approved by

1877

BERLINGUET v. THE QUEEN.

Taschereau J. in the Exchequer.

the chief engineer: and there is no such certificate.

Legally they cannot claim these extras. They have expressly and unconditionally renounced them. How could I come to their rescue without placing myself in direct opposition to the law? But if the petitioners have not forgotten to put forward and claim extras, they have omitted to acknowledge the considerable reduction made in their works by the engineers, such as the suppression of culverts, the substitution of iron tubes for culverts, of wood for iron in the great masses of masonry, and it has been proved that these charges and suppressions were a cause of considerable gain to the contractors, who doubtless forgot these favorable circumstances.

The petitioners also forget to acknowledge that the few changes which they made in the height of the grades were compensated by the rock excavations which they would have been obliged to make to maintain the level of the road and that this apparent increase was evidently all to their advantage. Moreover the contract declares that to have a right to claim these extras, the petitioners must obtain, for this end, the certificate of the chief engineer; the engineer would not grant this certificate and the conclusion is that the petitioners had no right to such extras, at least legally speaking.

"26. According to the evidence given by Mr. Fleming, engineer-in-chief, the only cases in which the works required of the petitioners exceeded the quantities determined are those of the bridges on the Miramichi and Restigouche rivers; he says that every where else the quantities determined and required to be executed really exceeded what was done, and this was a great benefit for the contractors, as Mr. Fleming says page 540 of his evidence: "We wanted to err on the right side, in favor of the contractors."

1877

BERLINGUET v. THE QUEEN.

Taschereau J. in the Exchequer.

The petitioners complained of having been delayed in their works in consequence of the engineers not supplying them with the plans of the various constructions. But Mr. Fleming and all the other engineers state that the general plans which the petitioners had to consult, and were at liberty to consult every day, were sufficient for the generality of cases, and that the plans only of structures requiring strong and deep foundations did not exist, and that in fact these latter plans should be prepared only after the excavations have been completed and the nature of the structure well determined, and that the engineer is satisfied when the contractors have materials in sufficient quantity to commence the structure. This is strictly enforced and is well established by several engineers, and it appears to me that there is much in this pretention of the engineers.

"27. I now come to the serious reproaches made by the petitioners against Mr. Smith, of having, in a conversation with Captain Armstrong and in another with Mr. John Home, behaved himself in a most singular manner, in a way calculated to throw much discredit on his own honor and honesty. According to Captain Armstrong, Mr. Smith told him in a conversation regarding the small amount of the monthly payments received by the contractors: "They got all they deserved or were entitled to." Upon Mr. Armstrong remarking to him (Smith) that it was very hard for the contractors to receive barely enough to pay their men, Smith replied: "I sent in a contract for this same section for my friends "in England, and if they had got it, they would have "had plenty of funds to carry on the business without "drawing on the government until it was finished." And Mr. Smith is said to have added: "These d——d "little Canadians are the cause of my not getting it" (the contract). Mr. Armstrong says that Mr. Smith did

1877

BERLINGUET v. THE QUEEN.

Taschereau J. in the Exchequer.

not mention to him the names of his friends. Mr. Armstrong asked him besides: "How could you have acted as engineer?" Smith replied: "I should have "resigned my situation and gone on with the works."

According to Mr. John Home, Mr. Smith addressed the following words to him, with regard to the advice he (Smith) gave to the petitioners of employing one Davey as superintendent: "If Davey is here, it is just "as easy for him to save you a half million dollars as 'anything at all and without any disparagement to the "government. The government will not have anything "to find fault with the road and you will get quit of the "Frenchmen that don't know anything at all about "building the road." He said "if they (Berlinguet) "want to get the credit of the work, let them go to salt "water and they would have the credit of the work, but "let them keep their tongue quiet. And he said: "I "will not sell myself to the Frenchmen."

It is only just to say that Mr. Smith denied energetically having used such words as these. It is also certain, as far as I can recollect the evidence, that no tender for these sections was sent out from England. But the accusation is serious, and it appears singular to me that Mr. Smith should have thus, deliberately, expressed such opinions, especially in presence of witnesses who were devoted friends of the contractors and employed by them.

"28. Moreover, he must have foreseen that his superiors would ask him for an explanation of his conduct and of his giving up the position of district engineer to take a contract. To suppose that this ignominious conduct on the part of Mr. Smith is possible, we must believe that he would have given up a good reputation of thirty years' standing and a lucrative situation in order to run the risk of certain ruin by such contracts. Such conduct can hardly be reconciled

1877

BERLINGUET v. THE QUEEN.

Taschereau J. in the Exchequer.

with the highly honorable character which the engineers, Messrs Fleming, Brydges, Grant and other witnesses have given him. "His honesty is beyond doubt," said Mr. Fleming. The idea that an engineer could gain half a million dollars out of such an enterprise seems to me rather exaggerated. Mr. Smith, it is true, may be greatly interested in denying such accusations which affect his moral character if they are well founded. On the other hand, the circumstances which I had occasion to observe in this case led me to believe that Mr. Armstrong, who is a very old man, and Mr. Home may have been completely mistaken as to the bearing of the above mentioned conversations. The repeated reading of their evidence with attention convinces me that there was misunderstanding, although the honorable character of the witnesses is acknowledged.

"29. But supposing these conversations were reported verbatim by the witnesses, what do they prove? Undoubtedly they prove that Smith had no sympathy for the contractors; that the contractors had neither the experience nor the aptitude for carrying out this enterprise; that they ruined themselves on it; that an intelligent manager like Mr. Davey could alone have rescued them from their difficulty.

In spite of his ill-will, Mr. Smith gave a good advice to the contractors, that of employing Mr. Davey as superintendent and as the only one capable of saving them from shipwreck. Such was the opinion of Mr. Schrieber, which we have read a moment ago, and of more than twenty witnesses heard in the case There is a wide difference between lack of sympathy and a fixed determination to ruin the contractors. The evidence proves that Mr. Berlinguet and Mr. Smith were on the best and most intimate terms; they travelled together, met to spend the night together, exchanged

1877

BERLINGUET v. THE QUEEN.

Taschereau J. in the Exchequer.

courtesies, joked and laughed pretty frequently, it is true sometimes at Mr. Berlinguet's expense in regard to his capacity and experience in building railways, which Mr. Smith denied even in the presence of Mr. Berlinguet Mr. Bertrand, Mr. Berlinguet's partner, used to join in those jokes, saying that he, Bertrand built churches and that Berlinguet built the occupants thereof, that is to say the statues of saints which were to adorn the churches.

"30. The long correspondence between Mr. Smith and the chief engineer, Mr. Fleming, and other engineers, shows a desire to favor the contractors, instead of an intention of ruining them. I say the same of Mr Bell, who, in 1872, succeeded Mr. Smith as district engineer. I sincerely believe that the accusations of ill-will for the contractors on the part of Mr. Smith is groundless, except, as I have already remarked, that he may have been prejudiced against Mr. Berlinguet on account of his (Berlinguet's) absolute want of experience and of the conviction he had of Mr. Berlinguet's inability to carry out his contract.

The proof convinces me that Mr. Smith and his colleagues conceded many things to the contractors where they could do so without injuring the road, and that they exacted "the pound of flesh," as one of the witnesses said, that is the full and integral execution of the works, where they thought this full execution necessary. Moreover, they had to superintend the execution of a detailed contract; they were under a chief and a superintendent in the person of Mr. Fleming, chief engineer, and under as many masters as there were commissioners, who were four in number. All these high and learned authorities approved the conduct of Mr. Smith, and I would not dare to say that they acted wrongly, legally speaking.

"31 The engineers have been reproached with having

obliged the contractors, without necessity and at considerable cost, to macadamise the crossings and sideways of the road. This is denied by the engineers in the most positive manner. The engineer-in-chief did not blame this use of broken stone for crossings if, at all events, it is true that the contractors were compelled to macadamize those crossings, and from this I infer: either that the engineers did not require these roads to be macadamised, or that it was rendered necessary, on account of the nature of the ground, for the solidity of the road, and in this case there might be no recourse against the government, unless the work was certified by the chief engineer.

The complaints which the contractors thought proper to prefer to the commissioners have all been considered and decided by the latter, according to the evidence given by Mr. Brydges, and redress was given when the complaints were well founded. Properly speaking, it was only about the month of March, 1872, that the contractors complained with bitterness of Mr. Smith, and it was in consequence of these complaints that the commissioners thought fit to recall Mr. Smith and replace him by Mr. Bell.

Having succeeded according to their wishes in obtaining the removal of Mr. Smith as district engineer, the contractors naturally inferred from this that the commissioners were disposed to render them justice, that their complaints were well founded, and that under an engineer more favorably disposed toward them their position and finances would be much improved in the form of monthly estimates. Let us remark, with regard to the recall of Mr. Smith, that on leaving he was promoted to a higher position on the Pacific Railway, with an increase of salary, a position which was inferior only to that of Mr. Fleming, the chief engineer.

1877

BERLINGUET v. THE QUEEN.

Taschereau J. in the Exchequer.

Therefore, if this was intended to cast blame on Mr. Smith and to punish him for his conduct towards the petitioners, I have reason to believe that such a punishment was not very hard upon him. The Hon. Mr. Langevin said he did not understand from the Commissioners that they had any reproach to make against him.

"32. Mr. Smith having been replaced the contractors continued their works with new vigor However, three months after, that is on the 26th of June, 1872, they addressed to the Commissioners a long memorial, which is found under No. 607 of printed documents, in which they describe in lugubrious language their financial position—I might almost say their bankruptcy and incapacity of continuing their works without a grant or increase of their monthly payments . These must have been heard, for over and above their monthly estimates they received for the months of August and September, 1872, on account of sections 3 and 6, a sum of $65,000.

There is under No. 640 of printed correspondence a letter from the bondsmen of the contractors, Messrs. Glover & Fry and Dunn & Home, in which they complain of the feebleness of their estimates as compared to the quantity of works which they pretended to have considerably increased. Nevertheless, Mr. Smith had left the road over three months, and in order to give an appearance of reason to the contractors regarding this new deficit, we would have to suppose that all the engineers conspired against the contractors in making false returns and diminishing their monthly estimates. In consequence of this letter and of the complaints of the petitioners, an engineer (Mr. Fitzgerald) employed by the government, after visiting the works made, on the 17th of August, 1872, a report intended to establish the quantities of work done. According to this report,

in or about August, 1872, there remained only about 34 per cent. of the work to be done, and deducting in favor of the contractors the value of their materials, the work done could be estimated at 75 per cent The perusal of the evidence of Mr. Fitzgerald did not at all convince me of the exactness of his calculations. He made this report at the pressing solicitation of the government, who desired to come to the assistance of the contractors, and the consequence of this report was, 1st. An increase of his salary by the government; 2nd. The payment of a sum of $400 or $500 made to him by the contractors for his report.

"33. This engineer is thus paid not only by government who employed him, but also by the contractors, who were not obliged to pay him. There seems to be something irregular in this I think that by overhauling the accounts to date of August, 1872, and by comparing the receipts of the contractors with their estimates, it would be seen that even if there remained only 25 per cent. of the works to be executed, the contractors had already received over and above their monthly estimates. However the contractors, upon the calculations of Mr. Fitzgerald, demanded, on the 4th of September, 1872, a grant of $150,000. The government allowed them only $34,545 for section No. 3, $19,342 for section No. 6 and $12,689 for sections 9 and 10 which are not in question in the present case. These sums were granted upon the report of Mr. Fitzgerald, and despite of the fact that the government might and should have kept back $137,000 at least for the 15 per cent. mentioned in the contract. It is then impossible to admit that the contractors were ill-treated by the commissioners or by the government. On the contrary, they had all the sympathies of both, if I am to judge: 1o. By documents 97 and 98 to which I will refer in a moment and 2o. by the $160,000, which

1877

BERLINGUET v. THE QUEEN.

Taschereau J. in the Exchequer.

were paid to the contractors in 1871 and 1872 without the certificate of the chief engineer, Mr. Fleming, which was strictly required in virtue of the Intercolonial Railway Act.

"34. The petitioners have made an infinity of complaints against the engineers. It would be tiresome to enumerate them; there would be no end to the task. I have carefully examined these complaints, and I find that with very few exceptions, the proof of the petitioners was refuted by the proof made on the part of Her Majesty. But I state it with regret, the contract constitutes the law, the contractors submitted to all its clauses, they renounced every claim for extras, and all damages, they agreed to submit without appeal to all decisions of the commissioners and of the chief engineer, and it is my imperative duty not to make new contracts for the petitioners, but to see that those are executed which they signed, however severe their terms may be. For them as well as for me, *dura lex, sed lex.*

"35. I must not overlook one of the greatest grievances put forward by the petitioners, that is the reproach which they make to the government of Her Majesty with regard to the insufficiency of the quantities and the nature of the works to be executed. This grievance may be partially founded in fact, but it has no foundation in law. For if I am to believe the testimony of Mr. Fleming. the quantities mentioned in the bill of works were liberally calculated and this was in the interest of contractors who were to have the benefit of the excess, and it was proved to my satisfaction that with the exception of the works at the Ristigouche and Miramichi rivers, where the works actually executed exceeded the quantities given, which was to the great benefit of the contractors. At law, the contractors cannot demand the value of this excess; they in advance

1877

BERLINGUET v. THE QUEEN.

Taschereau J. in the Exchequer.

renounced all claims of such a nature and nowhere in the contracts and stipulations do I find on the part of the commissioners any stipulation which would warrant such a claim; on the contrary, we find a formal denial of the right to any such extras.

I interpret these contracts as having to be executed for a block sum by the contractors, who were to benefit when the quantities should exceed the work and suffer from excess of the work without right to indemnify, should the work exceed the quantities. In order to justify this demand for indemnity on the part of the contractors, it would be necessary to find in the contract an express guarantee of the quantities. The plans, bill of works and specifications are there to attest that the government could and should guarantee no quantities, &c., &c.; they mention that the calculations are merely approximative and without guarantee. All this should have at first put the contractors on their guard. If they were mistaken they were willingly mistaken, and to them we can apply the maxim: *Volenti non fit injuria.*

"36 They must therefore blame themselves, and themselves alone, for the consequence arising from a surplus of quantities of the works to be executed, if such surplus did really exist, which I do not believe. Admitting, for a moment, that the contractors had to execute much more work than the bill of works mentioned and that they suffered damages on account of this, I must declare that I do not find any basis to estimate such damages. On this point the proof is vague and even of no value whatever. Supposing, moreover, that the proof was clear, all indemnity should be refused to the contractors in consequence of the clauses so onerous and so strict of the contract by which they (the contractors) renounced all damages, all extras, and even the balance due to them, if they gave up their contract or did not

1877

BERLINGUET v. THE QUEEN.

Taschereau J. in the Exchequer.

complete it in the time prescribed. These stipulations are excessively severe; they are the law governing the parties thereto, who submitted to them with their eyes open. *Dura lex, sed lex*, as I said above. Nevertheless, in the course of my deliberations the following question often presented itself to me:—

"37. "How is it that the petitioners have suffered so great a loss as they tell us they have experienced by the execution of their contract?" and I came to the conclusion that the record of the case explains this result:

I. The petitioners had no practical experience to guide them in their tenders to obtain the contracts, and subsequently in the execution of the works. One of the petitioners is a respectable lady having not the slightest knowledge of the building of a railway; the other, Mr. F. X. Berlinguet, is undoubtedly a man of great intelligence, of physical and mental activity, altogether exceptional, indefatigable, but without theoretical or practical experience of the construction of works so much out of his ordinary line.

"38. II. Before tendering Mr. Berlinguet had never been on the line, on the spot where the railway which he tendered was to be built, and had he visited the line he would have acquired only superficial knowledge of the works, as the road was covered with snow and the time for sending in his tender was comparatively very short. Mr. Fleming, page 9 D of his evidence, clearly explains that the shortness of the time prescribed for sending in the tenders deprived the parties who made them of any hope of reasonable calculations, and as to the possibility of completing the works in the time prescribed by the contracts, he says: "I think it ought "not to have been attempted. I am not prepared to "say it was impossible to do it, but it would have "required a lavish expenditure." Wherefore it was imprudent on the part of Mr. Berlinguet to have under-

taken such contracts on information so very uncertain. He, however, ran the risk, and the consequence is probably the present contestation.

"39. III. The petitioners themselves have taken the trouble to throw light on the causes of their want of success in the execution of their contract through their letter dated the 26th June, 1872 (Nos. 605, 607 of Printed Correspondence), which letter they addressed to the commissioners, and in which they attributed their losses: 1st. To an increase of wages, which in some cases amounted to 50 per cent., and this in consequence of the great demand for workmen in the United States and in Canada, which is an important item when we consider that the contractors had sometimes to employ and pay 2,500 men. 2nd. They attribute their losses, besides this increase of wages, to the inferiority of local workmen, who were inefficient and not accustomed to such works; they represent that these workmen left their work when the time for farming came round, and this at the time when the petitioners were in the greatest need of them, thereby increasing the expenditure by obliging the contractors to keep in continual employ and pay a larger number of workmen. 3rd. They attribute their losses to the fact that not finding skilful workmen in the country, they were obliged to import them at a great cost from without the province, and to pay for their passage hither; and that in many cases these workmen, whose passages they had paid, refused to work after their arrival.

IV. They attribute their losses to great expenditure incurred on account of shed building and other expenditures on which they were obliged to pay interest.

V. They attribute their great expenditure to the difficulty they had in finding quarries of good stone, for the great depth of the excavations required to lay

1877

BERLINGUET v. THE QUEEN.

Taschereau J. in the Exchequer.

the foundations of heavy structures.

VI. They say that they incurred a heavy loss in consequence of the failure of the crop in 1870, on the purchase of hay and grain required for their horses, which obliged them to import these articles from distances varying from 300 to 500 miles.

VII. They say that on account of the distance of the locality and want of easy communications, they were obliged to lay in a stock of provisions sometimes 3 or 8 months in advance, which involved a great loss of interest.

VIII. In this letter they acknowledge that having undertaken the contract during the winter season, they had no opportunity of examining the locality. Mr. Brydges, a man of great practical experience, says: "The works were carried on extravagantly and that "necessarily would account to a large extent for their "getting behind" *Vide* pages 201, 202 of his evidence. Other witnesses speak in plain words of the indolence, laziness and negligence of the foremen employed by the contractors. Walking bosses had to overlook tracts too extensive to enable them to do so efficiently, although they were competent men.

"40. We therefore have the important and irrefutable acknowledgment on the part of the petitioners that they suffered heavy losses for the reasons mentioned above and which might alone account for their want of success. It is true that the petitioners also impute their losses to the engineers and masonry inspectors, who, according to the pretentions of the former, exacted first class masonry from the contractors who were only bound to supply second class masonry. Well, we have seen that the chief engineer, the commissioners, a district and division engineers positively denied these ascertions, and I believe, gave sufficient explanation on this point. In virtue of his contract, Mr. Berlinguet was,

under heavy penalties, bound to complete his works and deliver them on the 1st of July, 1871. It is proved by Mr. Fleming that it was impossible to do so within the time prescribed without incurring a lavish expenditure. By the way, let us remark that Mr. Fleming had prepared for the information of the government, as his duty required him to do, an estimate of the probable minimum and maximum cost of 3 and 6. The minimum cost was $530,000 for section No. 3 and $493,666 for section No. 6, making a total of $1,023,666, and notwithstanding this, the tenders of the petitioners for these two sections amounted in the aggregate only to $819,390, so that the amount of their tenders was by $104,000 lower than the sum for which the chief engineer believed that the work could be executed, and we also see that the maximum cost was estimated at $1,320,000. I think these figures show the imprudence of the petitioners and account to a large extent for their failure. The petitioners, having no experience, it is true, but desiring to complete their contracts, incurred extraordinary expense and this also would account for their stoppage.

It appears to me that Mr. Berlinguet showed an unlimited want of foresight or rather very great ignorance of the cost and difficulty attending the building of a railway.

"41. I notice in document 606 the fact that the contractors relied much on the good will and sympathy of the government, and I believe that there is evident proof that neither the one nor the other was withheld from them, for, as we have already seen, upon the report of Mr. Schrieber, which was not at all favorable to the contractors, they succeeded in obtaining a sum of $160,400 without the certificate of the engineer, which was strictly required by the Intercolonial Railway Act. However Mr. Brydges and Mr. Fleming

1877

BERLINGUET v. THE QUEEN.

Taschereau J. in the Exchequer.

state that at the time of the abandonment of their contracts, the contractors had already received much more than the value of the works which they had executed, and this, notwithstanding the fact of a reduction of $178,000 in their favor, in all the works on sections 3 and 6, less an increase, however, on some bridges and culverts at Miramich and Restigouche rivers.

Now it is time to enquire to what extent and in what manner the petitioners have proved the amount of their expenditure to the date of the abandonment of their contracts. According to statements produced with their petition of right, the contractors show an expenditure for works on section No. 3 of a sum of $609,482.51, and on section No. 6 $596,022.63, making an aggregate of $1,205,565.14 expended, over and above $88,133.11 which they claim as due to them for interest on the difference between the sums which they monthly received and those which they would have had a right to get if the monthly estimates had been sufficient. As the contracts taken together were to have brought into the petitioners only $919,300. 23, and as it has cost the government the sum of $269,-082.60 to complete these contracts, it becomes interesting to know how the petitioners have proved their actual outlay.

"42. I must say that regarding the proof from a legal point of view, and without taking into consideration the respectability of the persons examined as witnesses to prove the correctness of these expenditures, the proof of these accounts would be insufficient to warrant me in accepting them as establishing the enormous amounts to which they figure up. This proof is vague and too general; the accounts for the time of workmen employed on the road are proved in block, if I may say so, without the precision required in such cases, particularly with regard to such a large amount. It appears

1877

BERLINGUET v. THE QUEEN.

Taschereau J. in the Exchequer.

to me that the petitioners should have brought before the court the persons who were in direct contact with the workmen in order to verify the correctness of the accounts and of the payments. The foreman should have been examined. Mr. Blumhart and Mr. Turner could not alone complete the proof. Both of them had to rely too much on the reports of sub-officers and other interested parties who, without any inclination to be dishonest, may have said in presence of Messrs. Blumhart and Turner, what they would not have dared to testify under oath before a court of justice. In a word, the proof is insufficient; legally speaking, it lacks several important connections to deserve such a degree of credibility as the law requires

"43. The question here presents itself as to whether the petitioners might not have a right against the Government of Her Majesty in consequence of the numerous promises which, they say, were made to them by the Hon. Mr. Langevin, Minister of Public Works for the Dominion of Canada, in 1871 and 1872. The contractors and their bondsmen, their endorsers and some of their friends, swore before me that in several interviews with Mr. Langevin with regard to their financial embarrassment and their intention of giving up the contracts, Mr. Langevin "had told them not to give up "their contracts; that the government did not intend "to build the Intercolonial at the expense of private "parties, and that if they carried on the contract to "completion they would be eventually indemnified for "their losses." Mr. Ross, the advancer to the contractors, swore that "Mr. Langevin told him that he could "in all security continue his advances and that he would "be refunded." Messrs Dunn and Home, bondsmen for the contractors, swore the same thing. Mr. L. H. Huot swore that Mr. Langevin told him the same thing, viz.: "To tell the contractors not to give up their con-

1877

BERLINGUET v. THE QUEEN.

Taschereau J. in the Exchequer.

"tracts, that sooner or later their claims would be set-"tled one way or the other by government." Mr. Langevin, examined as witness, swore the contrary and merely admitted to have told them that "it was their "interest to complete their contracts, which would have "resulted in causing no delay in the completion of the "road and would better the chances of the contractors "to have their claims favorably considered and settled "by government." He denies having used the words cited by the above witnesses. He was right; he would have gravely compromised himself as a member of the government and a public man, and he says that he could not bind the government. We therefore see the immense difference existing between the meaning of Mr. Langevin's expressions and that of the expressions of the above named witnesses. In this case, as in all the cases where the witness is interested, his mind may be influenced by interest and induce him to attach to conversations a meaning far different from that which they were intended to bear by him who uttered them.

"44. But this question is quite useless at present. Mr. Langevin could not thus pledge the government, he formally declared it, and I confess that one would vainly seek in the Intercolonial Railway Act for legal means to indemnify the petitioners, although their claims might be equitable. This contradiction between the evidence of Mr. Langevin and that of the petitioners, of their advancers and bondsmen, clearly establishes what I said a moment ago about the uncertainty of the testimony of men. Here is a number of educated persons, deservedly enjoying a high reputation for respectability, swearing in a manner diametrically opposed to each other as to the result of their conversations. This can also explain the contradictions which I remark in this case with regard to what the engineer, Mr. Marcus Smith, is alleged to have said to Messrs. Berlinguet

Home, Armstrong and others. We must accept with a certain degree of caution the evidence of an interested party.

"45. There is one point in the case on which the petitioners should succeed: It is that concerning the manner in which the engineers made their monthly estimates during the first four months following the beginning of the works, in 1870, as established by documents 97 and 98 produced with the official correspondence concerning the construction of the Intercolonial. According to this correspondence and the order in council of the 20th September, 1870, which settled the question, it would appear that the engineers committed errors resulting in a loss to the contractors, for interest, of $5,850.90 or thereabouts. In order to appreciate correctly the intention of the commissioners in their communication to the Privy Council (document 97) and the meaning and signification of the report of the Privy Council, I cite them verbatim, and I believe, although the chief engineer was not of the opinion of the Privy Council and of the commissioners on this point, that the engineers made grave errors in this occasion and that this sum of $5,850.90 should be credited to the petitioners in the final result of the case.

I must say that if the contractors suffered damages to this amount, which I allow them, they were well indemnified, if, as I have reason to believe, the report which I just read was followed to the letter. I also believe that in law and equity they should be credited with another sum of $27,023, representing the value of materials, (plant, &c.,) which they transferred to government when they gave up their contract in May, 1873. Deducting these sums from that of $159,988 which government paid to the contractors over and above their contract price, and as I see nothing in the proof to warrant me in believing that government deducted

1877

BERLINGUET v. THE QUEEN.

Taschereau J. in the Exchequer.

these $32,872.23 in making up that balance of $159,882, it follows that the real balance due to Her Majesty would be $127,110.

"46. If Her Majesty, in her answer to the petition of right, had demanded the application and the benefit of the section 3 of the contracts which stipulates a penalty of $2,000 per week, payable by the contractors from the 1st of July, 1871, to the day on which they gave up their contracts, I should condemn the petitioners to pay this penalty to Her Majesty under the form of liquidated damages, which penalty would amount to $216,000 for the 108 weeks during which the contractors were in default."

"But Her Majesty has not, by her written factum, demanded the execution of so severe a stipulation, but only a condemnation for $150,982.57 as a surplus paid by the commissioners to the contractors on their contracts and not at all under the form of penalty or damages. I think I would be adjudging *ultra petita* if I inflicted the penalty under the form of liquidated damages."

"On the other hand, if Her Majesty also demanded the execution of this part of the section of the contracts which stipulates that in case of giving up their contracts, the contractors would forfeit all right to any sum, percentage, or other moneys to which they would be entitled in virtue of these contracts, I should deduct these $32,872.23 which I am disposed to award them, and in this case I would give judgment in favor of Her Majesty for the sum of $159,982.54 with costs, in any event, against the petitioners."

"I shall wait for the advice of the Attorney General of Her Majesty for the dominion of Canada and for this purpose this case is adjourned to the 24th of October instant."

The formal judgment was as follows:—

1877

BERLINGUET v. THE QUEEN.

Taschereau J. in the Exchequer.

"The twenty-fourth day of October, in the year of our Lord one thousand eight hundred and seventy-seven."

"This court having heard the evidence and the pleadings of parties by their counsel, doth declare."

"That the said F. Xavier Berlinguet and Marie Charlotte Mailloux are entitled to the sum of five thousand eight hundred and fifty dollars and ninety cents, ($5,850.90) for interest upon and for the forbearance of divers large sums of money due and payable by Her Majesty's government to them the suppliants, and further to the sum of twenty-seven thousand twenty-two dollars and thirty-five cents ($27,022.35), for the value of certain materials to them belonging, and by them left to Her Majesty's government."

"But inasmuch as by section three of the contracts, the suppliants, having abandoned their said contracts, forfeit all right and claim to these two amounts, to wit, the total sum of thirty-two thousand eight hundred and seventy-three dollars and twenty-five cents, ($32,873.25) the said sum of thirty-two thousand eight hundred and seventy-three dollars and twenty-five cents is hereby declared forfeited;"

"And this court doth further order and adjudge that the said suppliants do pay to Her Majesty's Government of the Dominion of Canada the sum of one hundred and fifty-nine thousand, nine hundred and eighty-two dollars and fifty-seven cents ($159,982.57), as money overpaid to the suppliants by Her Majesty's government at the time of their abandoning their contracts;"

"And this court doth moreover order and adjudge that the said suppliants do pay to Her Majesty's government of the Dominion of Canada the costs of the present suit.

(Signed) NAPOLEON LEGENDRE,
Acting Registrar Court of Exchequer."

From this judgment the suppliants appealed to the Supreme Court of Canada, but no steps were taken by

1877

BERLINGUET v. THE QUEEN.

either parties to bring on the appeal until February, 1883, when an application was made to the full court on behalf of the appellants for an order directing the Registrar to set down for hearing the appeal the next session of the court.

Upon this application the following judgment was delivered by Strong J. on behalf of the court, on the 1st May, 1883, Sir W. J. Ritchie C.J. dissenting.

STRONG J.—This is an application for a direction to the Registrar to set down for hearing an appeal from a judgment of the Exchequer Court on a petition of right. This petition of right was a Quebec case and the judgment on it was pronounced at Quebec, where the cause was heard before Mr. Justice J. T. Taschereau on the 17th October, 1877. It has never to this day been drawn up or entered. At the time the judgment was pronounced, the exchequer rule No. 138, which requires that before an appeal can be taken from a judgment in the Exchequer Court, a motion for a new trial must be made to the judge who heard the cause and that the appeal must be from his decision on that motion, that is from the decision on the motion for a rule *nisi* if the judge refuses to grant the rule, or if he grants a rule *nisi*, from his decision on the application to make it absolute, did not apply to Quebec cases. On the 12th of February, 1878, exchequer rule No. 203 was passed, and by it rule 138 as well the rules immediately following, to 142 inclusive, were ordered and declared to be and to have been applicable to actions in which the cause of action shall have arisen in the Province of Quebec. On the 9th November, 1877, the deposit of $50 required by section 68 of the Supreme Court Act as security for costs was made with the Registrar.

On the 7th January, 1878, an application for a rule

1883

BERLINGUET v. THE QUEEN.

Strong J.

nisi to set aside the judgment was made to Mr. Justice Taschereau, who pronounced judgment refusing it on the 7th February following. Since then no step whatever has been taken in the cause, either as regards the appeal or otherwise, with the exception of some proceedings in the exchequer relating to a change of attorney by the suppliant and the taxation of costs between the suppliant's solicitor and his client, the transmission, pursuant to judge's order for the purpose of that taxation, of the papers to an acting Registrar of the court at Quebec, and the return of the same papers to Ottawa.

As I before stated the judgment was never drawn up or entered, and the Registrar has never set the appeal down for hearing according to the requirements of section 68. I am of opinion that the suppliant took every step it was obligatory on him to take to bring the appeal to a hearing. The deposit was made in due time. No subsequent deposit after the decision on the application for the rule was, in my view requisite, for I am of opinion that no *ex post facto* effect ought to be given to order 263, the power to make rules of procedure not authorizing the enactment of orders having a retrospective effect on proceedings already taken,—indeed I do not construe order 263 as intended to apply, so as to affect retroactively proceedings had in pending causes, but as applying to all future proceedings in pending Quebec causes. This being so, the question is whether the deposit for securing the costs having been made, as required by section 68 of the act, and the Registrar not having entered the judgment and not having set down the appeal to be heard as required by section 68, the suppliants appeal is now *ipso jure* out of court by the operation of rule 44 of the Supreme Court rules That rule provides that unless an appeal shall be brought on for hearing within one

1883

BERLINGUET v. THE QUEEN.

Strong J.

year after the security shall have been allowed, it shall be held to have been abandoned without any order to dismiss being required, unless the court or a judge shall otherwise order.

According to the procedure prescribed by section 68 it was impossible for the suppliant to take any step in the cause until the Registrar had set the appeal down to be heard, as required by said section 68. The next step to be taken by the suppliant according to that section was one, consequent on the setting down by the Registrar, and one which could not regularly be taken until the appeal had been set down; the words of the section, after providing for the deposit, being as follows:

> And thereupon the Registrar shall set the suit down for hearing before the Supreme Court on the first day of the next session, and the party appealing shall thereupon give to the party or parties affected by the appeal, or their respective attorneys, by whom such parties were represented in the Exchequer Court notice in writing that the case has been so set down to be heard in appeal as aforesaid.

Thus by the express words of the statute the notice was not to be given until after a certain step had been taken by the court or its officer.

In my opinion the suppliant is in strictness and of right entitled now to have this motion granted in order that he may proceed with his appeal; he is shown to be in no default, and he is within the equity of the rule that the act of the court can cause no prejudice.

It is true he might have made this motion earlier but I apprehend he is not to be prejudiced because he did not earlier invoke the aid of the court to enforce that which it was the statutory duty of the officer of the court to do of his own motion, immediately on receiving the payment of the deposit without any further application from the appellant.

The judgment in the Exchequer Court ought also at once to be entered on the judgment book in the Ex-

chequer Court—of course this can and must be done, *nunc pro tunc.*

Rule 156 of the Exchequer Court is very explicit as to this. That rule says that every judgment shall be entered by the proper officer in the book to be kept for the purpose. This entry is the record of the judgment and the entering of it is to be the act of the court or officer and not of the parties.

The entry is to be by the Registrar without waiting for any application from the parties, and if the party in whose favor the judgment is, requires an office copy it is to be delivered to him

I think the motion to set the appeal down to be heard at the next session of the court should be granted, but without costs, as the point of practice involved in the motion is a new one.

The appeal was argued in the Supreme Court of Canada by *Irvine* Q. C. and *Girouard* Q. C. for the appellants, and *Burbidge* Q. C. and *A. Ferguson* for the respondents.

Sir W. J. RITCHIE C.J.—The appellants were contractors, by virtue of two contracts under seal, for the construction of sections of 3 and 6 of the Intercolonial Railway, with Her Majesty represented for that purpose by Commissioners appointed under 31 Vic., cap. 13.

In view of the provisions of this Act, 31 Vic., cap. 13, sections 16, 17 and 18, which are as follows:

16. The Commissioners shall build such railway by tender and contract after the plans and specifications therefor shall have been duly advertised, and they shall accept the tenders of such contractors as shall appear to them to be possessed of sufficient skill, experience and resources to carry on the work of such portions thereof as they shall contract for; provided always, that the Commissioners shall not be obliged to accept the lowest tender in case they should deem it for the public interest not to do so; provided also, that no contract under this section, involving an expense of ten thousand dol-

1886

BERLINGUET v. THE QUEEN.

Ritchie C.J.

lars or upwards, shall be concluded by the Commissioners until sanctioned by the Governor in Council.

17. The contracts to be so entered into shall be guarded by such securities and contain such provisions for retaining a proportion of the contract monies, to be held as a reserve fund for such periods of time, and on such conditions, as may appear to be necessary for the protection of the public, and for securing the due performance of the contract.

18. No money shall be paid to any contractor until the chief engineer shall have certified that the work, for or on account of which the same shall be claimed, has been duly executed, nor until such certificate hall have been approved by the Commissioners ;

and of 31 Vic., cap. 12, an Act respecting the public works of Canada, by section 7, of which it is enacted that :—

No deeds, contracts, documents or writings shall be deemed to be binding on the department, or shall be held to be acts of the said minister, unless signed and sealed by him or his deputy, and countersigned by the secretary ;

and by virtue of the express terms of the contract as indicated in sections 2, 3, 4, 6, 9, 11 and 12, copies of which I have annexed hereto (1), I think the learned

(1) They, the contractors, shall and will, well, truly and faithfully make. build, construct and complete that portion of the railway known as "section No. 6," and more particularly described as follows, to wit:

Extending from the easterly end of "section No. 3" (number three) of said railway, being near Dalhousie, to the westerly side of the Main Post-Road near the forty-eight mile post easterly from Jacquet River, the said "section No. 6" being twenty-one miles, or thereabouts in length and within the province of New Brunswick, and all the bridges, culverts and other works appurtenant thereto, to the entire satisfaction of the commissioners, and according to the plans and specification thereof, signed by the commissioners and the contractors, the plans whereof so signed are deposited in the office of the commissioners in the city of Ottawa, and the specification whereof so signed is hereunto annexed and marked "schedule A," which specification is to be construed and read as part thereof, and as if embodied in and forming part of this contract. But nothing herein contained shall be construed to require the contractors to provide the right of way for the construction of railway.

(2) The contractors shall perform and execute all the works required

judge who tried this case could not have arrived at any other conclusion than he did; and therefore I think his

to be performed by this contract and the said specification, in a good, faithful, substantial and workmanlike manner, and in strict accordance with the plans and specifications thereof, and with such instructions as may be from time to time given by the engineer, and shall be under the direction and constant supervision of such district, division and assistant engineers and inspectors as may be appointed. Should any work, material, or thing of any description whatsoever, be ommitted from the said specification or the contract, which, in the opinion of the engineer, is necessary or expedient to be executed or furnished, the contractors shall, notwithstanding such omission, upon receiving written directions to that effect from the engineer, perform and furnish the same. All the works are to be executed and materials supplied, to the entire satisfaction of commissioners and engineer; and the commissioners shall be the sole judges of the work and material, and their decision on all questions in dispute with regard to the works or materials, or as to the meaning or interpretation of the specification or the plans, or upon points not provided for, or not sufficiently explained in the plans or specifications, is to be final and binding on all parties.

3. The contractors shall commence the works embraced in this contract within thirty days from and after the date hereof, and shall diligently and continuously prosecute and continue the same, and the same respectively and every part thereof shall be fully and entirely completed in every particular and given up under final certificate and to the satisfaction of the Commissioners and engineer on or before the first day of July, in the year of our Lord one thousand eight hundred and seventy-one (time being declared to be material and of the essence of this contract), and in default of such completion as aforesaid on or before the last mentioned day, the contractors shall forfeit all right, claim or demand to the sum of money or percentage hereinafter agreed to be retained by the Commissioners, and any and every part thereof, as also to any moneys whatever which may be at the time of the failure of the completion as aforesaid, due or owing to the contractors, and the contractors shall also pay to Her Majesty, as liquidated damages, and not by way of fine or penalty, the sum of two thousand dollars ($2,000) for each and every week, and the proportionate fractional part of such sum for every part of a week, during which the works embraced within this contract, or any portion thereof, shall remain incomplete, or for which the certificate of the engineer, approved by the engineers, shall be withheld, and the Commissioners may deduct

1886

BERLINGUET v. THE QUEEN.

Ritchie C.J.

decision must be affirmed and this appeal dismissed. In the case of *Jones* v. *The Queen* (2) I discussed similar pro-

and retain in their hands the such sums as may become due as liquidated damages, from any sum of money then due or payable or to become due or payable thereafter to the contractors.

4. The engineer shall be at liberty, at any time before the commencement or during the constructions of any portion of the work, to make any changes or alterations which he may deem expedient in the grades, the line of location of the railway, the width of cutting or fillings, the dimensions or character of structures, or in any other thing connected with the works, whether or not such changes increase or diminish the work to be done or the expense of doing the same, and the contractors shall not be entitled to any allowance by reason of such changes unless such changes consist in alterations in the grades or the line of location, in which case the contractors shall be subject to such deductions for any diminution of work, or entitled to such allowance for increased work (as the case may be), as the Commissioners may deem reasonable, their decision being final in the matter.

(6) If at any time during the progress of the works, it should appear that the force employed, or the rate of progress then being made, or the general character of the work being performed, or the material supplied or furnished are not such as to ensure the completion of the said works within the time stipulated, or in accordance with this contract, the commissioners shall be at liberty to take any part or the whole works out of the hands of the contractors, and employ such means as may see fit to complete the works at the expense of the contractors, and they shall be liable for all extra expenditure incurred thereby, or the commissioners shall have power at their discretion to annul this contract. Whenever it may become necessary to take any portion or the whole works out of the hands of the contractors, or to annull this contract, the commissioners shall give the contractors seven clear days' notice in writing of their intention to do so, such notice being signed by the chairman of the board of commissioners, or by any other person authorized by the commissioners, and the contractors shall thereupon give up quiet and peaceable possession of all the works and materials as they then exist; and without any other or further notice or process or suit at law, other legal proceedings of any kind whatever, or without its being necessary to place the contractors *en demeure*, the commissioners in the event of their annulling the contract may forthwith, or at their discretion, proceed to re-let the same or any part thereof,

(2) 7 Can. S. C. R. 570.

visions, read in connection with these statutes, at great length, and as that case has stood unreversed, and as I

or employ additional workmen, tools and materials, as the case may be, and complete the work at the expense of the contractors, who shall be liable for all extra expenditure which may be incurred thereby, and the contractors and their assigns or creditors shall forfeit all right to the percentage retained, and to all money which may be due on the works, and they shall not molest or hinder the men, agents or officers of the commissioners from entering upon and completing the said works as the commissioners may deem expedient.

9. It is distinctly understood, intended and agreed, that the said price or consideration of four hundred and fifty-six thousand nine hundred and forty-six dollars ($456,946.00) shall be the price of, and be held to be full compensation for all the works embraced in, or contemplated by this contract, or which may be required in virtue of any of its provisions or by law, and that the contractor shall not upon any pretext whatever, be entitled by reason of any change, alterations or addition made in or to such work. or in the said plans and specification, or by reason of the exercise of any of the powers vested in the governor in council by the the said Act intituled, "An Act respecting the construction of the Intercolonial Railway," or in the commissioners or engineer, by this contract or by the law, to claim or demand any further or additional sum, for extra work or as damages or otherwise, the contractors, hereby expressly waiving and abandoning all and any such claim or pretention to all intents and purposes whatsoever except as provided in the fourth section of this contract.

11. And it is further mutually agreed upon by the parties hereto, that cash payments, equal to eighty-five per cent. of the value of the work done, approximately made up from returns of progress measurements, will be made monthly on the certificate of the engineer, that the work for or on account of which the sum shall be certified has been duly executed, and upon approval of such certificate by the commissioners, on the completion of the whole work to the satisfaction of the engineer, a certificate to that effect will be given, but the final and closing certificate, including the fifteen per cent. retained, will not be granted for a period of two months thereafter. The progress certificates shall not in any respect be taken as an acceptance of the work or release of the contractor from his responsibility in respect thereof, but he shall, at the conclusion of the work, deliver over the same in good order according to the true intent and meaning of this contract and of the said specification.

12. This contract and the said specification shall be in all respects

1886

BERLINGUET v. THE QUEEN.

Ritchie C.J.

am of the same opinion as I was when that judgment was given, I do not think it necessary to go over the same ground again.

FOURNIER J.—Le jugement soumis à la révision de cette cour a été rendu par l'honorable juge J. T. Taschereau, dans la cour d'Echiquier, le 17 octobre 1877. Ce jugement renvoie la pétition de droit par laquelle les Appelants réclamaient de Sa Majesté une balance de $528,000, comme leur étant due par le gouvernement du Canada, sur la construction des sections nos 3 et 6 du chemin de fer Intercolonial, au sujet desquelles ils avaient fait un contrat avec les commissaires nommés pour la construction de ce chemin. Les pétitionnaires s'étaient engagés à construire ces deux sections par contrat signé, le ou vers le 25 mai 1870, mais à la réquisition des commissaires nommés par le gouvernement pour diriger la construction du chemin de fer Intercolonial, l'ouvrage avait été commencé aussitôt après l'acceptation des soumissions des Appelants et avant même la signature du contrat. L'ouvrage fut continué jusqu'au 9 juin 1873, époque à laquelle les commissaires donnèrent avis aux Appelants que leur contrat avait été annulé, que le contrôle des ouvrages leur était enlevé et que les commissaires eux-mêmes en complèteraient l'exécution.

Après avoir exposé les circonstances dans lesquelles le contrat a été fait, la pétition entre dans une exposition détaillée des sujets de plainte des Appelants, dont les principaux peuvent se résumer comme suit:—

1o. That there were no valid contracts between Her Majesty and the Petitioners; that if ever such contracts existed, they were annihilated or modified by the fact that the Petitioners had no communication of the plans and profiles nor of the bill of works; and, also,

subject to the provisions of the herein first cited Act, intituled "An Act respecting the construction of the Intercolonial Railway," and also, in so far as they may be applicable to the provisions of "The Railway Act, 1868."

that the schedule of prices agreed upon was increased by orders in council;

2o. That the Petitioners were compelled by the engineers employed by the Commissioners to execute works quite different from those mentioned in the contracts, much more costly and much above the stipulations of the contracts; and that they were entitled to payment thereof under the order in council.

3o. That the monthly estimates of progress made by the engineers were not carefully made and did not represent the quantity of work executed on the two sections and that consequently their monthly payments were much below the amounts to which they were entitled;

4o. That they complained frequently to the minister of Public Works and to the Commissioners and that in consequence of these complaints, the minister of Public Works promised to indemnity them if they continued the works assuring them that the abandonment of their works would be a great damage to the Government as well as to the Petitioners themselves;

5o. Moreover the Petitioners claimed the said sum of $523,000 under the form of general *indebitatus assumpsit* for money advanced, materials furnished, labour supplied, &c., &c.

A cette pétition sont annexées des comptes détaillés des montants dépensés par les Appelants pour l'exécution des ouvrages sur les susdites deux sections, comprenant aussi un état des ouvrages extrà pouvant être réclamés en vertu du contrat.

La défense de Sa Majesté, en réponse à la pétition, consiste principalement dans une dénégation en fait et en droit des allégations des Appelants. En outre, la défense allègue au long le contrat qui a été signé le 25 mai 1870 pour la construction des dites sections 3 et 6. Les principales clauses de ce contrat à considérer pour la décision de cette cause sont les suivantes: [Reads sections 3, 4, 6, 11 (1)]

La défense allègue que les sujets de plainte des Appelants furent examinés avec soin et que, de temps en temps, dans le but de leur venir en aide, les commissaires recommandèrent des augmentations de prix, mais en ayant toujours soin de ne pas dépasser la somme en

(1) *Ubi supra.*

1886

BERLINGUET v. THE QUEEN.

Fournier J.

bloc stipulée par le contrat pour la totalité des ouvrages.

Que vers le 24 mai 187 , les Appelants présentèrent aux commissaires une réclamation considérable pour des ouvrages *extrà*, en déclarant que s'ils n'étaient pas payés de cette somme, ils seraient obligés de suspendre les travaux, parce qu'ils ne pouvaient les continuer s'ils n'étaient point payés ; que les Appelants n'ayant pas droit à ces sommes, les commissaires leur signifièrent avis, conformément au contrat, que le contrôle des ouvrages leur était enlevé et le contrat annulé.

Qu'à l'époque de la signification de cet avis, il n'était dû aux contracteurs que $10,444 sur la section 3 et $73,946 sur la section 6, tandis qu'il restait de l'ouvrage à faire pour une somme beaucoup plus considérable.

Que pour terminer les ouvrages, les commissaires ont dépensé les sommes suivantes, savoir : sur la section 3, $107, 56.97, et sur la section 6, la somme de $136,915.60, ce qui fait que les Appelants ont reçu sur les deux contrats $159,983.57 de plus qu'il ne leur était dû, et cela sans tenir compte des pénalités pour lesquelles ils étaient responsables en vertu du contrat, pour retard dans l'exécution des travaux. Il y a une conclusion pour le remboursement de cette somme de $159,982.57.

La défense allègue que les Appelants n'avaient droit à aucun paiement, à moins d'avoir obtenu un certificat de l'ingénieur, et qu'ils ont été payés de tout ce qui a été ainsi certifié.

Sur cette contestation, un nombre considérable de témoins ont été examinés. Leurs témoignages imprimés forment deux énormes volumes. La correspondance entre les Appelants, le gouvernement et les commissaires a aussi été produite, avec un grand nombre de documents, qui forment encore plusieurs autres volumes très considérables.

C'est cette masse de témoignages et de documents que l'honorable juge a eu à examiner pour en arriver à

la conclusion de renvoyer la pétition. J'avoue que ce n'est pas sans beaucoup d'hésitations que j'ai abordé cette tâche difficile. Mais après avoir, comme l'honorable juge, fait un sérieux examen de cette preuve et de ces documents, j'ai été forcé d'arriver à une conclusion contraire à la sienne.

Un des premiers moyens invoqués par les Appelants étant qu'il n'y avait pas de contrat valable entre eux et Sa Majesté ; que s'il en avait existé un, savoir, celui qu'ils avaient signé le 25 mai 1870, ce contrat était incomplet, les plans n'ayant pas été signés ; de plus, qu'il avait, de fait, été mis de côté du consentement des deux parties ou du moins tellement modifié qu'il avait cessé de régler les obligations respectives des parties contractantes, il était tout naturel dans ce cas pour l'honorable juge de décider d'abord la question concernant la validité du contrat allégué par la Couronne. C'est aussi par l'examen des faits se rapportant à cette question que je commencerai l'étude de cette cause, après avoir toutefois fait sommairement allusion aux circonstances qui ont précédé la signature du contrat en question.

M. Fleming, l'ingénieur en chef chargé par le gouvernement de la direction des travaux de construction du chemin de fer Intercolonial, et sous la direction duquel le devis des ouvrages a été préparé, constate (1) qu'une exploration de ces deux sections avait eu lieu et que les mesurages et quantités d'ouvrages avaient été établis approximativement, et imprimés et publiés afin de donner à ceux qui voudraient contracter pour la construction de ces deux sections 3 et 6, la connaissance des ouvrages qu'il y aurait à faire. Il ajoute qu'à cette époque les quantités ne pouvaient pas être données avec exactitude, que tout ce qu'il était alors possible de faire c'était d'en donner une information approximative.

Les plans de détail (*special plans*) n'étaient point pré-

1886

BERLINGUET v. THE QUEEN.

Fournier J.

parés, mais les plans de presque toutes les structures l'étaient. Il n'y avait aucun plan de fondations. Il ne peut dire si les coupes transversales (*cross-sections*) avaient été faites; il croit cependant qu'elles n'étaient pas complètes. Quant aux quantités données dans le (*Bill of Works*) devis et aux profils indiquant la nature des ouvrages, ils étaient considérés aussi corrects qu'on peut les donner sans avoir fait un mesurage complet. Les profils n'indiquaient pas l'endroit de l'ouvrage, ni si c'était sur le penchant d'une côte ou sur un terrain plan; ils n'indiquaient que le contour général de l'ouvrage à faire. M. Fleming dit qu'il n'avait fait qu'à peu près (*rough estimate*) l'estimé du coût des travaux, fixant le maximum et le minimum des prix. D'après un document qui lui est attribué le minimum pour le n° 6 était de $493,666—et le maximum $615,000 pour la section 3, le minimum apparaît être $530,000 et le maximum $705,000.

Comme le fait voir ce témoignage, le gouvernement n'était pas dans la position d'offrir aux soumissionnaires pour ces contrats des informations suffisantes pour adopter le système de contrats à forfaits; il n'était pas en état de garantir les quantités d'ouvrage à faire. Les soumissionnaires n'avaient rien pour se guider puisque le gouvernement ne pouvait pas garantir les quantités d'ouvrage à faire et qu'il n'offrait que des données reconnues imparfaites sur la valeur et la quantité des travaux à faire. Mais le gouvernement pressé, pour des motifs d'intérêt public d'exécuter au plus tôt les grands travaux qu'il s'était engagé à faire en vertu de l'Acte de Confédération, n'avait pas eu le temps de se procurer de plus amples informations que celles qu'il avait mises à la disposition des contracteurs qui eurent à s'en contenter.

Berlinguet après avoir fait une étude très particulière des plans, profils et devis qui lui avaient été commu-

niqués, après avoir aussi obtenu beaucoup d'informations utiles de MM. Jobin et Cie, qui avaient abandonné le contrat qu'ils avaient eu de ces sections 3 et 6, —fit ses soumissions pour les mêmes travaux. On lui a fait à ce sujet le reproche de s'être lancé témérairement dans une entreprise pour laquelle il manquait d'expérience et on a prétendu expliquer son insuccès par cette considération. Je ne m'attacherai pas à refuter cette accusation, me contentant de referer à ce sujet au factum des appelants qui en démontre toute l'injustice. Toutefois le gouvernement par ses commissaires accepta ses soumissions et requit les contracteurs de se mettre immédiatement à l'œuvre, même avant la signature du contrat qui ne le fut que plus tard, le 25 mai 1870, mais les plans ne le furent jamais et furent détruits dans un incendie. Un contrat semblable fut signé pour la section No. 3.

Il est à peine nécessaire de dire que l'insuffisance des données fournies aux contracteurs n'est pas invoquée comme moyen de se soustraire à l'exécution du contrat. Mais il est important d'y référer pour faire voir que dans l'exécution d'ouvrages aussi mal définis que l'étaient ceux dont il s'agit, le gouvernement, aussi bien que les contracteurs, a dû bientôt s'apercevoir de la difficulté pour ne pas dire de l'impossibilité d'exécuter un pareil contrat. Aussi ce contrat n'a-t-il été considéré comme obligatoire que pendant un court espace de temps.

Presque toutes ses clauses ont été les unes après les autres annulées et mises de côté par les deux parties. On verra par les faits rapportés ci-après qu'il ne restait de ce contrat aucune autre obligation pour les contracteurs que celle de faire les travaux des deux sections et pour le gouvernement l'obligation de les payer aux prix déterminés par des ordres en conseil. Il y a eu renonciation de celui-ci à toutes les autres conditions, comme

1886

BERLINGUET v. THE QUEEN.

Fournier J.

celle de l'obligation de terminer les ouvrages pour le 1er juillet 1871—le temps étant déclaré de l'essence du contrat ; celle comportant confiscation de toute somme d'argent ou percentage retenu comme garantie de l'exécution des ouvrages, et aussi de toutes autres sommes dues aux contracteurs au cas où ils ne termineraient pas les ouvrages dans le temps fixé ; celle comportant une pénalité de $2,000 pour chaque semaine de retard apporté à la livraison des ouvrages dans le temps fixé ; celle donnant aux commissaires pouvoir d'annuler le contrat en donnant aux contracteurs sept jours d'avis ; celle fixant le prix en bloc pour la section 6, à la somme de $456,946 et à celle de $462,444 pour la section n° 3 enfin la 4me section déclarant que les paiements mensuels ne seraient faits que sur des certificats d'ingénieurs. Ce sont toutes les conditions importantes du contrat, les autres le sont peu, ou ne sont que de pure forme.

Si, comme j'ai confiance de pouvoir le démontrer par l'exposition des faits il résulte un abandon ou une renonciation formelle de la part du gouvernement, à toutes ces conditions, que reste-il alors du contrat, sinon comme je l'ai déjà dit, l'obligation pour les contracteurs de faire les ouvrages, et pour le gouvernement celle de les payer conformément à ses ordres en conseil.

L'honorable juge Taschereau adoptant pour point de départ de son examen des faits de cette cause, l'existence du contrat signé le 25 mai 1870 y a subordonné tous les autres faits constatant les nombreux changements et modifications qui y ont été apportés, bien que ces faits amplement prouvés soient de nature à établir qu'il y a eu de la part du gouvernement une renonciation légale à la plupart des conditions du contrat. Sur un point seulement a-t-il donné gain de cause aux Appelants.

Par son jugement du 17 octobre 1877, il reconnaît qu'il y a de la part du gouvernement violation de la

condition concernant le mode de paiements et déclare à ce sujet :

That the said Mr. Xavier Berlinguet and Marie Charlotte Mailloux are entitled to the sum of five thousand eight hundred and fifty dollars and 90 cents for interest upon and for the forbearance of divers large sums of money due and payable by Her Majesty's Government to them the Suppliants.

A l'appui de cette partie de son jugement l'honorable juge a exprimé comme suit les motifs qui l'ont induit à adopter cette conclusion :

XLV. There is one point in the case on which the Petitioners should succeed : it is that concerning the manner in which the engineers made their monthly estimates during the first four months following the beginning of the works, in 1870, as established by *Documents* 97 and 98 produced with the official correspondence concerning the construction of the Intercolonial. According to this correspondence and the order in council of the 20th September 1870, which settled the question, it would appear that the engineers committed errors resulting in a loss to the contractors, for interest, of $5,850.90 or thereabouts. In order to appreciate correctly the intention of the Commissioners in their communication to the Privy Council (Document 97) and the meaning and signification of the report of the Privy Council, I cite them verbatim, and I believe, although the chief engineer was not of the opinion of the Privy Council and of the Commissioners on this point, that the engineers made grave errors in this occasion and that this sum of $5,850.90 should be credited to the Petitioners in the final result of the case.

Dans cette partie de son jugement on voit que l'honorable juge donne raison aux Appelants, sur un des griefs importants de leur pétition, le 17me, dans lequel ils se plaignent que les estimés mensuels de l'ouvrage fait étaient incorrects et que les paiements faits sur ces rapports injustes étaient insuffisants pour couvrir leurs légitimes dépenses. Cette partie du jugement étant favorable aux Appelants, ils n'en mettent pas en question la légalité ni le bien jugé.

L'Intimée seule aurait pu le faire, mais elle n'a pas jugé à propos de prendre un contre-appel pour soumettre cette partie du jugement à la revision de cette cour. Les délais d'appel sont expirés depuis plusieurs années,

1886

BERLINGUET v. THE QUEEN.

Fournier J.

et cette partie du jugement étant passée en force de chose jugée, il faut, de toute nécessité, considérer comme un point réglé, que, dès les premiers mois de l'exécution des travaux, le gouvernement lui-même, par ses agents, mettait de grands obstacles à l'avancement des travaux en retardant le paiement de sommes considérables dues aux contracteurs.

La renonciation du gouvernement au droit d'exiger que les travaux fussent terminés dans le délai fixé par le contrat du 25 mai, savoir, au 1er juillet 1871, ainsi qu'aux pénalités et confiscations stipulées pour inexécution de cette condition, résulte nécessairement des diverses transactions qui ont eu lieu entre les contracteurs et le gouvernement après l'expiration du délai fixé par le contrat.

Avant de citer quelques-unes de ces transactions, il est bon de faire observer que l'ingénieur en chef, M. Fleming, dont le témoignage est cité par l'honorable juge, a déclaré que le délai fixé pour l'exécution des travaux était trop court; il dit à ce sujet:

I think it ought not to have been attempted.

I am not prepared to say it was impossible to do it, but it would have required a lavish expenditure.

La conclusion qu'en tire l'honorable juge, c'est que Berlinguet a été imprudent d'entreprendre avec des informations aussi incertaines et qu'il doit en subir les conséquences. Bien que cette condition soit reconnue comme impossible d'exécution, l'honorable juge n'hésite pas à tenir rigoureusement les Appelants à l'obligation de l'exécuter. Cette conclusion ne peut s'expliquer que par le fait que l'honorable juge a complètement omis de prendre en considération les faits nombreux par lesquels le gouvernement s'est désisté de cette condition. Quelle autre conclusion tirer de l'ordre en conseil du 27 juillet 1871, après l'expiration du terme fatal mentionné dans le contrat, accordant aux Appelants, pour les mettre en

état de continuer les travaux, une augmentation de 20 pour cent par verge cube sur les travaux en terre et d'une piastre par verge cube sur les ouvrages en maçonnerie. Plus tard, le 28 septembre de la même année, un autre ordre en conseil s'exprimait ainsi :

Having reference to the expediency of extending to the Contractors on the line every reasonable facility in the prosecution of their work' &c., &c., advise that the recommendation submitted on the said memorandum be approved.....

Le rapport ainsi approuvé accordait aux Appelants une avance de $25,000 par chaque section et cela près de trois mois après l'expiration du délai dans lequel les ouvrages devaient être finis.

Sur un rapport en date du 18 janvier 1872, signé par tous les commissaires et adressé au gouvernement représentant sur la recommandation de l'ingénieur en chef M. Fleming—

That these Contractors have pushed forward their work since last winter with a great deal of energy, having accomplished a great deal more than was expected, and that the character of the work generally is quite satisfactory ;

That he is quite satisfied from the statement both of the Contractors and Engineers in charge, that the work has been executed at a heavy loss ;

That from all he can learn the certificates fall far short of the actual expenditure, and unless they be increased the work must stop ;

That the work could not come to a stand without resulting in serious difficulties, and in all probability very large additional cost and, therefore, should be avoided if possible ;

un ordre en conseil fut adopté le 20 janvier 1872 approuvant et adoptant la suggestion des commissaires d'augmenter encore le prix du contrat.

Un autre ordre en conseil en date du 10 février 1872 rendu sur le rapport des commissaires approuve leur suggestion de faire les paiements aux taux augmentés par des ordres en conseil précédemment rendus.

Le 5 avril 1872 un ordre en conseil au même effet

1886

BERLINGUET v. THE QUEEN.

Fournier J.

que le précédent est rendu pour le paiement des ouvrages faits jusqu'à la fin du mois de mars 1872.

Afin de permettre aux contracteurs de continuer les travaux, le gouvernement rendit encore le 11 juin 1872 un ordre en conseil continuant les paiements aux mêmes taux jusqu'à la fin de juin.

Beaucoup d'autres documents que ceux ci-dessus cités constatent de la manière la plus positive qu'après le 1er juillet 1871, le gouvernement a consenti à la continuation des travaux sans égard à la stipulation qui faisait de l'époque de leur terminaison une condition essentielle. Mais ceux mentionnés plus haut sont certainement plus que suffisants pour faire voir que le gouvernement s'est volontiers départi de cette condition et constituent une preuve légale d'une renonciation au droit de s'en prévaloir. Lorsque l'on se rappelle le témoignage de M. Fleming déclarant qu'il était impossible de faire ces travaux dans le délai fixé, on comprend de suite le sentiment de justice qui a porté le gouvernement, sur les recommandations de son ingénieur et celle des commissaires, à laisser les contracteurs continuer l'ouvrage après l'expiration du délai fixé. En présence de ces faits il eût été plus logique et certainement plus légal, comme le feront voir les autorités citées ci-après, de conclure que cette condition avait été mise de côté.

Une autre conséquence inévitable de ces faits c'est qu'il en résulte que la condition donnant aux commissaires le pouvoir d'annuler le contrat en donnant aux contracteurs sept jours d'avis a aussi été abandonnée (*waived*) comme les précédentes. On a vu par tous les documents ci-dessus cités que les travaux ont été continués pendant tout près de deux ans après l'expiration du délai fixé pour leur exécution. Il n'était plus possible alors au gouvernement de se prévaloir du privilège d'annuler le contrat. Un privi-

lège aussi exorbitant ne pouvait plus être exercé, après une prolongation de délai aussi considérable, sans qu'il en résultât une grave injustice contre les contracteurs. Les circonstances dans lesquelles il a été exercé font voir que le gouvernement s'en est servi pour se constituer seul arbitre du différend survenu entre lui et les contracteurs, et après des délais et des rapports d'affaires qui justifiaient ceux-ci de croire que le gouvernement avait renoncé au bénéfice de cette clause. Les contracteurs ayant alors présenté aux commissaires leur présente réclamation se montant à la somme de $543,540 et ne recevant pas de réponse, informèrent le gouvernement qu'à moins qu'ils ne fussent payés de leurs avances les travaux ne pourraient pas être conduits avec autant de vigueur que le désiraient les commissaires. Sur cette réponse les commissaires demandèrent l'autorisation d'annuler le contrat (Voir ordre en conseil, p. 24) et donnèrent en conséquence un avis à cet effet. Cet ordre en conseil démontre que le contrat n'a pas été volontairement abandonné, mais fait voir qu'il a été enlevé aux contracteurs qui, faute de paiement de leur réclamation, déclaraient ne pouvoir procéder au gré des commissaires. Pour décider si les commissaires avaient droit d'en agir ainsi, il n'est pas nécessaire d'entrer maintenant dans le mérite de la réclamation qui leur était présentée ; la seule question à décider dans le moment est de savoir si le pouvoir d'annuler le contrat pouvait être exercé après l'expiration du délai fixé par le contrat, savoir le 1er juillet 1871. Je soumets qu'il n'était plus alors au pouvoir du gouvernement d'exercer ce privilège. Il est de principe qu'une condition aussi rigoureuse ne peut être exercée que dans le délai fixé, et comme c'est près de deux ans après son expiration que les commissaires ont donné l'avis requis par le contrat, il était alors trop tard pour s'en prévaloir. Cette condition avait alors cessé d'avoir aucun effet et il s'ensuit que les rapports entre les

1886

BERLINGUET v. THE QUEEN.

Fournier J.

parties contractantes doivent se régler comme si cette stipulation n'avait pas été insérée au contrat. Ce point est établi par l'autorité suivante qui s'applique également au cas où il y a des stipulations de confiscation et de pénalité comme dans le contrat dont il s'agit. Elles doivent aussi être mises en force avant l'expiration du délai fixé.

Dans la cause de *Walker and others* v. *The London and North Western Railway Company* (1), où des difficultés se sont élevées au sujet de l'interprétation de clauses analogues à celle dont il s'agit en cette cause, déclarant que si les ouvrages n'étaient pas terminés dans le délai fixé, ou conduits à la satisfaction de l'ingénieur qui en avait la direction, le contrat serait à l'option de la compagnie considéré comme nul pour tout ce qui resterait à faire, et que toutes les sommes alors dues aux contracteurs, ainsi que tous les matériaux et l'outillage et toutes sommes stipulées comme pénalités pour l'inexécution du contrat seraient forfaits en faveur de la compagnie, si les ouvrages n'étaient pas terminés avant le 31 avril 1873. Ils ne le furent point. Le sommaire de la décision est comme suit :

Held, upon the true construction of the contract the clause above set forth, with reference to the evidence of the contract and the forfeiture of the contractor's implements and materials, could only been forced before the time originally fixed for the completion of the works had expired.

Archibald, J., fait au sujet du délai dans lequel une telle clause peut être mise en force, la remarque suivante :

The clause in our opinion can only be acted on and enforced within the time fixed for the completion of the works, for the time is clearly of the essence of contract, and it is only with reference to the time so agreed that this rate of progress can be determined. If, as happened, the time has been extended, there may be a new contract to complete in a reasonable time ; but to give the clause in question any application to a reasonable time after the time

(1) 1 C. P. Div. p. 518.

originally fixed has expired, would be, without any express provision, to make the company judge in their own case of what was a reasonable time, and to enable them in their own favor to avail themselves of a most stringent and penal clause.....

1886

BERLINGUET v. THE QUEEN.

Fournier J.

Here there was a disregard of the time of completion by mutual consent, and a negotiation was on foot for allowing a longer time and enhanced prices to the contractor, but we do not decide the case on that ground, but upon what we consider to be the legal construction of the clause which could only be enforced before the time originally fixed for completion of the work had expired, and we therefore think the notice of the 22nd January 1874, was not effectual for all or any of the purposes mentioned in the question put to us, and that the contract was not avoided.

We think the defendants were not justified in point of law in taking possession of the plaintiffs implements and materials.

Emdens, dans son ouvrage intitulé "Law of Building" (1), fait au sujet de cette décision les observations suivantes approuvant la doctrine qui y est énoncée.

When there is a clause similar to that in *Walker* vs. *London* and *North Western Railway*, providing for the avoidance of the contract, and the forfeiture of the Contractor's implements and materials if he fails to proceed with the work at the rate of progress required in order to complete the works within the period limited for the purpose, or upon certain other events, such a clause can only be acted on, and enforced, before the time originally fixed for the completion of the works has expired. And the exercise of the right of election to rescind a building contract, on the ground of delay, or that the works cannot be completed within the given time, must be signified in an unqualified manner, and at all events, not after the builder has gone to expense in the belief that the right of election not being exercised, or has altered his position to his prejudice.

It follows, therefore, that as courts of law always lean against forfeitures, whenever it is intended to take advantage of any breach of covenant or condition in a building lease, or contract, so that it should operate as a forfeiture, the land owner or employer must take care not to do anything which may be deemed to be an acknowledgment of the continuance of the tenancy, or contract, and so operate as a waiver of the forfeiture.

Dans la cause de *Holmer* vs. *Guppy* (2) dans laquelle

(1) P. 124 (ed. 1882). (2) 3. M. & W. 381.

1886

BERLINGUET v. THE QUEEN.

Fournier J.

s'est aussi élevée la question de savoir dans quel délai devait être exercé le droit de forfaiture stipulé au cas d'inexécution d'ouvrages dans le temps fixé par le contrat, Parke B fait les remarques suivantes :

Then it appears that they were disabled by the act of the Defendants from the performance of that contract; and there are clear authorities, that if the party be prevented, by the refusal of the other contracting party, from completing the contract within the time limited, he is not liable in law for the default. It is clear, therefore, that the plaintiffs were excused from performing the contract contained in the original contract, and there is nothing to show that they entered into a new contract by which to perform the work in four months and a half, ending at a later period. The Plaintiffs were therefore left at large, and consequently they are not to forfeit anything for the delay.

Dans la cause de *Westwood and others* vs *The Secretary of State for India* (1), où il s'agissait d'opposer en compensation des pénalités stipulées pour défaut de livrer les ouvrages dans le délai fixé par le contrat, la cour déclara :

As to the set-off for penalties, they were clearly of opinion that it could not be sustained, because it must be taken, on the demurrer, however it might be disproved in point of fact, that the Defendant's engineers had ordered additions and alterations which has rendered it impossible to complete the work within the time and that he knew that they could not be so completed. That being so, it would be unjust and unreasonable to allow the Defendant to claim penalty for the delay.

J'ai cité les ordres en conseil prouvant de la manière la plus positive que la condition du délai fixé pour la terminaison des ouvrages avait été abandonnée, que des prolongations de délais avaient eu lieu de consentement mutuel après le 1er juillet 1871, et que le gouvernement n'a jamais eu un seul instant l'intention de mettre à exécution cette condition, non plus que d'exiger les confiscations et pénalités dont il n'a jamais été question dans leur correspondance. Mon but en faisant ces citations n'était pas seulement de prouver comme question de

(1) 11 Weekly Rep. pp. 261-2.

fait qu'il y avait eu un abandon volontaire (*waiver*), de ces conditions ci-dessus énumérées, mais je tenais aussi à faire voir que les parties contractantes avaient toujours été en excellents rapports jusqu'à la présentation de la réclamation des Appelants qui a fourni aux commissaires le prétexte de demander l'annulation du contrat.

Indépendamment de la renonciation volontaire résultant des faits ci-dessus rapportés, toutes les conditions de délai, de confiscations, de pénalités et d'annulation du contrat sont devenues caduques et sans effet par l'expiration du délai du contrat, suivant les autorités citées plus haut établissant clairement qu'elles ne peuvent être mises en force qu'avant l'expiration du délai convenu.

Sentant toute la force de l'argument sur la question de l'annulation du contrat après l'expiration du délai, on a essayé d'y trouver une réponse en prétendant qu'il y avait entre la troisième clause du contrat, au sujet de la confiscation et des pénalités que la loi décrète, au sujet de l'annulation du contrat et de la prise de possession des travaux, une différence essentielle, consistant en ce que dans la première, le délai est absolu et fatal— et que dans la dernière, le privilège d'annuler le contrat et de prendre possession des travaux est facultatif, et peut être exercé indistinctement soit avant soit après l'expiration du délai passé. En comparant les deux clauses on voit clairement que cette distinction n'est pas fondée et que dans l'une comme dans l'autre l'expiration du délai doit produire le même effet. La clause 6me, après avoir pourvu au droit de faire suspendre les travaux, s'exprime au sujet du droit d'annulation et de prise de possession, dans les termes suivants :

If at any time during the progress of the works, it should appear that the force employed, or the rate of progress then being made, or the general character of the work being performed, or the material supplied or furnished are not such as to ensure the completion of the said works *within the time stipulated*, or in accordance with this

1886

BERLINGUET v. THE QUEEN.

Fournier J.

contract, the commissioners shall be at liberty to take any part of the whole works out of the hands of the contractors, and employ such means as they may see fit to complete the works at the expense of the contractors, *and they shall be liable for all extra expenditure incurred thereby;* or the commissioners shall have power at their discretion to annul this contract. Whenever it may become necessary to take any portion or the whole work out of the hands of the contractors, or to annul this contract, the commissioners shall give contractors *seven clear days' notice* in writing of their intention to do so, such notice being signed by the Chairman of the Board of Commissioners, or by any other person authorized by the commissioners, and the contractors shall thereupon give up quiet and peaceable possession of all the works and materials as they then exist; and without any other or further notice or process or suit at law, other legal proceedings of any kind whatever, or without its being necessary to place the contractors *en demeure*, the commissioners in the event of their annulling the contract may forthwith, or at their discretion, *proceed to* re-let the same *or any part thereof*, or employ additional workmen, tools and materials, as the case may be, and complete the works at *the expense of the contractors, who shall be liable for all extra expenditure which may be incurred thereby*, and the contractors and their assigns or creditors shall forfeit all right to the percentage retained, and to all money which may be due on the works.

Cette faculté ne peut être exercée, comme le dit la clause, que si les commissaires ont lieu de croire que les ouvrages ne seront pas complétés dans le délai convenu :

Not such as to ensure the completion of the said works *within the time stipulated;* or the commissioners shall have power, at their discretion, to annul their contract.

Le pouvoir est donné dans l'alternative, et le délai dans lequel il doit être exercé, *within the time stipulated*, s'applique également à l'exercice soit de la faculté de prendre possession soit de celle d'annuler le contrat.

Il ne se trouve aucun terme dans cette clause qui puisse permettre de l'interpréter comme si elle avait dit que cette faculté pourrait être exercée en tout temps, soit avant, soit après le délai fixé ; elle dit, tout au contraire qu'elle ne pourra l'être que *within the time*

stipulated.

1886

BERLINGRET v. THE QUEEN.

Fournier J.

Cette clause est d'un caractère tout aussi pénal que le 3me, au sujet de la confiscation et des penalités ; elle comporte la peine de payer toutes les dépenses extra que les commissaires pourront encourir en faisant terminer les travaux. Il n'y a donc pas de différence à faire entre l'interprétation à donner à ces deux clauses. Ce serait aller directement contre les termes du contrat que de dire que ces pouvoirs pouvaient être exercés après le délai.

D'ailleurs c'est l'interprétation donnée à cette clause par les commissaires eux-mêmes, et par le gouvernement, comme le font voir les documents cités ci-après. Après la présentation de la réclamation des appelants (p. 320, vol. de correspondance) sur laquelle il n'a jamais été fait de rapport, ni statué en aucune manière par le gouvernement, les appelants dans leur lettre accompagnant cette réclamation et demandant un prompt règlement pour éviter la nécessité de suspendre les travaux, ajoutent :

Our securities have already made sacrifices and incurred liabilities beyond any precedent in their desire to aid us in having the works contracted for faithfully carried out. Nothing further can be done by them or us without any action on your part to afford us the substantial relief sought for.

Cette réclamation ayant été transmise pour examen à M. Fleming, l'ingénieur en chef, il fit rapport qu'il n'avait pas en sa possession les informations nécessaires *to enable him to make an immediate or early report thereon.* C'est sur cette réponse que les commissaires se basèrent pour demander l'autorisation d'annuler le contrat et prendre possession des travaux—ce que le gouvernement leur permit de faire par son ordre en conseil du 30 mai 1873, dans ces termes :

On a report dated 29th May, 1873, from the commissioners appointed to construct the Intercolonial Railway, stating in reference to the work upon Sections Nos. 3, 6, 9 and 15 of the Intercolonial

1886

BERLINGUET v. THE QUEEN.

Fournier J.

Railway, that the contractors of these sections, fyled with the commissioners on the 24th inst., statements of works executed, claimed to be extra, amounting in the aggregate to $543,554;

That these statements were submitted to the Chief Engineer for examination, but that he had not the information in his possession to enable him to make an immediate and early report thereon;

That the contractors upon being informed that payments could not be made upon these claims until the same should have been reported on and approved, informed the commissioners that in the absence of such payments they could not proceed with the works with as much vigor as the commissioners require;

The commissioners therefore recommend that they be authorized to take these respective sections out of the contractors' hands, and as the advertising and re-letting of the work remaining to execute would involve the loss of the greater part of the present working season, the commissioners also recommend that they be authorized (in terms of the contracts) to "employ such means as they may see fit to complete the works at the expense of the contractors."

On the recommendation of the Honorable the Minister of Public Works, the Committee advise that the authority requested be granted.

Se fondant sur cette autorisation les commissaires donnèrent aux Appelants l'avis requis par la section 6 du contrat (Voir p. 327, Vol. de Corr.), en invoquant les motifs suivants :

And whereas the force employed, the rate of progress being made, the general character of the work being performed, and the materials supplied and being furnished, are not such as to insure the completion of the works *within the time stipulated*, and are not in accordance with your contract.

Si les commissaires avaient considéré qu'ils avaient en tout temps le pouvoir d'annuler le contrat, auraient-ils invoqué le motif que l'ouvrage n'avait pas été terminé dans le délai fixé, lorsque ce délai était expiré depuis près de deux ans. Ils n'ont donc, dans tous les cas, voulu qu'exercer et n'ont de fait, exercé que la faculté stipulée, se trompant toutefois sur l'époque à laquelle ils auraient dû agir pour se prévaloir de ce droit. On a préféré ce procédé au lieu d'ajuster la réclamation des Appelants pour extras.

1886

BERLINGUET v. THE QUEEN.

Fournier J.

Ces explications me paraissent suffisantes pour faire voir que la clause 6 ne diffère pas de la 3me quant au délai dans lequel les pouvoirs stipulés devaient être exercés d'après la jurisprudence.

Faisant application au jugement de l'honorable juge Taschereau du principe que les forfaitures ne peuvent être prononcées après le délai fixé, qui était dans ce cas, le 1er juillet 1871, son jugement prononçant la confiscation de la somme de $5,850.90 représentant l'intérêt sur les sommes qui n'ont pas été payées aux époques où elles auraient dû l'être, est évidemment contraire à la jurisprudence et doit en conséquence être réformé.

En outre des $5,850.90 dus pour intérêt le jugement qui a maintenant force de chose jugée pour la partie favorable aux Appelants, déclare le gouvernement leur débiteur pour la valeur de l'outillage et des matériaux leur appartenant et au sujet desquels l'honorable juge s'exprime ainsi:

I also believe that in law and equity they (plff.) should be credited with another sum of $27,023, representing the value of materials which they transferred to Government when they gave up their contract in May 1873.

Mais il en prononce aussi la confiscation au bénéfice du gouvernement parce que les ouvrages n'ont pas été terminés dans le temps voulu. Cette confiscation doit nécessairement tomber comme la première, parce que l'honorable juge n'avait aucun pouvoir de la prononcer après le 1er juillet 1871. Ainsi, au lieu d'adjuger au gouvernement le bénefice de la somme de $32,873.90 qu'il enlevait aux Appelants, c'est le gouvernement qu'il aurait dû condamner à leur payer cette somme, et le jugement doit encore être réformé sur ce point.

L'effet des autorités ci-dessus est donc d'abord d'annuler la partie du jugement prononçant la confiscation; d'annuler la condition du délai pour l'exécution des ouvrages—comme étant de l'essence du contrat—

1886

BERLINGUET v. THE QUEEN.

Fournier J.

de rendre caduque et sans effet la condition comportant confiscation du percentage retenu et aussi de toutes autres sommes dues aux contracteurs, ainsi que la pénalité de $2,000.00 pour chaque semaine de retard, d'annuler aussi les procédés adoptés par les commissaires et le gouvernement pour faire considérer le contrat comme annulé, tels procédés ayant été adoptés après le 1er juillet.

Comme on le voit le contrat est réduit à peu de chose, et si comme j'espère le prouver la seule clause importante qui reste encore debout, celle fixant le prix en bloc des sections No 3 et 6, doit disparaître sur le principe qu'elle a aussi été abandonnée par le gouvernement, il en résultera que le contrat signé a été mis de côté en entier et remplacé par celui qui résulte de l'acceptation des soumissions des Appelants et de toutes les modifications qui ont été faites du consentement des parties dans le cours des ouvrages pour en déterminer la quantité et le prix.

Dans le but d'établir qu'il y avait eu abandon des conditions de délai, de confiscations et de pénalités, j'ai déjà donné des citations des ordres en conseil adoptés au sujet de l'exécution des travaux des deux sections Nos 3 et 6; mais je n'en ai donné que les parties faisant voir qu'il y avait eu abandon de certaines conditions; je vais maintenant référer aux parties de ces mêmes ordres en conseil, portant particulièrement sur la modification du prix stipulé par le contrat signé. Je référerai aussi à la correspondance et aux témoignages dans le même but.

Le plus important de tous ces ordres en conseil est sans contredit celui du 20 septembre 1870, ainsi conçu :

The Committee of Council have had under consideration the communication dated 20th September, 1870, from the Intercolonial Railway Commissioners, representing the hardships to the contractors of the present system upon which the monthly estimates of work done on the several sections are made up, and the heavy per-

centage unnecessarily retained from them, and recommending that the Engineer be instructed to make the returns of quantities actually executed fully equal to the work actually done each month, and that no deduction of 10 per cent. from the schedule prices be made for errors, omissions and contingencies.

The Committee, on the recommendation of the Hon. the Minister of Public Works, advise that the foregoing recommendations be approved and acted on; and that in the certificate required to be given by the Chief Engineer, that officer be at liberty to state that the percentage is relinquished in compliance with instructions from the Commissioners.

Cet ordre d'un caractère général et permanent autorise l'ingénieur à faire rapport des quantités d'ouvrages actuellement exécutés, sans déduction de 10 p. c. de la cédule de prix, pour erreurs, omissions ou autres circonstances. C'était une dérogation manifeste aux prix du contrat, introduisant le système de payer la valeur des travaux exécutés et revêtant ainsi les contracteurs de l'autorisation du gouvernement pour tous les ouvrages faits, sans égard aux conditions du contrat. Il n'est guère possible de lui donner une autre interprétation. C'est d'ailleurs ainsi que l'ont compris les parties intéressées qui s'y sont conformées jusqu'au moment du différend qui a amené la suspension des ouvrages. Les ordres en conseil subséquents au lieu de révoquer ce nouvel arrangement n'ont fait que le confirmer en faisant d'autres changements d'une nature encore plus favorable aux Appelants.

Comme on l'a vu par le jugement de l'honorable juge les Appelants avaient eu raison de se plaindre de l'insuffisance des rapports des ingénieurs au sujet des quantités d'ouvrage exécutés devant servir de base au paiement. L'absence de plans devant servir de guide aux contracteurs pour déterminer les quantités et la qualité des ouvrages entrepris, fut la cause que les difficultés continuèrent entre les ingénieurs et les contracteurs; ces derniers se plaignaient que les premiers exigeaient des ouvrages plus dispendieux que ceux qu'ils eussent été

1886

BERLINGUET v. THE QUEEN.

Fournier J.

obligés de faire d'après les plans qui devaient faire partie du contrat. Afin d'en arriver à un règlement de ces difficultés, M. Fleming, à la demande de plusieurs contracteurs et entre autres les Appelants, représenta au gouvernement que les certificats mensuels étaient insuffisants pour payer les dépenses actuellement encourues, et s'exprimait ainsi dans sa lettre du 27 septembre 1871:

With regard to the monthly certificates not furnishing the Contractors with sufficient funds to pay current expenses, I may observe that as these certificates are made up by computing the actual quantities of work executed at prices established by Order in Council, I have no power to vary them in any manner, and the only way to increase the certificates is for the Government to increase the prices which govern them. I reported at some length on the whole subject on 26th May last and again on 26th July, to which letters I beg to refer. Some assistance was then granted to the Contractors, and this assistance has undoubtedly been of great service in enabling them to push on the work with much greater vigor than previously, and I have much pleasure in stating that the work executed so far has, with very few exceptions indeed, been done in a satisfactory manner. In the letters referred to, I submitted the reasons why I thought it would be much better, under all the circumstances, for the Government to come to the assistance of the present contractors than to take the work out of their hands and re-let it to others. I am still very much of the same opinion, and in order to secure the completion of the railway with the least difficulty and delay having regard at the same time to economy, I would recommend still further aid to those Contractors who have special difficulties to contend with.

Se fondant sur cette lettre les commissaires firent rapport au Conseil Privé sur les réclamations des contracteurs et représentèrent qu'une grande partie des travaux se faisaient dans un pays peu habité et difficile d'accès; que plusieurs de ces contrats avaient été donnés lorsque les prix du travail et des matériaux étaient beaucoup plus bas; que les dépenses préliminaires, bâtisses, outillage, etc., avaient été considérables; qu'ils avaient discuté complètement les questions avec l'ingénieur en chef; qu'il était clair que si les contrats étaient donnés de nouveau ils coûteraient beaucoup plus que

les contrats actuels, sans compter les longs délais qui s'ensuivraient; que l'ouvrage avait été fait d'une manière satisfaisante et recommandait une nouvelle aide aux contracteurs qui avaient à lutter contre des difficultés particulières.

Les commissaires, après mûre considération, recommandèrent que pour les contrats entre Metis et Bathurst et la section n° 12, il serait préparé avec soin un estimé de l'ouvrage qu'il restait encore à faire pour terminer les entreprises; et que d'après les quantités ainsi vérifiées une nouvelle cédule de prix serait faite pour les quantités. Le lendemain de ce rapport, le 28 septembre 1871, le Conseil Privé adopta un ordre en conseil confirmant ce rapport et accordant l'autorité demandée en ces termes: "Having reference to the expe- "diency of extending to the contractors on the line "every reasonable facility in the prosecution of their "work, advised, &c."

En conséquence de cet ordre en conseil une nouvelle cédule augmentant considérablement les prix fut préparée pour servir de base aux paiements qui devaient être faits. De temps en temps de nouvelles augmentations de prix furent décrétées par d'autres ordres en conseil, que l'ingénieur en chef mit à exécution en informant le gouvernement que la conséquence nécessaire de ces augmentations auraient pour effet d'excéder la somme totale mentionnée au contrat. Dans son témoignage (p. 20 et 21) M. Fleming dit à propos des nouveaux prix:—

I think they were continued from the date of an Order in Council to that of the other without any reduction. I believe so. I acted upon the Orders of Council in every case so far as I can remember.

La demande des contracteurs pour les augmentations de prix, recommandée par l'ingénieur en chef et les commissaires et acceptée par l'ordre en conseil du 23 septembre 1871 et ceux qui ont été rendus après cette

1886

BERLINGUET v. THE QUEEN.

Fournier J.

époque, dans le but de permettre aux contracteurs d'exécuter leurs entreprises et d'éviter des délais, ne forme-t-elle pas un contrat complet qui doit lier le gouvernement ? C'est comme le dit M. Fleming, l'inévitable conséquence de l'adoption de cet ordre en conseil au sujet duquel il s'exprime ainsi :—

Question.—Did you not yourself inform those contractors that you considered this new payment as a new basis, or new departure, as intended to increase the bulk sum of the contracts ?

Answer.—The moment the Order in Council was passed, without knowing its legal effect, I felt that in the common sense point of view it entirely altered the contract.

Question.—It practically altered the contract then ?

Answer.—Yes, and so far as I was concerned in making out the certificates, it was an entirely new contract to me.

Question.—Do you know yourself, or have you any means of knowing whether these additional payments made the contractors, was an inducement to them to go on with the work at the period when they were on the point of giving it up ?

Answer.—The increase was undoubtedly to induce them to go on.

Dans une lettre adressée par lui à M. John S. Fry, l'une des cautions des Appelants, il dit encore : " I " invariably acted on those Orders in Council consider- " ing them in the light of new contracts as far as mak- " ing out my certificates were concerned."

Les prix augmentés par les ordres en conseil furent communiqués aux Appelants sans aucune restriction et ils avaient le droit d'interpréter cette action du gouvernement comme un acquiescement absolu à leur demande. Les ordres en conseil eux-mêmes ne leur furent point communiqués, comme le dit positivement M. Berlinguet, de sorte qu'ils ne furent jamais en position de s'assurer si l'un de ces ordres, en date du 27 juillet 1871 et l'autre du 20 janvier 1872, contenait la réserve que l'augmentation des prix n'aurait cependant pas l'effet de dépasser la somme totale du contrat. Celui du 28 septembre 1871, qui avait fait droit à leur demande, ne contenait aucune restriction de ce genre. A moins d'en

informer les Appelants, le gouvernement ne pouvait pas changer la position qu'il leur avait faite. Il eut été contraire à la bonne foi de les laisser continuer les travaux sous l'impression qu'on avait fait droit à leurs demandes, tandis que les ordres contenaient une condition qui n'aurait pas été acceptée, si elle eût été communiquée. Ce serait faire injure au gouvernement que de supposer qu'il eût voulu tendre un piège à des contracteurs, qu'il avait, dans son intérêt, encouragés à continuer leurs travaux. Bien que cette réserve se trouve dans les ordres du 27 juillet 1871 et du 20 janvier 1872, le gouvernement n'en ayant jamais donné communication aux Appelants, il faut en conclure qu'il s'est désisté de cette réserve comme étant contraire à sa détermination de venir au secours des contracteurs. Tous les ordres changeant les prix doivent donc recevoir leur plein et entier effet comme si cette réserve n'y eût jamais été insérée. S'il en était autrement, le gouvernement, après avoir empêché les Appelants de renoncer à leur entreprise pour éviter une ruine complète, se trouverait à bénéficier de sommes considérables par un moyen contraire à la bonne foi. Il me semble que la seule conclusion à tirer de ces documents et de l'action du gouvernement, c'est que les prix ont été modifiés, comme le comporte les ordres en conseil, en vertu d'engagements obligatoires et qui doivent être exécutés comme un contrat. L'honorable juge Taschereau objecte à cette conclusion comme contraire à l'acte 31 Vic., chap. 13, réglant la manière de faire les contrats pour la construction de l'Intercolonial; mais le gouvernement s'y est conformé autant qu'il lui a été possible. Si les circonstances l'ont forcé d'adopter certaines modifications au contrat passé conformément à l'acte en question, n'est-il pas prouvé, comme justification, par la correspondance, par les ordres en conseil et par le témoignage de M. Fleming, que ces modifications étaient indispen-

1886

BERLINGUET v. THE QUEEN.

Fournier J.

sables dans l'intérêt public; qu'il eût été plus dispendieux de chercher d'autres contracteurs que de laisser continuer ceux qui, d'après les nombreux rapports de l'ingénieur et des commissaires, donnèrent une si grande satisfaction; qu'un tel changement aurait entraîné des délais considérables dans l'exécution d'une entreprise que le gouvernement considérait comme du plus grand intérêt public de réaliser le plus tôt possible. Si la nécessité a forcé le gouvernement de déroger aux prescriptions du statut, qui en doit être responsable? Ce n'est certes pas les contracteurs. N'est-ce pas le gouvernement plutôt que les contracteurs qui n'ont fait qu'exécuter ses ordres?

De plus ces travaux ont continué pendant plusieurs années et le parlement chaque année en votant les sommes payées aux contracteurs a bien et duement approuvé ces modifications au contrat passé conformément au statut.

Les Appelants ont fait entendre plusieurs témoins pour prouver que sir Hector Langevin, alors ministre des travaux publics, avait, dans différentes entrevues avec les Appelants, MM. Dunn et Home, MM. Glover et Fry, leurs cautions, en réponse aux représentations qu'ils lui firent sur leurs embarras financiers, recommandé aux Appelants de ne pas abandonner leur contrat, que le gouvernement n'avait pas l'intention de construire l'Intercolonial aux dépens des particuliers, et que s'ils terminaient leur contrat, ils seraient indemnisés de leurs pertes. M. John Ross qui avançait les fonds aux Appelants jure positivement que sir Hector Langevin lui a dit qu'il pouvait en toute sûreté continuer ses avances et qu'il en serait remboursé. Ce témoignage est confirmé par au moins cinq autres témoins.

Sir Hector, entendu comme témoin, a nié cette conversation et en a donné la version suivante,—il reconnaît avoir dit seulement qu'il était de l'intérêt des

contracteurs de finir leurs contrats, ce qui éviterait des retards dans l'exécution des ouvrages et augmenterait les chances de voir leur réclamation favorablement accordée et réglée par le gouvernement. Tous les témoins qui ont rapporté la déclaration ainsi contredite sont de la plus haute respectabilité et auraient dû, par leur nombre, faire pencher la balance de la preuve en faveur des Appelants. Mais peu importe. Ceux-ci ne prétendent pas que si l'autre version prévalait, elle établissait un contrat. Pour servir leur objet, la version de sir Hector leur suffit, car ils ont principalement en vue de prouver que les changements faits par les ordres en conseil n'étaient pas seulement une aide temporaire, mais un règlement des difficultés sérieuses qui étaient soumises au gouvernement. L'admission de sir Hector confirme cette manière de voir, en faisant connaître les dispositions du gouvernement à l'égard des Appelants. Tout ce qui précède me porte à conclure que l'exécution des travaux devaient être réglée d'après le contrat qui résulte des ordres en conseil.

Mais, en supposant que le contrat signé le 25 mai 1870, doive déterminer les obligations respectives des parties, ne faudrait-il pas au moins prouver que les ingénieurs et autres agents du gouvernement chargés de la surveillance et de la conduite des travaux, n'ont point systématiquement commis d'infractions à ce contrat dans le but de nuire aux Appelants. Une des clauses du contrat donne à l'ingénieur en chef la direction des travaux, et oblige les Appelants à se soumettre à sa décision, ainsi qu'à celle de tous ceux qui agissent d'après ses ordres. On conçoit qu'en l'absence de plans, et lorsque, comme il est amplement prouvé, les plans des principales structures n'étaient faits que pendant la construction et souvent livrés aux contracteurs qu'après bien des demandes réitérées et de longs délais, il était facile à un ingénieur hostile aux contracteurs de leur

1886

BERLINGUET v. THE QUEEN.

Fournier J.

rendre impossible l'exécution de leur contrat. Il es reconnu qu'à moins qu'un ingénieur ne soit d'une grande impartialité, les contracteurs sont toujours à sa merci et peuvent être facilement ruinés par lui.

Les Appelants se plaignent que M. Marcus Smith, ingénieur en charge des deux sections Nos 3 et 6, a, dès le début, fait preuve à leur égard de sentiments hostiles et de violents préjugés qui se sont manifestés par de continuelles injustices, constituant une violation systématique et volontaire du contrat (*tortious breach*), rendant le gouvernement responsable des conséquences qui en sont résultées. Malgré une preuve complète, je puis dire, de ces griefs, l'honorable juge a décidé cette question de faits contre les Appelants, bien que la direction des travaux eût été enlevée à Smith, en conséquence de leurs justes plaintes. Après examen de la preuve, je suis forcé d'en venir à la conclusion que l'honorable juge n'a pas donné à cette preuve l'importance qu'elle méritait et qu'il a basé son opinion sur une preuve générale, insuffisante et d'un caractère moins désintéressé que celle faite par les Appelants.

L'ingénieur M. Smith, qui est prouvé être d'un caractère très irascible, avait une cause toute particulière d'animosité contre les Appelants, parce que ceux-ci, en prenant les contrats des sections 3 et 6, qu'il avait voulu faire avoir à quelques amis d'Angleterre, étaient la cause qu'il avait éprouvé un grand désappointement qu'il manifesta devant le témoin C. Lorgie Armstrong, qui rapporta une conversation avec M. Smith à ce sujet à l'occasion d'une observation faite par Armstrong sur l'insuffisance des paiements dont se plaignait Berlinguet :

Answer.—He said they had got all they deserved or entitled to. I remarked, it is rather a hard case; they scarcely get money enough to pay their hands. He observed—I sent in a contract for that same section for my friends in England, and if they had got it they would have had plenty of funds to carry on the business without drawing on

the Government until it was finished. He added—these d——d little Canadians are the cause of my not getting it.

Question.—Did he tell you the names of his friends in England?

Answer.—No; I asked, how could you act as an engineer in that case? He answered—I should have resigned my situation and gone on with these works.

Ce témoin, qui est âgé et d'une grande respectabilité, ne saurait être accusé d'avoir inventé de toute pièce une conversation de ce genre. Un autre témoin en rapporte une autre d'un genre différent, mais démontrant que Smith n'oubliait pas son désappointement :

Question.—Did you ever hear Marcus Smith say anything regarding these contractors?

Answer.—Yes—that they were nothing but d——d French fools that would not be long on the wo.ks?

Question—Where did you hear him say this?

Answer.—In Dan Delaney's, in a private room, it was in company with John Hamilton of Dalhousie, and a few more.

Dans une autre circonstance rapportée par L. H. Honoré Huot, témoin de la plus grande respectabilité, M. Smith s'est laissé aller contre Berlinguet à de tels excès de paroles que les personnes présentes furent obligées d'entrer dans la maison. Il s'agissait d'une visite que M. Davey désirait faire des sections 3 et 6. Le témoin rapporte ainsi la scène.

M. Smith voulait que ce fut M. Berlinguet lui-même qui lui fit visiter ces sections. M. Berlinguet lui répondit que c'était le capitaine Armstrong qui devait lui faire visiter ces sections et qu'une voiture était prête pour cela. M. Smith s'est alors fâché, et s'est servi de telles expressions que nous avons été forcés de rentrer dans la maison et nous avons laissé M. Berlinguet vider seul la querelle avec M. Smith.

Ajoutez à toutes ces manifestations violentes le témoignage de M. John Home qui prouve des faits tels qu'on hésiterait à les croire, si l'honorabilité de ce témoin n'était pas si généralement connue. Il n'y a rien de prouvé qui puisse diminuer la foi due à son témoignage. C'est un homme très intelligent, versé dans les affaires et possédant la confiance d'hommes de la plus haute

1886

BERLINGUET v. THE QUEEN.

Fournier J.

responsabilité dans Québec. Il rapporte que dans un entretien chez lui avec Smith, celui-ci lui dit :

If Davey is here it is just as easy for him to save you a half a million dollars as anything at all, says he, and without any disparagement to the Government. The Government will not have anything to find fault with the road, and you will get quit of the Frenchmen that don't know anything at all about building roads.

Smith a nié cette conversation, et l'honorable juge, il est vrai, a préféré croire la dénégation de Smith qui a également nié ses conversations avec Armstrong et autres témoins qui ont fait preuve de ses dispositions hostiles à l'égard des contracteurs. Est-il possible d'ajouter foi à ses dénégations, lorsque tant de témoins irréprochables affirment ce qu'il a dit.

Il est inutile d'entrer dans de plus grands détails sur ce sujet, car la lecture de la preuve fera voir que ces reproches contre Smith sont prouvés de la manière la plus satisfaisante. Ces dispositions qui ont inspiré Smith dans sa conduite à l'égard des contracteurs, l'ont porté à des exigences de nature à amener leur ruine. On comprend mieux après cela sa lettre du 23 août 1870, donnant des instructions à l'ingénieur de section, Lawson, et se terminant par les lignes suivantes :

"You must, however, do all that is necessary, regardless of quan-
" tities, as there is a large amount for contingencies, and, anyhow,
" the contract will probably have to be re-let."

Plus loin, il fait rapport aux commissaires qu'il n'avait été fait aucun progrès dans les ouvrages de maçonnerie, et qu'en proportion du progrès fait, cela prendrait vingt et un ans pour terminer la maçonnerie des sections 3, 6 et 9, et que les contrats ne peuvent être exécutés—"*the contract must fail.*" Cependant, les rapports des commissaires et les ordres en conseil dont de nombreux extraits ont été cités plus haut, constatent à plusieurs reprises que les travaux progressaient d'une manière satisfaisante. De nombreux témoins entendus de la part des Appelants ont aussi prouvé ce fait.

1886

BERLINGUET v. THE QUEEN.

Fournier J.

Etait-il possible de contredire plus positivement les assertions de Smith. Si son hostilité ne se fut manifestée qu'en paroles, il n'y aurait que peu de chose à en dire, mais elle se traduisait par des faits de la plus haute gravité, soit en ne faisant pas faire rapport correctement des quantités de travaux exécutés, ainsi que le jugement le reconnaît en accordant une indemnité en se basant sur ces motifs, soit en faisant faire des travaux beaucoup plus dispendieux que ceux voulus par le contrat, ou même des ouvrages inutiles, en négligeant de fournir les plans des ouvrages et causant ainsi des retards très préjudiciables, en condamnant des carrières de pierre, approuvées plus tard, en rejetant le ciment et d'autres matériaux pour des motifs futiles. Il y a à ce sujet une preuve considérable dans les énormes volumes qui contiennent les témoignages en cette cause. Lors de l'audition, les conseils des Appelants ont déclaré qu'ils n'entraient pas dans les détails de cette preuve, et déclaré aussi qu'ils ne considéraient pas la Cour obligée pour le présent d'en faire une étude particulière. En effet, cet examen ne peut devenir nécessaire que dans le cas où la cour serait d'avis, soit que le contrat a été mis de côté ou modifié du consentement des parties, ou qu'il y a eu *a tortious breach* donnant aux Appelants droit d'être indemnisé de leurs travaux. Il y a encore une autre raison pour ne pas entrer maintenant dans ces détails, c'est que la preuve a établi positivement qu'il n'a jamais été tenu compte des travaux extrà qui ont été ordonnés pour les déviations ou changements de niveau de la voie et au sujet desquels il faudra, dans tous les cas, ordonner une référence à experts.

Au sujet de ces extrà, le jugement de la cour d'Echiquier contient une erreur si palpable et d'une conséquence si importante pour les Appelants que seule, elle suffirait pour le faire infirmer.

L'honorable juge dans le parapraphe 34 de son juge-

1886

BERLINGUET v. THE QUEEN.

Fournier J.

ment dit :

But I state it with regret : The contract constitutes the law, the contractors submitted to all its clauses, they renounced every claim for extras, all damages, &c.

Au paragraphe 36, l'honorable juge répète cette assertion en disant :

Supposing moreover that the proof was clear, all indemnity should be refused to the contractors in consequence of the clauses so onerous and so strict of the contract by which they (the contractors) renounced all damages, *all extràs*, and even the balance due to them if they gave up their contract or did not complete it in time prescribed.

L'honorable juge n'a pu en venir à cette conclusion que parce que son attention n'a peut-être pas été suffisamment attirée sur l'effet que la continuation des travaux, après le délai fixé par le contrat, avec l'approbation du gouvernement et la promesse réitérée du gouvernement d'en payer la pleine valeur comme le démontre les rapports et les ordres en conseils devait avoir sur les clauses concernant la confiscation et l'annulation du contrat. On ne trouve pas à ce sujet une seule observation dans son jugement. Après avoir vu par les autorités ci-dessus, que le gouvernement n'ayant pas dans le délai fixé par le contrat exercé les pouvoirs que lui conféraient ces clauses, il n'était plus en son pouvoir de le faire, il faut en arriver à une conclusion contraire à celle de l'honorable juge. L'annulation ayant été illégalement prononcée, après le délai convenu, elle ne peut produire aucun effet, elle ne peut opérer ni confiscation ni renonciation aux extrà. Comme le démontrent les autorités citées, le délai passé, le gouvernement ne pouvait plus annuler le contrat et s'emparer des travaux comme il l'a fait. Il ne lui restait plus que le recours ordinaire aux tribunaux pour faire ordonner aux contracteurs que les travaux seraient terminés dans un délai raisonnable que, dans les circonstances où se trouvaient les parties, la cour avait seule alors le pou-

voir de fixer.

Ainsi, la renonciation prétendue aux *extras* n'ayant aucun effet, les Appelants avaient droit à tous les *extras* que la clause 4 du contrat permet de réclamer. Après avoir autorisé certains changements qui ne devaient pas donner lieu à réclamer des indemnités, la clause continue :

And the contractors shall not be entitled to any allowance by reason of such changes unless such changes consist in alterations in the grades or the line of location, &c., &c.....

La confiscation prononcée par le jugement étant illégale, il faut examiner la preuve faite au sujet du changement de niveau et de location de la ligne du chemin de (*change of grade and location of the line*). La preuve de ces changements et leur estimation d'après le devis (*bill of works*) constate qu'il y en a eu pour environ $23,000 auxquelles les Appelants auraient droit d'après la stipulation du contrat. On peut vérifier cette estimation en référant aux appendices A, p.p. 2 et 8 ; B, p. 2 ; C, p. 1 ; D, 1, *Book of correspondence*, p. 271*a*, p. 323, et aux témoignages suivants :

APPELLANT'S EVIDENCE,—Berlinguet : p. 5, l. 5 ; 27, l. 22 ; Fleming : pp. 46*d*, l. 30 ; 47*d*, l. 20 ; Fitzgerald : pp. 59*d*, l. 30 ; 60*d*, l. 1, 26 ; 61*d*, l. 4, 32 ; 62*d*, l. 1 ; 63*d*, l. 1, 12 ; Report. Cor. 271a, No. 3. Martineau : pp. 66*e*, l. 20 ; 70*e*, l. 10 ; 71*e*, l. 5, 25. Gagnon : p. 116*e*, l. 19, 122, 123, 132, 133, 137. Townsend : p. 334*e*, l. 18, 364.

RESPONDENTS' EVIDENCE,—Smith : pp. 22, l. 20 ; 63, l. 20. Harris : pp. 91*a*, l. 1 ; 95*a*, l. 35 ; 96*a*, l. 1. Bell : p. 311*a*, l. 10. Carmichael : p. 351*a*, l. 8.

Mais comme il n'appert pas d'après la preuve que les changements de niveau et de location de la ligne du chemin ont été mesurés séparément des ouvrages du contrat et qu'il en a été tenu compte par les commissaires ou leurs agents, et comme il est aussi prouvé d'après le témoignage de l'ingénieur Ruttan (1), que pendant l'hiver on ne mesurait pas l'ouvrage, je crois que je devrais adopter sur cette partie de la cause la

(1) Corr., p. 226, 23, 234.

1886

BERLINGUET v. THE QUEEN.

Fournier J.

conclusion à laquelle je suis arrivé dans la cause de *Muray* vs. *Queen*, rapportée dans les Journaux de la Chambre (1879), et ordonner une expertise. La Couronne, dans cette cause, a acquiescé à mon jugement, et comme les faits sont semblables dans la présente cause, je suis d'opinion que les pétitionnaires ont le même droit d'obtenir une expertise.

Mais comme il est en preuve qu'il n'a été tenu par les ingénieurs aucun compte de ces *extras*, qu'ils ont fait rapport des travaux exécutés sans jamais faire la distinction entre ceux du contrat et ceux qui étaient des *extras*, concernant les changements de niveau et de location de la ligne, la valeur de ces travaux se trouve avoir été payée à même le prix du contrat, au lieu d'avoir été en outre de ce prix. La défense a essayé de faire une preuve générale qu'il y avait eu dans le cours des travaux une compensation d'opérée en tenant compte des augmentations et des diminutions ; mais cet avancé n'a été imaginé qu'après coup par certains ingénieurs pour pallier l'injustice et l'irrégularité de leur conduite. Ils sont tous forcés d'admettre qu'ils n'ont jamais, dans leurs rapports, fait la distinction entre les travaux qui devaient être payés extrà et ceux qui devaient l'être à même le prix du contrat. Il est évident que leur explication est fausse et qu'ils n'ont pas à cet égard rendu justice aux contracteurs.

Au sujet de ces prétendues diminutions qui auraient compensé les augmentations, un avancé de M. Fleming mérite une attention particulière. Se fondant sur son témoignage, le juge a pris pour avéré qu'il y a eu en faveur des contracteurs une diminution d'ouvrage qu'ils auraient dû faire en vertu de leur contrat, se montant à la somme de $178,000. Le témoin ne s'est pas clairement exprimé, et il a été cause de l'erreur commise par l'honorable juge. Quoique un peu longue, je citerai une partie de son témoignage à ce sujet.

1886

BERLINGUET v. THE QUEEN.

Fournier J.

Question.—So in this instance the operation consisted in not charging the contractors with the occasional deductions?

Answer.—That is a matter of fact. The changes were with scarcely an exception, in the shape of deductions, and not of increase, and for the benefit of the Contractors. There is no exception to the rule in the case of these two sections. With regard to the reductions we succeeded in making in the works, I can only refer to what may be called works, such as masonry, clearing, grubbing, fencing, rock excavations and so on; the original *schedule of quantities*, moneyed out at certain prices made these works amount in all to $380,659 on Contract 3. The same works actually executed, and moneyed out at the same prices, comes to $265,659, in other words there was a saving effected, at those prices, of $115,000.

Question.—That shows the difference between the work that the Bill of Works called for and the amount performed.

Answer.—Assuming these calculations correct, it shows a very considerable reduction. On Contract 6 the reduction is not so great, but still it amounts to $63,000 arrived at in the same way.

Question.—So the saving by these reductions would be about $178,000.

Answer.—Yes. The last returns of quantities I received, dated July '70. There may have been some changes since that would affect the amounts named, but to what extent I can't tell.

On voit que M. Fleming a basé cette assertion sur la cédule des *quantités*, estimées à des prix qui donnaient en tout la somme de $380,659 pour le contrat n° 3. Ces ouvrages exécutés, estimés aux mêmes prix, ne se montent qu'à la somme de $265,659. Pour se faire bien comprendre, M Fleming aurait dû faire ici une distinction essentielle, et dire que les *quantités* estimées par lui n'ont pas été la base des contrats. Les contracteurs ne se sont nullement obligés de remplir les quantités qu'il avait, comme il le dit lui-même, estimées à peu près :—

We could not pretend to give exact quantities. In most cases, they were a good deal greater than strictly necessary.

Leur contrat était de construire 45 milles de chemin de fer, suivant les plans et devis, sans aucune obligation de se conformer au (*bill of works*) à la cédule des *quantités*. Ainsi, la prétendue réduction n'est pas faite sur les

1886

BERLINGUET v. THE QUEEN.

Fournier J.

ouvrages du contrat, mais elle est simplement la différence entre l'estimé probable des *quantités* fait (*bill of works*) par M. Fleming, et les quantités qui ont été trouvées nécessaires pour la construction du chemin de fer d'après les plans et devis. M. Fleming savait mieux que qui que ce soit que les contracteurs n'étaient pas obligés de remplir ces *quantités*; que, par conséquent, ce qu'il prétend être une réduction de $178,000 n'en est pas une sur les ouvrages du contrat. Il aurait dû dire plus clairement que cette somme de $178,000 ne représentait que le surplus de son estimation, c'est-à-dire l'erreur qu'il avait commise en voulant *errer du bon côté.* M Brydges a commis la même erreur. Ainsi, cette prétendue réduction n'est qu'un leurre et ne représente pas une diminution d'un centin. Cependant, cette assertion a produit un grand effet sur l'honorable juge qui a pensé qu'il y avait eu une réduction réelle de ce montant, et en a conclu qu'il devait y avoir compensation des réclamations des Appelants jusqu'au moins à concurrence des $178,000. Cette erreur évidente dans le jugement doit être reformée, et les Appelants déclarés avoir droit au prix de leurs ouvrages *extras.*

Le gouvernement ayant illégalement annulé le contrat, comme il a été démontré plus haut, pour s'emparer des travaux, aurait dû tout au moins prendre les précautions qu'exigeait de lui la prudence la plus ordinaire. Même si cette annulation eût été régulière, la plus simple justice demandait encore que l'on fît dans ce cas un état exact des travaux jusqu'alors accomplis par les contracteurs, afin de constater avec exactitude ce qui restait à faire pour terminer le contrat; rien de cela n'a été fait. Il n'a pas même été tenu compte des ouvrages qui ont été faits sous la direction de M. Brydges pour terminer le chemin tel qu'il l'a été par le gouvernement. Un état détaillé des ouvrages ainsi faits,

n'ayant jamais été donné, il est tout à fait impossible de savoir s'ils sont conformes au contrat. Il n'a été fait aucune preuve légale des ouvrages et de leurs prix.

L'honorable juge s'est contenté du seul témoignage de M. Brydges qui a donné son estimation du coût des ouvrages, sans avoir aucune connaissance personnelle de leur exécution et sans avoir pris aucun des procédés nécessaires pour s'assurer de leurs quantités.

Question. Have you got a statement of the amount of money that was paid by the Government to complete it?

Answer. It is in the book, I think. I think it is $197,000.

Question. Altogether 3 and 6?

Answer. The Government expended on No. 3, $107,556.97, and on section 6,136, $915.60.

Question. That was besides what had been paid to the contractors?

Answer. Yes.

Question. What is the amount then expended by the Government over and above the contract price?

Answer. Including sums paid to the contractors and what the Government expended in finishing the excess over the lump sum of the contract on section 3, $197,127.60, and on No. 6, $62,959.60.

Il est prouvé par un document dans la cause que les contracteurs, le 30 septembre 1872, huit mois avant la prise de possession des travaux, par les commissaires ont fait faire un estimé des ouvrages qui restaient à faire d'après le contrat. Cet estimé a été préparé sur des quantités fournies par le gouvernement et déterminées en la présence des commissaires Walsh et Brydges et de l'ingénieur, M. Bell et d'après cet estimé il restait des ouvrages pour un montant de $200,000. Il est vrai que dans le livre de correspondance (p. 303) on trouve un autre document produit par la défense, constatant qu'un estimé des quantités a été fait en décembre 1872, et qui contredit le premier état, mais on n'a pas pris la peine de prouver par qui il a été fait. Bell dit bien qu'il a été fait par ses employés mais il ne peut jurer s'il est correct. Ses employés n'ont pas été entendus comme témoins, et on ne peut dire s'il a été fait d'après les mesurages nécessaires pour s'assurer des quantités. Les contracteurs

1886

BERLINGUET v. THE QUEEN.

Fournier J.

n'en ont certainement pas eu connaissance.

Il est aussi en preuve que du moment que les commissaires ont pris possession des travaux, on a cessé de faire des rapports (comme ci-devant) des quantités d'ouvrages exécutés et de l'endroit où l'ouvrage se faisait. Il était suffisant pour ordonner les paiements de recevoir la feuille de paye certifiée par un conducteur. Ajoutez à cela que les témoins Stevenson, Townsend, Carmichael et d'autres s'accordent tous à dire que la dépense faite par le gouvernement à partir de cette date a été on ne peut plus extravagante.

Dans ces circonstances et malgré le fait que les contracteurs répudient toute responsabilité pour aucun paiement fait par le gouvernement, l'honorable juge a déclaré, après avoir prononcé la confiscation des montants qu'il reconnaissait être dus par le gouvernement aux contracteurs, que ces derniers étaient endettés envers Sa Majesté en la somme de $159,000. Je n'hésite pas à déclarer que je suis d'avis qu'il n'y a aucune preuve légale qui puisse justifier une telle condamnation et par conséquent son jugement sur ce point important devrait être infirmé, et une expertise ordonnée, pour s'assurer par des procédés réguliers, des quantités d'ouvrage qui restaient à faire sur les travaux d'après le contrat, le 11 juin 1873.

L'honorable juge a été plus difficile sur la nature de la preuve que les Appelants devaient faire de leur réclamation. Il me semble avoir exigé d'eux plus que la preuve ordinairement suffisante pour justifier une réclamation de ce genre. Les Appelants ont fait preuve de leurs paiements par MM Blumhart, Turner, Bosteed, Woodside et par toutes les autres personnes qui ont payé le prix des ouvrages et matériaux qui forment le montant de cette réclamation. Tous ces témoins en ont attesté l'exactitude. Il est impossible d'entrer dans plus de détails et d'être plus précis que l'ont été les Appelants dans cette preuve à laquelle, d'ailleurs, il n'a été fait

aucune objection de la part de la couronne. La preuve me paraît complète. La conclusion contraire de l'honorable juge est une erreur évidente. Mais comme je suis d'avis qu'il doit y avoir, pour opérer un règlement complet, une référence à experts sur certains points, je ne conclus pas maintenant à une adjudication finale.

Un des principaux chefs de la défense est ainsi formulé :

29. The Suppliants are not entitled to any payment, except on certificate of the Engineer, and they, the Suppliants have been paid all that they have obtained the Engineer's certificate for.

Quoique cette condition de fournir préalablement le certificat de l'ingénieur n'est pas obligatoire pour ce qui peut être dû pour dommages (*breach of contract*) ou pour la valeur des outillages, elle serait obligatoire pour une partie de la demande (*condition precedent,*) si le gouvernement, par la prise de possession illégale des travaux, n'avait lui-même rendu impossible l'exécution de cette condition préalable En outre il a été fait un rapport par l'ingénieur qu'il lui était impossible de certifier le montant dû aux contracteurs, parce qu'il n'avait pas d'information suffisante. Cependant il est pourvu par le contrat que les contracteurs ont droit à un certificat basé sur des mesurages des ouvrages faits, ces mesurages n'ayant pas été faits n'était-il pas du devoir du gouvernement de les ordonner? De plus, je suis encore d'opinion comme je l'ai déjà dit dans les causes de *Isbester* vs. *La Reine,*(1) que lors de la production de la présente pétition de droit, le gouvernement s'était mis dans l'impossibilité d'insister sur la production d'un certificat final de l'ingénieur en chef, par le fait d'avoir aboli cet office par statut.

Dans la cause de *Jones* vs. *Queen,* citée pour établir la nécessité de la production d'un tel certificat, il a été prouvé que le contrat avait été exécuté en entier par le contracteur, qui avait produit sa récla-

(1) 7 Can. S. C. R. 696.

1886

BERLINGUET v. THE QUEEN.

Fournier J.

mation devant les commissaires, que ces derniers après avoir obtenu le rapport et le certificat de l'ingénieur recommandèrent qu'il fut payé au contracteur une somme, en sus du prix en bloc mentionné dans le contrat, pour extra, de $31,091.85 et firent rapport que le certificat de l'ingénieur avait été refusé pour le surplus. Dans ce cas le gouvernement s'est conformé en tout point aux termes de son contrat et je concours volontiers dans la décision qui a été rendue en cette cause par l'honorable juge en chef.

Mais dans la présente cause les faits sont bien différents, il est prouvé 1° que le contrat a été annulé par le gouvernement après le délai fixé ; 2° que le gouvernement avant et après l'expiration du délai pour terminer le contrat a autorisé le paiement en plein de la valeur des ouvrages exécutés par les appelants et qu'ils ont été en partie payés sans faire la distinction des ouvrages qui pouvaient être considérés comme faisant partie du contrat et ceux qui étaient des ouvrages *extrà* ; 3° qu'avant que le contrat fût annulé les appelants ont produit une réclamation pour ouvrages exécutés et non payés, y compris les ouvrages *extrà* sur lesquels d'après les termes mêmes du contrat ils avaient le droit d'avoir la décision de l'ingénieur ; 4° que par le fait du gouvernement ils ont été mis dans l'impossibilité d'obtenir ce certificat ; et 5° que le gouvernement a admis en n'appelant pas de la décision de l'honorable juge Taschereau qu'ils étaient responsables pour *breach of contract*. Dans ces circonstances, je ne crois pas être en contradiction avec la décision de l'honorable sir W. J. Ritchie dans la cause de *Jones vs. La Reine* en déclarant que dans mon opinion la pétition des Appelants devrait être admise.

En résumé, je crois avoir démontré qu'il y a dans le jugement soumis à la revision de cette cour des erreurs qui en rendent l'infirmation inévitable ; le juge n'avait pas le pouvoir, après le délai du contrat expiré, de pro-

noncer la confiscation des sommes suivantes: 1° de $6,040 pour outillage vendu au gouvernement sur la section 3; 2° la somme de $20,932, aussi pour outillage et matériaux vendus sur la section 6; 3° celle de $5,850.90 qu'il avait accordée comme indemnité pour les retards injustes que les Appelants avaient éprouvés dans la réception de leurs paiements. Ces diverses sommes donnent un total de $32,873.25, auquel les Appelants ont un droit incontestable.

2° Il y a eu aussi erreur en considérant le contrat comme légalement annulé par le gouvernement, faute par les contracteurs d'avoir terminé les travaux dans le délai fixé. Cette annulation prononcée après l'expiration du délai fixé par le contrat aurait dû être déclarée illégale et sans aucun effet quelconque.

3° Il y a encore erreur en déclarant que la réduction illusoire de $178,000 a dû opérer la compensation des réclamations des Appelants et en particulier des *extras*, tandis que les Appelants avaient droit à certains *extras*. dont le compte n'a jamais été fait.

4o. Il y a une erreur manifeste dans l'adjudication de la somme de $159,000 comme étant le montant dépensé par le gouvernement pour terminer les travaux, en sus des sommes d'argent qui devaient être au crédit des contracteurs lors de l'annulation du contrat, tandis qu'il n'en a été fait aucune preuve légale.

5o. Une autre erreur évidente c'est la déclaration de l'honorable juge que les Appelants n'ont pas fait une preuve satisfaisante des items détaillés de leur réclamation, tandis qu'il était impossible d'en faire une plus directe et plus complète.

6o. Qu'enfin il y a erreur dans le jugement dont il est appel parce qu'il n'ordonne pas une référence pour déterminer la quantité d'ouvrages *extra* faits pour changement de location, et de niveau dont il n'a été tenu aucun compte mais dont la valeur s'élève d'après la preuve faite en cette cause à environ $28,000.

1886

BERLINGUET v. THE QUEEN.

Fournier J.

En conséquence je suis d'avis que l'appel devrait être alloué, que les appelants ont droit à une adjudication en leur faveur, de la somme de $32,873.25 ; qu'une référence à experts devrait avoir lieu 1o pour s'assurer, après que les quantités auront été vérifiées par mesurages, des paiements qui ont été faits en à compte des ouvrages compris dans le contrat, 2o. pour déterminer la quantité d'ouvrages extrà faits d'après les ordres des ingénieurs et dont le paiement avait été autorisé par l'ordre en conseil ordonnant le paiement de la valeur de tout ouvrage exécuté, 3o. pour déterminer le coût extrà des ouvrages faits sur l'ordre des ingénieurs que les contracteurs n'étaient pas tenus de faire sans rémunération, et 4o. enfin pour déterminer la valeur des ouvrages qui restaient à faire pour compléter le contrat lors de l'annulation du dit contrat par le gouvernement en juin 1878, le tout avec dépens.

HENRY J.—I concur in the views just expressed in this case by Mr. Justice Fournier, having had the opportunity of reading his notes, which are very exhaustive.

Some of the enactments referred to by the learned Chief Justice I do not think apply. Where the government receives value in work done and they get it done after they were informed that they could not get it so done unless the fair value was paid, and subsequently accept it and use it, it is hardly necessary to say that I think the government ought to be made answerable for it. In the position we occupy here, it is known as matter of fact, that there was a great deal of looseness in the construction of the Intercolonial railway. The contractors were called upon through the engineers relying on the power given to them through the contract to do a great deal of extra work and the parties were bound to perform it. In this case we have reason to know it caused a great deal of injury to the contractors. I have carefully read over the evidence bearing on the circumstances under which the government

1886

BERLINGUET v. THE QUEEN.

Henry J.

finally took possession of the works, and I am of opinion that there was no power to forfeit any moneys then due to the contractors. The government had the power up to a certain time to enforce the forfeiture clause of the contract, but by their action they waived it. When the time for completion arrived, they said "go on, we "will increase your rates," and they did go on and suddenly the government say, "we will not pay you for "any extra work, because you did not complete the "contract within the time specified." Under such circumstances, I am of opinion that to exact forfeitures would be doing a serious wrong, and such a conclusion is not warranted by authority. The parties were entitled to have their works measured and reported upon. True, estimates were made, but I cannot presume, after reading the evidence, that they were in favour of the contractors or in any way reliable, as measurements were not made.

I think with my brother Fournier that it is a fair case for an *expertise*, and that therefore the appellants are entitled to a judgment of the court, but to what extent I am not prepared to say.

I concur in the conclusions arrived at by Mr. Justice Fournier.

TASCHEREAU J.—I agree in the judgment to be read by my brother Gwynne.

As to section four of the contract which has been referred to, I think there is no doubt that under that clause the contractors were entitled to no allowance.

His Lordship read section 4 (1).

There is no contention that the contractors have ever obtained any certificate of the engineer for which they have not received money. On the contrary Mr. Berlinguet in his evidence admits that Mr. Noël, their agent at Ottawa, had received all moneys coming to them under the certificates of the engineer.

(1) See p. 74.

1886

BERLINGUET v. THE QUEEN.

Taschereau J.

Then under section 6 of the contract the commissoners were authorised (whenever it became necessary) to take any portion of the whole work out of the hands of the contractors and to complete it at the cost of the contractors. Now the suppliants seem to say "because you "have not taken the works out of our hands in 1871 "you have no right to do so in 1873." How long would they then have to complete the works, two years, three, five, ten? I do not think this correct. In my opinion the commissioners had a perfect right to do what they did; they gave the contractors more delay than they were entitled to, and I cannot see how they can now complain. I find that they themselves in May, 1873, sent a letter to the commissioners stating that they were unable to proceed with the work. I have never heard it contended during the argument that the contractors complained that the contract had been unduly taken out of their hands, and I cannot see how they could have had any reason to complain. This being so it follows that the government have expended a large amount, and it was never objected that the monies paid out had been unduly paid. The evidence on this point being uncontradicted, I think it is sufficient, and therefore the judgment of the court below, finding that it cost, over the contract price, a sum of $159,000, should be affirmed. I have, however, no objection to agree with Mr. Justice Gwynne and vary the judgment by deducting from the amount awarded to the Crown the value of the plant.

As to the question of forfeiture, granting the suppliants are right in saying there can be no forfeiture under clause 3 of the contract, I think that under clause 6 the government are entitled to be paid whatever amount they paid out in order to complete the works.

The appeal should be dismissed with costs.

GWYNNE J.—The gist of the suppliants' petition of right is that certain orders in council passed during

the progress of construction by the suppliants for the Dominion Government of sections three and six of the Intercolonial Railway, under a contract which had been executed by the suppliants, constituted a new contract, and wholly did away with and set aside the previous contract which had been executed by the suppliants.

After referring to the orders in council relied upon, and the circumstances under which the suppliants alleged they came to be made, the petition of right proceeds, paragraph 28:—"That the said orders in council constituted a new basis of contract, were a fresh departure as explained to your suppliants by the chief engineer appointed by your Majesty for the building of the said Intercolonial railway, and that the said orders in council were, with the consent and under the instructions of your Majesty's government, communicated to your suppliants to give them an inducement to the prosecution until completion of the works of the said section.

"29. That owing to the persistence of the Queen's own engineer to harass and obstruct your suppliants in the execution of the works, and owing to his determination to drive off your suppliants, Her Majesty's representatives, the said commissioners, in justice to your suppliants, did finally remove the said district engineer.

"30. That your suppliants were induced to continue the prosecution of the said works by the declaration aforesaid of your Majesty's chief engineer; that the advances and increase in prices provided by the said orders in council, were a departure from what he styled your suppliants contract, and not a mere change in the progress estimates or a mere temporary arrangement.

"31. That your suppliants were further induced to proceed with the said works by the assurance of your Majesty's Minister of Public Works, and of the members of your Majesty's government of the time being, to the effect that your Majesty's government were very

1886

BERLINGUET v. THE QUEEN.

Gwynne J.

anxious, in the public interest, that your suppliants should go on with the execution of the said works, and that should your suppliants complete the execution of the said works, your Majesty's government should see that your suppliant was paid in full their past and future advances for the said work.

"32. That there is now due and owing to your suppliants by Her Majesty's government, for money *bonâ fide* paid, laid out, and expended, in and about the building and constructing of the said sections three and six, under the circumstances above mentioned, a sum of five hundred and twenty-three thousand dollars."

The petition contained a count wherein the suppliants claimed the said sum on a *quantum meruit* for work and labor.

The Attorney General by his answer to the above petition of right, set out a contract executed by the suppliants, whereby they bound themselves to complete the said section number three for the bulk sum of $462,444 dollars, and said section number 6 for the bulk sum of $456,946.23 dollars. The answer further alleged that: On the 24th May, 1873, the suppliants addressed a letter to the Commissioners claiming for extra work large sums therein specified and stating that without receiving those sums they must stop all works, as they could not proceed any further, and the suppliants not being entitled to any such sums, and declaring that unless they received them immediately they could not proceed with the works, notices were served upon them in terms of the contract that the completion would be taken out of their hands, in which notices they acquiesced; that at the time of serving this notice, namely, on or about the 9th June, 1873, so generously had the suppliants been treated that there was unpaid on the contract price of section 3 the sum of $10,444 only, and on the contract price of section 6 the sum of $73,946 only, while on the other

hand a large amount of work remained to be done far exceeding what those sums would pay for.

That the Commissioners thereupon proceeded to complete the said works under their own engineers and foremen, and necessarily expended in doing so the following sums, namely: On section 3, $107,556.97, and on section 6 the sum of $136,915 60, the result being that the suppliants have been overpaid in the two contracts the sum of $159,982.57.

The answer then denies the several special charges of wrong and injustice in the petition of right alleged to have been committed upon and obstruction caused to the suppliants in the petition of right alleged, or that any new contract had been entered into by the Government with the suppliants, and concluded by denying that there is now due and owing to the suppliants by Her Majesty's Government any sum whatever for any works executed, money paid out or otherwise, with respect to the said sections 3 and 6, but that on the contrary the suppliants have been overpaid the sum of $159,982.57, for which, under the terms of their contract, they are liable and chargeable, and the Attorney General claimed that the said sum is justly due to Her Majesty under the terms of the said contract, and that the suppliants should be ordered to pay the same.

The Attorney General also submitted and contended that the suppliants were not entitled to any payment except on the certificate of the engineer, and alleged that they had been paid all sums for which they had obtained the engineer's certificate. After a most patient and thorough investigation of every charge and complaint made by the suppliants in their petition of right, the learned judge before whom the case was tried in the Exchequer Court found every item of their complaint against the suppliants, and in a most exhaustive judgment, pronounced judgment for the Crown in the sum of $159,982.57 From this judgment the sup-

1886

BERLINGUET v. THE QUEEN.

Gwynne J.

pliants have appealed.

Mr. Girouard, one of the learned counsel for the appellants, in his argument before us, thus put the case: 1st. That a new contract had by the Orders in Council been made and substituted for the old one; and 2nd, he claimed for changes in grade and location as extra work.

As to the first of these claims he admitted that unless decided in the suppliants' favor the petition of right could not be sustained, but if decided in his favor then he claimed a reference as to the amount due.

In the very elaborate judgment of the learned judge who tried the case, to the effect that the claim, as asserted in the petition of right, is without foundation, I entirely concur. Indeed the claim that a new contract was in the manner stated substituted for the old contract could not be entertained without an utter disregard of the provisions of the Dominion Statutes 31 Vic. ch 12 and 13. If, therefore, a counter claim had not been set up in the answer of the Attorney General the only judgment which would have been warranted by the evidence upon the claim as made in the petition of right would have been that it should be dismissed with costs. But the answer of the Attorney General required that the counter claim, set up by him on behalf of the government, should be adjudicated upon.

The claim was simply for the difference between the full contract price for which the suppliants contracted to execute the works and the amount which, in excess of that sum, they cost the government, who completed them under a provision in the sixth paragraph of the contract, which provided that:

The learned judge read the 6th paragraph (1).

The contractors, having refused to proceed with the works unless a wholly unjustifiable demand for payment to them of a sum of about $540,000 should be

(1) *Ubi. Supra.*

complied with, repudiated their contract and refused to proceed to completion of the works in accordance with their contract; it, therefore, became necessary in the language of the above 6th paragraph of the contract, to take the works out of the hands of the contractors, upon giving the seven days' notice as required by the contract, and to proceed to complete the works at the cost of the contractors. Such notice was given, the contractors acquiesced therein and, as provided in the contract, gave up to the commissioners peaceable possession of the works and of all materials, plant, &c., which they had on the ground for proceeding with the work. There is, I think, no intention expressed in this clause of the contract under which the government proceeded to complete the works, contracted for by the suppliants that they should forfeit their plant in addition to paying the increased cost of the works

It was the contractors' interest to let the government have the use of their plant, for otherwise the government must have themselves supplied all necessary plant, the cost of which the contractors in the terms of their contract must have paid. But there is, I think, no provision made that the contractors should forfeit their plant in addition to paying the increased cost of the works. When, therefore, the works were completed, what I think the contractors entitled to in the absence of any other special contract relating to the plant, was the return of their plant in its then condition, or in such condition as it should be by a reasonable use and care of it during the progress of the works to completion.

The only forfeiture spoken of in this sixth paragraph of the contract, is a forfeiture of the percentage retained, and of all moneys which might be then due on the works. The question whether these sums could be insisted on as forfeited, the works having been carried on without the interference of the government for about two years after the 1st July, 1871, which in the third

1886

BERLINGUET v. THE QUEEN.

Gwynne J.

paragraph of the contract was named as the day by which the works should be finally completed, does not arise in the present case, for as to the percentage which was by the contract agreed to be retained the government made no claim, in fact there was none, for the contention of the government is, and has been established, that they had not insisted on this term of the contract made in their interest, but on the contrary had paid largely in excess of what they were entitled to under the contract, and indeed almost the whole of the contract price not retaining the percentage, as they might have done under the contract, and in fact there was no money due to the contractors under the contract when they abandoned the works and refused to proceed further with them, so that no question arises here as did in *Walker* v. *L. & N. W. Co.* (1), whether such sums, if any there were, could be claimed as forfeited in addition to the liability of the contractors to pay the cost of the completion of the works, in excess of the contract price.

The learned judge in his judgment finds that the contractors are entitled to the sum of $5,850 99 for interest upon and for the forbearance of divers large sums of money due and payable to them, and further, the sum of $27,022.35 the value of the materials by them left to Her Majesty's government. But, he adds, that inasmuch as by section three of the contract the suppliants having abandoned the contract, forfeit all right and claim to these two amounts, to wit: $32,873.25 the said sum is hereby declared forfeited; and he further adjudged, that the suppliants do pay to Her Majesty's government of the Dominion of Canada, the sum of $159,982.57, as money overpaid by Her Majesty's government to the suppliants, at the time of their abandoning their contract. Now as to these items with reference first to the $5,850.90, the learned judge in his *motivé* accompanying the above judgment says

(1) 1 C. P. Div. 518.

1886

BERLINGUET v. THE QUEEN.

Gwynne J.

that it arises in this way:

"There is one point in the case in which the petitioners should succeed. It is that concerning the manner in which the engineers made their monthly estimates during the first four months following the beginning of the works in 1870, as established by documents 97 and 98, produced with the official correspondence, concerning the construction of the Intercolonial. According to this correspondence and the Order in Council of the 28th September, 1870, which settled the question, it would appear that the engineers committed errors resulting in a loss to the contractors for interest of $5,850 90, or thereabouts. In order to appreciate correctly the intention of the Commissioners in their communications to the Privy Council document 97, and the meaning and signification of the Privy Council, I cite them verbatim, and I believe, although the chief engineer was not of the opinion of the Privy Council and of the Commissioners on this point, that the engineer made grave errors on this occasion and that this sum of $5,850.90 should be credited to the petitioners on the final result of the case.

"I must say that if the contractors suffered damages to this amount which I allow them, they were well indemnified, if, as I have reason to believe, the report which I just read was followed to the letter.

"I also believe that in law and equity they should be credited with another sum of $27,023, representing the value of materials (plant, &c), which they transferred to the Government when they gave up their contract in May, 1873."

As to the first of the above items of $5,850.90, it will be observed that the learned judge admits that if the contractors had suffered the damages it was fully indemnified to them by the report of the Privy Council, which he says he has reason to believe was followed up

1886

BERLINGUET v. THE QUEEN.

Gwynne J.

to the letter. But, besides having been thus indemnified, the item does not come within the claim of the suppliants as presented in their petition of right. Their claims as there presented are, that the document relied upon by the Government, as the contract was wholly abandoned and set aside by the Orders in Council, relied upon in the petition as constituting a wholly new contract upon which, as the only contract existing or upon a *quantum meruit* the suppliants wholly rest their claim, whereas $5,850.90 is allowed as for errors, said by the learned judge to have been committed injurious to the right of the suppliants under the contract which the Government rely upon, but which the suppliants repudiate; while under the contract the suppliants can recover nothing except upon the certificate of the engineer which the suppliants have not to warrant the allowance of this $5,850.90, but on the contrary, as the *motivé* of the learned judge shews, the chief engineer repudiates the justice of the imputation of the errors which the learned judge has imputed to his subordinates and for which the learned judge has allowed this $5,850.90.

Then as to the $27,023 which I take to be wholly for plant to be used in carrying on the works to completion, other than material to be used in the work, as to which latter no deduction should be made, but taking it to be the fair value of the plant used for carrying on the works apart from materials used in the work, in the absence of a special agreement to the effect, I think the Government would not be entitled to retain the amount and at the same time to charge the suppliants with the full cost of the work in excess of the contract price. In view of the frame of the petition of right and the claims there asserted, it can only be by way of reduction of the amounts of the Government's counter claim that any allowance can be made to the contractors in respect of this sum of $27,023 as for value of

plant placed in the hands of the Government to enable them to complete the work.

However as to this plant the contractors when they abandoned their contract and gave it up to the Government to be completed by them, sold and transferred this plant to the Railway Commissioners by deed executed 11th June, 1873, in consideration of their agreeing to pay certain arrears of wages due to the laborers which had been employed by the contractors on the work. There is, however, a clause in that deed, the conditions of which appear to me to be that the contractors should be credited the value of the plant, on a final settlement to be made on the completion of the work by the Government, under the sixth paragraph of the contract, so that inasmuch as the learned judge has not deducted this sum from the $159,982.57 which he has found to be due the Government, as he would have done if he had not considered it to be forfeited under the terms of the contract, which I think it is not, it should now be deducted and the result will be to vary the judgment of the learned judge by reducing the sum found by him to be due to the Government of Canada to $132,959.

The form of the judgment should, in my opinion, be varied and should be to dismiss the petition of right with costs and to render judgment for the Crown on the counter claim for the sum of $132,959 as for money expended by the Government in completing the works in excess of the price for which the suppliants contracted to complete them, and this appeal must be dismissed with costs.

Appeal dismissed with costs. Judgment of the Exchequer Court varied.

Solicitors for appellants: *D. Girouard.*

Solicitors for respondents: *A. Ferguson.*

1884
*Dec. 6.
1885
*May 12.

DOUGALD McCALL AND WILLIAM BLACKLEY (PLAINTIFFS)..... } APPELLANTS;

AND

RICHARD WOLFF, FREDERIC WRAY, S. F. McKINNON, W. C. PROCTOR, THE BANK OF MONTREAL, JAMES D. TAIT AND EDWARD BURCH (DEFENDANTS)..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR MANITOBA.

Interpleader—Chattel Mortgage—Insufficient description of goods—Con. Stats. Man. ch. 49 sec. 5.

The Consolidated Statutes of Manitoba Ch. 49 sec. 5, enacts as follows; All the instruments mentioned in this act, whether for the sale, or mortgage of goods and chattels, shall contain such a full and sufficient description thereof that the same may be thereby readily and easily known and distinguished.

Held, Strong and Henry JJ. dissenting, that where goods, in a chattle mortgage, were described as "all and singular the goods, "chattels, furniture, and household stuff hereinafter particularly "mentioned and described, and particularly mentioned and "described in the schedule hereto annexed marked A; all of "which goods and chattels are now situate lying and being &c." (particularly describing the premises), without stating that such goods were all the goods on the said premises, there was not a full and sufficient description within the meaning of the above enactment and the mortgage was void as against execution creditors.

APPEAL from the Court of Queen's Bench, Manitoba, refusing to set aside a judgment of the Chief Justice in Chambers upon an interpleader issue.

The facts in the case are briefly as follows:

One Louisa Black was indebted to the plaintiff in the sum of $4,000 or thereabouts, and to secure the debt gave the plaintiffs a chattel mortgage on her stock-in-trade. In such mortgage the goods were described as

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

"All and singular the goods, chattels, furniture and "household stuff hereinafter particularly mentioned and "described, and particularly mentioned and described in "the schedule hereunto annexed marked 'A,' all of "which goods and chattels are now situate, lying and "being on the premises situate in a building on the "east side of Main street, in the said city of Winnipeg, "on the Grace Church property, and now being occupied "by the said Louisa Black as a millinery store and "dwelling, which said building may be more particu-"larly known as number two hundred and ninety-one "(291) Main street, in the said city of Winnipeg."

The defendants were also creditors of the said Louisa Black, and having obtained judgment on their respective debts issued executions under which the sheriff seized the goods on the said premises, No. 291 Main street. The plaintiffs claimed that the goods seized belonged to them under the said chattel mortgage, and the title to them was tried before the Chief Justice of the Court of Queen's Bench in Chambers, where judgment was given for the defendants, the Chief Justice holding the chattel mortgage void, both under the statute of Elizabeth and under ch. 49 of the Consolidated Statutes of Manitoba. The Court of Queen's Bench refused to set this judgment aside, and the plaintiffs then appealed to the Supreme Court of Canada.

Robinson Q. C. for appellants.

Lash Q. C. for respondents.

Sir W. J. RITCHIE C.J.—This is an interpleader issue. The plaintiffs claim the goods, &c., under a chattel mortgage made by Louisa Black, the execution debtor, to the plaintiffs, dated December 15th, 1882, and duly filed in the proper office. The defendants are subsequent execution creditors and claim the goods, &c., under their executions, and, among other things, contended that the mortgage was not executed in good faith and

1885

McCALL v. WOLFF.

Ritchie C.J.

for the express purpose of securing the money due or accruing due to the plaintiffs, but for the purpose of protecting the goods against the creditors of the mortgagor or preventing the creditors of the mortgagor from obtaining payment of any claim against her, and that the goods are insufficiently described, and is therefore void as against the defendants. This issue has been directed to be tried upon the application of the sheriff of the eastern judicial district of Manitoba. The issue was tried before Chief Justice Wallbridge, and judgment was rendered by him for the defendants on 19th February, 1883. On 6th June, 1883, the plaintiffs obtained a rule *nisi* from the Court of Queen's Bench to set aside the verdict and enter a verdict for the plaintiffs. In following Trinity Term the said court discharged the rule *nisi* and made the learned Chief Justice's order barring the plaintiffs' claim to the goods absolute with costs.

The plaintiffs now appeal from the said judgment of the Court of Queen's Bench.

The learned Chief Justice who heard this matter in first instance, and the full court on motion to set aside the decision of the Chief Justice, concurred in the holding that the description of the goods, with the exception of a very few insignificant items, does not contain the sufficient and full description of the goods, that they may be easily and readily distinguished, and on that account is void. If it were necessary to distinguish the items which comply with that section they would be found few in number and insignificant in value, and therefore they held the chattel mortgage void.

By the 49 Con. Stats. Man. 1880, sec. 5: "All the instruments "mentioned in this Act, whether for the sale or mortgage of goods "and chattels, shall contain such sufficient and full description "thereof that the same may be thereby readily and easily known "and distinguished."

If from the description given, the articles cannot be

1885

McCALL v. WOLFF.

Ritchie C.J.

readily and easily known and distinguished, it is clear the statute has not been complied with. I do not think the legislature intended to confine this description to the parties by whom it was prepared as between themselves alone, but the discription was to enable the property to be identified as against third parties, creditors or others claiming an interest in the property; this need not be such a description as that with the deed in hand without other enquiry the property conld be identified, but there must, in my opinion, be such material on the face of the mortgage as would indicate how the property may be identified if proper inquiries are instituted, as for instance, "all the prop-"erty now in a certain shop, &c."

Is the property then in this case described with sufficient certainty to enable it to be distinguished and identified?

It may have been the intention to convey all the goods in the store, but the mortgage does not say so, nor is there any evidence to show the goods named in the schedule where the only goods of that description in the store or what were the exact goods in the store, The description is:

[The learned Chief Justice then read the description of the goods (1)].

If we take the largest items in the schedule I can discover nothing in the description to guide any one in knowing or distinguishing them. In schedule "A" are items especially noticeable amounting to $8,455.

When we come to examine the evidence in the case the insufficiency of the description would seem to be made very apparent.

Doritty, the agent for the claimants, who obtained the mortgage says:—

Item one (of chattel mortgage) 22 doz. Spanish net. means 22 doz. yards Spanish net; the price shows it is per doz. yards; the next item, 20 Spanish net, 40 $8; this means 20 yards Spanish net; I know by the price this means yards, and not dozen yards; it would

(1) See p. 131.

1885

McCALL v. WOLFF.

Ritchie C.J.

require a knowledge of business to understand the quantities and qualities of the articles; item 3 is, 37 Spanish net, 65c. (in the column of price), means 37 yards of Spanish net at 65c. per yard; the schedule is such as would be sufficient to a business man having a knowledge of that description of goods; it would be difficult to a person not having that knowledge; the mortgagor would know it and the mortgagees would know it; I think Mr. White would understand it; but one not understanding that line, it might be difficult for such a person to understand it; it was prepared by my going to the place and taking notes of the stock; I got some of the prices from Mrs. Black; the annexed list is in my writing; Mrs. Black assisted me as to prices, the prices in wholesale; I got that list without her concurrence, and the prices she gave me on my asking for them.

And again on cross examination:

Description of chattel mortgage. "I made the list from memory, I had taken in Mrs. Black's store from time to time; I did not measure any of the pieces in the store, and no one else did for the purposes of this schedule; the lengths I got from looking at the ends; they generally run from 9 to 18 yards to the end; I counted the ends by my eye; I ran my eye over the lot in my mind; ribbons not all taken at one time; I may have counted in some twice or may have left out some pieces; the quantities are estimates not measurements and number of yards also and quantity may be more or less; I didn't think I was a great deal out in my estimate; the prices were put down when I was in the store: I put them down in the warehouse; the retail prices in figures and the cost in characters, and the reverse sometimes; I don't know how the ribbons were marked. The first item on page three, 22 Spanish net, means 22 yards, not 22 dozen yards."

Mr. White, referred to by this witness, is called, and he says:—

Looks at description of the goods in chattel mortgage; it does not contain such sufficient and full description of the goods that the same may be thereby readily known and distinguished. He looks at the mortgage—first item, 250 yards ribbon, 10c., $25; cannot tell what colour or quantity, or quality; the quality and width affect the price, colours does not; the price per yard would not show the width, quality or quantity, or colour; ribbons have their individual number, a number which indicates its width, and by its colour is plain; this is the general character of all the items on page one; only two lines in writing the articles, of which there are 30, must be ascertained by evidence outside the bill of sale; first item on page three, this might mean 22 yards or 22 dozen yards; there are some Spanish nets at the price of $2.75 per yard, and also $2.75 per dozen

1885

McCALL v. WOLFF.

Ritchie C.J.

yards, owing to width and quality, 7 on page two; I know what tissue is; I could not pick out the tissue in the store from the description given; on page two, the last item, this might be yards, it is a matter of judgment from prices, the quantity would be too large for pieces; it is set down at 50, and may be yards or pieces, I should think yards from the nature of her business; the articles should be numbered; this applies to all the articles described in the schedules excepting some on the last page; the last few items are not in my line, being show case, mirror, fixtures and carpet, shop fixtures and stands; the schedule is generally wanting in information; that the description does not give such description by which they can be easily known, they could not be priced out in a store.

Cross-examined by Mr. Patterson.—I understand the blank lines on the first page to indicate goods of the same character in the written words above them; this does not show what kind, quality or colour; and the first six lines on the second page, and four lines on the third page, under the word "crimp," that means crimp crape. The item on third page (8 blank), under "braided dresses," I don't think that means "eight black braided dresses," for the reason that Mrs. Black's business would not enable her to keep those 8 and 2 (=10) on hand; also from my knowledge of her stock. I saw coloured braided dresses there; I think the schedule means them. The dresses are not braided, it is the trimmings. Three blank lines more underlines; I can tell whether coloured, black or white. I don't know the quantity in that store on fourth page, and on all the other places three blank lines generally they would indicate similar articles to the one named above. On page two, 85 plush and satin, I would, knowing the business, know it meant yards, but a stranger would not; the place where yards is written is of assistance to me in interpreting its meaning. On page three, item of cream silk, wht, snow flake and spt net, $300 too indefinite to distinguish them. 120 yards gossamer silk if no other than I did tell it, but not of more than 120 yards, would put to eight or ten pieces; birds, ornaments—twenty birds, $225—that may mean birds from 20c. to $10 each; each stand bore its own box, is numbered, and each has its own number, $225.

This is all the evidence that bears on the description of the goods, and I cannot under this evidence say the judges in the court below were wrong in holding that there had not been a compliance with section 5, ch. 49 of the Consolidated Statutes, Manitoba. As between the parties, difficulty may not be likely to arise, but the statute is to protect creditors and subsequent purchas-

1885

McCALL v. WOLFF.

Ritchie C.J.

ers from uncertainty in regard to identity. If so, how can it be said that the description in this schedule, if as to many of the articles a description it can be called, was sufficient and full, that the articles proposed to be conveyed could thereby be readily and easily distinguished. The statute is a wise one and should be so construed so as to make it effectual.

STRONG J.—I am of opinion that the evidence of pressure was amply sufficient to establish that the security impeached was not given by way of voluntary preference, such as the Con. Statutes of Manitoba, ch. 37 sec. 96, avoids. That enactment is a transcript of that on the same subject contained in R. S. Ontario, ch. 118, sec. 2, and numerous cases have decided that a security of this kind obtained by a creditor as the result of pressure is not an illegal preference within the provision in question.

The objection that the goods are not sufficiently described, that is, that the mortgage did not contain such a sufficient and full description of the chattels mortgaged that the same might be readily and easily known thereby as required by the 5th sec. of the Chattel Mortgage Act of Manitoba, also fails. Numerous cases decided in Ontario under a statute precisely similar (1) have held such a description sufficient, and were I to hold otherwise I should overrule this long line of cases, which I am not prepared to do. Moreover, even if the question was *res integra*, I should not be disposed to consider this an insufficient description, for it seems to me that giving the statute a fair and reasonable construction it is here sufficiently complied with, and that to hold otherwise would be in effect to

(1) *Harris* v. *Commercial Bank*, 16 U. C. R. 437; *Ross* v. *Conger*, 14 U. C. R. 525; *Fraser* v. *Bank of Toronto*, 19 U.C.Q.B.381; *Powell* v. *Bank of Upper Canada*, 11 U. C. C. P. 303; *Mason* v. *Mcdonald*, 25 U. C. C. P. 435; *Bertram* v. *Pendry*, 27 U. C. C. P. 377; *Re Thirkell Perrin* v. *Wood*, 21 Gr. 492; *Mathers* v. *Lynch*, 28 U. C. Q. B. 354; *Wilson* v. *Kerr*, 17 U. C. Q. B. 168;

make it impracticable to give an effectual chattel mortgage upon property of this description, a stock of goods contained in a shop or store, the business of which was actually going on. For if this description does not suffice it would be in effect to require that in all such cases there must be an actual change of possession which would of course compel the stoppage of the business.

The American authorities decided on enactments corresponding in terms with that under consideration, sustain the view that the goods were here sufficiently described, and that it is not essential that they should be set forth with such particularity as to be capable of being identified by the written description in the mortgage without aid from any parol or extrinsic evidence, nor need the description be such as to enable a stranger to identify the articles without any aid from other evidence (1). In any case, even when the description is of the most minute kind, such assistance must be sought from extrinsic evidence to identify and ascertain the property comprised in the mortgage, and therefore it has been held in the American courts that it is sufficient that the mortgage points out the subject matter of it so that "a third person by its aid, together with the "aid of such enquiries as the instrument itself suggests, "may identify the property covered." When these conditions are complied with I am of opinion that the deed may be said to embrace a description of the articles sufficiently full and certain to enable them to be readily and easlly distinguished. This is, I think, what was done in the present instance.

The decision of the court below should be reversed and the *rule nisi* discharged.

Fournier and Taschereau JJ. concurred with the Chief Justice that the appeal should be dismissed with costs.

(1) *Harding* v. *Coburn*, 12 Metcalf, 333 per Dewey J.; *Willey* v. *Snyder*, 34 Mich. 60, per Cooley C.J.

1885

McCALL v. WOLFF.

Henry J.

HENRY J.—I think the statute would be sufficiently satisfied by a general description such as "all the goods" in a certain store, properly locating it, and a detailed description of them is in such a case altogether unnecessary, because the particular store being ascertained the description covers all the goods with as much certainty as if each article were specified and described. If, however, to a general description is added a detailed one by description of the articles and quantities of different kinds of goods, and that there are more goods of that particular kind than mentioned, and from which the others could not be distinguished, none at all, I take it, would be covered either by the general description or the detailed one. In the absence of such a difficulty to ascertain what is meant, or which particular kind is meant, I think the transfer would be good. For instance, a man gives all the horses in his stable and all the cows, and he gives five calves, and there are found to be ten there, it would not cover the five because you could not tell which five of the ten was meant to transfer, and so with these ribbons. The transfer says all the clothing that is there, and then gives the number of yards. I think in such a case that would be covered by a bill of sale, but where a difficulty would arise in selecting out of larger quantities specific articles a reduced quantity or number, then I take it none would pass. A mistake in the description, however, of certain goods would not invalidate the sale of the whole, which, if it had not been for that particular description, would have been good. I think under the circumstances, then, that the bill of sale was good to the extent of the goods that were in that building, that would not be subject of difficulty in ascertaining, as I before stated. I think the appeal should be allowed.

Appeal dismissed with costs.

Solicitors for appellants: *Paterson, Baker & MacLean*
Solicitors for respondents Wolff & Co.: *Ewart, Bodwell.*

& Wilson.

Solicitors for respondents McKinnon & Proctor: *Bain, Blanchard & Mulock.*

1885

McCALL v. WOLFF.

THE CANADA SOUTHERN RAILWAY COMPANY (Defendants)..... } APPELLANTS.

AND

GEORGE CLOUSE (Plaintiff).....RESPONDENT.

1885

*May 21.

1886

*April 9.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Farm crossing—Liability of Railway Company to provide—Agreement with agent of company—14 and 15 Vic. cap. 51 sec. 13—Substitution of "at" for "and" in Consolidated Statutes of Canada cap. 66 sec. 13.

The C. S. R. Co. having taken for the purposes of their railway the lands of C., made a verbal agreement with C., through their agent T., for the purchase of such lands, for which they agreed to pay $662, and they also agreed to make five farm crossings across the railway on C.'s farm, three level crossings and two under crossings; that one of such under crossings should be of sufficient height and width to admit of the passage through it, from one part of the farm to the other, of loads of grain and hay, reaping and mowing machines; and that such crossings should be kept and maintained by the company for all time for the use of C., his heirs and assigns. C. wished the agreement to be reduced to writing, and particularly requested the agent to reduce to writing and sign that part of it relative to the farm crossings, but he was assured that the law would compel the company to build and maintain such crossings without an agreement in writing. C. having received advice to the same effect from a lawyer whom he consulted in the matter, the land was sold to the company without a written agreement and the purchase money paid.

The farm crossings agreed upon were furnished and maintained for a number of years until the company determined to fill up the portion of their road on which were the under crossings used by C., who thereupon brought a suit against the company for damages for the injury sustained by such proceeding and for an injunction.

---

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

1885

CANADA SOUTHERN RWY. CO. v. CLOUSE.

Held, reversing the judgment of the court below, Ritchie C. J. dissenting, that the evidence showed that the plaintiff relied upon the law to secure for him the crossings to which he considered himself entitled, and not upon any contract with the company, and he could not, therefore, compel the company to provide an under crossing through the solid embankment formed by the filling up of the road, the cost of which would be altogether disproportionate to his own estimate of its value and of the value of the farm.

Held also, that the company were bound to provide such farm crossings as might be necessary for the beneficial enjoyment by C. of his farm, the nature, location, and number of said crossings to be determined on a reference to the Master of the court below.

The substitution of the word "at" in sec. 13 of cap. 66 of the Consolidated Statutes of Canada, for the word "and" in sec. 13 of cap. 51 of 14 and 15 Vic. is the mere correction of an error and was made to render more apparent the meaning of the latter section, the construction of which it does not alter nor affect.

Brown v. *The Toronto and Nipissing Ry. Co.*, 26 U. C. C. P. 206 overruled.

APPEAL from a decision of the Court of Appeal for Ontario (1) varying the decree of Mr. Justice Proudfoot in the Chancery Division of the High Court of Justice (2).

The facts of the case are as follows :—

The plaintiff in his statement of claim alleges that in the month of March, 1871, he entered into a verbal agreement with the defendants through their agent, John Avery Tracey, for the sale by the plaintiff to the defendants of $7\frac{21}{100}$ acres of land of the plaintiff's taken by the defendants for the purposes of their railway for which it was then agreed that the defendants should pay the plaintiff $662.00 and should make five farm crossings across the railway on plaintiff's farm ; that three of such crossings should be level crossings and the other two under crossings ; and that one of such under crossings should be of sufficient height and width to admit of this passage through it from one part of plaintiff's farm to the other, of loads of grain and hay, reaping and mowing machines, and that such crossings

(1) 11 Ont. App. R. 287. (2) 4 O. R. 28.

should be kept and maintained by the defendants for all time for the use of the plaintiff, his heirs and assigns; that at the time when said agreement was entered into the plaintiff was desirous that the same should be reduced to writing and signed by himself and the said Tracey for and on behalf of the defendants, and that he particularly requested said Tracey to reduce to writing and sign that part of the said agreement relating to the farm crossings to be made and maintained by defendants for the use of the plaintiff, but that said Tracey assured the plaintiff that a writing was unnecessary and that the law would compel defendants to build and maintain said crossings although the agreement with reference thereto was not in writing, and the plaintiff believing such representations, and relying thereon, did not further insist upon the said agreement being reduced to writing; that in pursuance of said agreement the plaintiff, by indenture bearing date the 16th day of March, 1871, duly conveyed the said $7\frac{21}{100}$ acres of land to defendants, and the defendants took possession of the same and paid the plaintiff the money consideration agreed upon therefor, and built their railway upon and along said parcel of land and furnished the several level and under crossings so stipulated for and agreed upon between plaintiff and defendants as aforesaid, and have maintained the same for the use of the plaintiff who has used the same without any interruption or hindrance from the time the said railway was built until the 8th of October, 1881, on which day the defendants caused the larger of the said two under crossings to be boarded up so as to render it impossible by, and useless to, the plaintiff, and on several occasions since the defendants have caused the said under crossings to be partly filled up with earth and rubbish, and the plaintiff has been put to great trouble and expense in removing such earth and other obstacles from the said under crossings,

1885

CANADA SOUTHERN RWY. CO. v. CLOUSE.

and rendering them fit for use by the plaintiff, and the plaintiff claimed: 1. Damages for the wrongs complained of. 2 An order restraining the defendants from any repetition of any of the acts complained of. 3. Such further relief as the nature of the case might require.

The defendants, in their statement of defence, admit that Tracey was a purchasing agent of theirs for right of way; but they say that the sum paid to the plaintiff was not merely for the expropriation of his land, but was also for all damages to his property through which the right of way was taken, in so far as it was injuriously affected. They deny that Tracey made any bargain or contract with the plaintiffs for three level and two under-crossings, as alleged in the plaintiff's statement of claim; that if he did he had no authority from the defendants to make the alleged promises, and that the defendants are not bound thereby; and they deny that the plaintiff is entitled to the larger under-crossing, in respect of which the action is brought, or to any under-crossing, or that the defendants are liable to furnish and maintain the same. They also deny that they furnished the under-crossings in the plaintiff's claim mentioned in pursuance of any agreement; that at the places where the two alleged under-crossings are there were depressions in the ground which the defendants bridged over instead of filling up, for economy, intending that these and similar other depressions along the line of their railway should be filled up with earth as soon as they should have the means to do so, and the superstructures over such depressions should require renewal; and that, although they were always ready and willing to allow land owners to use these places as under-crossings, and afforded them facilities for using them as such, it never was the intention of the defendants that the plaintiff, or persons similarly situated, should have the right to

use these crossings permanently, and they averred that they had furnished the plaintiff with good and suitable over-crossings, and they denied that they are legally bound to furnish him with any others; and they finally pleaded the statute of frauds as a bar to the action.

Mr. Justice Proudfoot made a decree in the plaintiff's favour, granting to him a perpetual injunction restraining the defendants from interfering with, hindering or obstructing the plaintiff in his possession, use and enjoyment of the under crossing under the defendants' railway, and lots numbers 10 & 11 in the 8th concession of the Township of Townsend. The defendants appealed to the Court of Appeal for Ontario from this decree and that court varied the decree making it as varied read as a decree granting the plaintiff an injunction restraining the defendants from interfering with, hindering or obstructing the plaintiff in the use and enjoyment of the under crossing under the defendant's railway, &c., until compensation shall have been made, in pursuance of the provisions of the statutes in that behalf, for the additional injury to the plaintiff's farm from any further exercise of the power of the company by which the plaintiff may be deprived of the said under crossing, and with these variations and directions the defendants' appeal was dismissed without costs.

From the decree so varied both parties appeal, the defendants insisting that the plaintiff's action should have been wholly dismissed, and the plaintiff that the original decree as made by Mr. Justice Proudfoot should not have been varied.

Cattanach for appellants.

The respondent having preferred to stand on his statutory rights under the impression that he might get more in that way than by agreement, he could only be entitled to such crossings as the law gave him. The

1885

CANADA SOUTHERN RWY. CO. v. CLOUSE.

learned counsel cited and referred to *Reist* v. *G. T. Ry. Co.* (1); *Burke* v. *G. T. Ry. Co.* (2); *Brown* v. *Toronto & Nipissing Ry.* (3); Hodges on Railways (4). Admitting there was an agreement, as alleged, specific performance would not be the appropriate remedy.

Citing *Sayers* v. *Collyer* (5); Fry on Specific Performance (6); Pierce on Railways (7); *Raphael* v. *Thomas Valley Ry.* (8); See *Gardner* v. *London C. & D. Ry.* (9). This last case has been followed in Canada in various cases. In *Simpson* v. *Ottawa &c. Ry. Co.* (10); the late Chief Justice of the Court of Appeal when in the Chancery Division, says that the legislature has confided to the company, and not to the courts, the discharge of all functions which have relation to public safety and convenience, &c.

McCarthy Q.C., and *Robb* for respondent.

The agreement alleged was clearly proved and so far performed as to get over the objection of the Statute of Frauds. The judge at the trial having believed the witnesses for the plaintiff, his finding should not be disturbed. *Grasett* v. *Carter* (11); Berthier Election (12).

The most the Railway Company can obtain is either recission of the whole bargain and a *restitutio in integrum*—or an option to take what we meant to give viz, our strip of land through the middle of our farm, less a perpetual right to an under crossing.

We put the company upon either horn of the dilemma.

The covenants are such as run with the land.

(1) 15 U. C. Q. B. 355.
(2) 6 U. C. C. P. 484.
(3) 26 U. C. C. P. 206.
(4) 6 Ed. 209.
(5) 24 Ch D. 180.
(6) 2 Ed. p. 38.
(7) Pp. 139 & 140.
(8) L. R. 2 Eq. 37.
(9) 2 Ch. App. 201.
(10) 1 Ch. Ch. (Ont.) 126.
(11) 10 Can. S. C. R. 105.
(12) 9 Can. S. C. R. 102.

Spencer's case (1); *Tulk* v. *Moxhay* (2); *Cooke* v. *Chilcotte* (3).

The plaintiff's case can be subjected to the test of specific performance under the circumstances and the law applicable to the subject, and the plea that the remedy of damages is sufficient under Lord Cairns' Act and R. S. O. c. 40, s. 40 would not be entertained; as in both these cases the acts of part performance have been such as to irretrievably change the condition and circumstances of the parties and to give the defendants full benefit of their contract in specie. That being so the court will go any length to make them perform their part of the agreement in specie.

Per Wigram V. C., in *Price* v. *Corporation of Penzance* (4); *Storer* v. *G. W. Ry. Co.* (5); *Lyttog* v. *G. N. Ry. Co.* (6); *Wilson* v. *Furness Railway* (7); *Green* v. *West Cheshire* (8).

Sir W. J. RITCHIE C. J.—I think it clear that at the time the agreement was entered into the erection of a trestle bridge only was in the contemplation of the company, and the agreement was made in reference to that. If the defendants had intended the agreement to be only temporary that should have been stipulated for; or if they intended to reserve to themselves the right to dispense with the trestle bridge at their own free will and pleasure, and substitute a solid embankment in lieu thereof, that should have been provided for; not having done so, I think plaintiff should have his under crossing. If it is more to the interest of the defendants that there should be a new embankment in lieu of a trestle bridge, they must so construct the embankment as to preserve the plaintiff's subway, or adopt such proceedings as will deprive the plaintiff of

(1) 1 Smith's L. C., 8 ed., pp. 80, 87 and 88.
(2) Ph. 774.
(3) 32 Ch. D. 694.
(4) 4 Ha. 506.
(5) 2 Y. & C. 48.
(6) 2 K. & J. 394.
(7) L. R. 9 Eq. 28.
(8) L. R. 13 Eq. 44.

1886

CANADA SOUTHERN RWY. CO. v. CLOUSE.

Ritchie C.J.

his under crossing and compensate him therefor.

I cannot think that having obtained the plaintiff's land at a reduced price by reason of the agreement that he should have one pass under the bridge it could have been intended by either party that the company were, the next day, at their own will and pleasure, to abandon the trestle bridge and adopt a solid embankment, and so deprive the plaintiff of his pass, he having accepted a reduced price for his land under a clear agreement that he was to have an underground crossing. I think if the defendants find it more to their interest to change the trestle bridge and substitute an embankment, they must so construct the embankment as to give the plaintiff what he, by taking a reduced sum for his land, has paid for it, even though the change and substitution mentioned should thereby involve an increased expenditure.

It is admitted that Tracey was the agent to secure the land for the right of way for the company, and I think, as incidental to that, he was clothed with authority to make agreements with the parties whose lands he was negotiating for with reference to crossings in connection therewith, not only with reference to their location, but also as to their natures. I think the evidence in this case very clearly shows that he did so; that the result of his dealings with the plaintiff was communicated to the officers of the company and acted upon by the company and the plaintiff; that to carry out the agreement, and enable the plaintiff to use and enjoy the privilege agreed on, a change was made in the construction of the trestle bridge by the company, and the plaintiff entered on the enjoyment of the way thus agreed on and arranged by the company, and has used the same, without interruption, for a number of years. I think there was evidence of the agreement and of its ratification by the company, and that the Vice Chancellor was right in holding that there was a

1886

CANADA SOUTHERN RWY. CO. v. CLOUSE.

Ritchie C.J.

concluded agreement for an under crossing. This crossing would appear to be a necessity for the plaintiff; he has bought it and paid for it by the reduced price of his land, and should not now be deprived of it because the defendants wish to change the trestle bridge to an embankment. If they do so they will be obliged to incur extra expense to furnish the plaintiff with his under crossing. Plaintiff has a right to the enjoyment of his under crossing until it is taken from him by legal means.

This, in my opinion, is the state of the case as it now stands. I do not think it necessary to enter on any discussion as to what the railway company might or might not do if they think it desirable to change from a trestle to an absolutely solid embankment, under the 11th section of the Consolidated Statutes of Canada, ch. 66. As suggested by Mr. Justice Patterson, they have not taken any steps in that direction.

It being abundantly clear that the under crossing was taken into consideration in fixing the amount the plaintiff was to receive and the company to pay, if the company find it desirable to build a close embankment and so make a complete severance of the plaintiff's farm for which they have paid him no compensation they must, by legal means, obtain the right and pay for it before altering the existing state of things.

I think there is no objections to vary the decree as suggested by Mr. Justice Patterson, and that the appeal must be dismissed with costs.

FOURNIER J.—was of opinion that the appeal should be allowed.

HENRY J.—I am of opinion that the agent had authority from the company to make special arrangements to a certain extent, but the ratification of his agreement only carried out the object of the company in making the contract with Clouse. They undertook

1886

CANADA SOUTHERN RWY. CO. v. CLOUSE.

Henry J.

to put up a trestle bridge and they did so. It was no object to them to have the use of an underground passage. They merely authorized the agent to arrange with parties for the damages which they had sustained and I do not think it amounted to the extent of authorizing him to bind the company to give the party a useless crossing and one which the law would not supply, and therefore I am rather of the opinion that Clouse is not entitled to the crossing.

The law provides in such a case for the appointment of arbitrators and I do not think that arbitrators would have power under the act to award an under crossing under these circumstances. I do not think the law would give them any such power.

The condition of these lands have altered since this agreement was made. A crossing for a two hundred acre lot would be very different in the eye of the law from that required for a fifty acre lot. A party has a two hundred acre lot divided into lots of fifty acres each and if he remains owner of the two hundred acre lot the necessity of a crossing for each fifty acres would not be so apparent as it is now when he only has the fifty acres. He should have an agreement for a special crossing.

I concur in the judgment of my brother Gwynne and think the appeal should be allowed.

TASCHEREAU J.—I have come to the same conclusion on the same grounds. I think the plaintiff is not entitled to an under crossing. The appeal should be allowed and the cross appeal dismissed.

GWYNNE J.—In order to arrive at a just conclusion as to what should be done in this case, it is necessary to consider what were the rights of the parties, and what their position towards each other was at the time of the promise being made, if any was made, by Tracey, as the defendant's agent, in respect of the under cross-

ings, the right to the perpetual enjoyment of which the plaintiff claims, what was the extent of Tracey's authority as the defendant's agent? What was the promise which in fact, if any, was made by him, and what was the actual consideration for such promise? It was not disputed, but was rather assumed, that the defendants had filed a map or plan of their proposed railway, with a book of reference, as required by the statute, preliminary to their taking measures to acquire the land required by them for their railway and works by compulsory expropriation under the statute, and that they were in a position therefore to enter into an agreement with him touching the compensation to be paid to him for the land intended to be taken, and for any damage which might be sustained by him from the manner in which they should exercise the powers vested in them. In order to proceed by compulsory expropriation it was necessary that they should have served on the plaintiff a notice containing a description of the lands to be taken and of the powers intended to be exercised with regard to the lands, and a declaration of readiness to pay some certain sum as compensation for the land to be taken and for such damages as might be occasioned to the plaintiff by the manner in which they proposed to construct their railway upon the lands so taken. The plaintiff had no power to resist the acquisition by the defendants of so much of the plaintiffs land as they required for the purposes of their railway, provided only that the land required was within the limits authorized by the statute, nor had the plaintiff any right to impose upon the defendants any obligation as a condition upon which alone he would consent to their having the land they required. The plaintiff's sole right at the time the agreement was made with Tracey consisted in the right of determining, by agreement *inter partes* if possible, and if not, of having determined by arbitration under the statute, the amount he should

1886

CANADA SOUTHERN RWY. CO. v. CLOUSE.

Gwynne J.

receive by way of compensation for the land taken from him and for such damage, if any, as the construction of the defendants railway through his farm might occasion to him over and above the mere value of the land taken. This latter value might possibly be easily agreed upon, but the amount of compensation to be paid for the damage, if any, which might be occasioned to the plaintiff by the manner in which the defendants proposed to construct their railway through his farm might not be so easy of adjustment. In order to enable a land owner to make a fair estimate of the damage thus occasioned to him it is but reasonable that the Railway Company should show him in what manner, and with what description of work, it is proposed that the railway should be carried through his land, namely, whether on the level throughout, or partly on the level and partly on an embankment, or in a deep cutting; and what mode of crossing is proposed to be supplied to enable the land owner to have access to his land on both sides, namely, whether by farm crossings on the level or by under or over crossings, or in one place by one kind, and in another by one of the other kind; unless information upon these particulars should be afforded, the land owner could not, although willing to come to terms with the company, nor, in case he should prefer submitting his case to arbitration under the statute, could arbitrators, form an accurate judgment as to the amount of compensation the land owner should receive for the damage which might be occasioned to him by the railway. The plaintiff here could not have imposed upon the defendants the obligation that they should give him at the place indicated here a permanent under crossing as a condition of their acquiring the land required for roadway through his farm. If the defendants thought that they could not conveniently, or consistently with a proper regard to their own interests, in view, for example, of the great expense

1886

CANADA SOUTHERN RWY. CO. v. CLOUSE.

Gwynne J.

of such a work, grant him such an under crossing, but that they could give him a surface crossing, or surface crossings, which, although not as convenient as the undercrossing he desires to have might be, still would afford some degree of convenience, all, if anything, that the plaintiff could claim would be reasonable compensation in money for the damage, if any, which might be occasioned to him by the difference in the convenience afforded to him by the surface crossings and in that which the under crossing, if granted, would afford to him. The defendants admit that Tracey was their agent for acquiring right of way. He had their authority to agree with the plaintiff upon the price to be paid for the land taken and also upon the amount to be paid by way of compensation for such damage as might be occasioned by the manner in which it was intended that the railway should be constructed through his farm. For this purpose it was necessary that he should be in a position to show in what manner the work was intended to be constructed. The defendants had put Tracey in such a position as their agent to deal with the plaintiff as to the amount of compensation to be paid to him that although he had not, and I think it clear that he had not, any authority vested in him to bind the defendants to give to the plaintiff a permanent under crossing, as claimed by him, still it was necessary that the defendants' agent should be in a position to show the nature of the works contemplated by the defendants to enable the plaintiff intelligently to estimate the amount of damage done to him for which he might be entitled to receive compensation, and to enable him to determine whether he should himself conclude an agreement with the defendants, or should, in preference, have recourse to the measures provided by law for obtaining satisfaction in the absence of agreement. As to surface crossings there does not appear to have been

1886

CANADA SOUTHERN RWY. CO. v. CLOUSE.

Gwynne J.

any difficulty; one has been given on each fifty acres, into which the plaintiff has divided his lot of two hundred acres, one of which divisions of fifty acres, and only one, he retains as his own, having apportioned the others among his children. A depression in a portion of the fifty acres retained by the plaintiff, which the railway would have to cross, indicated that an embankment would have to be constructed at some time, the expense of constructing an under crossing through which might be so great that the defendants might reasonably be expected to be unwilling to give such a crossing. The plaintiff, I think, seems to have entertained some such idea, for when asked by Tracey what he wanted for right of way, he replied, as appears by his own evidence, "that the farm was so cut up "that he did not see how he could have anything "handy." The evidence shows that the defendants' intention was to cross this depression in the land at first by trestle work with a bridge on it across a little stream which ran there through the lot, as a temporary expedient, such trestle work to be replaced at some subsequent time when the defendants should be better able to afford the expense, by a solid embankment, with a culvert in it sufficiently large for the waters of the little stream to pass through it. That a trestle work was the mode designed to be adopted in the first instance Tracey knew, as probably also did the plaintiff. Boughner, who is the witness to the agreement subsequently signed by the plaintiff, says that he was present when the plaintiff and Tracey were negotiating about the price to be paid to the plaintiff, and that Tracey suggested that there would be a good chance for an under crossing on the banks of the creek. Tracey himself, while he swears that he had no authority to agree, and that he never did agree with the plaintiff that he should have a permanent under crossing, admits that he did say

1886

CANADA SOUTHERN RWY. CO. v. CLOUSE.

Gwynne J.

that there was a chance for the plaintiff to pass under the bridge, and that he also said that the law gave all necessary crossings and that plaintiff would get all necessary crossings. He admits also that he entered in his private memorandum book the words: "Settled "with Clouse he can have one pass under bridge," which he says he so entered because, knowing of the trestle work intended to be constructed, he knew there was a chance for a pass under the bridge; and he swears that he had nothing to do with the crossing business except upon three or four occasions for which he received special instructions from Mr. Courtwright, who appears to have been a contractor for building the road. He never received any instructions from the board of directors nor from any one but Mr. Courtwright. In the view which I take, nothing turns upon any contradiction there may be in the evidence of the witnesses or any of them. In the actual facts which occurred, there does not appear to be much substantial difference, it was in the view which each took of what did take place that the difference exists. Tracey's view of the question of crossings appears to have been that this was a subject with which he, as agent merely for acquiring right of way, had nothing to do; that the law would give the plaintiff all necessary crossings; and I can well understand that in pointing out that by reason of the trestle work which was intended to be put up the plaintiff might get, or have an opportunity to get, the under crossing he wanted to have, he never contemplated by this suggestion, or by anything he said or by the memorandum entered in his book, that he should be understood as making, or as having made, any contract on behalf of the defendants that the plaintiff should have such a crossing or that he was imposing any obligation upon the defendants to give it. In the view which I take, the case may be determined upon what appears to me to be the true construction of the

1886

CANADA SOUTHERN RWY. CO. v. CLOUSE.

Gwynne J.

result of the evidence as given by the plaintiff himself.

In his letter of the 18th July, 1882, to the chief engineer of the defendants company, he says that his original demand was $1,000 for right of way and damages. I take this sum to be more accurate than the sum of $1,200, which the plaintiff on his examination in chief in the cause states to be the amount he first demanded when, as he says, his farm was so cut up that he did not see how he could have anything handy. It was then, according to plaintiff's evidence, that Tracey suggested that plaintiff could have this under crossing. Plaintiff says that he suggested that he should have some writing to that effect, but that Tracey said there was no need of it, that the law provided that people should have such crossings as were necessary to cross their farms and that Mr. Boughner lived handy and would see that plaintiff should get it all right; before finally closing with Tracey, the plaintiff consulted his lawyer, a Mr. Duncombe, who also told him that it was not necessary to have an agreement about crossings in writing, and that he would get them all right, that the law would give the crossings, that the statute provided for it.

That the plaintiff consulted Mr. Duncombe with a view to govern his conduct in negotiating with Tracey for the land taken there can be no doubt upon the plaintiff's own evidence; and Mr. Duncombe advised him that there was no necessity for any writing as to crossings, for that the law would give them. This appears to have been the general opinion. Tracey admits that he was of that opinion also, and that he so expressed himself. So advised, the plaintiff finally entered into an agreement with Tracey bearing date the 23rd of January, 1871, which was signed by the plaintiff whereby he agreed to convey to the defendants, by a proper deed with bar of dower, so much of lots 10 & 11 in the 8th concession of the Township of Towns-

end, in the County of Norfolk as is taken by the company for its line of railway containing $7\frac{21}{100}$ acres for the sum of $650.00 to be paid within thirty days from the date of the said agreement, being for price of land $540.75 and for price of damages $109.25, and the plaintiff thereby granted leave to the defendants to take possession at once for the purpose of prosecuting the work of grading.

Now, the true inference to be drawn from the above is that the plaintiff being advised by his counsel that there was no necessity for any writing relating to crossings, and that the law sufficiently made provision for them, deducted from the amount which he originally asked, upon the assumption that he was not to have the particular under crossing in question, the sum of $350.00 intending to rest upon his legal rights to secure him the crossings he required. The plaintiff very probably considered that what Tracey had said constituted a sufficient location for an under crossing, or he may have thought, under the legal opinion he had taken, that he had the right to locate his farm crossings, but it is clear, I think, that he relied upon the law to secure them to him and not upon any contract made with the defendants through Tracey as their agent, and he concluded his bargain for right of way and damages, which was reduced to writing and signed by him as a transaction wholly independent of all consideration of farm crossings and his rights thereto whatever they might be under the statute; and upon the 16th March following, he executed a deed whereby, in consideration of $662 then paid to him, he granted and confirmed to the defendants, their successors and assigns forever, the lands taken for their railway. Under these circumstances the plaintiff cannot, in my opinion, be now heard to say that he executed this deed upon condition of his having a permanent under crossing at the place in question or elsewhere; or even that a verbal agree-

1886

CANADA SOUTHERN RWY. CO. v. CLOUSE.

Gwynne J.

ment that he should have it constituted part of the consideration for his executing the deed granting the land for the railway—the two things constitute quite distinct transactions and were understood so to be—the one relating to the land required for the railway which was complete for the consideration stated in the agreement, and the other relating to crossings of the railway on the plaintiff's farm, as to which the plaintiff relied upon the law to secure them to him wholly apart from, and independently of, the agreement for the land. The plaintiff's case cannot either, in my opinion, be rested upon the allegation that the plaintiff was prevented by any fraud of the defendants, acting through their agent, from having an agreement verbally complete reduced to writing and signed, nor upon the contention that a verbal agreement was entered into which should be enforced against the defendants upon the ground that the plaintiff, upon the faith of the defendants performing their part, had faithfully performed his part of the same agreement. The plaintiff's legal and equitable right, if he has any, as to this under crossing cannot under the circumstances appearing in evidence be rested upon contract, but must be determined upon view of the statute law in virtue of which alone the defendants acquired the right of interfering in any manner with the plaintiff's property. What those rights are involves the necessity of reviewing the decision of the Court of Common Pleas for Ontario in *Brown* v. *Toronto and Nipissing Ry. Co.* (1); I was a party to that judgment, but I must confess that on further consideration I do not think it can be supported. I do not think that the substitution of the word "at" in section 13 of chapter 66 of the Consolidated Statutes of Canada, for the word "and," which was the word used in section 13 of ch. 51 of 14 and 15 Vic., makes any difference in the

(1) 26 U. C. C. P. 206.

construction of the section. In view of the identity of the language of the statute of the State of New York, of 1850, ch. 140, sec. 44, there cannot, I think, be a doubt that sec. 13 of our statute, 14 and 15 Vic. ch. 51, was taken from the statute of the State of New York. So, in like manner, I think that our amended section 18, as consolidated in chapter 66 of the Consolidated Statutes, was taken from the statutes of the State of New York of 1854, ch. 282, sec. 8, substituting the word "at" for "and." In the courts of the State of New York this amendment has not been considered to make any difference in the construction, and that it should not is, I think, the right conclusion. The amendment, indeed, appears to me to have been made to make the section more perfect than it originally was, and to express what was intended but was omitted in the section as it was. The word "and" being, by inadvertence as I think, used instead of "at," the section failed to express where the "openings, gates or bars in "the fences" were to be. The section ran thus :—

Fences shall be erected and maintained on each side of the railway of the height and strength of an ordinary division fence, with openings or gates or bars therein, and farm crossings for the use of the proprietors of the lands adjoining the railway.

Now it will be observed that this sentence fails to express where the "openings or gates or bars" were to be; they were to be in the fences, but in what part is not said, and yet it cannot be doubted that they were intended to be "at the farm crossings of the road for "the use of the proprietors of the lands adjoining the "railway." The substitution of "at" in the Consolidated Statutes for "and" precisely expresses this intention. The statute so amended is, in my opinion, to be construed as regarding "farm crossings" to be a necessary convenience for the use of the proprietors of the lands adjoining the railway when one part of a man's property is separated from the residue by the railway and to which necessary convenience such proprietor is

1886

CANADA SOUTHERN RWY. CO. v. CLOUSE.

Gwynne J.

entitled as of right, unless it shall appear that he has released and abandoned his right upon receiving compensation from the railway company in consideration of their depriving him of such necessary convenience. A railway may be so run across a man's property as to separate only a small angle from the rest of his farm; in such a case a farm crossing might not be necessary; but when a substantial part of a farm is separated by a railway from another substantial part, or a man's house is separated from his barn or stables or the like, then farm crossings constitute such a necessary requisite to the beneficial enjoyment of his property by the owner that no man can be deprived of them otherwise than by an instrument to that effect voluntarily executed by him or upon receipt of compensation adjudged to him by process of law, and the ordinary courts of the country are the courts wherein all differences between parties as to the nature, location and number of the crossings they are entitled to have, and all other matters incidentally arising are to be adjudicated upon and determined. These courts having jurisdiction to compel the construction of all such crossings as can be reasonably required have jurisdiction over every matter incidentally arising, and can, therefore, award pecuniary compensation also, if it should appear to be more reasonable that the land owner should be supplied with a less convenient crossing, with pecuniary compensation for difference in convenience, than that the railway company should be compelled specifically to give a more convenient crossing, as, for example, an under crossing, which, although it would afford the utmost amount of convenience, could be constructed only at a cost altogether disproportionate to the value of the farm upon which it was desired to be constructed, or disproportionate to the convenience which, when constructed, it would afford. The interests of both parties must in all cases be equitably con-

sulted. It would be quite unjust to compel a railway company to construct an under crossing through an embankment, the cost of constructing which would be quite disproportionate to the value of the land separated or in excess of fair compensation for the injury the farmer might sustain from his not having such particular crossing, if a reasonably convenient crossing throgh it may be less convenient can be given elsewhere. The court, no doubt, has the power, in a proper case, to compel by its decree a railway company to construct an under crossing, instead of rendering satisfaction in damages to the farmer for his not having such a crossing, and this power and jurisdiction is founded not upon any contract, but is an inherent power in the court, arising of necessity to enable it to do justice between the parties. Whether the court shall or not exercise this jurisdiction is quite discretionary with it in view of the circumstances of each particular case. The defendants, by giving to the plaintiff for the period of eleven years' permission to cross the railway under the trestle work which was but a temporary construction, have not, I think, become absolutely bound to give to the plaintiff an under crossing through a permanent embankment substituted now for the trestle work; the question, however, of what would be reasonably sufficient crossings is still open to the court which is bound to weigh in an equal scale the interests of both parties. The learned judge who tried this case has expressed the opinion that from the nature of the ground the undercrossing claimed is of such importance to the plaintiff that adequate compensation cannot be given to him in damages. I must say that I fail to see the evidence upon which this opinion is founded, and I cannot well see how it can be supported in the presence of the evidence of the plaintiff himself, who seems to have valued the want of it at $350.00, the amount

1886

CANADA SOUTHERN RWY. CO. v. CLOUSE.

Gwynne J.

by which he reduced his claim, which was for $1,000 00 when he was under the impression that he could not have this under crossing, to $650.00 when he understood that he could have it, thus, in effect, signifying his own estimate of the injury the want of the under crossing would do to him to be $350 00. Now, the evidence shows that the cost to the defendants of the crossing under the permanent embankment proposed to be constructed would be from $2,500.00 to $3,000.00, a sum of money so disproportionate to the plaintiff's own estimate of the amount he should have received on the supposition that he was not to have it (and I cannot but think also to the value of this little farm of the plaintiff's, consisting only of 50 acres) that I do not think a case is made which justifies the decree which was made in the court of first instance. The defendants, it is admitted, have already supplied one surface crossing upon this little farm; if another, or more, is or are reasonably necessary for the convenient enjoyment of his farm by the plaintiff he is entitled to them, and he is entitled to have that question enquired into and determined by the court in this action, which is so framed that the court can award whatever relief the plaintiff may be entitled to and the nature of the case may require. The court is by the suit in possession of the whole case, and in the suit the rights of the parties must be conclusively determined, instead of remitting the case to the arbitrators to award compensation, the course which is directed by the decree as varied by the Court of Appeal for Ontario.

The opinion which I have above expressed is founded upon, and is supported by, decisions of the Court of Appeals for the state of New York, in cases upon statutes similarly worded and which (concurring as I do in their soundness) I do not hesitate to adopt. The cases I refer to are *Wademan* v. *Albany and Susquehanna Ry. Co.* (1); *Clarke* v. *Rochester, Lockport & N.*

(1) 51 N. Y. 570.

F. Ry. Co. (1); *Smith* v. *N. Y. & Oswego Ry. Co.* (2); *Jones* v. *Sleighman* (3).

The result at which I have arrived is that the decree of the court of first instance should be varied as follows:

Declare that the plaintiff is entitled to have constructed and maintained for him by the defendants all farm crossings reasonably required, as necessary for the beneficial enjoyment of the lands separated by the defendants railway as it passes through his farm of 50 acres in the pleadings mentioned. Refer it to the master to enquire and report whether the one surface crossing already supplied by the defendants is reasonably sufficient for the enjoyment of his farm by the plaintiff, and if not in his opinion so reasonably sufficient then and in that case he is to enquire and report how many crossings, and where situate the defendants are willing to supply, or it would be reasonable to require that they should supply.

Dissolve the interlocutory injunction reserve all further consideration with costs.

Allow the appeal of the defendants the railway company and dismiss the cross-appeal of the plaintiff with costs.

Appeal allowed and cross appeal dismissed with costs.

Solicitors for Appellants: *Kingsmill, Cattenach & Symons.*

Solicitors for Respondents: *Tisdale & Robb.*

(1) 18 Barb. 350.
(2) 63 N. Y. 61.
(3) 81 N. Y. 194.

1885
*May 21, 22.
1886
*April 9.

THE CANADA SOUTHERN RAILWAY COMPANY (DEFENDANTS).. } APPELLANTS;

AND

JAMES ERWIN (PLAINTIFF)... .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Farm crossing—Agreement for cattle pass—Construction of—Liability of railway company to maintain—Substitution of solid embankment for trestle bridge.

In negotiating for the sale of lands taken by the Canada Southern Railway Company for the purposes of their railway the agent of the agent of the company signed a written agreement with the owner, which contained a clause to the effect that such owner should "have liberty to remove for his own use all buildings on the said right of way, and that in the event of their being constructed on the same lot a trestle bridge of sufficient height to allow the passage of cattle the company will so construct their fence to each side thereof as not to impede the passage thereunder."

Held, reversing the judgment of the court below, Ritchie C. J. dissenting, that under this agreement the only obligation on the company was to maintain a cattle pass so long as the trestle bridge was in existence and did not prevent them from discontinuing the use of such bridge and substituting a solid embankment therefor without providing a pass under such embankment.

APPEAL from a decision of the Court of Appeal for Ontario (1) varying a decree of Mr. Justice Ferguson in the Chancery Division of the High Court of Justice.

The facts of the case are similar to those of *The Canada Southern* v. *Clouse*, and will be found set out in the reports of both cases in the courts below and in the judgment of Mr. Justice Gwynne.

This appeal was heard at the same time as the appeal

---

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

(1) 11 Ont. App. R. 306.

1886

CANADA SOUTHERN RWY. CO. v. ERWIN.

Ritchie C.J.

in Clouse's case, the same counsel appearing for the parties respectively.

Sir W. J. RITCHIE C.J.—I agree with Mr. Justice Patterson that the right of the plaintiff is to have the state of things which has existed for the last ten years maintained, unless and until the company shall proceed under the statute to acquire a right to do what they now propose to do.

I am of opinion that the appeal should be dismissed.

GWYNNE J.—This case differs from that of Clouse against the same defendants in this that an agreement was reduced to writing by the solicitor of the company which was witnessed by him and signed by Mr. Tracey at the time that Smith, the then owner of the land of which the plaintiff is now proprietor, executed a deed granting to the defendants the land taken for their railway on lot No. 12 in the 9th concession of Townsend, this agreement is as follows:—

The Canada Southern Railway Company by John Avery Tracey, their duly constituted agent for the purchase of right of way, do hereby agree with James H. Smith, the owner of lot twelve in the ninth concession of Townsend, his heirs and assigns as follows:—

The said Smith having sold to the said company the right of way over lot number twelve in the ninth concession of the Township of Townsend, containing four acres and seventeen hundreths of an acre at and for the price of one thousand six hundred and fifty dollars and having given a conveyance to the said company for the same, it is hereby, notwithstanding such conveyance, agreed between the said parties that for the period of five years from the date of this agreement the said Smith, his heirs and assigns shall have possesion, undisturbed by the said railway company, of the woodshed and ground on which it is erected at the rear of his house and on the right of way so conveyed, and the fence of the said railway shall be so constructed as to leave a passage of at least five feet wide for the use of the said Smith, his heirs and assigns between the said woodshed and the railway fence and the said fence shall run from a point five feet south of the south-easterly corner of the said woodshed in a straight line to the south-easterly corner of a barn now standing

1886

CANADA SOUTHERN RWY. CO. v. ERWIN.

Gwynne J.

on the fence line of the said railway and shall so remain during the space of five years as aforesaid, and it is hereby agreed that the said company shall give such further assurance as may be deemed necessary to carry out this agreement which is hereby declared part of the consideration for the said conveyance. Dated September 26th, 1871.

This instrument was signed by Tracey and witnessed by Mr. Kingsmill, the solicitor of the company. When the agreement was produced Smith objected to it as insufficient in not providing for a cattle pass and other things which he insisted had been agreed upon, accordingly Mr. Kingsmill wrote on the back of the said agreement a further clause which was also signed by Tracey and witnessed by Mr. Kingsmill, which is as follows:—

It is further agréed, and it is to be taken as part of the within agreement, that the within named Smith shall have liberty to remove for his own use all buildings on the said right of way and it is also further agreed that in the event of there being constructed on the said lot a trestle bridge of sufficient height to allow of the passage of cattle the said company will so construct their fence on each side thereof as not to impede the passage thereunder. Dated September 26th, 1871.

No case for the reformation of this agreement so as to make it an agreement for a perpetual cattle pass under the railway at the place in question, whatever might be the character of the superstructure, has been established in evidence. The plaintiff's right, therefore, to recover in this suit must depend upon the construction of the agreement as it stands. The parties to the agreement must be regarded as being the best judges of what it was they were intending to provide for. Now it is to be observed that the pass spoken of in the agreement is not a "farm crossing," which, as I have already said in Clouse's case, is, in my opinion, a convenience which, unless a proprietor of lands severed by a railway accepts pecuniary compensation for being deprived of, or voluntarily releases his right thereto, is

1886

CANADA SOUTHERN RWY. CO. v. ERWIN.

Gwynne J.

a necessity for the use and enjoyment of the severed lands which the law provides for apart from any contract. The language of the agreement is that—

> In the event of there being constructed a trestle bridge of sufficient height to allow of the passage of cattle, the company will so construct their fences on each side as not to impede the passage thereunder.

All that such language can be construed as providing for is a passage for cattle only, and that conditional upon there being a trestle bridge of sufficient height to permit of such a passage. This agreement so conditioned cannot be construed as depriving the company of the right to discontinue the trestle bridge, which was erected as a temporary structure, and to construct an embankment in its stead unless they shall construct a cattle pass in the embankment. The agreement does not contemplate that there should be provided a cattle pass under an embankment. As, then, the "cattle pass" can only be claimed under the written agreement, the obligation of the company, which is to construct their fences so as not to impede the passage of cattle under a trestle bridge if such should be erected of sufficient height so as to permit of the passage of cattle under it, cannot have any binding effect if and when the trestle bridge shall no longer exist. The two things are very different, namely, constructing fences so as to permit cattle to pass under a trestle bridge, and constructing an arch, of sufficient dimensions to permit the passage of cattle under an embankment, the cost of which work might be in excess of the whole value of the severed lands. The plaintiff's statement of claim in this case should, in my opinion, have been dismissed with costs, but such dismissal would not operate against any claim, if any, which the plaintiff may have under the law for such farm crossings or farm crossing, as may be necessary

1886

CANADA SOUTHERN RWY. CO. v. ERWIN.

Gwynne J.

for the reasonable enjoyment of the severed lands. The appeal of the defendants therefore, in my opinion, in this case should be allowed with costs, and the statement of claim of the plaintiff be ordered to be dismissed in the court below with costs.

FOURNIER, HENRY and TASCHEREAU JJ.—Concurred.

Appeal allowed, and cross appeal dismissed with costs.

Solicitor for appellants: *Kingsmill, Catanach and Symons.*

Solicitors for sespondent: *Tisdale & Robb.*

1885

*Nov. 3.

1886

*March 6.

JAMES LORD, *et al*, (Defendants)..... .....APPELLANTS.

AND

THOMAS HENRY DAVIDSON (Plaintiff) ..... } RESPONDENT.

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

Charter party—Deficient cargo—Dead freight—Demurrage.

By charter party the appellants agreed to load the respondent's ship at Montreal with a cargo of wheat, maize, peas or rye, "as fast as can be received in fine weather," and ten days demurrage were agreed on over and above lying days at forty pounds per day. Penalty for non-performance of the agreement, was estimated amount of freight. Should ice set in during loading so as to endanger the ship, master to be at liberty to sail with part cargo, and to have leave to fill up at any open port on the way homeward for ship's benefit.

The ship was ready to receive cargo on the 15th November, 1880, at 11 a.m., and the appellants began loading at 2 p.m. on the 16th November. After loading a certain quantity of rye in the forward hold, as it would not be safe to load the ship down by the head any further, the captain refused to take any more in the

---

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

1885

LORD
v.
DAVIDSON.

forward hold. No other cargo was ready, and as the appellants would not put the rye anywhere except in the forward hold, the loading stopped. At 8 a.m. on the 19th the loading recommenced and continued night and day until 6 a.m. Sunday, the 21st, at which time the vessel sailed, in consequence of ice beginning to set in. When she sailed she was 214½ tons short of a full cargo. If the ice in the canal had not detained the barges having grain to be loaded, the vessel could have been loaded on the night of the 19th. The respondent sued appellants because ship had not received full cargo, and claimed 2½ days, 15th, 16th and 17th of November, and freight on 214½ tons of cargo not shipped. The appellants contended delay was not due to them but to the ship in not supplying baggers and sewers to bag the grain. That the time lost on the first week was made up by night work, and that mere delay in loading could not sustain claim for dead freight.

The Superior Court gave judgment for the respondent for the dead freight but refused to allow demurrage. This judgment was affirmed by the Court of Queen's Bench (appeal side).

On appeal to the Supreme Court of Canada.

Held, affirming the judgment of the court below, Henry J. dissenting, that as there was evidence that the vessel could have been loaded with a full and complete cargo without night work before she left, had the freighters supplied the cargo as agreed by the charter party, the appellants were liable for damages and that the proper measure of the respondent's claim was the amount of agreed freight which he would have earned upon the deficient cargo.

That the demurrage days mentioned in the charter referred to, and were over and above, the laying days and had no reference to the loading of the ship.

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

This action was instituted by the respondent, as owner of the S. S. "Whickham," for two and a half days' demurrage (£100) and for dead freight (£313).

The judgment of the court of the first instance allowed the dead freight (£313), rejecting the claim for demurrage.

From this judgment an appeal was taken by the appellants to the Court of Queen's Bench, (appeal side),

1885

LORD v. DAVIDSON.

and also a cross appeal for the demurrage by the respondent.

The Court of Queen's Bench confirmed the judgment of the court of first instance, and rejected the cross appeal.

The circumstances which gave rise to the action are fully stated in the head note and in the judgments hereinafter given (1).

Kerr Q.C. for appellants.

H. Abbott for respondent.

Sir W. J. RITCHIE C.J.—The respondent's (plaintiff) vessel the "Whickham" was chartered by the appellants (defendants) for a voyage from Montreal to the United Kingdom or continent. The ship was to load with a cargo of wheat, maize, peas and rye.

The only portion of the charter-party bearing on the present case, is the clause which provides that the ship should be loaded as fast as the cargo can be received in fine weather. The ship was to have an absolute lien on the cargo, dead freight and demurrage. Should ice set in during the loading so as to endanger the safety of the ship, the master to be at liberty to sail with part cargo and have leave to fill up at any open port on his way homeward for the ship's benefit

The plaintiff sued for dead freight, claiming that the ship could have been loaded with a full cargo if the defendants had not been negligent in supplying the cargo alongside. He also claimed demurrage two and a half days, the 15th, 16th and a part of the 17th of November. The dead freight claimed is on 214½ tons of cargo not shipped.

The ship left before receiving a full cargo under the provisions of the charter-party, by reason of the danger she was in from ice. The defendants contend that the delay was not due to them, but to the ship.

(1) See also M. L. R. 1 Q. B. 445.

1886

LORD v. DAVIDSON.

Ritchie C.J.

The claim in this case, is for dead freight and demurrage. The claim for dead freight arises in consequence of the failure to finish a full cargo. Dead freight denotes a sum agreed to be paid in respect of space not filled according to charter-party or damages provided for by the charter-party, in the event of the freighter not loading a full cargo. It is defined to be simply "an unliquidated compensation recoverable by the ship-owner from the freighter for a deficiency of cargo." And again "for the loss of freight, recoverable in the absence, or place of freight." In this case, the freighter agreed to load a full and complete cargo, and therefore he must have known, that if he failed to perform his agreement, he would be liable to the ship-owner in damages, under the name of dead freight, which damages however, in this case, cannot be considered unliquidated, because, by the express terms of the agreement, the proper measure of the ship-owners claim, is to be the amount of the agreed freight, which he would have earned upon the deficient cargo. Had there been no stipulation as to the measure of damages, then it may well be, as suggested by Lord Westbury in *McLean* v. *Fleming* (1), that unless a specific sum is fixed for dead freight all reasonable charges should be deducted, and in such a case, "in a charter-party giving no specific sum as the amount to be recovered by way of compensation for dead freight, the ship-owner becomes entitled only to a reasonable sum, which is another phrase for unliquidated damages."

In this case a specific sum was fixed for dead freight, in these terms: "Penalty for non-performance of this "agreement, estimated amount of freight." If, therefore, the ship owner was in fault, the estimated amount of freight on the cargo she might have received but for this default, would be the estimated amount of freight

(1) L. R. 2 Sc. App. 128.

1886

LORD v. DAVIDSON.

Ritchie C.J.

the ship would have earned but for such default.

The vessel is to be loaded as fast as the cargo can be received in fine weather; the cargo is to be brought to and taken from alongside the ship at ports of loading and discharge at merchant's risk and expense. These clauses cast on the charterer the duty of providing the cargo alongside as fast as it could be received in fine weather. The facts sufficiently show, in the absence of any evidence to the contrary, that the Port Warden's certificate was sent to the appellants office before noon of the 15th of November, and therefore the loading should have commenced on that day; but assuming that it was received after twelve o'clock of the 15th, the charterer did not commence loading until one o'clock p.m. of the 16th.

Without occupying time in going over the evidence in detail, I think it shows that had the cargo been supplied, and the vessel loaded, from the time she was ready to take in cargo, or from the sixteenth, as fast as she could have received it, she would have been loaded with a full and complete cargo before six a.m. of the twenty-first, when she sailed. There was ample evidence, in my opinion, in fact, to show that had the loading been begun when, and continued, as it should have been by the freighters supplying the cargo as required, a full cargo could have been loaded by Friday, the nineteenth, without night work, and she did not, in fact, leave until Sunday, the twenty-first. As to the loss of time from two o'clock of the seventeenth, when loading was stopped by the Captain's order, up to eight a. m, on the nineteenth, it arose entirely from the default of the shippers, the captain was justified in refusing to allow any more grain to be put in the forward hold, and the shippers should have been prepared with cargo to go on with the loading in a proper manner, and not being in a

1886

LORD v. DAVIDSON.

Ritchie C.J.

position, or willing to do so, the responsibility for the delay must rest with them; and therefore, I think the judgment right, and the appeal should be dismissed with costs, and costs in the court below except the costs of the respondent's cross appeal which should be dismissed with costs; because, as to the question of demurrage, the two days on demurrage mentioned and awkwardly interlined in the charter-party clearly refer to and are over and above the laying days which are the running days allowed for discharging cargo, commencing from the time of the ship's being ready to deliver cargo, necessarily at the port of destination and have no reference to the loading of the ship; and therefore, there is no ground whatever, for any claim for demurrage.

As to the vessel sailing at the time she did, the provision is,—

> Should ice set in during the loading so as to endanger the ship, the master to be at liberty to sail with part cargo, and to have leave to fill up at any open port on the way homeward, for ship's benefit.

This clearly shows, that if there were no laches on either side, but should ice set in, as mentioned, before a full cargo was loaded, then neither party could have any claim on the other, neither party being to blame; and the ship-owner would be entitled to freight on the cargo she was in a position to avail herself of at an open port for ship's benefit. The evidence clearly shows that the ship was entirely justified, from the state of the weather, in leaving, at the time, and under the circumstances she did. I do not think that the exercise of the option to leave without a full cargo, by any means absolved the appellants from their obligation fully to load the ship, for their failure to do so, arose from their own laches.

FOURNIER J.—Par la charte-partie, les affréteurs, Lord et autres s'étaient engagés à fournir à l'intimé, un

1886

LORD v. DAVIDSON.

Fournier J.

chargement de grains pour le steamer Wickham, en livrant le fret aussi promptement qu'il pouvait être reçu dans le beau temps (*ship to be loaded as fast as cargo can be received in fine weather*). Le steamer fut prêt paraît-il à recevoir son chargement le 15 novembre 1880, à 11 heures a. m, mais il n'est pas prouvé que le certificat du maître du hâvre ait été livré à temps pour mettre les chargeurs en demeure de procéder ce jour-là même au chargement. Il n'est pas contesté toutefois qu'ils auraient dû commencer le lendemain matin, le 16. Cependant ils ne furent prêts à commencer qu'à deux heures de l'après-midi. Après avoir pris une certaine partie de la charge consistant en seigle (*rye*), dans les compartiments de l'avant, rien n'ayant été mis au centre ni à l'arrière, le steamer se trouvait tellement incliné que son avant plongeait de trois ou quatre pieds de plus que le reste. Le commandant crut qu'il n'était pas prudent pour la sûreté du navire de laisser mettre plus de fret dans cette partie du vaisseau, avant qu'il n'en eût été mis assez dans les autres compartiments pour remettre le vaisseau sur la ligne droite et, fit alors défense d'en mettre davantage dans le compartiment de l'avant. Les affréteurs avaient encore du seigle (*rye*) pour continuer le chargement, mais comme ils avaient destiné les autres compartiments à recevoir du blé-d'inde et qu'ils n'en avaient pas alors à fournir, ils suspendirent le chargement.

Ces retards dans le chargement, dûs à ce que le grain des appelants étaient dans des barges retenues par les glaces dans le canal Lachine, firent perdre au moins une journée et demie à deux jours de temps, c'est-à-dire plus qu'il n'en aurait fallu pour compléter le chargement. Il est prouvé que le chargement aurait pu être mis abord le mercredi soir, si les glaces n'avaient pas retardé l'arrivée des barges contenant le grain des appelants. L'arrimeur John Britt dit qu'il en a chargé

1886

LORD v. DAVIDSON.

Fournier J.

un de même capacité en 27 ou 28 heures.

Par suite de ces retards, et la saison étant très avancée, le commandant du steamer craignant de se voir retenu par les glaces et obligé d'hiverner en Canada, donna avis aux appelants qu'il laisserait le port, dimanche matin, 21 novembre sans attendre plus longtemps pour un chargement complet. Dans ces circonstances le propriétaire Davidson réclame les dommages qui furent stipulés par la charte-partie comme suit :

Penalty for non performance of this agreement, estimated amount of freight.

La somme de £313 représentant d'après la charte-partie la différence entre la quantité de chargement reçu et le chargement complet lui a été accordée par la Cour Supérieure dont le jugement a été confirmé. Bien que ce ne soit pas par refus ou négligence de leur part que les appelants n'ont point livré un chargement complet, cependant comme ils ne se sont pas mis en garde contre les accidents et les retards qui pouvaient empêcher leur grain d'arriver à temps, ils doivent subir la pénalité à laquelle ils se sont soumis sans condition.

Les intimés ont réclamé £100 pour surestarie (*demurrage*), mais cette somme leur a été justement refusée. Comme il n'y avait pas de délai fixé pour opérer le chargement, ce n'est pas à titre de surestarie (*demurrage*) mais à titre de dommage qu'ils auraient pu réclamer une indemnité pour délai dans le chargement, mais l'indemnité pour dommage ayant été réglée par la convention il n'y a pas lieu d'en accorder d'autre que celle qui a été convenue.

Par la dernière clause de la charte-partie, il est convenu que si durant le chargement, la glace mettait en danger la sûreté du bâtiment, le commandant aurait la faculté de partir avec ce qu'il aurait de chargement, et qu'il lui serait loisible de le compléter dans son voyage de retour pour le bénéfice du vaisseau. Cette clause ne

1886

LORD v. DAVIDSON.

Fournier J.

peut pas être invoquée par les appelants, car il est clair d'après la preuve que sans les délais survenus dans le chargement, le vaisseau aurait pu laisser le port de Montréal avant le dimanche matin, 21 novembre, comme il a été forcé de le faire à cause du danger dont il était menacé par les glaces qui s'étaient formées en grandes quantités et menaçaient d'arrêter la navigation d'un moment à l'autre. Appel renvoyé avec dépens.

HENRY J.—The respondent, who resides in England, was on the 20th of October, 1880, the owner of a steamship called the "Whickham," then on her way with a cargo from Barrow, in England, to Montreal. On that day a charter party of affreightment was entered into between the parties to this action, as follows :—

CHARTER PARTY.

Montreal, 25th October, 1880.

It is this day mutually agreed between T. H. Davison, owner of the good steamship or vessel, called the "Whickham," of the measurement of about quarters capacity, 1,124 tons net register, or thereabouts, whereof ——— is master; now on way to this port with cargo from Barrow, and Messrs. Lord & Munn, of Montreal, merchants;

That the said ship being tight, staunch and strong, and every way fitted for the voyage, shall, with all convenient speed (with leave to take outward employment as above, and to coal at Sydney, C.B., outward or homeward) sail and proceed to Montreal at least ⅔ cargo to be wheat, maize, peas and "or" rye, or so near thereto as she may safely get, and there load, always afloat, from the said merchant's agents, a full and complete cargo of wheat and or maize, and or peas in bulk, and "or" rye or other goods; oats if shipped, and "or" barley, not to exceed ⅓ cargo, and "or" flour not exceeding 2,000 barrels; petroleum and its products excluded; (the vessel to line and dunnage and load under the inspection of the Port Warden as customary), which the said merchants are hereby bound to ship, not exceeding what she can reasonably stow and carry, over and above her tackle, apparel, provisions and furniture; and being so loaded therewith proceed to a safe port in the United Kingdom; or on the continent, between Havre and Hamburg inclusive, Amsterdam and its approaches excluded; (calling at Queenstown, or Falmouth, or Plymouth, at the master's option, for orders, which are to

be given the master within 12 hours of arrival, or lay days to count for detention beyond that time) or so near thereunto as she may safely get, and deliver the same always afloat at all tides on being paid freight in cash at the following rates, without discount or allowance, in full of all port charges, pilotage and dues:—

	Wheat, Maize, or peas, per 480 lbs.	Barley, per 400 lbs.	Oats, per 320 lbs.	Flour, per bar'l
	s. d.	s. d.	s. d.	s. d.
To the U. K. for orders or continent direct.....	6 3	5 3¾	4 10½	3
To the U. K. for orders to discharge on continent.		Ten per cent. additional.		
To the U. K. direct, orders on signing B. L.....	6	5 1	4 7¾	21 0½

Charterers option cancelling if not arrived here by 10th November.

If other lawful merchandise (petroleum and its products always excluded) be shipped, the charterers engage to pay the same total amount of freight as the ship would make with a full cargo of wheat at the above rates.

(The act of God, the Queen's enemies, restraints of princes, pirates, fire, damage by collision, leakage, vermin, sweating, and all and every other dangers and accidents of the seas, rivers, boilers and machinery and steam navigation, of what nature and kind soever, before and during the said voyage, being always excepted.)

Cash for ship's use at port of loading not exceeding £600 to be supplied on account of freight at the current rate of exchange, subject to insurance. Ten running days, sundays excepted, are to be allowed the same merchant (if the ship be not sooner despatched) for discharging; commencing from the time of ship being ready to deliver cargo.

Ship to be loaded as fast as can be received in fine weather and ten days on demurrage, over and above the said lying days at forty pounds per day; lighterage if any to be at merchants risk and expense.

If the vessel is ordered direct or from a port of call to any port on the continent where she may be prevented from entering owing to insufficiency of water, lay days are to commence from date of arrival in the roads, custom or alleged custom to the contrary notwithstanding. If ordered to London, cargo to be discharged immediately after the arrival of steamer, or the captain has the power to discharge it into craft and "or" land it at expense and risk of the consignees, but no discharge to the place after dark.

The ship to be allowed to call at intermediate ports for coaling or

1886

LORD
v.
DAVIDSON.

Henry J.

other purposes; to sail with or without pilots; to tow and be towed, or otherwise assist vessels, without prejudice to this charter.

The cargo to be brought to and taken from alongside the ship, at ports of loading and discharge, at merchant's risk and expense.

The captain to sign bills of lading at any rate of freight without prejudice to this charter, provided all difference of freight to the ship's credit be first paid him in cash.

The ship to have absolute lien on the cargo for all freight, dead freight and demurrage, due under this charter party, but charterer's responsibility to cease upon shipment of the cargo, provided the cargo be worth the freight, demurrage, &c., on arrival at the port of discharge. The vessel to be addressed at port of loading to Carbray Routh & Co., free of address commission.

A commission of five per cent. is due by the ship to Carbray Routh & Co., on the amount of freight, demurrage, &c., ship lost or not lost. Penalty for non-performance of this agreement, estimated amount of freight.

Should ice set in during loading so as to endanger the ship, master to be at liberty to sail with part cargo, and to have leave to fill up at any open port on the way homeward for ship's benefit.

The "Whickham" arrived and discharged her cargo at Montreal, and is alleged to have been ready to receive her outward cargo on the 15th of November. It is also alleged that a certificate of the Port Warden that she was so ready signed by him was before noon of that day served on the appellants. Such service is denied and there is no evidence to sustain the allegation of service beyond a statement of Mr. Routh, the ship's agent, that he sent it by a messenger before that hour.

By the usage and custom of the port the charterer is bound to commence loading on the day the notice is given, if served before noon, otherwise the obligation to commence loading is postponed to the following day.

The appellants continued the loading until the morning of the 21st, when the master refused, for the reasons that will hereafter appear, to take any more cargo.

It is shown that during the loading the weather was cold and stormy, with occasional falls of snow, which, to some extent, delayed the operation. On the 20th the

master of the "Whickham" gave notice to the appellants, that on account of the threatening state of the weather and ice beginning to set in, he had decided, for the safety of his vessel, to start in the morning of the following day, the 21st November, and he did so start. In doing so, I think, under the circumstances he was justified, as the evidence shows that had he remained longer there was risk of the vessel being frozen in port for the winter, or of being lost or damaged if she sailed. It is shown that she so sailed with a cargo short of her carrying capacity to the extent of two hundred and fourteen and a-half tons, amounting to £313 sterling for the freight. The respondents claim to recover that amount in the present action, together with £100 for demurrage under the clause in the charter party.

Ship to be loaded as fast as can be in fine weather, and ten days on demurrage. Over and above the said lying days at forty pounds per day.

It is generally the custom to insert in a charter party the number of days allowed for loading, and a provision for the rate of demurrage, if beyond the number of days specified. The charter party in this case was made by using a printed one with the necessary blank and filled in and altered by Mr. Routh. It seems to me that the provision for demurrage is wholly inapplicable to the circumstances in this case. No number of days was stated or agreed upon, but the ship was to be loaded "as fast as can be received in fine weather." It is clear that the clause in question which provides for "ten days on demurrage over and above the said lying days" cannot be reconciled with the provision that the master might sail with part cargo, if ice set in during the loading so as to endanger the ship.

Taking the whole of the charter party into consideration (which is the proper mode of construing it when

1886

LORD v. DAVIDSON.

Henry J.

the provisions are doubtful or antagonistic), I am of the opinion that demurrage was not intended to be provided for as part of the contract.

By the contract appellants undertook to load the ship as fast as she could receive the cargo in fine weather, and if the respondent has shown they did not do so and that the master was justified in sailing with part cargo, as I think he was, under the agreement, the respondent is entitled to damages for the cargo short shipped but not to demurrage. Demurrage is but liquidated damages by law or by agreement of parties. The respondent in this case claims both demurrage and loss of freight, but it is clear to me that if he is entitled to recover at all it is but damages for the loss arising by the short shipment of cargo.

The respondent charges substantially that the appellants thereto had commenced to load on the fifteenth of November and to continue uninterruptedly from such commencement to furnish cargo as fast as the ship could receive the same, and that had they done so the full cargo would have been loaded before the ship sailed, and inasmuch as she had to sail with a part cargo and the appellants having undertaken to provide a full cargo and failed to do so, they are liable to pay him for the freight short of what he was entitled to.

The appellants by their pleas, after denying everything contained in the respondents declaration, except as admitted by their pleas, allege that they were not obliged to commence loading, according to the usage of the port, until the sixteenth, on which day they commenced and continued during the working hours of that day; that from 7 o'clock, a.m. on the seventeenth they proceeded with the loading of rye until two o'clock in the afternoon, when they were stopped by the master; that when so stopped they had grain alongside more than sufficient to occupy the whole of said

1886

LORD v. DAVIDSON.

Henry J.

day; that on the eighteenth snow fell from 2 o'clock, a.m. till 3 o'clock in the afternoon; that they had seven thousand bushels of rye then alongside, which the weather prevented their putting on board during that time; that on the nineteenth they worked in loading all day and all night, and the same on the twentieth, up to the time of the vessel's leaving; that they were obliged by the custom of the port to work in loading but eleven hours a day, and that the constant working during the nights of the nineteenth and twentieth more than made up for any loss of time in the loading that might be imputed to them, and that when the vessel sailed they had alongside sufficient rye and other grain to fill up the vessel.

The appellants further pleaded that under the agreement and the custom of the port the ship was bound to supply persons known as "baggers" to bag the grain as it was put on board, but did not supply a sufficient number or a sufficient number of stevedores, and thereby impeded the loading to the extent of the balance of the cargo unshipped, which was alongside ready to be shipped.

The respondent by his replication after a general denial of the allegations contained in the pleas specially denies that the appellants were only to work at loading eleven hours each day, but were bound by the charter party and by the custom of trade and port in such cases to load as fast as possible night and day.

He also specially denies that he failed to supply the requisite number of baggers and stevedores, and avers that he and his agents did their best and the utmost in their power to supply them, and specially denies that the appellants had alongside the vessel when she left Montreal sufficient rye and grain to fill her. I will deal first with the issues raised by the special denials in the replication.

1886

LORD
v.
DAVIDSON.

Henry J.

1st. As to the obligation of the shippers by the charter party and the custom of the trade and of the port to furnish cargo night and day, it is necessary to look at the evidence, the charter party being silent as to that point. I can find no evidence to sustain the respondent's contention as to the custom of trade or of the port. On the contrary the evidence shows that a master is not bound to receive cargo during the night, and he can refuse to do so at dark. Masters sometimes do so, but it is quite well understood they are not bound to do so. No custom can bind one party to a contract unless both are bound, and no binding custom can exist which depends on the option of one of two parties. Such being the case the appellants cannot be concluded under this contract, and assumed to have agreed to furnish cargo at night in the absence of a special contract to do so. They, when sought to be made answerable for the consequences of failure to ship a certain quantity within a certain number of hours, may fairly say: "we were only obliged to ship during eleven hours "each day, and we have shipped during as many hours "as we would have done had we commenced on the fif-"teenth and supplied cargo eleven hours every day." If my deductions from the evidence are correct the appellants made up all the time in shipping the cargo that they were bound to employ, a part of which too was stormy and not the fine weather mentioned in the contract, and therefore are not liable for damages for short cargo.

The fact may be suggested that the vessel left with only a part of her cargo and that the contract provided for a full one. So it did, to some extent, but we should not fail to consider the provision for the interests of both parties suggested by the lateness of the season, and the chances there were that the vessel might not be able to remain long enough to take in a full cargo.

1886

LORD v. DAVIDSON.

Henry J.

It is obvious that the respondent would not run the risk of the ship being frozen up in the port, or hazard her safety by agreeing to wait long enough under any circumstances to take in a full cargo. He protected himself by the provision that he was to run no such risk, and stipulated that in case the vessel's safety required her to leave with a short cargo. She should have the right to call and fill up her cargo on ships account at any intermediate ports. Provision was, therefore, made not only to exonerate the ship for leaving before being fully loaded, but to earn the balance, if any, of freight by calling at any intermediate ports. The respondent by his master availed himself of the license to leave without a full cargo, and he had as a compensation for short freight the right otherwise to make it. Suppose he had secured the balance of freight after leaving Montreal, he could not then have had recourse upon the appellants even had they been guilty of delay in loading. I do not say, however, that he was bound to do so, or that his failure to do so would exonerate the appellants if otherwise liable, but it is an ingredient in the case to show that both parties felt when the contract was entered into, that owing to the lateness of the season the full loading of the ship might and would be impracticable within its provisions. The one party had therefore to run the risk of having only a part of his cargo shipped and the other that of having only a part of his chartered freight. The case is therefore different from one in which both have absolute rights, the one under any circumstances to furnish a full cargo and the other to wait a reasonable or stipulated time to take it on board. I admit liabilities in the one case as well as in the other, but they are in some points essentially different as to respondent's denial in respect of his alleged failure to supply a sufficient number of baggers and stevedores. His denial is at

1886

LORD v. DAVIDSON.

Henry J.

first positive, but it is materially weakened by the averment "that he and his agents and employés did "their best and the utmost in their power to supply a "sufficient number." Taking the whole together the reasonable deduction is that the baggers and stevedores were not supplied in sufficient numbers but that those representing the respondent did what they could to get them; and the evidence on the part of the appellants most clearly establishes the allegation in the plea, and I may add that to that evidence there is no substantial contradiction. The rate of taking in cargo, as admitted by the witnesses of the respondent, corroborates the statements of the witnesses for the appellants on that point, and the whole evidence on both sides leaves no doubt on my mind that if there had been all the time a sufficient number of baggers and stevedores the whole cargo might have been shipped before the vessel sailed. Griffiths, the shipping clerk of the appellants, was examined as a witness on the trial, and states that the day and night of the twentieth up to the time of the vessel leaving, 19,500 bushels were shipped, and that had there been a sufficient force of baggers and stevedores they could have loaded in that time at least 40,000 bushels. He stated:

The delay was caused by the scarcity of general labour. It was through the small number of bag sewers and the scarcity of the general labour on the ship, of course the labour generally would be regulated by the number of sewers, but the first cause is the scarce number of sewers.

When asked:

If there had been baggers enough on board the vessel to meet the grain, when could the loading have been finished, working as you did?

He replied:

By Saturday afternoon.

His testimony on this point is sustained by that of several other witnesses. Pierre Boutet states that for

five hours during the night of the 19th, the ship took on board 2,433 bushels, and that had there been baggers enough and the necessary labor on the ship they could have loaded 10,000 bushels.

Arthur Ritter, an engineer on board one of the elevators employed in loading the vessel, proves that 2,000 bushels an hour is about the usual rate to be shipped on board a steamship when there are sufficient baggers and others on board to receive it. He also proves they were delayed by the insufficiency of the baggers. He says that from five to nine o'clock of the morning of the 21st, the ship received but 1,318 bushels, and that "they could have bagged that in an hour if they men "enough."

W. Routh, the ship's agent, who was actively engaged about the loading being asked as to the delay alleged to have been caused by the small number of baggers, replied that he was continually present at the loading and could not answer that question, but he subsequently added:

I know we were constantly after the contractor for the baggers to obtain more men to expedite the ship.

Mr. Routh also states that with a sufficient number of baggers 2,000 bushels an hour may be loaded. When asked:

Was it possible to get more than a single gang of ten men, four boys and a foreman on Saturday night? Replied we were pushing Redden (meaning the contractor) and he assured us it was an impossibility.

It is obvious, taking the testimony of the appellants' witnesses, sustained as it is by by the statements of Mr. Routh, that delay was caused in the shipments by the ship not being able, through a sufficient number of baggers and others to receive the cargo as fast as it should have done, and that to that delay may be ascribed the failure to fill up. If the ship was to receive and stow the cargo as is always its duty, and that to perform

1886

LORD v. DAVIDSON.

Henry J.

that duty so as to receive the cargo with due promptitude, a certain class and amount of labor is necessary, and that it is not engaged in sufficient quantity to prevent unnecessary delay, the owner is answerable for the consequences, and it is no answer for him to make, that he did his best, but failed to obtain such labor there. In the evidence of Mr. Routh we have the admission of his contractor Redden that sufficient labor could not be procured; it is proved otherwise that the short loading of the ship was due to that failure, and that position is not substantially contradicted. Here then is a delinquency shown on the part of the ship, which, in my opinion, should estop her owner from making the complaint of delay he has done against the appellants.

It must not be forgotten that the respondent contends that the appellants were bound to work night and day in loading; they were bound to load within a reasonable time, working during the accustomed hours, and he was equally bound to receive the cargo at the usual rate. If by his default the ship did not receive it at such rate of speed and the ship had to leave wanting a part of her cargo, the blame must fall on the ship. He who requires promptness from others should not fail in it himself, and I cannot come to any other conclusion after a most careful consideration of the facts and circumstances in evidence than that the short cargo of the ship was caused by the failure of duty on the part of the ship and that but for such, any delay on the part of the appellants would not have prevented the ship from having a full cargo when she sailed. Under the evidence I have referred to, the charge at all events of contributory negligence is proved against the respondent. The loss he claims to recover for was at all events largely caused by his own failure to receive promptly, as he was bound to do, the whole cargo having to that

extent contributed to the loss he cannot receive damages therefor from another.

The evidence has satisfied me that the whole cargo might have been shipped if taken on board as fast as it was tendered, but if I am wrong in that conclusion I am safe in saying that the evidence does not sustain the respondent's claim as one without such reasonable doubts as should be absent to entitle him to recover.

I am therefore of opinion that the appeal should be allowed and judgment entered for the appellants with costs.

TASCHEREAU J.—This action was instituted by the respondent, as owner of the S. S. "Whickham," for two and a half days' demurrage at £40 per day (£100. 0. 0.) and for dead freight (£313. 0. 0.) The judgment of the Superior Court allowed the dead freight but rejected the claim for demurrage. The appellants appealed from this judgment to the Court of Queen's Bench, (appeal side), and a cross appeal for the demurrage was taken by the respondent. The Court of Queen's Bench maintained the judgment of the Superior Court for £313, and rejected the appeal of the respondent for demurrage. From this judgment the appellants have appealed to this court. There is no cross appeal before this court by the respondent from the judgment dismissing his claim for demurrage. The question involved is one of fact, that is: as to whether the loading of the vessel at Montreal was delayed by the acts of the respondent or of the appellants. Whether, by the charter party the lay day or days on demurrage stipulated for therein apply to the loading or only to the discharging of the vessel is also in issue. The following are the facts of the case: The "Whickham" was chartered by the appellants by a charter party entered into between them as merchants and the respondent as owner on the

1886
LORD
v.
DAVIDSON.
Taschereau J.

twenty-fifth of October, 1880; by which it was agreed that the steamship then on her way to Montreal should proceed to Montreal, and there be loaded by the appellants with a full and complete cargo of wheat or rye or other goods at rates which are not in contestation. The penalty for non-performance of the agreement by the charterers was fixed at the estimate amount of freight or what is called dead freight. The charter contains this clause:

Ten running days, Sunday excepted, are to be allowed the said merchant (if the ship be not sooner dispatched) for discharging commencing from the time of ship being ready to deliver cargo.

Ship to be loaded as fast as can be received in fine weather, and ten days on demurrage over and above the said lying days at £40 per day. Lighterage, if any, to be at merchant's risk and expense.

Owing to the lateness of the season there was a special clause as to the time of the leaving of the ship, which read as follows:—

Should ice set in during the loading so as to endanger the ship, the master to be at liberty to sail with part cargo and to have leave to fill up at any open port on the way homeward for ship's benefit.

The vessel arrived at Montreal on the eighth of November, 1880. A verbal notice of the arrival was given on the following day to the appellants by the captain and Routh, the agent.

On the fifteenth the ship, having discharged her inward cargo, was examined by the Port Warden, according to the custom of the port, and his certificate of her readiness for cargo delivered before noon to the appellants who were then bound, according to the custom of the port, to begin loading at noon on that day. They, however, had no cargo ready, and the loading only began at one o'clock on the following day; one day being thus lost. The cargo brought alongside on this day was rye alone, and was put into the number two hold of the vessel, forward, at the request of the appellant's foreman. The loading continued up to five

1886

LORD v. DAVIDSON.

Taschereau J.

o'clock in the afternoon of that day, and was re-commenced at seven o'clock on the following morning, the seventeenth.

The appellants continued loading rye into this forward hold until two o'clock in the afternoon when they were stopped by the captain, the safety of the ship being endangered by her being loaded down by the head. He accordingly refused to take any more cargo into this forward hold, and the appellants refused to put the rye, which was the only grain that they had, into any other of the holds of the vessel, as they wished to keep them for wheat alone. The appellants having no other grain ready, the loading of the vessel was stopped until eight o'clock on the morning of the nineteenth, when other grain came alongside, and the loading was continued at number two and three holds; and went on night and day until six o'clock on the morning of Sunday, the twenty-first, when the vessel sailed from the port in consequence of the setting in of the ice.

The respondent claims that the whole of the eighteenth and half of the seventeenth were thus lost by the failure of the appellants to supply grain; and that the loading of the vessel was thus delayed for one day and a half, besides the first day already mentioned. The respondent also claims that the vessel was not loaded at any time as fast as she could receive cargo; and had she been loaded from the time she was ready to take in cargo as fast as she could have received it, she would have been loaded with a full and complete cargo before sailing. When the vessel left she was two hundred and fourteen and a half tons short of a full cargo. The respondent therefore claims the freight upon these two hundred and fourteen and a half tons of cargo, at the same rate as though an equal quantity of wheat had been shipped, namely; at the rate of six shillings and three

1886

LORD v. DAVIDSON.

Taschereau J.

pence a quarter, amounting in all to the said sum of £313 sterling.

The master of the vessel on account of the threatening state of the weather and ice sailed on the morning of Sunday, the 21st. The evidence shows that he was perfectly justified in so doing. It was in fact the last ship from Montreal to get to sea that fall, and $100 extra had to be paid to the sea pilot to get her out from Quebec,

The plea to the action admitted the charter party, and the fact that the appellants were notified at or about mid-day on the fifteenth of November that the vessel was ready to receive cargo; but denied that they were obliged according to the custom of the port to begin loading until the sixteenth. The plea also admits the dates of the loading as given in the declaration, and the fact that the appellants were prohibited by the captain from proceeding with the loading on the seventeenth, inasmuch as he declared that it would be dangerous to continue. The appellants, however, state that at that time they had a large quantity of grain alongside the vessel more than sufficient to occupy the whole of that day; and that on Thursday, the eighteenth, snow fell from two in the morning till three in the afternoon. That they had seven thousand bushels of rye alongside of the vessel ready to be put on board, but that, owing to the weather, and to the danger which might be occasioned to the ship and the grain by putting the rye on board during the snow storm, it was impossible to continue loading on that day. That thereafter, that is from Friday morning, they continued loading the vessel, working day and night; although obliged solely, as they allege, to work during ordinary hours from seven A.M. to six P.M. and they claim that, by working all Friday and Saturday night, they thereby gave thirteen hours on each of said days, over and

above the number of working hours which they were under the charter party obliged to ; and that by reason of such night work they made up any loss of time which might be imputed to them. And they allege that they put on board on the nineteenth sixteen thousand seven hundred and fourteen bushels of rye, twenty thousand nine hundred and seventy-four bushels of corn, and on the twentieth up to the morning of the twenty-first, twenty-one thousand eight hundred and six bushels of rye, and that when the vessel left on Sunday morning they had alongside sufficient rye and grain to completely fill her up.

The appellants also allege that during the progress of loading the vessel was bound to supply baggers, to bag the grain as it was put on board ; and that the master and owners entirely failed to supply the requisite number, and the putting on board of the balance of the cargo was thereby impeded.

On these grounds they therefore claim that the delay is not to be imputed to them, and that they are not responsible for the damage suffered.

Now as to the evidence. The Superior Court found that the appellants received the Port Warden's certificate before twelve o'clock on the fifteenth, and that they, by their negligence, lost ten working hours in not commencing to load the said vessel before one o'clock on the sixteenth. That finding is fully supported by the evidence.

With reference to the question as to upon whom the responsibility should fall for the loss of time from two o'clock on the seventeenth, when the loading was stopped by the captain's orders, up to eight a.m. on the nineteenth the evidence shows that the responsibility for the delay should fall on the respondent. It is proved by Britt and Routh, that if the loading had begun at noon on Monday, with a the full quantity of all kinds of grain,

1886

LORD
v.
DAVIDSON.

Taschereau J.

the ship would have been completely loaded by Wednesday night, or Thursday morning, without night work and that, even if the loading had been continued with all kinds of grain from the time it began on Tuesday, she would have had a full cargo by Friday morning.

The pretention of the appellants that the loading on the eighteenth was stopped on account of snow is not supported by the evidence. On their pretention as to their having made up the time which was lost by night work, it is clear that this extra work was rendered necessary by their former default and want of diligence As to their plea that they were delayed by the insufficient number of baggers, the evidence entirely fails to support it. They never made any complaint of the kind during the loading. It was only when sued by the respondent that they make known for the first time this grievance. They never thought of it before.

Now, as to the interpretation to be given to the charter party, it seems to me clear, as found by the courts below, that no lay days or days for demurrage were allowed for loading, and the advanced period of the season explains why. The ten days are for the discharging only. The appellants themselves understood it to be so when, in the course of the loading of the "Whickham" they told the master that they would never thereafter charter a ship for loading without lay days being specified in the charter. There can be no question as to the amount of damages. Art. 1076, C.C.

GWYNNE J.—The only question in this case appears to me to be whether the defendants were guilty of neglect in not furnishing the vessel with a full cargo and whether any and, if any, what portion of the quantity by which the cargo was short should be attributed to

1886

LORD
v.
DAVIDSON.

Gwynne J.

plaintiff.

The true construction of the contract contained in the charter party I think is that the defendants were bound to furnish the ship with a full and complete cargo which was to be loaded as fast as it could be received in fine weather, but should ice set in so as to endanger the ship the master should be at liberty to sail with part cargo without the ship incurring any responsibility to the defendants, and for any deficiency in the cargo fairly attributable to the master under such circumstances, sailing with a short cargo, the defendants should not be responsible. The evidence sufficiently establishes that the master was perfectly justified in sailing when he did and the sole question is: Have the defendants been guilty of such default as subjects them to liability for freight upon the whole of the quantity by which the cargo was short, or is the deficiency fairly to be attributed, and if so, in what proportions to the plaintiff and the defendants?

I do not think it has been established that the Port Warden's certificate of the readiness of the ship to receive her cargo was served upon the defendants before noon of the fifteenth November. David Shaw, a ship agent, called by the plaintiff, said that in his opinion the proper way to serve it was for the captain to send a notice accompanying it to the charterers and that it must be served before noon to make the rest of the day count, and the only evidence of its delivery that we have is the evidence of Mr. Routh, who says that it was delivered at the defendant's office at or before noon on the fifteenth November, that it was sent under an envelope addressed to Lord & Munn by messenger to their office, but the messenger was not called nor any other evidence of the time of its delivery given than the above which leaves it in doubt whether or not the certificate was delivered before noon. The defendants'

1886

LORD
v.
DAVIDSON.

Gwynne, J.

plea admits only that it was delivered at or about, (which might be after) noon, and contends that such a delivery did not put the defendants in default for not beginning to load on the same day, and I cannot say that I think this default has been sufficiently established. That the defendants were in default on the sixteenth, seventeenth and eighteenth November there can, I think, be no doubt, but the defendants contend that the fact of the vessel not having been laden to the full capacity before she left the port of Montreal is attributable to the default of the plaintiff, whose duty it was to provide baggers, in not providing a sufficient number of competent persons; that there was a difficulty in getting baggers at that season, and that the plaintiff failed in getting as many as were required, and that the captain tried to get, and that those whom he did get were chiefly, if not wholly, boys, the evidence I think does establish, and the difficulty appears to me to consist in determining whether the whole of the deficiency in the freight is to be attributed to the default of the defendants, or whether some, and if any, what portion of it is to be attributed to the default of the plaintiff. The default of the plaintiff is charged as having occurred upon Saturday, the twentieth, and there is evidence that but for the default of the defendants on the sixteenth, seventeenth and eighteenth, the vessel might have been completely laden on the eighteenth, and the plaintiff contends that notwithstanding any default of the captain in not supplying a sufficient number of competent baggers the vessel might at any rate have been completely laden before she left on the Sunday morning, until which day she was detained by the default of the defendants on the sixteenth, seventeenth and eighteenth November, and so for the convenience of the defendants. If this be so then the defendants are, I think, liable to the full amount of the deficiency, for

1886

LORD v. DAVIDSON.

Gwynne J.

their contract was to furnish the vessel with a full and complete cargo as fast as it could be received on board in fine weather, of which contract their neglect to furnish a sufficient quantity of grain on the sixteenth, seventeenth and eighteenth November, constituted a clear breach, and they cannot be relieved from their responsibility for the natural consequence of this breach by reason of default in the captain to supply a sufficient number of baggers on the twentieth.

The learned judges in both of the courts below who have pronounced their judgment in favor of the plaintiff were of opinion that, as matter of fact, the vessel might have been completely loaded long before the morning of the twenty-first November, when she left port, but for the default of the defendants on the sixteenth, seventeenth and eighteenth November, and I cannot undertake to say that this is an erroneous conclusion. I must concur, therefore, in dismissing the appeal.

Appeal dismissed with costs.

Solicitors for appellants: *Kerr, Carter & Goldstein.*

Solicitors for respondents: *Abbott, Tait & Abbott.*

PIERRE ACHILLE ADÉLARD DORION, (Plaintiff ès-qualité and Intervenant in the Superior Court)..... APPELLANT.

1885

*Oct. 31.

AND

JEAN-BAPTISTE THÉOPHILE DORION, (Defendant and contesting party in the Superior Court)..... RESPONDENT.

1886

*March 8.

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

Substitution, Curator to—Rights of action—Intervention by a plaintiff in another capacity, when irregular—Art. 154 *C.C.P.—Cross-Appeal.*

Held, affirming the judgment of the court below, that a curator to

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

1885

DORION v. DORION.

a substitution has no right of action to recover from a curator in whose stead he has been appointed any moneys due by the latter and belonging to institutes.

Also, on cross-appeal, reversing the judgment of the court below, that inasmuch as no final judgment could have been obtained in the suit brought by the appellant, as curator, against the respondent which could impair the legal rights of the institutes, the said curator's intervention in said suit brought in his capacity of assignee of the institutes should have been dismissed. Art 154 C.C.P.

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

One Moreau, as curator to the substitution created by the will of the late Jacques Dorion, brought an action against the respondent, who had ceased to be curator to the substitution created by the said will, alleging that the respondent retained in his possession large sums of money belonging to the estate, and prayed for an account, and that, should the respondent fail to render the account, he be condemned personally to pay to the said plaintiff in his said capacity the sum of $12,000 and interest.

The respondent by his pleas acknowledged his indebtedness to the estate in a certain sum which he declared he was willing to pay to plaintiff if he had authority to receive it.

On 4th January, 1865, *débats de compte* were filed by Moreau and subsequently the present appellant took Moreau's place as curator to the substitution, and took up the instance as curator to the substitution. On the 14th September, 1881, he moved that the respondent should be compelled to constitute new attornies

On the 11th September, 1881, the appellant in his quality of curator produced the following declaration:

"Le dit Demandeur ès-qualité par reprise d'instance "demandant acte de la déclaration faite par le dit J. B. "T. Dorion, en sa reddition de compte qu'il est débiteur

(1) 4 Dor. Q. B. 213.

1885

DORION v. DORION.

"de la succession de la somme de huit mille quatre "cent vingt-sept piastres et soixante-treize centins "déclare qu'il accepte la reddition de compte telle que "produite par le dit défendeur ainsi que les conclusions de sa défense, et en demande acte."

This was preparatory to an inscription for final hearing on the merits for the 13th December, 1881. On the 12th a motion was presented to ask delay to plead—(*a*) that defendant was not obliged to account (*b*) new facts. The court granted defendant leave to plead new facts, and refused leave to replead as to the right of plaintiff to demand an account, inasmuch as defendant "ne peut revenir sur cette admission et reconnaissance de sa part" *i. e.*, contained in his first plea. The present respondent then asked for leave to appeal from this judgment because of the limitation as to the re-pleader, but leave was refused.

The defendant then filed a plea containing a variety of allegations. To this, a special answer was made, and the case was inscribed for hearing and was heard.

When the record was *en délibéré*, the appellant filed an intervention as the representative of all the *grévés*, setting up a right to the balance of the money in the hands of the respondent as representative by cession and otherwise of all the *grévés*.

The respondent pleaded to this intervention and prayed for its dismissal

Judgment was rendered on this intervention by the Superior Court *inter alia* condemning the respondent to pay the appellant a sum of $14,282.72. On appeal to the Court of Queen's Bench (appeal side) brought by the present respondent, that court reversed the judgment of the Superior Court and condemned the respondent to pay to the appellant, as representing C. Dorion, E. Dorion, F. Dorion and J. B. T. Dorion, the *grévés*, the said sum of $525.37 with interest thereon from the

1885

DORION v. DORION.

27th June, 1882, and to pay costs to appellant upon the intervention and the contestation thereon. The said court condemning the appellant to pay the costs of the appeal.

The Court of Queen's Bench ordered also the record to be sent down to the Superior Court to invest in the name of the said substitution the sum that the respondent acknowledged he had in his possession, and as it may be ordered by the court of the first instance; reserving to the appellant whatever rights he may have to claim the money paid for the respondent; reserving likewise to respondent the right to claim the sum that he is condemned to pay to the appellant by this judgment, in the event the respondent gets the deed of transfer of the 25th April, 1862, annulled; reserving also to the *appelés* of the said substitution whatever right they may have to contest the account rendered by the said respondent, or to ask another account; reserving also to the superior court to decide about the costs other than the costs of intervention and contestation thereof.

Madore for appellant and respondent on cross-appeal.

The judgment of the Superior Court should be confirmed in full and the amount increased according to the conclusions of the intervention. [TASCHEREAU J.—You did not appeal from the judgment of the superior court and how can you ask this court to allow you more than the amount granted by the superior court?] I submit the whole case is open on the appeal to this court.

The first question on this appeal is whether the appellant, as curator, had a right in law to have the defendant, who was a debtor of the substitution, condemned to pay the capital sum he had in his possession, belonging to the substitution, without any security, particularly when the appellant represents as *cessionnaire* all the *grevés* of the substitution.

1885

DORION v. DORION.

The article 945, C. C. and the amendment of the same by 38 Victoria chap. 13, which amendment makes no change as far as the power of the curator is concerned, say that the curator "attends to the substitute's interest, "in all inventories and partitions and other circum- "stances in which his intervention is requisite or "proper."

The article 947, C. C. says:

The institute peforms all the acts that are necessary for the preservation of the property.

He makes all payments, he receives moneys due and reimbursements, invests "capital sums" and exercise before the court all powers necessary for these purposes.

The court below having confirmed the right of the appellant as *cessionnaire* of all the *grevés de substitution*, as well as the Superior Court on that point, it follows that under the above articles 947 and 945 C. C., the appellant, as intervenant, had full power to receive the capital the respondent had in his possession.

But, moreover, in the present case, the appellant, as curator to the said substitution, had also the legal capacity under the said article 945 C. C. to sue the respondent on behalf of the substitutes, for the money the respondent had in his possession unsecured, as being the legal representative of the substitutes.

See Thevenot d'Essaule on Substitution (1); Pothier, Substitution (2); Guyot Vo. Substitution (3); *Dorion* v. *Jones* (4).

On the question of prescription the learned counsel relied on *Philipp* v. *Joseph* (5), *McKenzie* v. *Taylor* (6). Arts. 1043, 1714, 295, 296, C. C.

The learned counsel also contended that the appellant was entitled to the interest the respondent had offered

(1) No. 770.
(2) Bugnets' Ed. Nos. 178, 541 and 548.
(3) P. 522.
(4) Court of King's Bench P. Q. 1836, not reported.
(5) 19 L. C. J. 162.
(6) 9 L. C. J. 113.

1885

DORION v. DORION.

to pay on $8,427.63, from the 14th of August, 1858, which he has not paid or was not prescribed by law.

Pagnuelo Q.C. for respondent and appellant on cross appeal.

The curator to a substitution has no right of action to claim the capital or the interest belonging to the substitutes. His duty is to watch the acts of the institutes, Arts. 945, 946, 959 C. C. The respondent in this case can only be asked to render an account as a *negotiorum gestor*, and this he has been willing to do. He could not be sued in the capacity of curator, for as such he had no right to administer the estate. Had the intervention not been allowed there can be no doubt the appellant's action would have been dismissed. I contend that the intervention should not have been admitted, but that judgment should have been given on the merits. Arts 413, 435, 200, 1119, C. C. P.; Dalloz, Rep. (1); *Carter* v. *Molson* (2). On the question of interest the learned counsel referred to art. 295, 1714 C.C. Denizart (3); Troplong (4); Aubry & Rau (5); Pothier (6); Dalloz (7); Sirey (8).

Madore, in reply, contended that the pleadings admitted the right of the appellant to intervene. Art. 1245 C. C.

Sir W. J. RITCHIE C. J. and HENRY and GWYNNE JJ. concurred in the conclusion arrived at by FOURNIER and TASCHEREAU JJ.

FOURNIER J.—Dans ses notes sur cette cause qu'il a eu l'obligeance de me communiquer, l'honorable Juge Taschereau ayant déjà fait un exposé complet non seulement des faits qui ont donné lieu au présent litige, mais

(1) Intervention, Nos. 102, 103, 104.
(2) 8 Legal News 285.
(3) Vo. Intérêts des Intérêts.
(4) Mandat 503.
(5) 4 Vol. p. 644.
(6) Mandat 56.
(7) 1864, Pt. 1 p. 40.
(8) 1863, p. 416.

aussi des questions de droit à résoudre, je crois devoir me borner à quelques observations pour exprimer mon concours dans ses conclusions

Deux questions principales s'élèvent en cette cause: la première est de savoir si un curateur à la substitution a droit de porter une action pour se faire rendre compte par le possesseur des biens substitués; la deuxième, si une telle action ne lui appartient pas, était-il en son pouvoir, par une intervention fondée sur des cessions des droits des grevés, obtenues pendant l'instance de l'action en reddition de compte, d'améliorer sa position en changeant la cause d'action pour empêcher le renvoi de sa demande.

Les conclusions de l'action sont à l'effet d'obtenir un compte de la gestion et administration que l'intimé a eue en sa qualité de curateur à la substitution créée par le testament de feu Jacques Dorion et des biens d'icelui, avec les intérêts et les intérêts des épargnes, à compter du jour du paiement des différent s sommes d'argent reçues par le dit intimé, en sa dite qualité, en outre à produire avec le dit compte et à son soutien toutes les pièces justificatives d'icelui, comme aussi et à mettre le dit demandeur (présent appelant) en sa dite qualité, (curateur à la même substitution) en possession de tous les titres, papiers, pièces et renseignements qui regardent la dite succession, etc., etc, etc., que le dit demandeur a en sa dite qualité, droit d'avoir du défendeur, sinon et à défaut par le dit défendeur (intimé) de satisfaire immédiatement à tout ce que dessus, pour se voir condamner personnellement à payer au dit demandeur, en sa dite qualité, une somme de douze mille livres du cours actuel, pour tenir lieu du dit compte, de la remise des titres, pièces et renseignements, etc

L'appelant avait été nommé lui-même curateur à cette substitution en remplacement de l'intimé, et c'est

1886

DORION v. DORION.

Fournier J.

en cette qualité qu'il a repris l'instance introduite par M. Pierre Moreau qui avait aussi été nommé curateur à la même substitution en 1859.

Comme curateur à une substitution l'intimé avait-il le droit de porter une action de la nature de celle dont les conclusions sont rapportées ci-haut ? Il est certain que non. Une telle action n'a jamais été donnée au curateur à une substitution, ni dans l'ancien droit, ni sous le Code Civil de la province de Québec.

L'art. 945 C. C. qui n'a rien changé à l'ancien droit sous ce rapport ne donne au curateur à la substitution que des fonctions très limitées. Elles se bornent à représenter les appelés non nés lors de la mort du substituant, à veiller à leur intérêt en tous inventaires et partages et dans les autres cas où son intervention est requise ou peut avoir lieu. L'amendement fait plus tard à cet article par le 38me Vic. ch. 13, n'affecte aucunement la question en cette cause.

Les appelés nés et incapables sont représentés comme dans les cas ordinaires. Ce curateur n'ayant aucun droit ni à la possession ni à l'administration des biens de la substitution ne peut en conséquence avoir droit d'action pour s'en faire rendre compte ou s'en faire mettre en possession.

Il en était de même sous l'ancien droit. "L'ordon-"nance, dit Merlin (1), n'exige la nomination d'un tuteur "ou curateur à la substitution, que dans deux cas, savoir: "Pour assister à l'inventaire des biens du substituant, "quand le premier substitué n'est pas né; et pour assister "dans le même cas, à l'emploi des deniers. Voilà donc, "conclut Thevenot, toute la charge du tuteur, suivant "l'ordonnance."

Lors de la nomination de l'appelant comme curateur tous les grevés de substitution étaient nés et capables de se représenter eux-mêmes, de sorte

(1) Substitution sec. XI par. VI p. 207.

que l'appelant n'avait aucun droit de s'immiscer dans les affaires de la substitution. Son action n'ayant d'autre but que de s'en faire rendre compte, elle doit nécessairement être renvoyée. Il est vrai que l'intimé a reconnu, par une reddition de compte qu'il a présentée en réponse à l'action, devoir la somme de £2,106.18.2, mais ce n'est pas envers l'appelant qu'il s'est reconnu débiteur, c'est envers ceux qui sont avec lui les grevés de substitution. Cette reconnaissance ne peut donc lui servir pour obtenir ses conclusions, car la cour ne peut rien statuer sur les conclusions d'une action que la loi ne reconnait pas.

L'intervention est-elle mieux fondée que l'action principale? Il est évident d'après les faits de la cause que ce n'est que dans l'espoir de soutenir l'action dans laquelle il devait nécessairement succomber, que l'intimé a eu recours à l'expédient de cette intervention qui, d'ailleurs, a été produite très irrégulièrement. Il n'est pas nécessaire d'insister sur les irrégularités quoiqu'elles soient certainement suffisantes pour faire déclarer l'intervention inadmissible, mais il y a encore une raison plus forte pour la faire rejeter. C'est que l'on ne peut pas avoir droit d'intervenir dans une action dont la loi ne reconnaît pas l'existence. Aucune partie ne peut avoir d'intérêt à intervenir dans un semblable cas. Pour exercer ce droit il faut, suivant l'art. 154 C. P. C., avoir des intérêts à faire valoir. L'intervenant, telle que l'a fait clairement voir l'hon. Juge Taschereau dans ses notes sur cette cause, manque de l'élément essentiel pour avoir droit d'intervenir, c'est-à-dire d'un intérêt qui aurait pu souffrir quelque préjudice résultant de l'adjudication sur ce qui faisait l'objet de la demande principale.

La définition de cet intérêt vient d'être donnée dans la cause de *Carter* v. *Molson* (1) citée par l'intimé, dans

(1) 8 Leg. News, pp. 285 et 286.

1886

DORION v. DORION.

Fournier J.

laquelle le Conseil Privé de Sa Majesté s'est exprimé comme suit :

The event of the suit can only refer to the operative decree which may ultimately be given in favour of one or other of the parties to it, and not to the views of fact or law which may influence the court in giving decree. Section 154 appears to have been framed for the very purpose of limiting the right of intervention to the persons who can show that a final judgment may possibly be obtained in the suit which will enable the party who obtains it to possess himself of the estate, or otherwise to impair their legal rights.

Cette autorité qui est d'une évidente application aux faits de la cause doit suffire pour faire décider que l'intervention doit subir le même sort que l'action principale.

TASCHEREAU J.—In March, 1821, Jacques Dorion by his will, bequeathed his estate to his brother Charles, with substitution in favor of the said Charles' children, and the children of his children, so long as there would be any of the name.

Jacques Dorion died, Charles then came into possession of the estate. He, sometime after, also died. J. B. J. Dorion, the present respondent, appears then to have been named curator to the substitution created by the will of Jacques Dorion, and to have been in that quality, as alleged by the appellant in his declaration, in possession of the said estate from the 20th of August, 1840, to the 14th of August, 1858. It is evident that, as curator, the respondent had no right whatever to the possession of this estate However, he was allowed to take and hold it.

In August, 1858, one Pierre Moreau was appointed to replace the said respondent as curator to the said substitution, and, as such, in June, 1859, brought the present action against the respondent. The present appellant having subsequently replaced the said Moreau as curator, the action now stands in his name.

The declaration alleging that the said respondent

had in his hands large sums of money belonging to the said estate claims an account of his administration of the said estate from August, 1840, to August, 1858, and concludes as follows:—

"That the defendant (now respondent) be con-
"demned to render an exact and faithful account under
"oath of his gestion and administration in his capacity
"of curator to the said substitution and of all the prop-
"erty thereof with the interests and the interest of the
"savings from the day the said sums of money were
"paid to the said defendant in his said quality, and
"moreover to produce with the said account all
"vouchers in support thereof, and that, should the said
"defendant fail to do so, he be condemned personally
"to pay to the said plaintiff in his said capacity the
"sum of twelve thousand pounds."

The respondent, in answer to this action, appears to have rendered an account in which he acknowledged his indebtedness to the said estate in certain amounts which he declared himself ready and willing to pay to the said plaintiff provided the said plaintiff had authority to receive them.

The appellant's first contention is that, by such a plea, the respondent has acknowledged his indebtedness to him and is now debarred from questioning his right. This objection cannot be sustained The respondent acknowledged his indebtedness to the estate, not to the plaintiff, and has declared himself ready to pay the plaintiff if the plaintiff can establish his right to these moneys, and in that case only.

So that the first question submitted for our determination is as to the authority of the plaintiff, in his said quality of curator to this substitution, to receive and the right to claim the payment into his hands of what the respondent may owe to this estate.

The solution of this question presents no difficulty.

1886

DORION v. DORION.

Taschereau J.

The plaintiff, as curator, has no such right. At the death of Charles Dorion the whole of this estate reverted to his sons as institutes under Jacques Dorion's will, the revenues thereof to be used or abused of at their will and pleasure, the capital sums to be held by them subject to transmission to their children. The curator, as such, has no right whatever either to one or the other. This action is consequently unfounded in law, and must be dismissed.

Now, as to the intervention. This intervention was filed under the following circumstances. The case had been argued on the merits, and was standing for judgment. The appellant then, evidently to prevent a judgment being given and, it may fairly be assumed, not expecting a favourable one, went to another judge of the same court and obtained leave to file an intervention in his own personal name as assignee of the institutes, Charles Dorion's children, in virtue of certain deeds of assignment or transfer by which the said institutes had assigned to him all the rights accruing to them under the will of Jacques Dorion. The intervention's conclusions are:—

"Therefore the said intervening party prays that he "may be allowed to intervene in this case, to agree as "the only representative of the *grevés de substitution* "and to unite with the plaintiff, *ès qualité*, inasmuch "as it might be useful, to accept defendant's account "and his confession of judgment, and give to the said "plaintiff, *ès qualité*, all authorization and the approba- "tion wanted from the *grevés de substitution*; that the "said petitioner may be received as intervening party, "and the said defendant condemned to pay to the said "Achille Adelard Dorion, as well in his capacity of "curator and administrator of the said estate, as the "only representative of all the *grevés de substitution*, "the amount he has confessed to owe in his account

1886

DORION v. DORION.

Taschereau J.

" and plea, with interest as alleged, amounting this day " to $26,403.08, the whole according to the conclusions " of the declaration and costs."

A more irregular proceeding I have never heard of. Here is a party who, it is evident, to prevent his adversary from getting a judgment to which he has an acquired right from the judge before whom the case has been argued, goes to another judge and obtains leave to file an intervention in which he virtually says, " Well, " my original action is unfounded in law and must be " dismissed, but I personally have rights against the " defendant under other titles, as assignee of certain " third parties, and I claim the right to intervene in " this case not only to prevent the defendant from ob- " taining the dismissal of my action, unfounded though " it be, but also to get for myself personally, as such " assignee, a judgment against the defendant."

Had the appellant the right to so intervene in this case? I pass over to the question of procedure raised before us, as to the period of the case and the way in which this intervention was filed. Though the Chief Justice and Mr. Justice Ramsay in the Court of Queen's Bench were of opinion, and I fully agree with them, that the filing of it was totally irregular, yet the court did not feel authorized to dismiss it on that ground.

The right in law of the appellant so to intervene is, however, denied by the respondent, and has to be determined.

It appears to me that, under the circumstances of this case, the appellant had no right to this intervention.

That it was nothing else but a new action against the defendant is undeniable. That it was filed to prevent the dismissal of the principal action and so snatch away from his adversary a judgment he had an acquired right to is plain. For this purpose, and for this purpose alone, does Mr. P. A. A. Dorion, the assignee, come

1886

DORION v. DORION.

Taschereau J.

to the rescue of Mr. P. A. A. Dorion, the curator. Could this be done? Article 154 of the Code of Civil Procedure enacts the rule on the subject: "Every person," says this article, "interested in the event of a pending "suit is entitled to be admitted a party thereto in order "to maintain his rights."

These are clear terms To be allowed to intervene a party must be interested in the event of the suit, and it can only be to maintain his rights, not anybody else's rights, that he can be allowed to intervene. Or to put it on the highest possible authority:

> The event of the suit can only refer to the operative decree which may ultimately be given in favour of one or other of the parties to it, and not to the views of fact or law which may influence the court in giving decree. Section 154 appears to have been framed for the very purpose of limiting the right of intervention to persons who can show that a final judgment may possibly be obtained in the suit which will enable the party who ebtains it to possess himself of their estate or otherwise to impair their legal rights (1).

Now, here, it appears on the very face of the proceedings that no final judgment could possibly be obtained in this suit which could have enabled the plaintiff to possess himself of this estate, or would otherwise impair the legal rights of the institutes or of their assignee. Where, then, is the assignee's interest in the event of the suit, and it is his own suit, it must not be lost sight of? The only interest, it is plain, is the curator's, the principal plaintiff's interest, not the assignee's, the intervening interest. The very allegation of the intervention shows that the principal action must be dismissed, and that it is to prevent such judgment that the intervention is filed. That is to say, the institute, or in their name Dorion, their assignee, intervene, not to protect their rights, which the dismissal of the action would leave intact and unimpaired, but to protect Dorion's, the curator's rights.

(1) *Carter* v. *Molson*, 10 App. Cas. 664, 8 Leg. News, 281.

1886

DORION v. DORION.

Taschereau J.

The intervening party has, then, no interest in the event of the action, his rights are not endangered, he did not intervene in order to maintain his rights This intervention should then be dismissed.

The judgment appealed from maintained the intervention, and though apparently admitting that the action was unfounded, failed to dismiss it. I think there is error in this, and that the cross appeal should be allowed with costs.

Appeal to be dismissed with costs Cross appeal allowed with costs. Action and intervention dismissed with costs in the two courts below against the appellant, P. A. A. Dorion, personally. Distraits to Messrs. Pagnuelo & St. Jean.

Solicitors for appellant: *Madore & Bruchésé.*

Solicitors for respondent: *Pagnuelo, Taillon & Gouin.*

WESTERN ASSURANCE COMPANY (DEFENDANTS) ..... } APPELLANTS;

AND

MICHAEL SCANLAN AND EDWARD O'CONNOR (PLAINTIFFS) ..... } RESPONDENTS.

1886

*Mar. 30 & 31.

*May 17.

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

Marine Insurance—Constructive total loss—Perils not insured against—Abandonment—Arts. 2538, 2541, 2544, *C. C. (P. Q.)*

On the 28th September, 1875, a steam barge, loaded with sand, sank while at anchor near Chateauguay, in the river St. Lawrence. The barge was raised and floated within a week after the disaster. It was shown that on the starboard side there was an auger hole in the bilge of the barge which had been plugged

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

1886

WESTERN ASS. CO. v. SCANLAN.

up with a little wooden plug, and that the plug had come out. The vessel was raised by the insurers under the salvage clause of the policy.

On the first October there was a formal protest, made at the request of the master and officers of the barge, setting forth all the details of the wreck.

On the 6th December, 1875, the insurers were notified that the vessel was abandoned, the notice of abandonment concluding with the words: "It is hardly necessary for me, after your taking "possession of the vessel, to make any further declaration of "abandonment, but I now do so in order to put that fact for- "mally of record, and now again give you notice thereof."

The vessel was eventually sold by consent of all parties interested for $150.

In an action on the policy for a total loss,

Held, reversing the judgment of the court below, that there was not sufficient evidence to enable plaintiffs to recover as for a total or constructive total loss of the vessel.

Per Fournier J.—That the notice of abandonment was not given in conformity with the Art 2544 of the Civil Code, and not made within a reasonable time. Art. 2541 C. C.

APPEAL from the judgment of the Court of Queen's Bench Montreal confirming a judgment of the Superior Court by which the appellants were condemned to pay as for total loss of the steam barge "Westport" insured under policy No. 3,019 for the sum of $3,300, viz. $2,000 to the respondent O'Connor as the party to whom so much was made payable by the policy and the balance to respondent Scanlan proprietor of the vessel, with interest from 13th June, 1876, and costs.

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

"The action is founded upon a policy of insurance issued by the appellants, dated the 1st May, 1875, whereby it is declared that the appellants, in consideration of a premium of one hundred and forty-eight dollars and fifty cents, insured respondent Scanlan's steam barge "Westport," in the sum of three thousand three hundred dollars, from noon of the said date, the 1st

May, 1875, to noon on the 20th November, 1875.

"The policy stipulates that the company insures, on account of Michael Scanlan, loss, if any, payable to Edward O'Connor to the extent of two thousand dollars ($2,000.00) the said steam barge for the said period unless sooner terminated.

"That the said barge should be employed exclusively in the freighting and passenger business, and to navigate only between Montreal and Chateauguay and Papineauville on the Ottawa River

"That the perils insured against are those of the lakes, rivers, canals, fires, jettisons, that shall come to the damage of the said vessel or any part thereof, subject to the exceptions mentioned in said policy.

"On or about the 28th of September, 1875, the said steam barge sank in the River St Lawrence, at Chateauguay, and a claim was made on the insurers by the respondent Scanlan, for the amount of said policy.

"The appellants resisted payment, claiming that they were not liable in the circumstances, upon which the respondent Scanlan entered action, praying that the appellants be condemned to pay to him the said sum of three thousand three hundred dollars ($3,300.00) with interest.

"The appellants, besides a general answer, pleaded by different pleas, *inter alia*, breach of warranty, want of competent master, engineer and crew; that the vessel sank from inherent defects, and by acts of owner or crew, or both.

"The appellants submit:—

"1st. That there was no legal evidence of record to support a condemnation as for total loss, and none as to the extent of the injury done to the vessel, and that no judgment whatsoever ought to have been given against Appellants.

"2nd. That it is established that the vessel in any case

1886

WESTERN ASS. CO. v. SCANLAN.

sank from inherent defects or the acts or conduct of owner or crew, or both, for which appellants are not responsible.

"3rd. That respondent's evidence is contradictory and unreliable and insufficient to support the judgment appealed from.

"The respondents, by their answers to appellants' pleas, resist these pretentions.

"The respondent O'Connor, intervened in the case, alleging that by the terms of the policy the loss, if any, was payable to him to the extent of two thousand dollars ($2,000.00).

"The intervention was admitted by the respondent, Scanlan, but resisted by the appellants on the same grounds as the principal demand and by consent of the parties the evidence and documents of record were made common to both issues.

"The Superior Court on the 9th March, 1883, rendered judgment in favor of the respondents for the full amount claimed by them respectively, with interest and costs.

"From this judgment an appeal was taken to the Court of Queen's Bench (appeal side) by the judgment of which rendered on the 29th May, 1885, the judgment of the court below was confirmed.

"From this judgment the present appeal is taken.

"The question submitted to this court is whether the appellants are, under the pleadings, facts and circumstances, entitled to have the judgment of the Superior Court and Queen's Bench reversed."

The material facts as disclosed by the evidence are as follows: The vessel sank, at a place, where it was 10 or 12 feet deep, when at anchor and in comparatively smooth weather.

After the sinking of the vessel the appellants raised her under the salvage clause of the policy; the vessel

1886

WESTERN ASS. CO. v. SCANLAN.

having sand in her at the time she sank, this had to be pumped out, but she was raised within a fortnight and put in a place of safety in the Lachine Canal and respondent Scanlan was notified that she was there subject to his order.

At the trial it was proved that there was in starboard side an auger hole in the bilge of the barge; this hole had been made where a pipe had gone through the side of the vessel to supply water to the engine and boiler; the pipe had been shifted over from that place to another place a little distance from where that hole was and the hole had been plugged up with a little wooden peg, this plug of course had come out.

Nearly two months after the vessel had been so raised under the salvage clause of the policy and respondent Scanlon had been notified that she was in the canal and subject to his orders, he, on the 6th December, 1875, delivered to appellants' agent the letter of that date.

Montreal, 6th December, 1875.

Messrs. SIMPSON & BETHUNE,

General Agents of the Western Ass. Co.

Sirs,—I have to ask for an immediate settlement of the claims arising out of the loss of my steam barge "Westport," covered by policy No. 3019, in the Western Assurance Company, on the 1st May, 1875, which vessel was totally lost at Chateauguay on the 28th day of September last, and abandoned by me. It is hardly necessary for me, after your taking possession of the vessel, to make any further declaration of abandonment, but I now do so in order to put that fact formally of record, and now again give you notice thereof.

Your obdt. servt.,

(Sgd.) M. SCANLAN.

The vessel thereafter lay in the canal for several years, and on a consent being given by the parties a year and a half after this action was instituted, that the

1886

WESTERN ASS. CO. v. SCANLAN.

vessel should be sold and that the sale should not prejudice the rights of either party in the case which was "to be proceeded with to final judgment as if this "consent had never been made," she was sold for $150.

Laflamme Q.C. and *Trenholme* for the appellants.

The loss was not occasioned by any of the perils insured against, and the onus was on the plaintiff to show that the accident was caused by some external violence forcing the plug out of the hole. Moreover, the hole was not there at the time of the insurance, and there was negligence. Arts. 2509 C.C. and Parson's Marine Insurance (1); Arnould (2); *Dupeyre* v. *Western Marine and Fire Insurance Company* (3); Philipps on Insurance (4). Even if the vessel was lost by the perils insured against respondent was not entitled to recover, because there was no legal abandonment. Arts. 2538, 2541, 2544. The facts in evidence did not justify an abandonment. *Provincial Insurance Company* v. *Leduc* (5); *The Sun Mutual Insurance Company* v. *Masson* (6); *Anchor Marine Insurance Company* v. *Keith* (7).

The sale of the vessel cannot be invoked against appellant as it was made upon consent.

Davidson Q.C. for respondent:

This court should not reverse the decision of the court below on questions of fact.

The plaintiff (respondent) urges that the thing insured was "wholly destroyed or lost," and so became an absolute total loss. Art. 2,522 C. C. The same article defines a constructive total loss as occurring when "the thing, "though not wholly destroyed or lost, becomes of little "or no value to the insured."

(1) 1 Vol. p. 537.
(2) 2 Vol. 5th, Ed. 542.
(3) 2 Rob. (La.) p. 457.
(4) 1 Vol. p. 489 and seq.
(5) L. R. 6. P. C. 224.
(6) 4 L. C. Jur. 23.
(7) 9 Can. S. C. R. 483.

Only in the latter case is abandonment necessary. Arts. 2,522, 2,538, 2,541 C. C. Surely there was practically a total effacement of the thing insured when salvage expenses of $1,930 only produced $150. Surely a vessel valued at $5,000 must be deemed "wholly destroyed" when, after such a disbursement, only $150 could be realized from her. She was not even of "little or no value to the insured," when, to have accepted the remains of her, would have imposed upon him a contribution by average adjustment very far beyond what he was receiving.

No precise form is required for a notice of abandonment; it is not even necessary that it should be in writing. Dixon's law of shipping (1).

Arnould (2) lays down the same principle.

How appellant can pretend that the loss was not total is difficult to understand. The vessel went down in eighteen feet of water. After efforts, extending over a fortnight, and an expenditure, according to the plea, of $1,930, the remains of the vessel were brought to the Lachine canal. She was raised to the surface with her cargo still in her. To go down as she did must have wrenched her badly, and dragging her to the surface laden with sand, to the extent of one-half or two-thirds of her capacity, completed her destruction as a vessel. Appellants subsequently selling the hulk for $150, in itself is a strikingly conclusive proof of the totality of the loss.

The learned counsel cited *The Quebec Marine Insurance Co.* v. *The Merchants' Bank of Canada* (3); *Lemelin* v. *The Montreal Insurance Company* (4); *Cambridge* v. *Anderton* (5); Philipps on Insurance (6); *Roux* v. *Salvador* (7).

(1) P. 575.
(2) P. 850.
(3) 13 L. C. Jur. 267.
(4) 1 Q. L. R. 337.
(5) 2 B. & C. 691.
(6) 2 Vol. No. 2302.
(7) 3 Bing. 266.

1886

WESTERN ASS. CO. v. SCANLAN.

Ritchie C.J.

With reference to the time when notice of abandonment should be given, the English law says, within a reasonable time. French law says within six months, twelve months. The courts have to say what a reasonable time is.

We also contend that the silence of the company, after the receipt of the letter of December the 6th, amounts to an acceptance of the abandonment. *Hudson* v. *Harrison* (1).

On the question of negligence the learned counsel relied on art. 2509 C. C. (P.Q.), and *Cross* v. *British America Ins. Co.* (2); *Provincial Ins. Co* v. *Leduc* (3).

Trenholme in reply stated the evidence had been taken at *enquête*, and this court was therefore quite as competent to come to a conclusion as the courts below on the questions of fact, as to whether it was a loss falling within any of the perils insured against, citing *Phillips* v. *Barber* (4).

Sir W. J. RITCHIE C. J.—I think, in this case, that the parties have failed to show that there was a total, or constructive total, loss, and that there was no ground for sustaining the allegation that the vessel was lost by the perils of the seas. There was a hole in her bottom, but not a hole caused by the winds and the waves. There was nothing whatever to show that when this vessel was raised, and the hole plugged up, she would not be as good a vessel as ever.

STRONG J.—The policy sued upon in this action is not the ordinary marine policy, but one of a very special form, applicable to vessels navigating the inland waters of Canada,—the River St. Lawrence from Quebec westward, and the Great Lakes. It contains amongst others, the following stipulation: "Further,

(1) 3 Brod. & Bing. 97.
(2) 22 L. C. Jur. 10.
(3) L. R. 6 P. C. 224.
(4) 5 B. & Al. 161.

"the insured shall not have a right to abandon the "vessel in any case unless the amount the insurers "would be liable to pay under an adjustment as of a "partial loss shall exceed half the amount insured." This special clause makes the question of the respondents' right to recover as for a constructive total loss a very different one from that which it would have been under the general law as enacted in the Civil Code, if the insurance had been effected by the ordinary marine policy without any special stipulation of this kind. It is manifest that there can be no right to recover as for a constructive total loss unless it is proved that the amount of the loss would, if valued as a partial average loss exceed the sum of $1,650, being one half of the whole amount insured It was for the respondents to have poved that the amount of the loss did exceed this sum, but this they have wholly failed to do, and as the amount of the loss could only have been the expense of raising the vessel and the restoration of the machinery by repairing the damage caused by he submerging, which could not have amounted to any such sum as that mentioned, it plainly appears that the plaintiff could not have made any such proof. At all events it is sufficient to say that he has not by his proofs brought himself within this condition, and so cannot recover for a constructive total loss.

It is out of the question to say that the company waived this condition by taking possession and repairing; as they had a right to do this according to the express terms of the policy under the salvage cfause.

According to English practice however, a plaintiff suing on a marine policy for a constructive total loss, may, if it turns out that he is disentitled to recover for the loss suffered as a total loss, fall back on his right to recover as for a partial or average loss, and I assume, in

1886

WESTERN ASS. CO. v. SCANLAN.

Strong J.

the respondent's favor, that he would be considered to have the same right in the courts of the province of Quebec. Then is the plaintiff entitled to recover here for a partial loss? Upon the evidence I am clearly of opinion that he is not. The inevitable conclusion from the evidence must be that the sinking of the barge would not have occurred but for the auger hole in the bottom which had been bored apparently for the purposes of an injection pipe to supply the boiler with water. This might and ought to have been secured otherwise than by a wooden plug, liable to be displaced by the action of the water, as it is shewn that many other devices existed by which this hole might have been securely plugged, and which would have been resorted to by any prudent owner. It is impossible to believe that whilst this hole below the water line in the side or bottom existed in the insecure state disclosed by the evidence the barge was seaworthy. Then the loss being most satisfactorily demonstrated to have been consequent upon this unseaworthy condition of the vessel, it was within the exception of the policy which expressly excludes from the insurance, losses consequent upon "rotten-"ness, inherent defects, overloading and all other un-"seaworthiness."

I have heard no argument or reason suggested which furnishes an answer to this objection to the plaintiff's right to recover in this action, and I can think of none which could be suggested and it must, therefore, in my judgment prevail. There are other defences pleaded which I think are also maintained, but these it is not necessary to notice the foregoing reasons being sufficient grounds for reversing the judgment of the courts below. This must be done with costs to the respondent here, and in the Court of Queen's Bench, and the action and the intervention in the Superior Court must

both be dismissed with costs.

1886

WESTERN ASS. CO. v. SCANLAN.

Fournier J.

FOURNIER J.—The vessel sank in six feet of water; she was raised by the company under the Salvage clause in the policy, was put in the dock, and the contention now is that the company took possession of the vessel as if she had been regularly abandoned. But that was not the fact; it was only notifying the party that the vessel was raised. Both parties agreed in having her sold.

This is certainly not, under the circumstances, a constructive total loss. It was set up that there was an abandonment, but there was no abandonment which the code requires to be made within a reasonable time. Notice was given to the company but not in conformity with the statute. All the circumstances must be stated in the notice of abandonment. I think the appeal should be dismissed.

HENRY J.—I entirely concur in the view that there was no total loss here, or anything amounting to it. The vessel sank, with every prospect of being raised again. She sustained literally no damage. She was raised and pumped out by the company, and I think the respondent produced no evidence to sustain the claim for a total loss.

GWYNNE J. concurred with Sir J. W. RITCHIE C. J.

Appeal allowed with costs.

Solicitors for appellants: *Trenholme, Taylor, Dickson & Buchan.*

Solicitors for respondents: *Davidson & Fitzpatrick.*

1886

*May 5 & 6.
*Nov. 8.

THE CONFEDERATION LIFE ASSOCIATION OF CANADA (DEFENDANTS)..... APPELLANTS;

AND

EDMUND O'DONNELL, ADMINISTRATOR OF ALPHONSE O'DONNELL, DECEASED (PLAINTIFF)..... RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Life insurance—Condition in policy—Not to be valid until countersigned—Instructions to agent—Escrow—Admissibility of evidence—Entry in books of deceased—Not exclusively against interest—New trial.

In an action on a policy of life insurance, which was not countersigned according to the terms of a memorandum on its margin, the defence was that the premium was never paid and the policy was never delivered. On the trial the learned judge admitted in evidence an entry in the books of his father, made by the deceased holder of the policy, showing a payment to the agent of the company of an amount equal to the premium, which the evidence showed was paid by money given to deceased by his father. He also admitted the evidence of the agent, who had since died, taken at a former trial of the cause, to the effect that the premium was not paid, and that he would not countersign the policy until it was paid, and that the policy was only given to the deceased to enable him to examine it, and not as a duly executed policy. The jury found a verdict for the plaintiff, but stated, in answer to a question submitted by the court, that the agent had been instructed not to deliver the policy until it was countersigned. The Supreme Court of Nova Scotia affirmed the verdict. On appeal to the Supreme Court of Canada,

Held, per Ritchie C. J. and Gwynne J., that the policy was only delivered to the agent as an escrow, and as it was never duly executed and delivered the company was not liable.

Per Strong J.—That the memorandum as to countersigning was not a condition of the policy, and the plaintiff was not barred by non-compliance with its terms; but the evidence of the

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

1886

CONFEDERATION LIFE ASS. OF CANADA v. O'DONNELL.

entry in the books of the deceased was improperly admitted, and there should be a new trial.

Per Fournier and Henry JJ.—That the policy was properly executed and delivered, and as there was sufficient evidence to sustain the verdict independent of the evidence alleged to have been improperly admitted at the trial, the appeal should be dismissed.

Per Henry J.—Under the present practice the court is bound to uphold a verdict if there is sufficient legal evidence to sustain it independently of evidence improperly received, and cannot take into consideration the effect on the jury of such illegal evidence. Strong J. *contra.*

The court being thus divided in opinion a new trial was granted.

Opinions expressed in *The Confederation Life Association* v. *O'Donnell* (1) adhered to.

APPEAL from a decision of the Supreme Court of Nova Scotia refusing to set aside a verdict for the plaintiff and order a new trial.

This was an action on a policy of life insurance which contained a memorandum on its margin to the effect that it was not to be valid until countersigned by the agent, but which was not, in fact, so countersigned. The policy was in the possession of the deceased at the time of his death and was found among his papers. The company refused to pay the amount on the ground that the premium had never been paid, and that the policy was never duly delivered.

At the trial the company tendered in evidence the deposition of the agent who had effected the insurance, taken at a former trial of the cause, the agent having since died, which was received by the court subject to objection. This evidence was to the effect that the premium had not been paid, and that he, the agent, refused to countersign the policy without it; that the policy was only delivered to the deceased to enable him to examine it and was to have been returned but was not. To rebut this, the plaintiff offered in evidence, and the court received, an entry in the books of the

(1) 10 Can. S. C. R. 92.

1886

CONFEDERATION LIFE ASS. OF CANADA v. O'DONNELL.

deceased as follows :—"November 29th, paid F. Allison $48.06," (Allison was the agent). This evidence was objected to as not being against interest. The plaintiff also swore that the agent had admitted the payment of the premium.

The jury found a verdict for the plaintiff, but stated, in answer to a question submitted by the court, that the agent had been instructed not to deliver the policy until it was countersigned. The Supreme Court of Nova Scotia refused to order a new trial. The company then appealed to the Supreme Court of Canada.

Beatty Q. C. and *C. H. Tupper* for the appellants :

As the agent had no authority to deliver the policy until it was countersigned the company are not bound by his acts, and the policy has never been delivered as an instrument binding upon us *Montreal Ass. Co.* v. *McGillivray* (1) ; *Xenos* v. *Wickham* (2).

The entry in the books of the deceased was clearly inadmissible. There is no case decided in which the written entry of the interested party himself has been so received, it must be an entry by a third person. See *Ganton* v. *Size* (3) ; *Higham* v. *Ridgway* (4) ; *Bewley* v. *Atkinson* (5) ; *Massey* v. *Allen* (6).

Weldon Q.C. and *Lyons* for the respondent :

If the agent chooses to deliver the policy without countersigning it the company are bound. The insured had no notice of the instructions to the agent.

Then as to admissibility of evidence. The entry in the books was made in the course of business and it is immaterial whether it is for or against interest. See *Bewley* v. *Atkinson* (5) ; *Price* v. *Earl of Torrington* (7) ; *Doe Pattestrall* v. *Turford* (8) ; *Prince of Wales ins. Co.*

(1) 13 Moo. P. C. 87.
(2) L. R. 2 H. L. 296.
(3) 22 U. C. Q. B. 473, affirmed in 2 E. & A. 368.
(4) 10 East 109.
(5) 13 Ch. D. 283.
(6) 13 Ch. D. 558.
(7) 1 Smith L. C. 344.
(8) 3 B. & Ad. 890.

v. *Harding* (1) ; *Marks* v. *Lahee* (2).

1886

CONFEDERATION LIFE ASS. OF CANADA v. O'DONNELL.

Ritchie C.J.

Sir W. J. RITCHIE C. J.—I adhere to the opinion I expressed when this case was before this court on a former occasion, namely, that the instrument declared on as a policy of insurance was an incomplete instrument for want of the signature of the agent, and which instrument the agent had no right to deliver, or the deceased to accept, as a binding contract, and this view is confirmed by the finding of the jury on the last trial, the jury having found, as a matter of fact, that Allison, the agent, was instructed by the defendants not to deliver the policy until it was countersigned by him, thus establishing to the satisfaction of the jury that the policy was in Allison's hands as an escrow, not to be delivered until countersigned, and which there is evidence to sustain.

The necessity of countersigning appearing on the face of the policy, and there being no evidence whatever to show that Allison had any right or authority to waive or dispense with the countersigning, but the finding of the jury being to the contrary effect, I think the defendants cannot be held bound by this as an instrument executed and delivered as their deed. I think, on this finding, that the judgment should be entered for the defendants.

STRONG J.—The plea of *non est factum* put in issue the due execution of the policy as a deed. If the effect of section 94 of the Revised Stats. (4th series) is to make such a plea inadmissible that point should have been raised by demurrer. As it is, issue is joined on the plea, and that issue had to be disposed of at the trial. To constitute the policy the deed of the defendants, it was essential to show that it had been duly sealed and delivered and the plea must be construed as if it had

(1) E. B. & E 183. (2) 3 Bing. N. C. 418.

1886

CONFEDERATION LIFE ASS. OF CANADA v. O'DONNELL.

Strong J.

in extenso denied the sealing and delivering. So that if the plea of *non est factum* is generally excluded by the enactment in question, abolishing pleas of the general issue, still on this record it is to be read as a plea denying the sealing and delivering. I am however of opinion, that the plea of *non est factum* is still a proper mode of putting in issue the due execution of a deed declared on in an action, as being a specific denial of the fact of execution, and is not to be considered a general plea like not guilty in an action of trespass.

I have also to differ from the learned judge who presided at the trial in the view which he took of the law as to delivery of sealed instruments as escrows. The objection here is that there was never any effectual delivery of the deed. And I take the law to be now well settled that an instrument under seal, though handed over to the custody of a party taking under it, may be shewn to have been so delivered subject to a condition until the performance of which it was not to take effect as a deed (1). Therefore, if it appears that the delivery of a deed already sealed to the grantee was with the intention that it should not take effect as a deed, but in order that he should read and examine it and return it to the grantor, upon which terms and conditions, according to the evidence of Allison, the policy was delivered in the present case, the grantee cannot retain it and insist upon his possession of the instrument as conclusive evidence that it was duly delivered to him as a completed instrument.

I entirely agree with the court below that the printed memorandum found in the margin of the policy in the following words:

(1) *Watkins* v. *Nash*, L. R. 20, Eq. 262; *Trust & Loan Company* v. *Ruttan*, 1 Can. S. C. R. 564; Jones on Construction Commercial Instruments, p. 226.

1886

CONFEDERATION LIFE ASS. OF CANADA v. O'DONNELL.

Strong J.

This policy is not valid unless countersigned by.....
.....agent at.....
Countersigned this.....day of.....
Agent.

does not in any way affect the validity of the policy as a deed, though I think it has some weight as a mere fact confirmatory of Allison's evidence. There was no evidence to go to the jury shewing that Allison had been instructed not to deliver the policy until it was countersigned. The learned judge should not, in my opinion, and as he himself upon further consideration thought, have left to the jury the question which evoked this finding, and the finding itself was therefore rightly disregarded in entering the verdict. Had there been evidence of any instructions from the company to Allison, not to deliver the policy until it was countersigned, and not to countersign it until the premium was paid, it would not affect the validity of the policy, at all events it could not have that effect in the absence of any notice to the assured of such instructions having been given, and the mere existence of the blank, incomplete skeleton memorandum by itself, entirely insensible, would not have been sufficient to establish notice to the assured that the policy was not to be a complete instrument until the memorandum had been filled up and some agent's signature attached to it. If any authority is wanted for this position, the case of the *Prince of Wales Assurance Co.* v. *Harding* (1), referred to by Mr. Justice McDonald is amply sufficient for that purpose. The question to be decided at the trial was therefore, in my view, purely one of fact. Was the policy delivered to the assured, as Allison says, merely to be read and examined by him and then to be returned to the agent, to be retained until the premium was paid, or was the premium in fact paid and the policy

(1) E. B. & E. 183.

1886

CONFEDERATION LIFE ASS. OF CANADA v. O'DONNELL.

Strong J.

delivered as a complete instrument to take effect as such. It is manifest that the question of the intent with which the policy was delivered, must now be regarded as altogether dependent on the other fact as to the payment of the premium; and if there was legal evidence of this fact of payment proper for the consideration of the jury, and their finding proceeded upon legal and admissible evidence, it should not now, in my judgment, be disturbed. At the former trial of this action when Allison was examined as a witness, there was no admissible evidence of the payment of the premium beyond the presumption arising from the policy having been in the possession of William O'Donnel at the time of his death and for some time before. Allison gave direct evidence that the premium had not been paid, and he was able to point to the incomplete state of the memorandum in the margin of the policy and the absence of his countersignature as confirming his testimony. I thought sufficient weight had not been given to this, the attention of the jury not having been called to it, and that the great preponderance of this evidence in favor of the defendants, confirmed as it was by this circumstance, entitled them to a new trial. Since the first trial Allison has died and upon the last trial additional evidence was given as to the payment of the premium, some of which would not have been admissible during Allison's life. First there was put in evidence an entry made by the assured in a cash book of his father's, charging himself with the amount of this premium as having been paid by him to Allison on the 29th November, 1872, out of his father's cash. The entry is as follows: "1872, Nov. 29.—Paid F. Allison "$48.06." This sum, $48.06, is the exact amount of the annual premium payable under the policy. This evidence was, I think, inadmissible, both upon prin-

1886

CONFEDERATION LIFE ASS. OF CANADA v. O'DONNELL.

Strong J.

ciple and authority. I do not dispute the proposition that an entry against interest, by a deceased person, is admissible in favor of his own personal representatives, his executors or administrators, or others claiming under him. However anomalous such a rule may seem, the cases relating to endorsements upon bonds and notes make it impossible to deny that such is the law. I am of opinion, however, that upon another ground this entry was inadmissible. It does not come within the principles upon which entries of deceased persons are considered evidence as being against interest, for although as between his father and William O'Donnell himself it was an admission against the interest of the latter, yet as regards the present defendants it was in his own interest and favour, and being so was inadmissible. The cases of *Ganton* v. *Size* (1) and *Massey* v. *Allen* (2) are in point and conclusive as authorities shewing that this evidence ought not to have been admitted. This evidence was tendered at the former trial, but being objected to it appears not to have been pressed by the learned counsel for the plaintiff, and the objection to it therefore prevailed. Other additional evidence of what Allison (who died after the first trial) said when applied to by the plaintiff for a settlement was also given by the plaintiff himself at the last trial in 1885. Whether this evidence was properly receiveable as the admission of an agent of the defendants within the scope of his authority as such, is a point on which I express no opinion. In favor of its admissibility, it might be said that as Allison was the agent of the defendants, to whom the plaintiff had to apply for a settlement of the loss, it was within his authority to recognize the validity of the plaintiff's claim under the policy, and anything he said to that effect was binding on the defendants, at least in the absence of any evi-

(1) 2 Er. & App. Rep. 368. (2) 13 Ch. D. 588.

1886

CONFEDERATION LIFE ASS. OF CANADA v. O'DONNELL.

Strong J.

dence showing that his authority was restricted. I think, however, the admission of Allison deposed to by the plaintiff was good evidence against the defendants upon the same principle as that on which it was attempted to support the entry in the book, namely, as a declaration of a deceased person against his interest. It is now quite clearly established that the rule of evidence first authoritatively recognized in the case of *Higham* v. *Ridgway* (1) that a declaration by a deceased person opposed to his pecuniary or proprietory interest, in respect of a matter which he had no interest to misrepresent, is admissible not only when the declaration is embodied in some entry or memorandum in writing but also when it is merely oral. In the 8th and last edition of Taylor on Evidence (2) the rule is thus stated:

> It is now determined both with reference to this exception and also to that which relates to declarations made in the course of business or duty that the term "declaration" includes a mere oral statement as well as a written memorandum. The former may indeed be entitled to less weight with the jury than the latter, but the law of England recognizes no distinction between statements made by word of mouth and those made in writing, except when the writing is by deed or is rendered necessary by some statute.

And the learned writer cites numerous authorities to show that his text is a correct deduction from the decided cases. It follows that the plaintiff's testimony of Allison's statement to him that the premium was paid was admissible evidence, and was properly submitted to the jury. The weight to be given to this evidence was, of course, solely a question for the jury, and, therefore, if the illegal evidence of the entry in the cash book had not been let in I should not have been disposed to interfere with the verdict. It is impossible to say, however, that the jury may not have been exclusively influenced by the evidence of the entry in the cash book, which was improperly received, and therefore,

(1) 10 East. 109, 2. Smith L. C. 270. (2) P. 591.

1886

CONFEDERATION LIFE ASS. OF CANADA v. O'DONNELL.

Strong J.

although the court has power under Order 38, Rule 10, of the Nova Scotia Judicature Act of 1884, in its discretion, to give judgment now on the legal evidence taken at the trial, rejecting that of the entry in the book, yet for the reason given I think the case not a proper one for the exercise of such a power, but that the case ought to go down to another trial, in order that a jury may pass on the evidence of Allison's admission, as stated by the plaintiff, without the complication of the illegal and inadmissible evidence of the entry.

I think the rule in the court below should be made absolute for a new trial.

FOURNIER J.—This case comes up before us for the second time. When the first appeal was before this court, I was of opinion that the appeal should be dismissed, and my reasons are reported in the 10th Vol. Canada Supreme Courts Reports, page 92. The circumstances under which this case comes up again before this court have not altered my opinion, and I again think the respondent is entitled to succeed, and therefore, the present appeal should be dismissed with costs.

HENRY J.—I am of the same opinion. I gave my reasons in a former appeal, reported in 10 Can. S. C. R. 101, why I consider that it was not necessary for the agent to countersign the policy. The instructions to him not to deliver the policy until it was countersigned I think were directory only, and under all the circumstances I think the evidence conclusive to show that the policy was delivered, not as an escrow, but for the purpose of giving it all the force of a duly executed policy.

I am of opinion that the verdict should be sustained on the strength of the statute which provides that if the court sees that there is sufficient evidence by other

1886

CONFEDERATION LIFE ASS. OF CANADA v. O'DONNELL.

Henry J.

testimony, independent of any effect that might be produced on the jury by evidence that should not have been admitted, they should sustain the verdict. It is, I think, mandatory to the court not to question whether the evidence received has had an effect on the minds of the jury or not, and it is the duty of the court to ascertain if there is sufficient evidence to warrant them in confirming the verdict, and I think the intention of the statute is, that where there is such evidence the verdict should be sustained. Before that statute it was a matter for the consideration of the court whether the evidence improperly admitted had any effect on the minds of the jury, but since the statute it is different.

I am not sure that the evidence was improperly received. As to that I give no opinion. I entertain the same opinion as in the former case. The plaintiff has shown himself entitled to our judgment, and I think the judgment of the court below should be affirmed with costs.

GWYNNE J.—I also remain of the opinion which I announced when this case was before the court on a former occasion as reported in 10 Can. Sup. Co. Rep. 92.

Upon that occasion the court sent the case back for a new trial upon the ground that the evidence relied upon by the plaintiff was wholly insufficient to support a verdict in his favor in view of what appeared on the face of the document produced as the policy declared upon, and of the evidence of the witness, Allison, who testified that this document had been sent to him at Halifax from the head office of the defendants at Toronto as an escrow not to be issued to Wm. A. O'Donnell named therein, since deceased, and of whose estate the present plaintiff is administrator, until the premium should be paid, and he, Allison, should countersign the policy; he also testified that the premium never had been paid and that for this reason he never did countersign the document or issue it as a policy

binding upon the defendants' company, and that in point of fact the policy had never been delivered to the deceased, O'Donnell, as a contract, but that he, Allison, had let him have it merely to read its conditions.

Before the recent trial took place the witness Allison had died, but his deposition taken on the former trial was received in evidence at the recent one, and the only additional evidence adduced by the plaintiff consisted of an entry (said by the plaintiff to be in the handwriting of his deceased son,) in a book which the plaintiff said related to the business of himself and his son, and was the only cash book kept between the two of them, and of a statement made by the plaintiff in his evidence that although Allison after the decease of William A. O'Donnell, upon the occasion of being applied to by the plaintiff for payment of the policy, said that he thought the premium never had been paid, yet that on a subsequent occasion, on meeting the plaintiff on the street, he said to him that he (the plaintiff) "had the policy now and the money was "paid," by which the plaintiff said that he understood Allison to mean that the premium had been paid. The entry in the book was under date Nov. 29th, 1872, as follows, under the word "Paid," at the head of a number of entries chiefly in the handwriting of the plaintiff himself, "F. Allison, $48.06." There cannot, I think, be entertained a doubt that this entry was improperly received in evidence as lacking the only element which could have made it admissible, for it was not an entry made by the deceased against his own interest. As to the statement alleged to have been made to the plaintiff by Allison casually on the street, the proper time for the plaintiff to set it up was upon the former trial, when Allison gave his evidence upon oath, and not now after his decease. It is singular that the plaintiff should never, after the making of this alleged statement by Allison, have applied to him for payment of the

1886

CONFEDERATION LIFE ASS. OF CANADA v. O'DONNELL.

Gwynne J.

policy, as he appears never to have done, for the plaintiff says in his evidence, after mentioning the statement as above, "I did not call at his office after that. He "should have sent me the money." But apart from the consideration that, even if admissible, little weight should be attached to evidence of this nature now, after the decease of the witness, offered (for the first time, so far as it appears,) by way of impeachment of evidence given on oath in the plaintiff's presence on the former trial, without any allusion having been made to any such acknowledgment as is now relied upon, I am of opinion that the evidence was inadmissible as being an attempt to bind the defendants by a statement alleged to have been made by Allison at a time when he had no authority to affect the defendants by any statement of his other than one made upon oath and subject to cross examination by the defendants, the parties sought to be affected. Although no action had yet been brought, it is, I think, sufficiently apparent that before and at the time of the making of the alleged statement the defendants were disputing their liability to the plaintiff upon the ground that the premium never had been paid and that the instrument had never lost its character of an escrow in the hands of Allison. The declarations or acknowledgements of an agent are never admitted as evidence against his principal unless they are part of the *res gesta* and they become admissible, not as admissions, but solely on the ground that they are part of a transaction then being conducted by the agent for his principal. An agent's declaration of a past transaction is not admissible although it may have some relation to an act which the agent may be doing for the principal when he makes the declaration, but if the declaration be made at a time when the agent is not transacting any business for his principal it can not be received, there being in such case no *res gesta* of which the declaration forms a part. In *Fairlie* v. *Hastings*

10 Ves. 126, Sir Wm. Grant thus states the law.

As a general proposition what one man says, not upon oath, cannot be evidence against another man. The exception must arise out of some peculiarity of situation coupled with the declarations made by one. An agent may undoubtedly, within the scope of his authority, bind his principal by his agreément and in many cases by his acts. What the agent has said may be what constitutes the agreement of the principal, or the representations or statements made may be the foundation of, or the inducement to, the agreement; therefore, if writing is not necessary by law, evidence must be admitted to prove the agent did make that statement or representation. So with regard to acts done, the words with which those acts are accompanied frequently tend to determine their quality. The party therefore to be bound by the act must be affected by the words, but except in one or other of those ways I do not know how what is said by an agent can be evidence against his principal. The mere assertion of a fact cannot amount to proof of it though it may have some relation to the business in which the person making that assertion was employed as agent. * * * The admission of an agent cannot be assimilated to the admission of the principal. A party is bound by his own admission and is not permitted to contradict it. But it is impossible to say a man is precluded from questioning or contradicting anything any person has asserted as to him as to his contract or agreement merely because that person has been an agent of his. If any fact material to the interest of either party rests in the knowledge of an agent it is to be proved by his testimony, not by his mere assertion.

In *Betham* v. *Benson* (1), Dallas C.J. says:

It is not true that where an agency is established the declarations of the agent are admitted in evidence merely because they are his declarations; they are only evidence where they form part of a contract entered into by the agent on behalf of his principal and in that single case they become admissible. The declarations of an agent at a different time have been decided not to be evidence; indeed the cases on the subject draw the distinction between the declarations of an agent accompanying the making of, and therefore forming a part of the contract, and those declarations which are made either at a subsequent or an antecedent period. The case of *Biggs* v. *Lawrence* (2), has been disapproved of by Lord Kenyon; the receipt in that case being merely the written declaration of the agent ought not to have been admitted. *Fairlee* v. *Hastings* (3), is the latest authority on the subject, and it was there held by the late Master of the Rolls, on a review of all the decisions, that although an agency is

(1) Gow. 48. (2) 3 T. R. 454.
(3) 10 Ves. 123.

1886

CONFEDERATION LIFE ASS. OF CANADA v. O'DONNELL.

Gwynne J.

established a declaration of the agent can only be evidence against the principal where it accompanies the transaction about which he is employed, and if made at another time it is not admissible.

In *Mortimer* v. *McCallan* (1), Lord Abinger C.J. says:

As a general principle it is undoubtedly true that conversations with an agent after the transaction are not evidence against his principal, but the question is whether this be or be not a part of the *res gesta*.

And so the rule is laid down in the text books.

Mr. Phillips in his treatise on evidence (2) says:

It is only the statements or representations of the agent made in effecting an agreement or doing an act within the scope of his authority that are evidence against his principal, and the reason is because they may be explanatory of the agreement or determine the quality of the act they accompany.

Now, at the time of the statement having been made, if it was made by Allison to the plaintiff on the street as alleged by the latter, the former was not engaged in the transaction of any business for the defendants to which the statement could attach. There was no transaction whatever then being conducted by Allison for the defendants of which the statement could form a part. The statement, if made, related wholly to a past transaction, and the evidence offered of its having been made, was therefore inadmissible. Upon the former trial, when Allison gave his evidence upon oath, testifying that in point of fact the premium never had been paid, the plaintiff's evidence, as now offered, could only have been received by way of impeachment of the credit of Allison's evidence, and this only by causing him to be asked on cross-examination whether he had not made the statement which the plaintiff now says he did make, drawing at the same time Allison's attention to the time and place of his having, as is alleged, made the statement, which, if Allison denied, the plaintiff's evidence might have then been received by way of contradiction. The plaintiff thus had then full opportunity of laying the necessary foundation for the

(1) 6 M. & W. 69. (2) Vol. 1 p. 79.

1886

CONFEDERATION LIFE ASS. OF CANADA v. O'DONNELL.

Gwynne J.

introduction of the evidence which he now relies upon and did not do so. Nor does he appear to have then suggested that Allison had ever made such a statement. To permit this evidence now to be received after Allison's death would, in my opinion, be to lay the axe to the root of a well recognized and salutary rule of law and evidence.

I concur, therefore, in the opinion of the Chief Justice, that the verdict should have been in favour of the defendants upon the evidence which was admissible and the findings of the jury having relation to that evidence, and that our judgment should now be in favor of the defendants upon the issues joined.

Appeal allowed and new trial ordered.

Solicitor for appellants: *Charles H. Tupper.*

Solicitor for respondents: *James N. Lyons.*

1886

*Nov. 26.

*Dec. 7.

THE CANADIAN PACIFIC RAILWAY COMPANY (DEFENDANTS).... } APPELLANTS;

AND

CHARLES G. MAJOR (PLAINTIFF).....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

Railways and railway companies—Cons. Railway Act 1879 (42 *Vic. ch.* 9)—*Application of, to special act—Canadian Pacific Railway incorporation act* (44 *Vic. ch.* 1)—*Powers of company under —Right to build line beyond terminus.*

Held, Henry J. dissenting, that the Canadian Pacific Railway Company have power, under their charter, to extend their line from Port Moody in British Columbia to English Bay.

APPEAL from a decision of the Supreme Court of British Columbia restraining the Canadian Pacific Railway Company from constructing their line from Port Moody to Coal Harbor and English Bay through the

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

1886

CANADIAN PACIFIC RWY. CO. v. MAJOR.

land of the plaintiff.

This was an application by the plaintiff Major to the Supreme Court of British Columbia to restrain the Canadian Pacific Railway Company from proceeding with the construction of their road beyond Port Moody, the terminus of the road in British Columbia under the charter of the company, through the lands of the plaintiff. A similar application had previously been made by one Edmonds, another land owner whose property was to be affected by the proposed extension, and the court had granted an injunction, holding that the Consolidated Railway Act of 1879 applied to this company and that, under section 7 sub-section 19 of that act, the company could not build their line beyond the terminus named in their charter. Under the practice in British Columbia a motion for an injunction is an interlocutory proceeding, and, therefore, not appealable to the Supreme Court of Canada. In Edmonds case, therefore, the proceedings ended with the order for an injunction, but in Major's case, in order to enable the company to appeal, the motion for an injunction was, by consent, turned into a motion for a decree, and the court having adhered to their former decision, and decided in favor of the plaintiff, Mr. Justice Gray dissenting, on the ground that the Railway Act of 1879 does not apply to this company except where it is beneficial to the charter, but is over-ruled by the Act of Incorporation, the company brought this appeal to the Supreme Court of Canada.

Robinson Q.C., and *Tait* Q.C. for the appellants.

The question to be decided is: Does the restriction in section 7, sub-section 19 of the Railway Act, 1879, apply to this company? It is claimed that the Railway Act, by its terms, is made applicable to the charter of the company unless expressly excepted. But the charter itself says, by section 22 of the contract with the company, which is made a part of the act, and by

1886

CANADIAN PACIFIC RWY. CO. v. MAJOR.

section 17 of the act itself, under the title "powers," that the Railway Act shall only apply in so far as it is not inconsistent with, or contrary to, the provisions of the act or of the contract. This is the later act, and must override the Railway Act, and it is to the charter alone that we must look to see if the company have the powers that are claimed in this case.

Section 14 of the contract gives the company the largest possible powers. The learned Chief Justice of the court below thought it could not have been the intention to allow the company to go to any portion of the Dominion, but this section says that they can.

Section 15 of the act is clear, and undoubtedly gives us the power to do this work. That section, after setting out the termini of the road in its different directions, and certain branches already constructed or contracted for, declares that the main line and the said branches, and any other branches to be constructed, and any extensions of the said main line thereafter to be constructed or acquired, shall constitute the Canadian Pacific Railway.

It seems unreasonable that any restrictions as to termini should be placed upon such a company as this in a country like British Columbia, especially when it is remembered that the declared intention was to carry the line to the Pacific coast and thus carry out the terms of union of the Province with the Dominion. The counsel cited *The Atlantic and Pacific Railway Company* v. *St. Louis* (1).

Eberts for the respondent.

Port Moody is made the terminus by the charter, and the line cannot go beyond it without express authority. The Railway Act cannot be varied or excepted in the special act by implication.

Richards Q.C., counsel in a similar case pending against the company, asked leave to be heard as *amicus*

(1) 66 Miss. 228.

1886

CANADIAN PACIFIC RWY. CO. v. MAJOR.

curiæ. By consent of counsel for the appellants such leave was granted.

Richards Q. C. The company are seeking to exercise the right of eminent domain, and must have express authority to do so.

Section 25 of the charter shows what extension means. And see Pierce on Railways (1); Morawitz on Private Corporations (2).

The company can build the road to Port Moody, and build branches, but there is no authority to extend the road beyond Port Moody. Large sums of money have been expended by property owners at Port Moody on the strength of its being the terminus of the road.

The learned counsel referred to the case of *Plattville* v. *The Galena, &c., Railway Company* (3), cited in Morawitz, p. 360.

Sir W. J. RITCHIE C.J.—The real and only point in controversy in this case is, as to the right of the Canadian Pacific railway Co. to extend, or to make branches extending, their line in British Columbia beyond Port Moody. The Canadian Pacific Railway claim the right to do so under their special Act of 1881. Section 22 of that Act, first schedule, is as follows:

22. The Railway Act of 1879, in so far as the provisions of the same are applicable to the undertaking referred to in this contract, and in so far as they are not inconsistent herewith or inconsistent with or contrary to the provisions of the act of incorporation to be granted to the company, shall apply to the Canadian Pacific Railway.

And under the title "powers" in the schedule annexed it is provided by section 17:

17. "The Consolidated Railway Act 1879," in so far as the provisions of the same are applicable to the undertaking authorized by this charter, and in so far as they are not inconsistent with or contrary to the provisions hereof, and save and except as hereinafter provided, is hereby incorporated herewith.

Therefore, the provisions of the consolidated Railway Act of 1879, so far as applicable, must be read as in aid

(1) Pp. 145 and 494. (2) 2 ed. Sec. 373.
(3) 43 Wis. 493.

1886

CANADIAN PACIFIC RWY. CO. v. MAJOR.

Ritchie C.J.

of the undertaking authorized by the act of 1881, and as subordinate thereto, and be held to operate only in so far as they are not inconsistent with, or contrary to, the provisions of the act of 1881; and when they are inconsistent or contrary the provisions of the act of 1881 must prevail. It is, therefore, to the act of 1881 that we must look to ascertain what the Canadian Pacific Railway can do with reference to branches or extensions.

The grave mistake into which, with all respect, I think the learned Chief Justice has fallen is, in my opinion, in not reading the consolidated Railway Act as entirely subordinate to the Canadian Pacific Railway Act of 1881. This is strongly indicated in the view which the learned Chief Justice expresses with reference to the right of the Canadian Pacific Railway to construct branches. He thinks the railway is confined to six miles by virtue of the act of 1879. But by section 14 of the contract included in, and made part of, the act of 1881 it is provided:

> That the company shall have the right, from time to time, to lay out, construct, equip, maintain and work branch lines of railway from any point or points along their main line of railway to any point or points within the territory of the Dominion.

From which it is abundantly clear that the right conferred on the railway company from time to time to lay out, construct, equip, maintain and work branch lines of railway from any point or points along their main line of railway to any point or points within the territory of the Dominion is entirely inconsistent with any such limitation; and, therefore, I think the company had a right to construct a branch from any point or points on the railway to English Bay as well as to any other point or points within the territory of the Dominion. It would, indeed, to my mind, be a most curious and extraordinary anomaly if the company could run a branch starting at any point along the railway, say one, two or half a dozen miles from Port

1886

CANADIAN PACIFIC RWY. CO. v. MAJOR.

Ritchie C.J.

Moody to Coal Harbor or English Bay, and could not construct a branch from Port Moody to the same place, both being, practically, extensions of the railway to the same point. In other words, that they could start from any and every point along the railway and could not start from any and every point on the railway, a distinction, I humbly think, without a difference.

So, in like manner, I cannot accede to the learned Chief Justice's construction of section 15 in schedule A in the act of 1881. By section 4 of the act of incorporation it is provided that:

All the franchises and powers necessary or useful to the company to enable them to carry out, perform, enforce, use and avail themselves of every condition, stipulation, obligation, duty, right, remedy, privilege and advantage agreed upon, contained or described in the said contract are hereby conferred upon the company. And the enactment of the special provisions hereinafter contained shall not be held to impair or derogate from the generality of the franchises and powers so hereby conferred upon them.

And section 14 provides that:

The company shall have the right from time to time to lay out, construct, equip, maintain and work branch lines of railway from any point or points along their main line of railway to any point or points within the territory of the Dominion, provided always, that before commencing any branch they shall first deposit a map and plan of such branch in the Department of Railways. And the Government shall grant to the company the lands required for the road bed of such branches, and for the stations, station grounds, buildings, work shops, yards and other appurtenances requisite for the efficient construction and working of such branches. in so far as such lands are vested in the Government.

And by the 15th section of schedule A it is provided:

That the company may lay out, construct, acquire. equip, maintain and work a continuous line of railway of the guage of four feet eight and one-half inches, which railway shall extend from the terminus of the Canada Central Railway near Lake Nipissing, known as Callander station, to Port Moody, in the Province of British Columbia (and also other branch lines not material to the present inquiry); and also other branches to be located by the company from time to time as provided by the said contract, the said branches to be of the guage aforesaid; and the said main line of railway and the said branch lines of railway shall be commenced and completed as provided by the said contract; and together with such other branch

lines as shall be hereafter constructed by the said company; and any extension of the said main line of railway that shall hereafter be constructed or acquired by the company shall constitute the line of railway hereinafter called the Canadian Pacific Railway.

No doubt, under the contract provided for by the Act of 1881, the Canadian Pacific Railway Company obligated themselves to build only to Port Moody, but I can discover nothing in the act to indicate that Port Moody was to be the actual and final termination of the Canadian Pacific Railway; in other words, was to be a fixed terminus, with no powers of extension under the legislation of 1881. On the contrary, the 15th section indicates, in my opinion, directly the contrary, and shows, I think, conclusively that the terminus of the Canadian Pacific Railway was not to be fixed at Port Moody, but was to be extended by branches and extensions to be constructed or acquired, if required by the exigency of the road or deemed by the company necessary for the purpose of effectually connecting the waters of British Columbia with the railway system of Canada; and when so constructed by the Canadian Pacific Railway the road, not to Port Moody, but the road, with such branches and extensions when constructed or acquired, was to constitute the Canadian Pacific Railway, and the construction of which branches and extensions was contemplated by, and provided for in, the act of 1881 and the schedules thereto annexed.

The learned Chief Justice repudiates this view, and thinks this section gives the company no power to construct any extension whatever, and no power even to acquire any extension west of Port Moody. But to arrive at this conclusion he has to get over the words, "and any extension of the main line of railway that "shall hereafter be constructed or acquired by the com- "pany shall constitute the line of railway hereinafter "called the Canadian Pacific Railway." This he accomplishes, and can only accomplish, by practically reading them out of the statute, which he does after

1886

CANADIAN PACIFIC RWY. CO. v. MAJOR.

Ritchie C.J.

this fashion. He says the word "constructed" in the 15th section must be taken to mean "lawfully constructed;" that is to say, under some subsequent act if the company choose to apply for and obtain it. This certainly, as a mode of construction, has the merit of novelty, and suggests the pertinent question: If no authority was conferred, or intended to be conferred, by these words, and authority to construct was only to be obtained by subsequent legislation, and if, therefore, they are to have no effect in the statute by which they were enacted, why, or for what possible purpose, or to accomplish what, were they inserted? I confess myself unable to answer this, to my mind, most reasonable inquiry. No court has a right to reject, or refuse to give effect to, the words of the legislature, if a reasonable construction can be placed on the language used, and, therefore, I am constrained so to construe this statute as to give effect, if possible, to this, to my mind, very plain language of the legislature, and I can give no effect to it if it was not the intention of the legislature to authorize such branches and such extensions of the main line as might be found expedient to complete and make available this great national undertaking, the construction of a railway connecting the sea-board of British Columbia with the railway system of Canada, a construction not only reasonable but one which, in my opinion, harmonises with the subject of the enactment and the object which the legislature had in view.

The learned Chief Justice has rightly said, as applicable to this case, that there is no magic in words, or I should say in names, so that whether this is called or treated as a branch or as an extension (for I can see no reason why a branch may not be an extension or an extension a branch if consistent with the general scope of the act) the railway company have, under the act of 1881, authority for its construction, subject, of course, to a compliance with all the provisions applicable to

1886

CANADIAN PACIFIC RWY. CO. v. MAJOR.

Ritchie C.J.

the expropriation of lands and other matters connected with the construction and extension of the road and its branches.

The Chief Justice says, with reference to the conclusion he has arrived at, "I do so, necessarily, with regret, because I think the decision contrary to the interests of everybody in the Province including the plaintiffs." It will therefore, no doubt, give much pleasure to the Chief Justice, as it is most satisfactory to me to feel, that this court has been enabled to arrive at a conclusion which must be gratifying to everybody within the Province, and which ought to be equally so to the plaintiffs. It is not often, in controversial litigation, that it is made apparent that the interests of all parties, the public included, are identical, and are secured by the judicial determination of the controversy.

STRONG J.—Concurred.

FOURNIER J.—I think the point is very clear. The Canadian Pacific Railway Act says that the Consolidated Railway Act of 1879 shall be applicable to the company in so far as it is possible, and as far as its provisions are not repugnant. The question is whether we find authority in the Canadian Pacific Act to extend their line of railway, and this seems to me to be given in such plain words that I cannot see how the contrary can be suggested. By the 14th section of the C. P. R. Act the company is. (His Lordship here read the section) (1).

I think there is very little room for interpretation. The reasoning of Mr. Justice Gray is so convincing that I cannot but adopt his conclusions.

TASCHEREAU J.—I am of opinion that this appeal should be allowed for the reasons given by the Chief Justice.

(1) See p. 336.

1886

CANADIAN PACIFIC RWY. CO. v. MAJOR.

Henry J.

HENRY J.—I intended to read the 15th section of the charter of the Canadian Pacific Railway Company, but as it has been so generally referred to I need not do so. I must say that I fail to see the power which the company ascribe to it. It does no more than give them corporate power to extend their line to the eastward as I shall endeavor to show hereafter, and this was necessary because of the power given by the act to acquire lines of railway east of the eastern terminus and consequently, under the head of corporate powers, the necessary authority was given. Now under the head of "powers" by section 17 it is declared that:

The Consolidated Act, 1879, in so far as the provisions of the same are applicable to the undertaking authorized by this charter, and in so far as they are not inconsistent with or contrary to the provisions hereof, and save and except as hereinafter provided, is hereby incorporated herewith.

And by section 15 the company may lay out, &c.,

And any extension of said main line of railway that shall hereafter be constructed or acquired shall constitute the line of railway hereinafter called the Canadian Pacific Railway.

By the 1st section of the schedule to the special act the line is divided into 4 sections, the western section from Kamloops to Port Moody. The latter after much consideration had been finally adopted as the western terminus. Section 15 then was not intended for any extension westward; but "the Canadian Pacific Railway" was constituted to be the line east from Port Moody to Callendar station, including named branches and any extension eastward under the provisions of section 25, and the provisions of the latter section account for the provisions in section 15, that the extension afterwards constructed or acquired by the company should be included as part of the main line. I cannot come to the conclusion that anything else was meant. The western terminus was a subject long debated and finally decided by the legislature in the same act to be Port Moody. That certainly helps us to the conclusion that the provision in section 15 before mentioned was made

1886

CANADIAN PACIFIC RWY. CO. v. MAJOR.

Henry J.

solely to provide corporate powers for any extensions eastward of Callendar, that by construction or purchase the company should acquire.

The power given by the 14th section is to build "branch lines of railway from points along their main line." No person will assume that building branch lines along the main line means an extension from the terminus virtually making another terminus.

Then sub-section 19 of section 7 of the Consolidated Railway Act, 1879, provides that:

No railway company shall have any right to extend its line of railway beyond the termini mentioned in the special act.

Unless these words are to have no effect, or unless special power is given by the act, I cannot understand how it can be said that the company have power to build their proposed extension and change of terminus. The question therefore is, as to the termini of the road, and the right of extension from there. To the eastward the extensions are provided for, but I can see nothing but the bare provision necessary in section 15 to include corporate powers over extensions west.

By the sub-section 2, of section 2 of the Consolidated Railway Act of 1879, it is provided that:

The said sections shall also apply to every railway constructed or to be constructed under the authority of any act passed by the parliament of Canada, and shall, so far as they are applicable to the undertaking, and unless they are expressly varied or excepted by the special act, be incorporated with the special act, form part thereof, and be construed therewith as forming one act.

And by section 3 it is enacted that:

For the purpose of excepting from incorporation with the special act any of the sections forming part first of this act, it shall be sufficient in the special act to enact that the sections of this act proposed to be excepted, referring to them by the words forming the headings of such sections respectively, shall not be incorporated with such act, and the special act shall thereupon be construed accordingly.

The provision of section 3 was adopted by Parliament in the special act by section 18, which provided that the 11th sub-section of section 8 of the act of 1879

1886

CANADIAN PACIFIC RWY. CO. v. MAJOR.

Henry J.

should not apply. Section 21 of the charter provides that sub-sections 1 and 2 of section 22 shall not apply, and by section 23 several other sections and sub-sections are provided not to apply. With the provisions in sub-section 2 of sections 2 and 3 just mentioned, which, it must be presumed were under the eyes of whoever prepared the special act for the government and of the company and the legislature, can it be imagined that any variation from the provision of section 19 before mentioned would not have been expressly made if such were intended?

Section 22 of the special act also provides that the provisions of the Railway Act of 1879 shall apply to the Canadian Pacific Railway, in so far as applicable to the undertaking, and in so far as they are not inconsistent with or contrary to the provisions of their act of incorporation.

Now, I cannot perceive that there is any inconsistency if we look at the true meaning of the whole special act and read it with the provisions of the act of 1879. The latter enacts, section 2, that its provisions shall apply to all companies "unless they are expressly varied or excepted by the special act," and "shall be incorporated with the special act, form part thereof and be construed therewith as forming one act."

I feel bound, then, to read the two acts as one and to give effect as far as possible to every part of them. I seek in vain for any express inconsistency so far as relates to any extension of the main line west from Port Moody. If we had not before us in bold relief the fact that the legislature had fixed the terminus at Port Moody, and that section 25 had not been enacted, we might speculate as to what was meant by the words, "and any extension of the said main line of railway that shall hereafter be constructed or acquired by the company" in section 15, but with the knowledge of the legislature that the western terminus

had been declared, and that the act had made provisions for extensions eastward, and that the line from Kamloops west to Port Moody was not to be built or completed by the company, but by the government and handed over when so completed to the company, it would be, in my opinion, straining the force and meaning of the provision in section 15 of the charter, intended, in my opinion, to confer corporate powers only, to construe them as giving authority to extend the line ten miles from Port Moody, the settled terminus, to Vancouver city. I have shown that the provisions of section 25 required the provision in section 15 to give corporate powers to include extensions eastward as a part or parts of the Canadian Pacific Railway.

Section 4 of the charter is, in my opinion, but the usual provisions of a company's charter. Every company acquires similar franchises and powers, but the provisions in that section cannot, in any way, extend the operation, in other respects, of the charter.

Under the act of 1879, the company might build branches from any station including the terminal ones, but under the special act the company could not build a branch from either terminal station, as the right to do so is limited to start from points along the line. The company in this case occupies this position, that if it invokes the power under the former the right, I take it, must be limited to six miles; for they cannot invoke one part of the provision made part of their own charter by express legislative enactments and reject the limitations. Some one has said that the act must be construed as giving all that is beneficial to the company and discarding what is not so. I cannot see my way clear to adopt that mode of construction. In my humble opinion the bitter must go with the sweet. Rights and privileges are given to companies, but they are to be enjoyed only by yielding statutory rights and

1886

CANADIAN PACIFIC RWY. CO. v. MAJOR.

Henry J.

privileges to others. The companies are given facilities for carrying out their chartered rights, but duties and responsibilities are annexed which must be performed and acknowledged. Companies must keep within the powers conferred by their charters, and if they exceed them they must be answerable for wrongs committed.

I am of the opinion that the company in this case had no legal right to extend the terminus from Port Moody to Vancouver City. I would have preferred to have been able to arrive at a different conclusion, as it is, no doubt, largely in the public interest that the road in question should be speedily finished, and a loss to the company to be delayed in finishing it. In differing from my colleagues, I have at least the satisfaction of feeling that, if I am wrong in my views, they will not affect the result.

I regret to have been obliged to explain my views without sufficient time to do so as as I could have wished. It was desirable an early decision should be given where such large public as well as private interests are involved.

I will only then add that I have read very carefully the judgment of the learned Chief Justice of the court below and fully concur with him in the reasons he has given for deciding as he did, in favor of the respondent. Entertaining the views I have expressed, I think the appeal should be dismissed.

GWYNNE J.—It is, I think, of no importance whether the work proposed to be constructed by the C. P. Ry. Co. be called a "branch" or an "extension." I can see no difficulty in a "branch" line of railway being constructed from the extremity of a "main" line. But whatever may be its most appropriate designation, I concur in the opinion that the company have power under their Act of Incorporation to construct it, subject to the provisions of the Consolidated Railway Act as

to acquiring right of way.

1886

CANADIAN PACIFIC RWY. CO. v. MAJOR.

Appeal allowed with costs, and plaintiff's action in the court below dismissed.

Solicitors for appellants: *Drake, Jackson & Helmcken.*

Solicitors for respondent: *Eberts & Taylor.*

D. McCALL & Co., JOHN FERGUSON AND J R. COX (the said D. McCALL & Co.) (DEFENDANTS)..... } APPELLANTS;

AND

JOHN McDONALD, SAMSON, KENNEDY & GEMMELL. TAIT, BURCH & COMPANY, JENNINGS & HAMILTON, SIMPSON ROBERTSON & SIMPSON, AND McKINNON, PROCTOR & COMPANY (PLAINTIFFS)..... } RESPONDENTS.

1886

*May 28 & 29.

*Nov. 8

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Chattel morgage—Fraudulent as against creditors—Assignment in trust by mortgagor—Trust in after suit by creditors to set aside mortgage—Mortgagees not included as plaintiffs—Trust deed not attacked.

Where a trader who was in insolvent circumstances had given a chattel mortgage on his stock in trade to secure a debt, and shortly after executed an assignment in trust for the benefit of his creditors—

Held, affirming the judgment of the courts below, that the mortgage was void under the statute, and that certain simple contract creditors of such trader could maintain a suit, on behalf of themselves and all other creditors except the mortgagees, to set aside the mortgage without including the mortgagees as plaintiffs, and without attacking the assignment in trust.

APPEAL from the Court of Appeal for Ontario (1), affirming the judgment of the Chancery Division (2) in favor of the plaintiffs.

---

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

(1) 12 Ont. App. R. 593. (2) 9 O. R. 185.

1886

McCALL v. McDONALD.

One Cox, a trader, gave a mortgage on his stock to the firm of McCall & Co., and a short time afterwards he assigned all his estate to one Ferguson in trust for the benefit of his creditors. The firm of McDonald & Co., who were simple contract creditors of Cox, brought suit, after the assignment in trust, against the mortgagees and Ferguson to set aside the mortgage, alleging that it was given when Cox knew himself to be insolvent, and with intent to defeat and delay his creditors and give McCall & Co. a fraudulent preference. It was also alleged that the assignment in trust was made at the instance of McCall & Co with intent to prevent any impeachment of the mortgage. McCall & Co. were not made plaintiffs in the suit.

The goods covered by the mortgage were the only assets of Cox, and the mortgagees had taken possession of and were selling them. It was agreed that they should all be sold and the proceeds paid into court to abide the results of the suit.

At the hearing before Ferguson J. a decree was made in favor of the plaintiffs, the material portion of which was as follows :

2. This court doth declare that the chattel mortgage made by the defendant Cox in favor of the defendants D. McCall & Co., and bearing date the 22nd day of March, A.D. 1884, was and is fraudulent and void as against the plaintiffs and such other of the creditors of the defendant Cox as may contribute to the expenses of this suit, and doth order and adjudge the same accordingly.

3. And it appearing that the defendants D. McCall & Co. have, under the chattel mortgage aforesaid, sold the goods and chattels covered thereby, and that, under the terms of an order made in this action and dated the sixteenth day of May, 1884, they have paid into court to the credit of this cause the amour t realized under the said sale, to wit, the sum of $5,000 ; this court doth

order and adjudge that the said sum of $5,000, together with interest accrued thereon, be forthwith paid out of court to the defendant Ferguson, to be by him forthwith distributed among the creditors of the defendant Cox, under the terms of the deed of assignment from the defendant Cox to the said defendant Ferguson, having regard to the provision hereinafter contained as to the costs of these proceedings.

The Court of Appeal affirmed the decree except as to the disposition of the money in court, which they ordered to be retained in court and paid to the creditors filing claims. The defendants then appealed to the Supreme Court of Canada.

In addition to the authorities cited in the report of the case 9 O.R. 185 and in the present judgments, the learned counsel for the appellant *Robinson* Q.C. and *Geo. Kerr* referred to the following cases:—*Wood* v. *Dixie* (1); *Bills* v. *Smith* (2); *Royal Canadian Bank* v. *Kerr* (3); *Johnson* v. *Fesemeyer* (4); *Nunes* v. *Carter* (5); *Ex parte Topham* (6); *Newton* v. *Ontario Bank* (7); *Allan* v. *Clarkson* (8); *Totten* v. *Douglas* (9); *McWhirter* v. *Thorne* (10); *McCrae* v. *White* (11); *Long* v. *Hancock* (12); *Ex parte Chesney, Re Dungate* (13); *Ex parte Winder, Re Winstanley* (14); *Ex parte King. In re King* (15).

S. H. Blake Q.C. and *Macdonald* for respondent referred to *Ex parte Wheatly* (16); *Ex parte Hall* (17); *Ex parte Hill* (18); *Ex parte Griffith* (19); *Ex parte Chaplin* (20); *Ex parte Johnson* (21); *Re Maddever* (22); *Cookson* v. *Swire* (23);

(1) 7 Q. B. 892.
(2) 11 Jur. N. S. 157.
(3) 17 Gr. 47.
(4) 3 DeG. & J. 73.
(5) L. R. 1 P. C. 342.
(6) 8 Ch. App. 619.
(7) 15 Gr. 283.
(8) 17 Gr. 570.
(9) 18 Gr. 341.
(10) 19 U. C. C. P. 302.
(11) 9 Can. S. C. R. 22.
(12) 12 Can. S. C. R. 532.
(13) 9 Ch. D. 701.
(14) 1 Ch. D. 290.
(15) 2 Ch. D. 256.
(16) 45 L. T. N. S. 80.
(17) 19 Ch. D. 580.
(18) 23 Ch. D. 695.
(19) 23 Ch. D. 60.
(20) 26 Ch. D. 319.
(21) 26 Ch. D. 338.
(22) 27 Ch. D. 523.
(23) 9 App. Cas. 653.

1886

McCALL v. McDONALD.

Ritchie C.J.

Tomkins v. *Saffery* (1); *Jones* v. *Kinney* (2).

Sir W. J. RITCHIE C.J.—No sufficient grounds have, in my opinion, been shown for disturbing the finding, on the question of fact, of the court of first instance confirmed, as it has been, by the Court of Appeal; so that the only questions we have to consider are questions of law.

Two preliminary objections were urged before Mr. Justice Ferguson. He says:—

A preliminary objection was taken and urged as to the frame of the suit. It was said that when the simple contract creditor brings a suit to set aside a conveyance, he must sue on behalf of himself and all other creditors, and the exclusion by the plaintiff of McCall & Co., who were creditors, was fatal.

There was also another preliminary objection which was renewed at the final argument, namely, that a simple contract creditor could not sustain a suit to set aside a chattel mortgage for fraud in a case where the mortgagor had made an assignment for the benefit of creditors generally; that the simple contract creditors, the plaintiffs in this case, could not sustain the suit as they did not attack the assignment as well as the mortgage.

The learned Chief Justice of the Court of Appeal says:—

"Several legal questions have been raised. First, the right of these plaintiffs to ask this relief; they are simple contract creditors, suing on behalf of themselves and all other creditors other than the defendants; this has been objected to but I think it fully warranted by the practice in such cases

"It has been objected that the plaintiffs cannot sue before judgment. This, he thinks, can be done, and I agree with him that simple contract creditors, suing on behalf of themselves and all other creditors other

(1) 3 App. Cas. 213. (2) 11 Can. S. C. R. 708.

than the defendants, can maintain a suit to avoid a deed fradulent and void as against creditors.

Then he says:—

"The strongest objection urged was, that as the debtor had made a general assignment of his estate to a trustee for the general benefit a few weeks after he had made the impeached chattel mortgage this, it is contended, puts the plaintiffs out of court in this suit.

"It is urged that the mortgage is only void against creditors; that it is good against the mortgagor, and that his assignee has no higher right and now represents him, and that so long as the latter assignment is unimpeached no creditor can be heard to impeach the mortgage"

I confess myself wholly unable to understand how the making of this assignment by the mortgagor for the general benefit of his creditors can practically confirm and make good a mortgage which is now admitted to have been fradulent and void as against creditors, and thus, as it is claimed, put the plaintiffs out of court. It is said that the mortgage is good as against the assignee and that he could not contest its validity. Assuming this to be so, so far from its militating against the creditors' right to intervene and have the mortgage declared, as it has been proved to be, fradulent and void, it seems to me rather to strengthen their position. All they want is, that all the debtor's property should be fairly distributed among them, and they are therefore willing that the assignment, which they have executed and which provides for such a distribution, should stand. But is that any reason why a mortgage, fradulent and void as against them, should also stand? And because they are willing that there should be a fair and equal distribution of the debtor's property among all his creditors are they to be shut out from claiming that the property so fradulently conveyed should be included in such distribution as not having

1886

McCALL v. McDONALD.

Ritchie C.J.

been, as against them, legally mortgaged, but on the other hand that by the act of their debtor assigning all his estate for their benefit the fradulent and void mortgage is made good and valid? Instead of such a monstrous result it does seem to me that if the assignee for the creditors could not set aside the fraudulent instrument, every principle of reason and common sense points out that the creditors should be able to have it declared void and of none effect, and so remove it from out of his and their way. It seems to me no better than mockery to say to the creditors, "true it is your debtor has made a mortgage fraudulent and void as against you, but as he has conveyed for your benefit all his estate and property, including the very property covered by the mortgage, and without any reference to the mortgage, and to which instrument you are assenting parties, that this makes good the mortgage and renders it valid and binding, unless, indeed, you set aside the assignment which nobody impugns, and still less, you who are parties to it, and which, in fact, you think fair and just, as also fraudulent and void.

As the assignment to Ferguson is not attacked, does it not follow, as a matter of course, that the proceeds of the sale would necessarily go to Ferguson for distribution among the creditors of Cox? The mortgage being removed, the property or the proceeds of the property, come to him unincumbered, and why should it not be held by him and be distributed in accordance with the terms of the assignment to him? Putting it in the most favorable way, namely, that the assignment only amounted to a conveyance of the equity of redemption in the mortgaged goods, if Ferguson, on behalf of the creditors, sought to redeem the property, could the mortgagor and the mortgagee, or either of them, set up the claim as against the creditors that the mortgage debt was due and payable, and without payment of which the property could not be redeemed

when the mortgage itselt, as against those very creditors on whose behalf Ferguson was seeking to redeem the property, had been declared fraudulent and void, and to the proceeds of which they, the creditors, had therefore become entitled? The moment this mortgage was displaced, and to be treated, as against creditors, as non-existing, the property, in my opinion, necessarily falls into the assignment for their benefit, and thus becomes in a position to be immediately administered for their benefit, thus affording them an effectual and substantial relief against the property. Therefore, the setting aside of this mortgage is no mere barren declaration; on the contrary, the moment the deed is set aside the creditors and others for whom they sue are in a position to obtain, under the assignment, the fruits of the decree, the court having set aside the deed, and the defendant Ferguson, representing the creditors, holding the property for their benefit under an instrument the validity of which neither the mortgagor nor mortgagee can, or do, question. Therefore, no necessity exists, in my opinion, for independent proceedings to obtain execution against the property in the deed, supposing such would have been necessary if no assignment had been made, for the simple reason that if the assignment is good no execution could issue against the goods at the instance of an individual creditor inasmuch as, I take it, it would be competent for Ferguson, under the assignment, on behalf of the general body of creditors to resist any such execution.

I agree with the learned Chief Justice that there is no difficulty in disposing of all the matters in controversy between the parties before the court; in fact I find but one matter really in controversy, namely, was or was not this mortgage fraudulent and void? If so, then there does not appear to be any further controversy that I can discover. Nobody alleges that if this mortgage is fraudulent and void the assignment is not

1886

McCALL v. McDONALD.

Ritchie C.J.

reasonable and fair and that the proceeds of the mortgaged goods should not be distributed in accordance with its terms. Then, what possible objection can there be to the court ordering the money to be paid out to the creditors through the instrumentality of the deed of assignment? If Ferguson J. had not adjudged the amount to be paid out to the assignee, he being a party before the court and the assignment to him not being disputed or questioned, if he applied for an order to have the money paid over to him as the party legally entitled to it on the face of the proceedings, who could successfully resist his claim? Certainly not Cox nor his mortgagees, still less the creditors who claim to have the mortgage set aside for the very purpose of having the proceeds distributed equally among them. The solution of the whole matter, to my mind, is that so soon as the mortgage is declared fraudulent and void, it is to be treated and dealt with as if it had never existed, as against the creditors as if the mortgage had never been executed.

There does not appear to have been any question raised, or objection made, to the money being paid to Ferguson; on the contrary, it appears that all parties are willing that that course should be adopted, and therefore I can see no reason for varying the judgment of Ferguson J. in this particular. If any reason was shown why he should not receive it, then I agree with Chief Justice Haggarty, that the court can deal with the matter and allow each creditor to prove his claim in the master's office, and therefore, in my opinion, the decree in this case is neither futile nor fruitless.

I may say generally, that the judgment of Chief Justice Haggarty, and the reasons on which it is founded, commend themselves strongly to my mind.

STRONG J.—The plaintiffs' right to maintain this suit without having recovered judgment for their debt is, I

think, clear upon the authority of *Reese River Mining Co.* v. *Attwell* (1). The Master of the Rolls there points out the distinction between a suit to set aside a deed as a fraud on creditors under the statute of Elizabeth where the relief sought is confined to the mere avoidance of the deed, and such a suit where there is superadded the additional relief of equitable execution. In the latter class of cases for the reasons given by Lord Cottenham in his judgment in *Neate* v. *Duke of Marlborough* (2); and for those assigned for the judgment in *Smith* v. *Hurst* (3); not only was the recovery of a judgment an essential preliminary to the filing of the bill but legal execution must also have been issued and lodged in the sheriff's hands.

There are two cases in which it is laid down generally that a creditor cannot maintain a bill to set aside a deed as being void against creditors without having first recovered a judgment at law, *Colman* v. *Croker* (4); and *Lister* v. *Turner* (5); but those cases may, I think, fairly be attributed to principles governing the exercise of equity jurisdiction which prevailed at the time they were decided, but which have long since become obsolete, both in Ontario and in England. At the date of these decisions the Court of Chancery scrupulously avoided deciding any questions of law; if a legal question arose it was sent to a court of law for decision, if in other respects the suit was maintainable. As the foundation of the creditors' right to sue was a legal question, namely, the existence of the legal debt which constituted him a creditor, this was treated as a matter for adjudication in a court of law and until it had been there disposed of it was considered that the creditor had no *locus standi* in equity. Since 1853. at all events, when this practice was abolished by general orders, afterwards confirmed by statute, this rule has not

(1) L. R. 7 Eq. 347.
(2) 3 Mylne & C. 407.
(3) 10 Hare 30.
(4) 1 Ves. jr. 160.
(5) 5 Hare 281.

1886

McCALL v. McDONALD.

Strong J.

applied (if indeed it ever did apply) to the Ontario Court of Chancery and since the passage of the statute, commonly called from its author "Rolt's Act," and which was enacted long before the Judicature Act, it has ceased to have force in England. I, therefore, adhere in all respects to the judgment delivered in the case of *Longeway* v. *Mitchell* (1)

As regards the right of assignees for the benefit of creditors to maintain a suit to set aside a deed made by the assignor (the debtor) in fraud of creditors generally, I am of opinion (following what was decided in *McMaster* v. *Clare* (2), and in this court in *Burland* v. *Moffatt* (3); and what has frequently been laid down as law in the United States(4); that the assignee or trustee in such cases must be deemed to claim under the debtor his assignor, and consequently that he cannot, like an assignee in bankruptcy, or one who has a statutory title under an Insolvent Act, be admitted to assert a title paramount to that derived by him from his author, the debtor, who manifestly could not sue for such a purpose. There is, however, no reason so far as I can see for disentitling a creditor who is entitled to the benefit of such a trust deed from suing so long as he has not released his debt or accepted the benefit of the trust as a satisfaction of the debtors liability to him.

As regards the merits of this case upon the evidence I have had great doubt whether it establishes the plaintiff's case. So far as it depends on conflicting testimony in the oral evidence of witnesses who were examined at the trial, I consider myself bound to accept the finding of the learned judge so far as he adopted the facts deposed to by the plaintiff's witnesses in preference to those stated on behalf of the defendants. But the case depends to some extent on other considerations—on inferences to be drawn from undis-

(1) 17 Gr. 190.
(2) 7 Gr. 550.
(3) 11 Can. S. C. R. 76.
(4) See Waite on Fraudulent Conveyances (2nd ed.) p. 179.

puted or established facts, and from written evidence contained in documents and correspondence, to which class of proofs the rule laid down in *Gray* v. *Turnbull* (1) and many other cases has no application. I think, however, when a case has been heard in an intermediate Court of Appeal, and the decision of the judge of first instance has there been confirmed without dissent upon questions purely of fact, though of facts not depending on conflicting testimony, no useful purpose is served by a single judge dissenting in a second Court of Appeal; and, I must add, I doubt if a second Court of Appeal ought, ever, except in a case of the most manifest error, to disturb a concurrent judgment arrived at by a first judge, and a unanimous Court of Appeal, upon any question of fact, even upon one not depending on the credit to be attributed to witnesses, but dependent altogether on inferences to be drawn from documentary evidence or undisputed facts. In making these observations I do so upon the under- standing that Mr. Justice Burton, who differed in the Court of Appeal, did not express any positive opinion upon the evidence, but based his dissent altogether on legal points irrespective of the merits.

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

FOURNIER, TASCHEREAU and GWYNNE JJ. concurred in dismissing the appeal for the reasons given by His Lordship the Chief Justice.

Appeal dismissed with costs, the judgment of the Court of Appeal being varied as to the disposition of the money in court, and the original judgment of Ferguson J. restored.

Solicitors for appellants McCall & Co.: *Kerr & Bull.*

Solicitors for appellant Ferguson: *Foster, Clarke & Bowes.*

Solicitors for respondents: *MacLaren, MacDonald, Merritt & Shepley.*

(1) L. R. 2 Sc. App. 53.

1886

*May 25 & 26.

*Nov. 8.

THE REVEREND JOHN PHILIP DuMOULIN (DEFENDANT)..... APPELLANT;

AND

THE REVEREND JOHN LANGTRY AND OTHERS (PLAINTIFFS and DEFENDANTS) ..... RESPONDENTS.

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

Appeal direct from court of original jurisdiction—S. C. A. A. 1879, *sec.* 6—*When court below has expressed an opinion on the merits—Church lands—Rector and wardens—Interest of latter to appeal in name of rector (plaintiff)—Indemnity—Rectory endowments—Rectory lands—*29 *and* 30 *Vic. c* 16—*Construction.*

A suit brought by respondents against D. as rector of St. James Cathedral, Toronto to have certain lands declared to be held by him not only for himself but also for the benefit of the other rectories in the city of Toronto, was decided by Ferguson J., in favour of the respondents, a decision which, on appeal to the Chancery Division of the H. C. J., was upheld. Up to the time of the judgment rendered by the latter court the proceedings had been carried on in the name of D. by arrangement between him and the church wardens of St. James Cathedral, who contended that they had an interest separate from that of D. in the disposition of the lands and the revenues therefrom, and who had indemnified D. against costs. But upon the church wardens proposing to appeal to the Court of Appeal, D. refused to allow his name to be further used in the proceedings. The Court of Appeal, upon an application being made by the church wardens for leave to appeal, refused to grant such appeal, holding that the church wardens had no interest in the lands or revenues (1). The church wardens thereupon applied to Strong J. in chambers for leave to appeal *per saltem* to the

---

* PRESENT—Sir W. J. Ritchie C. J. and Fournier, Henry Taschereau and Gwynne JJ. On the application for leave to appeal direct Strong J. was present.

(1) 11 Ont. App. R. 544.

1886

DUMOULIN v. LANGTRY.

Supreme Court of Canada under sec. 6 of the S. C. A. A. 1879 from the judgment of the Chancery Division. The judge held that the church wardens had an interest at least which justified them in appealing. He would not, however, as a judge in chambers, overrule the decision of the Court of Appeal, but grant leave to renew the application to the full court.

On the motion coming before the full court it was

Held, that the appeal should be allowed upon a proper indemnity being given by the church wardens to D. against all possible costs, the court expressing no opinion on the merits of the case itselt. Henry J. dissenting, on the ground that it was impossible to decide the right to appeal without entering into the merits, and on the merits the church wardens had no interest in the lands or revenues.

And on the main appeal it was

Held, affirming the judgment of the courts below, that the lands in question in this case were rectory lands within the meaning of the Act 29 and 30 Vic. c. 16, entitled "An Act to provide for the sale of rectory lands in this Province."

Held, also, that the lands were held by the rector of the Church of St. James, in the city of Toronto, as a corporation sole for his own use, and not in trust for the vestry and church wardens or parishioners of the rectory or parish of St. James, and such vestry and churchwarden had therefore no *locus standi in curiâ* with respect to said lands.

PPEAL from the judgment of the Divisional Court of the Chancery division of the High Court of Justice for Ontario, pronounced on the 19th day of December, 1884. The appeal was brought *per saltem* to the Supreme Court, under the circumstances set out in the head note.

The facts and pleadings in the case are fully set out in the reports of the case in 7 Ont. Rep. pages 499 and 644, and in the judgment of Gwynne J. hereinafter given.

Howland & Arnoldi for appellant;

James MacLennan, Q.C., for the Township Rectors;

Hector Cameron, Q.C., for the Diocese of Toronto.

The argument of counsel and cases and statutes relied on sufficiently appear in the reports of the case in 7 Ont. (1).

(1) Pp. 503 et seq. & p. 647 et seq.

1886

DuMoulin v. Langtry.

Ritchie C.J.

Sir W. J. Ritchie C.J.—In this case I have had the privilege of reading the notes prepared by Mr. Justice Gwynne and I entirely agree with him as to the proper construction to be put upon the statute. I am of opinion that the appeal should be dismissed with costs.

Fournier J., concurred with Gwynne J.

Henry J.—I have not had the privilege of reading my brother Gwynne's reasons for judgment, but I concur in dismissing the appeal, and had so made up my mind. When the appeal was asked for I was of opinion that the statute bound the incumbent He himself admitted it, and received what was necessary for his support and was willing that the balance should go to the church. The church wardens, wanting the whole sum for one parish and wanting to force an appeal after there had been an adjudication of a court of justice against them, claimed that the appellant was their trustee. I was of opinion when the application for leave to appeal was made that he was never such trustee. He himself denied it and this court forced an appeal upon him because the church wardens offered to give security for the costs. I was opposed to this at the time, and I see no ground for coming to a different conclusion now.

Independently of this the wardens had no interest, and they had no right to bring this appeal, and Mr. Dumoulin having agreed to abide by the judgment appealed from, he should not have been compelled to appeal to this court.

I am in favor of allowing the judgment in favor of the plaintiff to stand, and of dismissing the appeal with costs.

Taschereau J.—I am also of the same opinion as to the taking of the appeal. I am of opinion that the appeal should be dismissed.

1886

DuMoulin v. Langtry.

Gwynne J.

GWYNNE J.—This case comes before us by way of appeal direct from the judgment of the chancery division of the High Court of Justice for Ontario. The appeal is taken in the name of the defendant, the rector of the parsonage or rectory of St. James in the city of Toronto, formerly the town of York, but in the interest of the vestry parishoners and church wardens of St. James' Church, who, as the rector declined instituting, on his own behalf, an appeal from the said judgment, obtained an order from this court enabling them to appeal in the name of the rector upon their indemnifying him from all costs. The claim of the vestry and church wardens is, that they and the parishioners of the said rectory are the *cestuis que trustent* of the lands mentioned in the plaintiff's statement of claim, and that the rector of St James' parsonage, or rectory, holds the same merely as a trustee to their use, and that therefore the lands in respect of which the suit has been instituted do not come within the operation of the statutes in the plaintiff's statement of claim mentioned, that is to say, ch. 16 as amended by ch 17 of the statutes of the late province of Canada passed in the session held in the 29th and 30th years of Her Majesty's reign, and two acts of the legislature of the province of Ontario, namely, 39 Vic. ch. 109 and 41 Vic. ch. 69. Part of the land in question was granted by letters patent from the Crown bearing date the fourth day of September, 1820, by which certain land therein described was granted unto and to the use of D'Arcy Boulton, then one of the justices of the Court of King's Bench in and for the Province of Upper Canada, John Beverley Robinson, His then Majesty's Attorney General for the said Province, and one William Allan, and to their heirs and assigns, upon trust to hold the same for the sole use and benefit of the resident clergyman of the town of York and his successors appointed or to be appointed rectors of the Episcopal Church therein to

1886

DuMoulin v. Langtry.

Gwynne J.

which the said land is appurtenant, to make leases of the same with the consent of the incumbent, and to receive the rents due or to grow due therefrom to his own use. The letters patent contained a proviso that whenever the Governor, Lieutenant-Governor, or person administering the government of the said province, should erect a parsonage or rectory in the said town of York, and present to such parsonage or rectory an incumbent or minister of the Church of England, who should have been duly ordained according to the rites of the said church, then and whenever the same should happen the said grantees in the said letters patent named, or any succeeding trustees appointed as in the said letters patent was provided, should, by an instrument in writing under the hands and seals of the trustees then being, attested by two or more credible witnesses, transfer and convey all the parcel or tract of land, with the appurtenances by the said letters patent given or granted, to such incumbent or minister being so appointed as aforesaid, and his successors forever, as a sole corporation to and for the same uses and upon the same trusts as before mentioned and expressed; that is to say, to the sole use and benefit of the resident clergyman and his successors appointed or to be appointed rectors of the Episcopal Church in the town of York. The only Episcopal church at this time in the town of York was called St. James' Church, of which the Rev. John Strachan, then and from thenceforth until the month of February, 1847, was the incumbent.

Another portion of the land in question, together with a number of other parcels of land, was granted by the Crown by letters patent bearing date the 26th day of April, 1879, unto and to the use of the Honorable William Dummer Powell, then Chief Justice of the Province of Upper Canada, James Baby and the Reverend John Strachan, their heirs and

1886

DuMoulin v. Langtry.

Gwynne J.

assigns upon certain trusts in the said letters patent declared, and among such trusts upon trust to make conveyances of the parcels or tracts of land by the said letters patent granted or any part thereof to and for such use or uses as the Governor, Lieutenant Governor, or person administering the government of the Province of Upper Canada, and the Executive Council thereof for the time being, should from time to time by order in writing appoint.

The grantees named in these letters patent, by an indenture bearing date the 4th day of July, 1825, and made between them of the first part and the same persons as were named grantees in the said letters patent of the 4th day of September, 1820, of the second part, (after reciting therein the letters patent of the 26th day of April, 1819, and that His Excellency Sir Peregrine Maitland, Lieutenant Governor of the Province of Upper Canada and the Executive Council thereof had, by an order in writing bearing date the 2nd day of December, 1824, required the grantees in the said letters patent named to convey to D'Arcy Boulton, John Beverley Robinson and William Allan for the use of the church in the town of York and of the clergyman incumbent thereof, for the time being, the parcels of land therein described (being part and parcel of the lands by the said letters patent of the 26th of April, 1819, granted to the grantees therein named, the parties to the said indenture of the first part) conveyed, assured and confirmed unto and to the use of the said parties thereto of the second part, their heirs and assigns the same parcels of land in the said order in writing described (being part of the land now in question) upon trust, however, that the said parties to the said indenture of the second part should hold the same for the sole use and benefit of the resident clergyman of the town of York and his successors appointed or to be appointed incumbent of the parsonage or rectory of the

1886

DuMoulin v. Langtry.

Gwynne J.

Episcopal Church according to the rites and ceremonies of the Church of England in the said town to which the said land is appurtenant, or to make leases of the same with the consent of the said incumbent, and to receive the rents due and to grow due therefrom to his own use. This indenture contained a provision for the appointment of a new trustee, or new trustees in the place of a trustee or trustees dying or becoming incapable to act in the execution of the trust of the said indenture and a proviso to the same effect verbatim as that contained in the said letters patent of the 4th of September, 1820, in the event of the Governor, Lieutenant Governor, or person administering the government in the province, erecting a parsonage or rectory in the said town of York. The town of York was incorporated as the city of Toronto in 1834.

From the date of the letters patent of the 4th September, 1820, the grantees therein named and the trustees for the time being of the lands thereby granted, and from the 4th July, 1825, the same persons, as trustees for the time being of the lands in the indenture of tha date mentioned, held the several pieces of land now in question in trust for the sole use and benefit of the Rev. John Strachan as the clergyman who was incumbent of St. James Church, in the town of York (afterwards the city of Toronto) until the 16th day of January, 1836, when by letters patent of that date, under the great seal of the province of Upper Canada, after reciting the provisions of the Imperial statute 31st Geo. 3, authorizing the Governor, Lieutenant Governor, or person administering the government of the province, with the advice and consent of his Majesty's executive council within the same, to constitute and erect in every township or parish which then was or thereafter might be formed, constituted or erected within such province one or more parsonage or rectory, or parsonages or rectories, according to the establishment

of the church of England, a parsonage or rectory was erected and constituted at the city of Toronto, in the township of York, according to the establishment of the church of England, and by the said letters patent it was declared that such parsonage or rectory should, "be hereafter known, styled and designated as 'the "first parsonage or rectory within the said township "of York, or otherwise known as, the parsonage or "rectory of St. James." By these letters patent certain lands situate in the township of York and therein mentioned, whereof the crown was seized, were set apart as a glebe and endowment to be held appurtenant with the said parsonage or rectory, and by letters patent of the same date the Rev. John Strachan, then the clergyman and incumbent of the church of Saint James, in the said city, received the presentation to the said rectory and was duly inducted thereinto, and from thenceforth he became entitled as the rector of the parsonage or rectory of Saint James, not only to the sole use and benefit of himself, as rector of the said parsonage or rectory of the lands mentioned in the said letters patent of the 16th January, 1836, but also to the sole use, benefit, and enjoyment in like manner of the lands mentioned in the letters patent of the 4th September, 1820, and in the indenture of the 4th July, 1825, as the endowment of the said parsonage or rectory; and accordingly the trustees for the time being of the said last mentioned letters patent and indenture, who from the granting of the said letters patent of the 16th January, 1836, constituting the said parsonage or rectory, and the presentation and induction thereinto of the said Rev. John Strachan as the rector thereof, held the said lands in trust for the sole use and benefit of the rector of the said parsonage or rectory and his successors as a corporation sole, by a deed bearing date the 10th of February, 1841, after reciting the letters patent and indentures in virtue of which they held the said lands

1886

DuMoulin v. Langtry.

Gwynne J.

in trust, and the erection of the said parsonage or rectory, and the presentation and induction thereinto of the said Rev. John Strachan, as the rector thereof, did grant, convey, assure, and transfer unto him, as rector of St. James and his successors in the said rectory as a sole corporation, the said lands, &c, to have and to hold the same as rector of St. James, and his successors in the said rectory forever as a sole corporation to and for the same uses and upon the same trusts as are mentioned and expressed in the said letters patent of the 4th September, 1820, and the said indenture of the 4th July, 1826, therein recited, that is to say, as to the lands in question here to the sole use and benefit of the said rector and his successors as rectors of the said parsonage or rectory. In the month of February, 1847, the Rev. Henry James Grasett succeeded the Rev. Dr. Strachan as rector of the said rectory and continued to be such rector, and in the possession and enjoyment of the lands now in question and of the rents, issues and profits thereof to his own sole use and benefit, as such rector until his death in the month of March, 1882.

For sixty years, therefore, the lands now in question have been held and enjoyed to the sole use and benefit of the incumbent, for the time being of the church of St James in the city of Toronto, and for upwards of forty of those years the legal and equitable estate therein has been vested in the same incumbent as rector of the rectory erected by the letters patent of the 16th January, 1839, and his successors as a corporation sole for the sole use and benefit of the rector for the time being of the said rectory, and during all that time no pretension has ever been asserted that any part of the land now in question was held in trust for the use or benefit in any particular of the vestry or churchwardens of, or of the parishioners attending, the parish church of the rectory or parish of Saint James, and I must say that in my opinion there is no foundation whatever for any

1886

DuMoulin v. Langtry.

Wynne J.

such pretension, and therefore such vestry, church wardens or parishioners have no *locus standi in curiâ* to maintain this appeal. The present rector was well advised not to appeal on his own behalf from the judgment of the Chancery Divisional Court, for I entertain no doubt that whatever may be the proper construction to put upon the words, "rectory lands," as used in the preamble of 29 and 30 Vic. c. 16. the language of the enacting clause is abundantly sufficient to include, and as I think was framed with preciseness *ex abundanti cautelâ* for the purpose of including, the lands now in question as lands which had been granted by the Crown as appurtenant to, and belonging to, and appropriated for, the rectory of St. James, equally as it did include within its operation the lands set apart for the like purpose by the letters patent of the 16th January, 1836.

If it were necessary to put a construction upon the words "rectory lands," as used in the preamble, I should not feel disposed to put upon them the narrow construction that they apply only to the lands mentioned in the letters patent erecting and constituting the several rectories which were erected under the Imperial statute 31st George III. To my mind it is plain that whether the church, which was known as St. James' Church, in the town of York, had a legally constituted parish attached to it or not, it was in popular phraseology understood to be a parish church, whatever may have been supposed to be the bounds of the parish, and from the language of the letters patent of the 4th September, 1820, I think there is no doubt that the intention of the Government was that, whenever rectories should be established under the provisions of the Imperial statute 31st Geo. III, the church of St. James, for whose incumbent the letters patent of September, 1820, made some provision, should be the parish church of a parish or rectory to be so erected

1886

DuMoulin v. Langtry.

Gwynne J.

and constituted. In this opinion I am confirmed by the language of the letters patent of the 16th day of January, 1836, declaring that thereafter the parsonage or rectory thereby erected should be known as the first parsonage or rectory within the township of York, otherwise known as the parsonage or rectory of St. James.

The lands which had been granted and settled by the Crown in trust for the sole use and benefit of the clergyman for the time being incumbent of St. James' Church prior to the letters patent of the 16th of January, 1836 became, upon the issue of those letters patent, as much part of the lands granted by the Crown as an endowment of the rectory and appropriated to the use of the rector of St. James' for the time being as did the lands mentioned in the letters patent of the 16th January, 1836, and came as much within the term "rectory lands" as did the latter. Under the circumstances attending the erection of the rectory of St. James and the presentation to that rectory of the incumbent of St. James' Church, in the City of Toronto, which church became the parish church of the rectory, we can well conceive that the provision which the Crown had already made for the sole use and benefit of the incumbent of the Church of St. James before its erection into the parish church of the rectory of that name, operated on the Government in determining what further provision for the endowment of the rectory should be made in the letters patent constituting the rectory. The statute 29th & 30th Vic. ch. 16 was plainly, as I think, passed for supplementing the powers then already vested in the incorporated synods of the several dioceses by placing under their control (as the proper power in the church to have the management and disposition of the temporalities of the church) all lands granted by the crown for, and forming part of, the endowment of any rectory, as effectually as prior statutes

had placed under their control property otherwise acquired for a like purpose. In the view of the very great increase in the value of the property held as an endowment of the rectory of St. James beyond what was at all necessary for the support of its rector, and which endowment was, in fact, sufficient for the support of many clergymen of the church having the cure of souls, and but ill provided for in other parishes, nothing was more natural than that the synods of the dioceses, constituted as they are of the clergy and laity of the church, should, after the decease of any living incumbent having vested interests during his life, have the disposition of the property constituting the endowment of the rectories within the respective dioceses, with the view of providing means for extending the influence and services of the church throughout the poorer parts of the dioceses. Accordingly it was upon the application of the provincial synod that the act 29th and 30th Vic. ch. 16 was passed. The act was passed in the undoubted interest of the church, and the rights of all living persons having vested interests in lands situated as those in question here are, were scrupulously preserved Hitherto the application of the act to the lands in question here has never been doubted, and I am of opinion that there is no room whatever for a doubt as to its application to them.

The appeal must be dismissed with costs.

Appeal dismissed with costs.

Solicitor for appellant: *Frank Arnoldi.*

Solicitors for respondents (plaintiffs): *Moss, Falconbridge & Barwick.*

Solicitors for the Rev. Henry G. Baldwin *et al.* respondents (defendants): *Armour & Gordon.*

Solicitor for township rectors respondents (defendants): *Alfred Hoskin.*

1886

*Feb. 19.

*May 17.

WILLIAM LOGAN (PLAINTIFF)... .....APPELLANT;

AND

THE COMMERCIAL UNION INSURANCE COMPANY (DEFENDANTS) ..... } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Insurance against fire—Condition—Production of magistrate's certificate—Waiver of condition.

A policy of insurance against fire contained the following conditions:—

"The assured must procure a certificate under the hands of two magistrates most contiguous to the place of fire, and not concerned or directly or indirectly interested in the loss or assurance as creditors or otherwise, or related to the assured or sufferers, that they are acquainted with the character and circumstances of the assured, and have made diligent inquiry into the facts set forth in the statement and account of the assured, and know, or verily believe, that the assured really, by misfortune, and without fraud or evil practice, hath or have sustained by such fire loss or damage to the amount therein mentioned.

"No one of the foregoing conditions or stipulations, either in whole or in part, shall be deemed to have been waived by or on the part of the company, unless the waiver be clearly expressed in writing by indorsement upon this policy, signed by the agents of the company at Halifax, N.S."

The insured premises having been destroyed by fire he applied to two magistrates contiguous to the place of the fire for the required certificate, which they refused, and he finally obtained such certificate from two magistrates residing at a distance from such place. The proofs of loss, accompanied by the certificate, were sent to the agent, who subsequently made an offer of payment to compromise the claim, stating that if such offer was not accepted the claim would be contested. The agent, on a subsequent occasion, told the assured that he objected to the claim, as he "did not think it was a square loss."

Held, affirming the judgment of the court below, that the non-production of the certificate, required by the above condition, pre-

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

vented the assured from recovering on the policy.

Held also, that even if such condition could be waived without indorsement on the policy, the acts of the agent did not amount to a waiver.

Semble, that the condition could not be so waived.

APPEAL from a judgment of the Supreme Court of Nova Scotia (1) setting aside a verdict at *nisi prius* for the plaintiff.

The above head-note contains a sufficient statement of the facts upon which this appeal was decided.

Sedgwick Q.C. for the appellants.

Condition 19, relating to waiver, does not refer to matters arising after the loss. *Franklin Fire Insurance Co.* v. *Chicago Ice Co.* (2).

If the agent had said that the proofs of loss were defective in respect to the magistrate's certificate, we could have procured it. He was aware of the defect when he told Logan that the proofs were satisfactory. *Pitney* v. *Glens Falls Insurance Co.* (3).

Henry Q.C. for the respondents

There can be no estoppel in the case of persons insured under this policy. See *Walsh* v *Hartford Insurance Co.* (4); *Merserau* v. *Phœnix Mutual Life Insurance Co.* (5).

Sir W. J. RITCHIE C. J.—The judgment of the Supreme Court of Nova Scotia was clearly right. There was, unquestionably, a non-compliance with the 14th condition of the policy, which provides that:

The assured must also procure a certificate under the hands of two magistrates most contiguous to the place of fire, and not concerned or directly or indirectly interested in the loss or the assurance as creditor or otherwise, or related to the assured or sufferers, that they are acquainted with the character and circumstances of the assured, and have made diligent inquiry into the facts set forth in the statement and account of the assured, and know or verily believe that the assured really, by misfortune, and without fraud or

(1) 6 Russ. & Geld. 209.
(2) 11 Am. Reps. 469.
(3) 61 Barb. (N. Y.) 335.
(4) 73 N. Y. 5.
(5) 66 N. Y. 279.

1886

LOGAN v. COMMERCIAL UNION INS. CO.

Ritchie C.J.

evil practice, hath or have sustained by such fire loss or damage to the amount therein mentioned.

Instead of producing a certificate under the hands of two justices of the peace most contiguous to the place of the fire, &c., the evidence showed that application had been made to two such justices who had refused to give the required certificate. But it is alleged that the respondents had waived the production of such certificate. There is not, in my opinion, any sufficient evidence of waiver in this case, supposing the want of the certificate could be waived without writing indorsed on the policy. The only evidence bearing on this question of waiver is as follows: On the 19th of March Salter, defendant's agent at Halifax, wrote the plaintiff as follows:—

EXHIBIT D. T.

COMMERCIAL UNION ASSURANCE COMPANY
Of London, England.

Capital.....£2,500,000 stg.
Address—P. O. Box 64, Halifax.

HALIFAX, N.S., 19th March, 1884.

WM. N. LOGAN, Truro.

DEAR SIR,—Yours of the 17th inst. received and noted. I sent up the papers *re* your case to Truro, but Mr. Corey won't be there for some time, so I have sent to get them returned, when I will adjust the case myself and see what I can do.

Yours faithfully,

WM. S. SALTER.

And on the 22nd of March he wrote again:

COMMERCIAL UNION ASSURANCE COMPANY
Of London, England.

Capital.....£2,500,000 stg.
Address—P. O. Box 64, Halifax.

HALIFAX, N.S., 22nd March, 1884.

WM. N. LOGAN, Truro, N.S.

DEAR SIR,—Yours 20th inst. received and noted. Papers *re* your case have been returned, and I have looked into them. If you care to compromise the matter for $300 without prejudice I will pay, otherwise will contest the case.

Yours faithfully,

(Sgd.) WM. S. SALTER.

The plaintiff says:

Last of February I went to Halifax again and said to Salter, How are things progressing in my case? He replied, "Your papers and every thing are quite satisfactory, there are one or two cases ahead of yours and when they are settled yours will be." After waiting awhile I wrote to Salter and got D. T. in reply; wrote to him again and got E. T. in reply (D. T. and E. T. put in;) I then went to Halifax and saw Salter, with McCully, my attorney; McCully asked why he objected to pay the full amount; he said he did not like the loss; McCully asked if that was the only objection; he replied he did not think it was a square loss and made some reference to the location of the building.

And Mr. McCully says:

Went to Halifax in March as agent of plaintiff; latter end; on a Saturday and on Monday went with plaintiff who had just got the letter with the offer; we went to plaintiff's office; I asked what his objections were and he shrugged his shoulders and said he did not like the loss; I asked what he meant and he replied, I do not think it is a square loss; I asked if there were any other objections; he replied the same as in Murphy's case, the premises are not accurately described, you are not entitled to anything, but rather than have trouble I will pay $300.

So far from this being a waiver, the very reason assigned for not paying the loss, namely, that the agent did not think it a square loss, may have been, and probably was, based on the rumors the witness Ryan who, though not residing near the fire sent a certificate, said were afloat. His language was "I was there shortly after the fire and heard a great deal about it; some people said the place had been set afire." Or, at any rate, the very fact of the plaintiff's neighbors, two Justices of the Peace contiguous to the fire, refusing to sign the certificate, or even the fact of the plaintiff not producing such a certificate, would be quite sufficient to raise the agent's suspicion that it was not a square loss, and assigning such a reason, so far from being evidence of a waiver of the condition, shows, on the contrary, inferentially, that it would be relied on. But apart from this, the 19th condition is conclusive against the plaintiff. It is as follows:

19. No one of the foregoing conditions or stipulations, either in

1886

LOGAN v. COMMERCIAL UNION INS. CO.

Ritchie C.J.

whole or in part, shall be deemed to have been waived by or on the part of the company, unless the waiver be clearly expressed in writing by endorsement upon this policy signed by the agents of the company at Halifax (N.S.)

There is no pretence for saying that this condition was complied with, nor does it appear to have been in any way, directly or indirectly, referred to by either party. I think, therefore, the appeal must be dismissed with costs.

STRONG J.—The appeal in this case is from a judgment of the Supreme Court of Nova Scotia making absolute a rule for a new trial. The action is brought on a policy of insurance against fire, granted by the respondents in favour of the appellant on property described as a "Stock of Liquors, &c. contained in the bar" in a building occupied by the appellant near Wallace, in Cumberland County, N.S.

The policy was subject to several conditions, twenty in number, of which, however, two only require notice for the purposes of the present decision. By one of the stipulations contained in the 14th condition it was provided that, in case of loss,

> The assured must also procure a certificate under the hands of two magistrates most contiguous to the place of fire, and not concerned or directly or indirectly interested in the loss or the assurance as creditor or otherwise, or related to the assured or sufferers, that they are acquainted with the character and circumstances of the assured, and have made diligent enquiry into the facts set forth in the statement and account of the assured, and know or verily believe that the assured really, by misfortune, and without fraud or evil practice, hath or have sustained by such fire loss or damage to the amount therein mentioned.

The 19th condition was as follows:—

> No one of the foregoing conditions or stipulations, either in whole or in part, shall be deemed to have been waived by or on the part of the company, unless the waiver be clearly expressed in writing by endorsement upon this policy, signed by the agents of the company at Halifax, N.S.

By the 9th plea the respondents pleaded non-per

formance of the provision requiring the certificate of two justices of the peace contained in that portion of the 14th condition already stated. This the appellant answered by two replications—the first taking issue on the plea, and the second alleging that before action brought the respondents, by express renunciation and waiver, waived the performance of the condition. To this the respondents rejoined that by the 19th condition waiver could only be by writing endorsed on the policy, and that there had been no such written waiver. This the appellant met by taking issue on the rejoinder and by a sur-rejoinder that the 19th condition itself had been waived by the respondents. At the trial which took place before Mr. Justice Thompson and a jury at Truro the appellant, being examined on his own behalf, deposed that in an interview with Crowe, who was the local agent of the respondents at Truro, subordinate as such to Salter, the agent at Halifax, the following conversation took place:

> I said he must not delay me, as I had to get a certificate from the two J.P.'s nearest the fire. He said that was of no consequence, as any two responsible J.P.'s would do.

The appellant also proved and put in a certificate to the effect required by the condition, signed by two justices of the peace, Ryan and Sutherland, who were not, however, the justices living most contiguous to the premises. Mr. McCully, the plaintiff's attorney, proved that application had been made to Messrs. Clarke and Logan, two justices of the peace residing near the place of the fire, and, as I gather from the judgment, more contiguous than Messrs. Ryan and Sutherland, but they refused to certify. The appellant also swore that having gone twice to Halifax to see Salter, the agent of respondents there, who granted and signed the policy, on the second occasion and when Salter had had in his hands for some time the papers

1886

LOGAN v. COMMERCIAL UNION INS. CO.

Strong J.

furnished by the appellant as proofs of loss, the following conversation took place:

I said to Salter, "How are things progressing in my case?" He replied, "Your papers and everything are quite satisfactory. There "are one or two cases ahead of yours, and when they are settled "yours will be."

This conversation was denied by Salter, who says in his evidence:

I did not tell him his papers were right.

This was all that could be put forward as evidence of waiver. The learned judge refused to non-suit, although he was of opinion there was no evidence of waiver of the 19th condition, and left three questions to the jury as follows:

Did the agent of the defendant company waive the requirement of a certificate under the hands of two magistrates, as stated in the 14th condition on the back of the policy?

Did the agent of defendant company waive the 19th condition?

Do you accept the account of the conversation between plaintiff and the agent (in February) as testified to by the plaintiff, or as testified to by the agent?

Upon all three of these questions the jury found in favour of the appellant. A new trial was moved for on several grounds, one of these grounds being "that "there was no evidence of waiver of the conditions of "the policy to go to the jury." And a rule *nisi* having been granted it was, after argument, made absolute.

I am of opinion that, irrespective altogether of the requirement of the 19th condition requiring that any waiver should be in writing, there was no evidence showing that the stipulations as to the magistrate's certificate required by the 14th condition had been, in fact, waived in such a way as to bind the respondents, even if a verbal waiver had not been provided against. Salter, as agent, apart from the authority expressly conferred on him to waive in writing, had no power so to bind the respondents, and granting that the plaintiff's account of what passed at the interview at Halifax was,

as the jury found, the true one, what was then said could not in any way have precluded the company from setting up the want of the certificate as a defence, simply for the reason given that Salter was exceeding his powers in assuming (even if the plaintiff's evidence is to be so construed) to dispense with it. Further, even if there could have been any doubt of this in the absence of the 19th condition, that condition clearly excludes any authority in the agent to waive otherwise than according to its terms. Lastly, there was not the slightest evidence of any waiver of the 19th condition itself, and moreover it is manifest that nothing Salter, the agent, might have said, could have had the effect of enlarging the limited powers to waive which the company had thought fit to impose upon him. The appeal is therefore totally unfounded, and should be dismissed with costs.

HENRY J.—I am of the same opinion. I think the appellant is clearly not entitled to recover, and that there is not the slightest evidence of waiver. I think the waiver must be indorsed on the policy.

FOURNIER and GWYNNE JJ. concurred.

Appeal dismissed with costs.

Solicitors for appellant: *Sedgewick, Ross & Sedgewick.*

Solicitors for respondent: *Henry, Ritchie & Weston.*

1886

*Feb. 26, 27.
*May 17.

THE NORTH AMERICAN LIFE ASSURANCE COMPANY (Plaintiffs)..... } APPELLANTS.

AND

ELIZABETH JANE CRAIGEN (Defendant)..... } RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Life Assurance—For benefit of another—Wager Policy—14 *Geo.* 3 *ch.* 48.

The statute 14 Geo. 3 Cap. 48 enacts: 1. That no insurance shall be made by any person or persons, bodies politic or corporate, on the life or lives of any person or persons, or on any other event or events whatever, wherein the person or persons for whose use or benefit, or on whose account, such policy or policies shall be made, shall have no interest, or by way of gaming or wagering; and that every insurance made contrary to the true intent and meaning of this act shall be null and void to all intents and purposes whatsoever.

2. That it shall not be lawful to make any policy or policies on the life or lives of any person or persons, or other event or events, without inserting in such policy or policies the name or names of the person or persons interested therein, or for what use, benefit, or on whose account, such policy is so made or underwritten.

3. That in all cases when the insured hath an interest in such life or lives, event or events, no greater sum shall be recovered or received from the insurer or insurers than the amount or value of the interest of the insured in such life or lives, or other event or events.

Held, affirming the judgment of the court below, that this statute never was intended to prevent a person from effecting a *bonâ fide* insurance on his own life, and making the sum insured payable to whom he pleases, such insurance not being "by way of gaming or wagering" within the meaning of the first section of the act.

Held also, that section 2 of the said act applies only to a policy on the life of another, not to a policy by a man on his own life.

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

1886

NORTH AMERICAN LIFE ASS. CO. v. CRAIGEN.

APPEAL from a judgment of the Supreme Court of Nova Scotia affirming the decision of the Court of Equity, dismissing the plaintiffs' bill.

The facts of the case pertinent to the present appeal are as follows:—

The action was brought to have cancelled a policy of life insurance, issued by the plaintiff company to Edmund Francheville Russell, in the sum of one thousand dollars, dated the 29th day of December, 1881, payable to the respondent.

Russell was a merchant in Halifax in 1881. The respondent was an intimate friend of his wife, and he desired to make some provision for her after his death. She had no pecuniary interest in his life, either at the time the policy was effected or at the time of Russell's death.

The application for the policy was made by said Edmund Francheville Russell, and dated 17th December, 1881; it applied for a policy for the sum of ten thousand dollars, payable to the estate of the applicant. On the 24th December, 1881, Edmund Francheville Russell wrote the following letter to J. S. Belcher, Esquire, agent of the plaintiff company:

"HALIFAX, N.S., December 24th, 1881.

"*J. S. Belcher, Esq.*,

"DEAR SIR,—You will please make policies for the ten thousand dollars insured in the North American Mutual Life Insurance Company on my life as follows: one policy for four thousand dollars in favor of Captain James E. Hadley, of Guysboro; one policy for four thousand dollars in favor of Miss Jessie Richardson, of Sydney, Cape Breton; one policy of one thousand dollars in favor of Elizabeth Jane Craigen, of Halifax, N.S.; one policy for one thousand dollars in favor of

1886

NORTH AMERICAN LIFE ASS. CO. v. CRAIGEN.

Annie Handford Craigen, of Halifax, N.S.

"Yours truly,

(Sgd.) "E. F. RUSSELL."

The appellant company accepted the said proposal for insurance, and issued a policy of insurance to said Russell, insuring his life for the benefit of the said Elizabeth Jane Craigen in the sum of one thousand dollars. By the terms of the policy the company "insures the life of Edmund Francheville Russell, here-"inafter called the assured, and promises to pay at its "said office in the city of Toronto to Elizabeth Jane "Craigen, of Halifax, Nova Scotia, her executors, "administrators or assigns, one thousand dollars," &c.

The appellant company was aware when the policy was effected that the respondent had no pecuniary interest in the life of Edmund Francheville Russell. On January 4th, 1882, Belcher, agent at Halifax of appellant company, wrote to the managing director at Toronto of appellant company a letter containing the following words: "I may say that Mr. "Russell is insuring for the benefit of these people-- "his brother-in-law, sister-in-law, and two friends of "his wife. They do not know anything of his inten-"tion, and he would not ask them to sign the docu-"ments sent, as he does not wish them to know; "merely a favor on his part; he owes them nil; he "says in case of death he wants these amounts paid "without going through the hands of his executors."

On the 15th July, 1883, the company brought this action to have the policy delivered up to be cancelled, alleging in their bill that they first knew the want of interest in the defendant after the death of the assured, whereupon they immediately tendered a repayment of the premium and demanded the policy which was refused.

Mr. Justice Thompson dismissed the bill with costs.

1886

NORTH AMERICAN LIFE ASS. CO. v. CRAIGEN.

From this decision the appellants appealed to the Supreme Court of Nova Scotia *in banco*, which gave judgment dismissing the appeal and confirming the judgment appealed from. The present appeal was then taken.

J. K. Kerr Q.C. for the appellants.

We contend that the policy is within the terms of the statute of Geo. 3, and void as a wager policy. See *Evans* v. *Bignold* (1); *Hodson* v. *Observer Life Assurance Soc.* (2); *Dowker* v. *Canada Life* (3); *Shilling* v. *Accidental Ins. Co.* (4).

The defendant must occupy one of two positions; either the policy was one effected for her benefit, which the statute forbids, or it is issued to Russell whose name is not in the policy in the manner contemplated by section 2.

When the application was made the company called Russell's attention to the want of interest in the beneficiary, and he replied that he was acting under advice and would take the policy as directed.

The following cases were cited: *Vezina* v. *New York Life* (5); *Etna Ins. Co.* v. *France* (6); *Warnock* v. *Davis* (7); *Connecticut Mutual* v. *Sctwenk* (8); *Sadler's Co.* v. *Badcock* (9).

Graham Q.C. for the respondent.

It will not be contended that a party cannot insure his own life. See 32 Albany L. J. 386, Nov. 14, 1885, commenting on the case of *Warnock* v. *Davis*. The writer of this article cites *Triston* v. *Hardey* (10) to show that a policy is valid, even if the premium is paid by the beneficiary.

The company contract with Russell that they will

(1) L. R. 4 Q. B. 622.
(2) 8 E. & B. 40.
(3) 24 U. C. Q. B. 597.
(4) 2 H. & N. 42.
(5) 6 Can. S. C. R. 30.
(6) 94 U. S. R. 561.
(7) 104 U. S. R. 775.
(8) 94 U. S. R. 593.
(9) 2 Atk. 554.
(10) 14 Bea. 232.

1886

NORTH AMERICAN LIFE ASS. CO. v. CRAIGEN.

Ritchie C.J.

pay Craigen. *McQueen* v. *Phœnix Mutual* (1). The company had knowledge of all the facts and cannot succeed unless the policy is absolutely void.

Sir W. J. RITCHIE C.J.—The bill in this case sets out that one Edmund Francheville Russell, on or about December 17th, 1881, made a proposition to the plaintiffs to insure his life in the sum of $10,000, and accompanied said proposal with a letter directed to the plaintiffs, through their agent at Halifax, dated the 24th day of said December, directing that the said sum of $10,000 be written in four policies, of which one was to be in favor of the defendant for $1,000; that the plaintiffs accepted such proposal and issued a policy insuring the life of the said Russell for the benefit of the defendant in the sum of $1,000; that the said Russell died, and the defendant having been called upon so to do made due proof of his death, but admitted that she had no interest whatever, beneficial, pecuniary or otherwise, either at the time of the making and executing such policy or at the time of the death of said Russell; that at the time the plaintiffs issued said policy they had no knowledge that the defendant had no beneficial or pecuniary interest in the life of the said Russell, and that on being fully satisfied of that fact they immediately tendered back to the defendant the premium paid on said policy, and informed her that they would not be bound by said policy to pay her any amount thereunder, and the defendant refused to accept the said premium or to deliver up the said policy; and the bill prayed that the policy should be declared null and void, and that the same be delivered up to the plaintiffs to be cancelled, and that the defendant be restrained by injunction from proceeding in any action at law upon the said policy against the plaintiffs, or assigning or disposing

(1) 4 Can. S. C. R. 660.

1886

NORTH AMERICAN LIFE ASS. CO. v. CRAIGEN.

Ritchie C.J.

of said policy, and for other relief as may seem meet.

This bill was, in my opinion, properly dismissed. The injunction said to have been granted was, in my opinion, most improperly granted, as I have not the slightest doubt as to the liability of the company in this case. The policy was issued on the 29th of December, 1881, whereby the company, in consideration of the application for this policy, and the statements and agreements therein contained hereby made a part of this contract, and of the annual premium, $39.50, to be paid in advance to the company at its head office in the city of Toronto on the delivery of their policy, and thereafter on the 20th day of December in every year during the term of 19 years, insures the life of Russell, hereinafter called the insured, of Halifax, in the county of Halifax and province of Nova Scotia, and promises to pay at its said office, in the city of Toronto, to Elizabeth Jane Craigen, of Halifax, Nova Scotia, her executors, administrators or assigns, one thousand dollars with profits, first deducting therefrom the balance of the current year's premium, if any, and all loans on account of this policy, in sixty days after satisfactory proof at its said office of the death of the insured, during the continuance of this policy, under the following provisions. (Here follows certain conditions which are of no importance in this case.)

There is no pretence for saying that Russell did not insure his own life and pay the premium with his own money, making the loss payable on his death to Elizabeth J. Craigen, without her knowledge. I am clearly of opinion that he had a perfect right to insure his own life; that his interest supports the policy, and that the policy was not, in any sense of the term, a wager policy. It was obtained, and the premium paid, by a person who unquestionably had an interest in his own life, and was not ob-

1886

NORTH AMERICAN LIFE ASS. CO. v. CRAIGEN.

Ritchie C.J.

tained by the party now claiming the money, but was obtained without collusion with, or even the knowledge of, the party whom the assured designated to receive the amount upon his death.

Craigen's first connection with the policy appears to have occurred thus: Russell, about the 21st of January, 1882, delivered to her a sealed envelope directed to her, and requested her to use the contents for her own benefit in the event of his death, and after his death she opened the envelope and found the policy which had been effected by Russell on his own life, with his own means, and, as she says, without any direction from her and without any procurement or solicitation on her part and, in fact, without her previous knowledge.

Can it be doubted that a man has an insurable interest in his own life on which he may effect a *bonâ fide* insurance? And can it be that he cannot appoint any one to receive the money in the case of his death during the existence of the policy?

Against his doing so the statute 14 Geo. 3 cap. 48 has been invoked, which enacts:

First—That no insurance shall be made by any person or persons, bodies politic or corporate, on the life or lives of any person or persons, or on any other event or events whatever, wherein the person or persons for whose use or benefit, or on whose account, such policy or policies shall be made shall have no interest, or by way of gaming or wagering, and that every insurance made contrary to the true intent and meaning of this act shall be null and void to all intents and purposes whatever.

Second.—That it shall not be lawful to make any policy or policies on the life or lives of any person or persons, or other event or events, without inserting in such policy or policies the name or names of the person or persons interested therein, or for what use, benefit, or on whose account such policy is so made or underwritten.

Third.—That in all cases where the insured hath an interest in such life or lives, event or events, no greater sum shall be recovered or received from the insurer or insurers than the amount or value of the interest of the insured in such life or lives or other event or events.

This act never was intended to prevent persons from effecting *bonâ fide* insurance on their own lives; when once so effected the insured is at liberty to assign the policy to whom he pleases, and the assignee may recover without showing interest or payment of consideration, resting on the rights of the persons who effected the insurance, the statute applying only to the original parties to the policy. See *Ashley* v. *Ashley* (1).

It is quite another matter where an evasion of the statute is attempted by a person procuring one in whose life he has no legal interest to insure it with his money and for his benefit, though ostensibly for the advantage of the party insuring. In this case, as I have said, there was no attempt to evade the statute. Russell applied for the insurance on his own life, paid the premium out of his own money, and the company, with full knowledge of all the circumstances, issued to him a policy; the contract thus made with Russell not having the semblance of a wager policy, but being made in good faith, what possible objection, in law or in principle, can there be to his requiring the amount, in case of his death, to be paid, not to his personal representatives, but to a specific person whom he designates to receive the same? The loss could not be paid to Russell himself because it is not payable until he is dead and gone. What is there to justify the principle that the statement in the policy of the name of the person to whom he wishes the money to be paid on his death vitiates the policy? What rule or principle of law is invaded by the parties, by mutual agreement, designating who shall be entitled to receive the proceeds when due instead of the personal representatives of the deceased? He could assign the policy; he could bequeath the policy; and I have yet to learn that he could not make it payable to trustees for the benefit of particular indi-

(1) 3 Sim. 149.

1886

NORTH AMERICAN LIFE ASS. CO. v. CRAIGEN.

Ritchie C.J.

viduals. If he could, why could he not make it payable to the assignee, devisee or individual himself or herself?

Section 2 which has been so much relied on has, it appears to me, been entirely misapprehended on the argument. It applies only to a policy on the life of another, not to a policy by a man on his own life. The statute only requires that where a party makes an insurance on the life of another the policy shall contain the name of the person for whose use, benefit, or on whose account the policy is made; therefore where a third person is a person interested in the policy the name of that person so interested must, no doubt, be inserted. Section 3, read in connection with section 2, shows very clearly that section 2 refers to insurance on the lives of others, not to insurance by a party on his own life. But if section 2 be applied to a case like the present I do not see what the defendants have to complain of. The name of the party for whose benefit the assured caused the insurance to be effected, in other words, the party intended by the assured to be benefitted by the insurance on his death, does appear.

No English case has been cited nor, I think I can safely say, can be found, to sustain the plaintiffs' contention. In the United States of America decisions in different States of the Union are in direct opposition. I will refer to a few of them.

In *Campbell* v. *The New England Mutual Life Insurance Co.* (1), the marginal note says:

An action may be maintained on a policy of life insurance obtained by a man on his own life, without proving an insurable interest therein in the person for whose benefit it is declared on its face to be made.

And in the same case (2) Wells J. says:

The policy in this case is upon the life of Andrew Campbell. It was made upon his application; it issued to him as "the assured;"

(1) 98 Mass. 381. (2) At p. 389.

1886

NORTH AMERICAN LIFE ASS. CO. v. CRAIGEN.

Ritchie C.J.

the premium was paid by him; and he thereby became a member of the defendant corporation. It is the interest of Andrew Campbell in his own life that supports the policy. The plaintiff did not, by virtue of the clause declaring the policy to be for her benefit, become the assured. She is merely the person designated by agreement of the parties to receive the proceeds of the policy upon the death of the assured. The contract, (so long as it remains executory), the interest by which it is supported, and the relation of membership, all continue the same as if no such clause were inserted. *Fogg* vs. *Middlesex Insurance Co.* (1); *Sanford* vs. *Mechanic's Insurance Co.* (2); *Hale* vs. *Mechanic's Insurance Co.* (3); *Campbell* vs. *Charter Oak Insurance Co.* (4); *Forbes* vs. *American Insurance Co.* (5).

It was not necessary, therefore, that the plaintiff should show that she had an interest in the life of Andrew Campbell by which the policy could be supported as a policy to herself as the assured. The defendants raise no question as to her right to bring this action if the policy can be supported for her benefit.

In *Hogle* vs. *The Guardian Life Insurance Company* (6) the marginal note reads:

4. Any person has the right to insure his own life though he does it for the benefit of another; and he may have the loss payable to the assured or to his own assignee or appointee.

5. A policy of insurance effected by a person upon his own life may be disposed of as the insured sees fit.

Garvin J.:

The contract was with Warner, whose life was insured for her (the plaintiff's) benefit, and the promise is to pay her. The action is properly brought in her name. *Lawrence* v. *Fox* (7). But whether this is so or not the plaintiff is the real party in interest and can maintain the action. (Code sec. 111). The insurance was effected by Warner. He applied for it, paid the premium, took all the initiatory steps for proving it. It was delivered to Warner, and nothing is clearer than that Warner could make the loss payable to whom he pleased. He did so, making it payable to her. Therefore the question of whether she had an insurable interest in the life of her father does not and cannot arise. Any person has a right to insure his own life though he does it for the benefit of another. *Rawls* v. *The American Ins. Co.* (8). He

(1) 10 Cush. 337.
(2) 12 Cush. 541.
(3) 6 Gray 169.
(4) 10 Allen (Mass.) 213.
(5) 15 Gray 249.
(6) 6 Robinson (N.Y.) 567.
(7) 20 N. Y. 268.
(8) 27 N. Y. 282.

1886

NORTH AMERICAN LIFE ASS. CO. v. CRAIGEN.

Ritchie C.J.

may have the loss payable to the assured, or to his own assignee or appointee; and whichever be the form his interest in his own life is the same. There is therefore no question as to the plaintiff's interest in his own life. That question does not arise. *St. John* v. *American Mutual Ins. Co.* (1); *Ruse* v. *Mutual Benefit Life Ins. Co.* (2).

A policy of insurance effected on one's own life may be disposed of as the insured sees fit. It is not material that the beneficiary, appointée, or assignee, have an interest in the life of the insured at the inception of the policy. A valid policy once made, it so remains if the conditions are complied with, *Valton* v. *National Fund Life Ass. Co* (3). On the termination of the life the sum insured is payable absolutely (4).

In *Olmstead* v. *Keyes* (5) Earl J., after referring to the insurance authorities, says:

> The rules, as gathered from these authorities, is that where one takes out a policy upon his own life as an honest and *bonâ fide* transaction, and the amount insured is made payable to a person having no interest in the life, or where such a policy is assigned to one having no interest in the life, the beneficiary in the one case, and the assignee in the other, may hold and enforce the policy if it was valid at its inception and the policy was not procured, or the assignment made, as a contrivance to circumvent the law against betting, gaming and wagering policies.

And in *The Provident Life Insurance & Investment Co.* v. *Baum* (6) Ray J. says:

> In consideration of eighteen dollars, the receipt of which is hereby acknowledged, The Provident Life Insurance and Investment Company do hereby insure Americus Baum against loss of life in the sum of $3,000, to be paid to Napoleon Baum or his legal representatives within ninety days after sufficient proof that the assured, at any time after the date hereof and before the expiration of this policy, shall have sustained personal injury caused by any accident within the meaning of this policy and the conditions hereunto annexed, and such injuries shall occasion death within ninety days from the happening thereof; sufficient proof being furnished to this company.

(1) 13 N. Y. 31.
(2) 23 N. Y. 516.
(3) 20 N. Y. 32.
(4) 27 N. Y. 290.
(5) 85 N. Y. at p. 600.
(6) 29 Indiana Rep. 236.

1886

NORTH AMERICAN LIFE ASS. CO. v. CRAIGEN.

Ritchie C.J.

And he goes on to say (1):

The position assumed by the appellant in argument that this policy is one of indemnity, and that the appellant must show an interest in the life of the assured, does not, we think, arise in this case. The policy in terms declares that the company insure Americus Baum against loss of life in the sum of three thousand dollars. It cannot be questioned that a person has an insurable interest in his own life, and that he may effect such insurance and appoint any one to receive the money in case of his death during the existence of such policy. It is not for the insurance company, after executing such a contract and agreeing to the appointment so made, to question the right of such appointee to maintain the action. If there should be any controversy as to the distribution among the heirs of the deceased of the sum so contracted to be paid it does not concern the insurers. The appellants contracted with the insured to pay the money to the appellee, and upon such payment being made they will be discharged from all responsibility. So far as the insurance company is interested the contract is effective as an appointment of the appellee to receive the sum insured.

The law, then, of this case is against the defendants, and I do not know that I have ever adjudicated on a case where the defendants had so little merits. The company appear to have suggested that the law would not allow a policy to be made payable to a person having no present insurable interest in the life of the assured, and yet, with the following letter from their agent,

Wm. McCabe Esq., Toronto:—

DEAR SIR—I have at hand your favors of 27th and 29th ults., also policies for Mr. Russell; they all came together. I have also received your favor of 31st., with paper and envelopes to-day. I have read over your letters of 29th very carefully, and understand that Mr. Russell can not insure for the benefit of others, and that I am authorized to hand him his policies, which I have done; expected to have seen him to day but have not. I may say that Mr. Russell is insuring for the benefit of these people—his brother-in-law, his sister-in-law, and two friends of his wife. They do not know anything of his intention, and he would not ask them to sign the documents sent as he does not wish them to know, merely a favor on his part, he owes them nil; he says in case of death he wants these

(1) At p. 240.

1886

NORTH AMERICAN LIFE ASS. CO. v. CRAIGEN.

Ritchie C.J.

amounts paid without going through the hands of his executors.

Yours truly,

(Sgd.) JOSEPH S. BELCHER.

and with this full knowledge they have a policy made out as Mr. Russell wished and received his premium. Could it be that with this knowledge they wickedly took Russell's money for what they thought would be a valueless policy and intended, in case of death, to repudiate it? And yet such is the only inference that can be drawn from this most unjust at tempt to defeat a righteous claim.

With all the circumstances as above detailed, there being no allegation, or pretence for saying, on this record that there was any concealment, fraud or evasion practised on the part of the insured or on that of the defendant in this case, it is difficult to understand how they could bring themselves to resist this claim. They have neither law, merits, nor justice on their side, and therefore, in my opinion, the appeal should be dismissed with costs (1).

STRONG J.—This is a suit in equity to have a policy of life assurance delivered up to be cancelled upon the ground that it was a wager policy, effected by or on behalf of a person having no interest in the life, and so void under the provisions of the Stat. 14 Geo. III. ch. 48. The assurance was effected by Russell, whose life was the subject of it, and who paid the premium, there being nothing to show that at or before that time the defendant knew anything about the matter. The contract of the company contained in the policy was with Russell, and with Russell alone, and by the proper construction of the instrument the premiums were to be paid by Russell. Russell, it is true, afterwards handed over the policy to the defendant, but this, if it had any legal effect, operated only as a subsequent assignment. The well known rule of the law of

(1) See *Bloomington Mutual Life Ass.* v. *Blue*, 35 Albany L.J. 442, published since this judgment was rendered.

1886

NORTH AMERICAN LIFE ASS. CO. v. CRAIGEN.

Strong J.

contracts, that when a contract or covenant is made between two persons for the benefit of a third that third person is not to be considered a party to the contract and cannot sue upon it, applies here. The policy was, it is true, made payable to the defendant, but the defendant was not for that reason in a position to recover upon it, there being no privity of contract between her and the company, unless she has become entitled to sue by reason of some valid and effectual transfer made by Russell to her. It would be premature now to say whether there has been an effectual gift of the policy to the defendant or not. It is sufficient for the purpose of this appeal to say that the contract of insurance intended to be carried out by the policy, was at its inception an insurance effected by Russell on his own life and, as such, entirely unobjectionable. No statute or rule of law that I am aware of prohibits a policy of this kind. It is not one which the statute 14 Geo. 3 was designed to prevent. Every man has an insurable interest in his own life and he may, either by will or by act *inter vivos* by way of assignment, direct the payment of the sum assured to be made, at his death, to a third person, and as he may clearly do this by an assignment of the policy, subsequent to its being effected, so he may do the same by an instrument contemporaneous with the policy; and if he can do this by a contemporaneous instrument collateral to the policy, there is no reason why he may not effect the same end by a provision embodied in the policy itself, which is all that has been done here.

Of course, if it is made to appear by evidence that the undertaking of the person whose life is assured to pay the premiums is colorable, and that the premiums are in reality to be paid by a third person who has no insurable interest in the life and who is to have the benefit of the insurance, the policy will be a wager

1886

NORTH AMERICAN LIFE ASS. CO. v. CRAIGEN.

Strong J.

policy and so within the statute and void, but nothing of the kind appears here.

The statute 14 Geo. 3 no doubt applies and the validity of the policy is to be determined by it, for the contract of insurance must be considered as having been made at Toronto, the domicile of the defendants, and the law of Ontario has been properly put in evidence by proof or admission of the statute of the late Province of Upper Canada, establishing the law of England as it stood in 1791 as the rule of decision, which, it cannot be doubted, had the effect of introducing the statute in question as a governing enactment into the law of that province. But for the reasons already stated I am of opinion that the statute does not invalidate the policy. I attach no importance to the pretended variation of the policy by converting it into one effected by the defendant; inasmuch as for the reasons assigned by Mr. Justice Thompson in his judgment in the court below such variation never took effect.

The law applicable to this case is well stated in *Olmstead* v. *Keyes* (1), for although neither the statute of Geo. III. nor any similar statutory enactment is in force in New York, yet the courts of that state have repeatedly held that the common law had the same effect in forbidding wager policies on the lives of third parties as the statute had in England.

I may add that if this policy had been made in Nova Scotia, or if by reason of there being no proof of the *lex loci*—the law of Ontario—we had been called upon to determine the case by the law of Nova Scotia, where the statute is not in force, I should, had the facts warranted it, have felt no difficulty in adopting the New York rule, that a wager policy effected by a person having no interest in the life was, at common law, against public policy and so void.

(1) 85 N. Y. 593.

1886

NORTH AMERICAN LIFE ASS. CO. v. CRAIGEN.

Strong J.

There is a further reason for holding that this appeal must fail. This is a bill in equity, and the decision appealed from was pronounced before the Nova Scotia Judicature Act came into force. It is well established that a Court of Equity will not decree cancellation for matters of avoidance apparent on the face of the instrument impeached. The whole ground of equity insisted on by the appellants in the present case is that the policy is void on its face. This point was alluded to but not decided in *Desborough* v. *Curlewis* (1). It is manifest, however, that the inclination of the court in that case was in favour of the objection, which I think well founded in the present case, and a sufficient ground for the dismissal of this appeal if other and more substantial reasons were not also applicable.

The appeal should be dismissed with costs.

FOURNIER J.—I entirely concur in the opinion of His Lordship the Chief Justice, and especially in his last observation.

HENRY J.—The case as presented by the evidence here is that of a company who, with full knowledge of all the circumstances, enters into a contract, and after the contract has been performed by the insured goes into a Court of Equity and asks for an injunction against the parties entitled to be paid to restrain them from bringing an action. This is a most unjust proceeding, and I do not understand it; I am clearly of opinion that a man can insure his own life and, with the consent of the company, can make the insurance payable to whom he pleases. This is totally different from a wager policy, which means a party insuring another person's life to make money out of it. The statute is not applicable to a case of this kind, and the company has no right to ask any court to restrain the

(1) 3 Y. & C. 175.

1886

NORTH AMERICAN LIFE ASS. CO. v. CRAIGEN.

Henry J.

defendant from bringing an action. It is a most unrighteous proceeding on the part of the company. The appeal should be dismissed with costs.

TASCHEREAU J.—I am also of opinion that this appeal should be dismissed for the reasons just given by His Lordship, the Chief Justice. I desire particularly to add that I also fully agree in all that has been said by His Lordship as to the nature of the contestation raised by the company against this claim. Such contestations by these companies are very much to be regretted, and are of a nature to prove a serious blow to the whole system of life insurance.

Appeal dismissed with costs.

Solicitor for appellants: *W. F. MacCoy.*

Solicitor for respondent: *Geo. H. Fielding.*

1884

*Nov. 12 & 13.

1885

*May 12.

THE ATTORNEY GENERAL OF NOVA SCOTIA, AT AND BY THE RELATION OF DAVID M. DICKIE, JOHN M. STARR, ROBERT M. RAND, DAVID B. NEWCOMBE, PEREZ M. BRECKEN, MINARD ROSCOE, JAMES BLIGH AND GEORGE W. FISHER (PLAINTIFFS) ..... } APPELLANTS;

AND

FREDERIC J. AXFORD, WILLIAM SMITH, AND HENRY ZINCK (DEFENDANTS)..... } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT ON NOVA SCOTIA.

Grant to Township—Land for school—Charitable trust—Acceptance of by trustees—Discretion of trustees—Doctrine of Cy pres.

By the patent or grant of the Township of Cornwallis, in Kings Co., N. S., made in 1761, four hundred acres of land were declared to be "for the school." By a subsequent grant from the Crown

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

in 1790, the said four hundred acres were declared to be vested in the Rector and Wardens by the name of the Church of Saint John, in the said Township, and the Rector and Wardens of the said Church for the time being "in special trust, to and for the use of one or more school or schools, as may be deemed necessary by the said Trustees, for the convenience and benefit of all the inhabitants of the said Township of Cornwallis, and in trust that all schools in said Township furnished or supplied with masters qualified, agreeably to the laws of this Province, and contracted with for a term not less than one whole year, shall be entitled to an equal share or proportion of the rents and profits arising from said school lands, provided the masters or teachers thereof shall receive and instruct, free of expense, such poor children as may be sent them by the said trustees."

The grantees took possession of the land mentioned in said grant, and they and their successors in office have ever since remained in possession of it, and until the year 1873 the rents and profits arising from such land were distributed among the schools of said Township, and poor children sent by the trustees to, and educated in, said schools according to the terms of the trust. In 1873, however, the then trustees discontinued such distribution and allowed the funds realized from said lands to accumulate, the reason alleged therefor being that the schools of the Township had become so numerous that the sum appropriated to each would be too small to be of use, and also, that under the free school system all the poor children of the township were educated free of expense and the object for which such funds had previously been supplied no longer existed.

The present defendants were invested with the said trust in 1879, when the revenue of the said lands had accumulated until they amounted to over $1,200. Shortly after they became such trustees it was determined to build a school house in a certain district in said Township with the money. A meeting of the vestry of the church was held and a resolution passed authorizing such school house to be built on land leased from the church; the school was to be non-sectarian, but after school hours any of the children that wished could receive instruction in the doctrines of the Church of England. On a suit to restrain the defendants from using the trust funds to build such school house and praying for an account,

Held, reversing the judgment of the Supreme Court of Nova Scotia,

1884

ATTORNEY GENERAL OF NOVA SCOTIA v. AXFORD.

and restoring that of the court of first instance, that the trustees had no discretion as to the application of the trust funds, but were bound to distribute them among all the schools of the Township, which would be entitled to participate under the terms of the trust, however wanting in utility such a disposition of said funds might be.

Held also, that the Attorney General of the Province was the proper person to bring this suit.

Held, per Strong J. that in interpreting the trust, in order to explain the apparent repugnancy in the grant in providing that the rents were to be distributed among one or more schools, &c., and also among all the schools in the township, the probable condition of the township, in respect to the number of schools therein, at the time the grant was made, coupled with the long continued usage which has prevailed in the manner of administering the trust, could be considered as a rule of guidance for such interpretation.

Held also, per Strong J., that under the doctrine of *Cy-près*, a reference might be made to the master, to report a scheme for the future administration of the charity.

APPEAL from a decision of the Supreme Court of Nova Scotia (1), reversing the judgment of the Judge in Equity (2) ordering an injunction to restrain the defendants from improperly using the trust funds in question in the suit and a reference to the master for an account of such funds.

By the patent or grant of the Township of Cornwallis in 1764, four hundred acres of land were declared to be set aside for school purposes; and by a subsequent grant in 1790, the said lot of four hundred acres was granted to William Twining, rector, and John Burbidge and Benjamin Belcher wardens, of the church of St. John, in said township, and to the rector and wardens of the said church for the time being, in special trust for the use of the school or schools in Cornwallis aforesaid. The habendum of the said grant is as follows:

To have and to hold the said parcels, lots or tracts of four hundred acres of land, and all and singular other the

(1) 5 Russ. & Gel. 107. (2) Russ. Eq. Reps. 429.

premises hereby granted unto the said William Twining, rector of the said Church of St. John, and John Burbidge and Benjamin Belcher, wardens thereof, during their continuances in the said offices respectively, and to the rector and wardens of said Church of St. John for the time being, in special trust to and for the use of one or more school and schools as may be deemed necessary by the said trustees for the convenience and benefit of all the inhabitants of the said township of Cornwallis, and in trust that all schools in said township, furnished or supplied with masters qualified agreeably to the laws of this province and contracted with for a term not less than one whole year, shall be entitled to an equal share or proportion of the rents and profits arising from said school lands, provided the masters or teachers thereof shall receive and instruct, free of expense, such poor children as may be sent them by the said trustees.

The said rector and wardens accepted the trust created by said grant, and from that time until the year 1873 the profits realized from the said lands were divided among all the schools in the township of Cornwallis. In 1873, however, the then trustees refused to make such distribution and allowed the trust funds to accumulate, and in 1879, when the present defendants became trustees, they received from their predecessors over $1,200 of trust funds. The reason alleged for not continuing to distribute the funds was, that under the free school system, which had been in operation since 1865, all poor children in the township were, by law, educated free of expense, and the primary object for the expenditure of the trust funds no longer existed; and also, that the schools had become so numerous that the amount received by each on the distribution would be too small to be of use.

The present defendants resolved to use the money in

1884

ATTORNEY GENERAL OF NOVA SCOTIA v. AXFORD.

their hands to build a school house in a certain section of the township, and this suit was brought to restrain them from so using the funds. The Judge in Equity, before whom the case was heard, granted an injunction and ordered an account to be taken of the rents and profits of the school lands. His judgment is reported in Russell's Equity Reports, page 429. The majority of the Supreme Court of Nova Scotia agreed in reversing the judgment of the Judge in Equity, holding that the trustees had a discretion as to the manner of carrying out the trust, and under the altered state of circumstances since the trust was created they had not exercised that discretion unlawfully. The plaintiffs appealed to the Supreme Court of Canada.

Roscoe for appellants.

Henry Q.C. for respondents.

Sir W. J. RITCHIE C.J.—In this case I agree with every word of the judgment of the learned Equity Judge. His judgment, in my opinion, should not have been reversed.

Of course the learned Equity Judge only intended to say that the money is to be distributed among those schools which come within the words of the "trust," that is, in trust that all schools in said township, furnished or supplied with masters qualified agreeably to the laws of the province and contracted with for a term not less than one whole year, shall be entitled to an equal share or proportion of the rents and profits arising from said school lands, provided the masters or teachers thereof shall receive and instruct, free of expense, such poor as may be sent to them by the said trustees. This the learned judge has clearly indicated. I think the judgment of the Supreme Court reversing that judgment entirely wrong, and this appeal should be allowed and the judgment of the equity judge restored.

1885

ATTORNEY GENERAL OF NOVA SCOTIA v. AXFORD.

Strong J.

STRONG J.—This appears to be a very plain case, and one which may be decided by the application of elementary principles of the law relating to charitable trusts.

In the first place, however, it will be well to dispose of an objection *in limine* to the maintenance of the suit as an information of the Attorney General of the Province of Nova Scotia. I entirely agree with the late Judge in Equity in what he has said upon this head. The Attorney General of the province is clearly the proper officer to sue in respect of all matters having locality in the province. This is a matter having such locality, and no reason has been, or could have been, suggested why the duty of suing in respect of a charitable trust of lands within the province, the objects of the charity being also entirely provincial, should be cast upon the Attorney General of the Dominion. The same point was raised before me in the *Attorney General* v. *Niagara Falls International Bridge Company* (1), and for the same reasons as those I there assigned, which apply with even greater force here, I now hold this point to be untenable.

It is said the defendants have not the legal estate in the trust lands, since the grant in the deed of the 31st December, 1790, having been to the then rector and church wardens, and the rectors and wardens for the time being, of the Church of St. John in the township of Cornwallis, the only estate which could have vested was a life estate in the immediate grantees, as the rector and church wardens were not a corporation, and that consequently the defendants are not accountable as trustees. Without stopping to enquire whether a grant by the Crown to named persons, described as and actually at the time holding certain offices, and their successors in those offices, does or does not create

(1) 20 Gr. 34.

1885

ATTORNEY GENERAL OF NOVA SCOTIA v. AXFORD.

Strong J.

a corporation by implication—a question for an affirmative answer to which there is considerable authority—it is sufficient here to say, that the letters patent created a valid charitable trust, and that in any case, much more in the case of a charity, a Court of Equity will never allow a trust to fail for want of a trustee. The defendants have assumed to act as trustees, and are such *de facto* if not *de jure*, which is sufficient for all the purposes of the relief sought by this information—an injunction to restrain an improper diversion of the trust funds from the legitimate objects of the charity, and an account of the monies received by them from their predecessors and which have since come to their hands as rents.

As regards the proper construction of the trust, I also agree with the late Judge in Equity, though this is the most difficult question which the case presents. At first sight there might seem to be a repugnancy between the early and the latter part of the limitations of the trust, the former saying that the trust was to be "for "the use of one or more school or schools as might be "deemed necessary by the trustees," and the latter declaring a trust for all schools which should comply with the conditions named. This, I think, coupled with the long continued usage which has prevailed in the manner of administering the trust, is sufficiently explained by an observation in the judgment of Mr. Justice James, who very pertinently points out that there may have been, at the early day at which the grant was made, "only one school in the township, perhaps not one." But for the usage, however, I should have had some doubt as to this, in the absence of any evidence of what the circumstances actually were at the date of the grant. That this is a legitimate mode of interpreting a charitable trust, when there is any ambiguity in

1885

ATTORNEY GENERAL OF NOVA SCOTIA v. AXFORD.

Strong J.

its terms, is well established by authority (1).

Then as regards the conditions imposed with reference to the contracts with the masters, and the free instruction of poor children, it appears that these conditions have been altogether superseded by the general school law of the Province, which makes all public schools free. It follows, that according to the strict terms of the trust, as applied to the existing state of things, the income is divisible amongst all the schools in the township, however wanting in utility such a disposition of the funds might be, and the trustees of their own motion, and without the authority of the court, had no right to make any other application of them; they were consequently guilty of a breach of trust in appropriating the charity funds in their hands to the erection of a school house, and more especially as the building was upon the land of other proprietors.

It appears, therefore, that such a decree as the late Judge in Equity proposed to make, and, as I assume, would have been drawn up for the purpose of carrying out his adjudication if an appeal to the full court had not been interposed, would have been perfectly correct so far as it would have enjoined the defendants from laying out any of the trust funds upon the building, and also so far as it would have directed an account of rents received, as well as of the monies handed over by the defendants' predecessors.

Agreeing, as I do, however, with Mr. Justice Weatherbe, that this is a proper case for the application of the doctrine of *cy-près*, and not feeling the difficulty which he felt in administering that relief, I think there may be superadded to the directions I have already mentioned a reference to the master to report a scheme for the future application of these funds.

(1) *Attorney General* v. *Smithies* 1 Keen 307; Tudor's Charitable Trusts, p. 243 (Ed 2) and cases there cited.

1885

ATTORNEY GENERAL OF NOVA SCOTIA v. AXFORD.

Strong J.

It is said that there are some sixty schools in this township, and a division of the income amongst such a number would be carrying out the general intention of the charity in such a way as to make it useless. It is said by the text writer, already quoted (1):

The doctrine of *cy-pres* is applied by the Court of Chancery to cases not only where the terms of the gift in trust for charitable purposes are in themselves ambiguous or imperfect, but also where, being originally precise and complete by lapse of time or otherwise, they had become unsuited, under altered circumstances, to carry out the general intentions of the founders.

The law as thus laid down, and which is supported by a large number of decided cases, manifestly applies to the present case. The "altered circumstances" here require that some new scheme for applying the income of the charity to educational purposes, which was the general intention of the Crown in founding it, should be devised.

It is quite clear, on the authorities, that charity informations have always been regarded in courts of equity as exceptional cases, so far as the rules of pleading are concerned, and that in such cases the court will give any relief which may seem to it to be appropriate, although not specifically prayed for. I again refer to Mr. Tudor's book (2) as correctly summarising the law as to this point also. It is there said:

Many of the formalities of pleading, adopted in ordinary cases, have not been enforced in cases of charities, and it has been laid down by Lord Hardwicke that on an information by the Attorney General for the regulation of a charity it is the business of the court to give a proper direction to the charity without having regard at all to the propriety or impropriety of the prayer of the information. *Attorney General* v. *Jeanes* (3).

Thus, if the wrong relief or no relief at all, with regard to particular objects or a particular person, is prayed, the Court of Chancery will nevertheless give proper relief. And *a fortiori*, when there is a prayer for general relief, proper relief will be given upon an infor-

(1) Tudor's Charitable Trusts, p. 260.

(2) P. 163.

(3) 1 Atk. 355.

1885

ATTORNEY GENERAL OF NOVA SCOTIA v. AXFORD.

Strong J.

mation for a charity without any specific prayer; thus where an information was filed to set aside a lease of a charity estate, and for general relief, Lord Eldon said that it was perfectly settled that the information had prayed quite enough to authorize an account of the rents.

The authorities referred to by the writer will be found entirely to bear out this statement of the law.

The decree, therefore, in my opinion, besides ordering or continuing the injunction (as the case may be), and directing the accounts already mentioned, should have added to it a reference to the master to report a scheme for the future administration of the charity. There may also, if the Attorney General desires it, be a reference to appoint new trustees As to the costs, the defendants must pay all the costs both here and below up to the decree, but the future costs, as well as the further directions consequent on the master's report, must be reserved to be disposed of by the Supreme Court in Equity, when the cause comes before it on the report. The order of this court should direct that a decree to this effect be entered in the Supreme Court of Nova Scotia in equity.

FOURNIER, HENRY and TASCHEREAU JJ. concurred.

Appeal allowed with costs.

Solicitors for appellant: *J. N. & T. Ritchie.*

Solicitors for respondents: *Henry & Weston.*

ROBERT THOMSON (DEFENDANT).....APPELLANT;

AND

NATHANIEL DYMENT (PLAINTIFF).....RESPONDENT.

1886

*May 27 & 28.

*Nov. 8.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Contract—Sale of lumber—Acceptance of part—Right to reject remainder.

T. contracted for the purchase from D. of 200,000 feet of lumber of a certain size and quality, which D. agreed to furnish. No place

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

1886

THOMSON v. DYMENT.

was named for the delivery of the lumber, and it was shipped from the mills where it was sawed to T. at Hamilton. T. accepted a number of carloads at Hamilton, but rejected some because a portion of the lumber in each of them was not, as he alleged, of the size and quality contracted for.

Held, affirming the judgment of the Court of Appeal for Ontario, Fournier and Henry JJ. dissenting, that T. under the circumstances of the case had no right to reject the lumber, his only remedy for the deficiency being to obtain a reduction of the price or damages for non-delivery according to the contract.

APPEAL from the decision of the Court of Appeal for Ontario (1), affirming the judgment of the Common Pleas Division (2) in favor of the plaintiff.

The material facts of the case are as follows:

The defendant, Thomson, was a dealer in lumber at Hamilton, Ont., and previous to the year 1884, he had purchased lumber from the plaintiff. In January, 1884, he received a letter from the plaintiff containing the following offer: "I am informed you want 200,000 feet 2 "inch plank, 18 feet; I will furnish it for same price "and terms as last summer." On January 26th, 1884, he answered said letter as follows: "I will take 200,- "000 feet 2 inches, 18 feet, 6 inches up to 12 inches, "good, sound, square edge, fit for car flooring, at $10, "3 months." On February 2nd, 1884, the defendant received the following: "I could not furnish the "200,000 feet 2 inch plank, 18 feet, for less than $10.50 "per thousand," On February 20th, he wrote as follows: "I will take 200,000 feet cut as follows, 2 x 6, "2 x 8, 2 x 9, 2 x 10, 2 x 12, 18 feet, at $ 10.25, 3 "months. It must be good, sound, square-edged stuff, "red and white pine." On February 23rd, he received the following answer: "I will accept your offer for "the 200,000 feet of 18 feet plank, from 6 to 12 wide, "quality same as I supplied you last year, your accept- "ance at three months from date of shipments."

On the strength of this correspondence the plaintiff

(1) 12 Ont. App. R. 659 (2) 9 O. R. 566.

began in June, 1884, to ship the lumber from his mills on the line of the Hamilton & North-Western Railway to the defendant at Hamilton, who accepted a number of car loads, but refused to accept others on the ground that a portion of the lumber in them was not up to the standard of his letter of February 20th. All the lumber had been sent to Hamilton except one car load which, by defendant's orders, was sent to London.

1886

THOMSON v. DYMENT.

The plaintiff sued for the whole amount shipped, and defendant in his statement of defence offered to pay for the portion which was of the proper size and quality.

The plaintiff recovered a verdict at the trial for the full amount, and both the Common Pleas Division and the Court of Appeal refused to disturb it. Both these courts held that the defendant had no right to reject the lumber, his only remedy being to proceed against the plaintiff for damages for non-delivery according to contract. From the decision of the Court of Appeal the defendant appealed to the Supreme Court of Canada.

Bain Q.C. and *Cappelle* for the appellant, as to right of inspection and rejection, and when and where it must be exercised, in addition to cases cited in the court below, referred to *Towers* v. *Dominion Iron and Metal Co.* (1); Campbell on Sales (2); Chitty on Contracts (3); *Morton* v. *Tibbett* (4).

As to rights of buyer to reject goods on ground of difference in kind or quality see Benjamin on Sales (5); *Barr* v. *Gibson* (6); *Gompertz* v. *Bartlett* (7); *Behn* v. *Burness* (8).

The vendor is bound to give opportunity to inspect goods. Benjamin on Sales (9).

(1) 11 Ont. App. R. 315.
(2) Ed. '81, pp 387, 388 & 389.
(3) 11th ed. p. 424.
(4) 15 Q. B. 428.
(5) 3 ed. p. 902.
(6) 3 M. & W. 390.
(7) 2 El. & Bl. 849.
(8) 3 B. & S. 751.
(9) 3. ed. p. 687.

1886

THOMSON v. DYMENT.

Delivery to carrier is delivery to purchaser, but carrier can only receive not accept goods. Benjamin on Sales (1).

In a severable contract the buyer is bound to accept such parts as are in accordance with the contract, but has a right to reject such as are not. *Couston* v. *Chapman* (2); *Borrowman* v. *Free* (3); *Highlands Chemical Co.* v. *Matthews* (4).

The question of goods being or not being according to the contract is for the jury. *Weiler* v. *Schilizzi* (5); *Bannerman* v. *White* (6).

McCarthy Q.C., for the respondent, contended that under the circumstances the appellant had not the right of rejection as claimed, but his remedy was either by a reduction in the price claimed or by cross-action or counter claim. He referred to Benjamin on Sales (7) and to *Campbell* v. *Mersey Docks* (8); *Rohde* v. *Thwaites* (9).

Bain Q.C. in reply cited *Wait* v. *Baker* (10).

Sir W. J. RITCHIE C.J.—After a careful consideration of this case I have arrived at the conclusion, on the facts presented, that by the shipments on the railway of lumber which answered generally the kind of lumber contracted for there was a substantial compliance with the contract, and the vendee had no right to reject any number of carloads because of the inferiority in quality of a very small portion in each carload, but that his redress was a claim for reduction in the price, or for damages which would appear, in this case, to have been, comparatively, of a very trifling amount and for which he has been allowed an abatement in the price. Of course, if the article shipped was of an entirely different

(1) 3 ed. p. 686.
(2) L. R. 2 Sc. App. 250.
(3) 4 Q. B. D. 500.
(4) 76 N. Y. 145.
(5) 17 C. B. 619.
(6) 10 C. B. N. S. 844.
(7) 3 ed. p. 902.
(8) 14 C. B. N. S. 412.
(9) 6 B. & C. 388.
(10) 2 Ex. 1.

1886

THOMSON v. DYMENT.

Ritchie C.J.

character the case would be very different, but here the description was substantially satisfied, which resolves the dispute into one of quality; and the verdict establishing that the deficiency in quality only amounted to $90, or about 4½ per cent., an amount insufficient to justify the rejection of the lumber, which, in other respects, answered the terms of the contract, and defendant having been allowed that amount, substantial justice has, in my opinion, been done, and I cannot see any object to be gained by disturbing this verdict, though I must say I cannot very well understand why the evidence as to quality should have been rejected in the first instance as applicable either to the question whether the article supplied accorded with the contract, or as matter in reduction of the price; but I think we must take the verdict as establishing, after defendant was permitted to go into the evidence of the quality and character of the lumber, exactly how defective it was, and therefore there can be no possible object gained by sending the case to another trial by reason of the rejection of the evidence in the first instance.

FOURNIER J.—Le contrat fait entre les parties résulte de leur correspondance à ce sujet. L'intimé s'obligeait à livrer à l'appelant pour le prix convenu 200,000 pieds de bois de la qualité et des dimensions mentionnées dans la correspondance. Le bois s'étant trouvé de dimensions plus petites que celles convenues et de mauvaise qualité,—14 charges de chars furent refusées à leur arrivée à Hamilton, parce que les madriers n'avaient pas 18 pieds de longueur, 2 pouces d'épaisseur, et de 6 à 12 pouces de largeur,—

And was not "good sound square edge stuff and of the same quality" as was shipped the previous year by plaintiff to the defendant.

Après une correspondance entre les parties à ce sujet, l'appelant offrit la somme pour la qualité de bois

1886

THOMSON v. DYMENT.

Fournier J.

qui s'était trouvée conforme au contrat. Dyment fit suivre le refus de cette offre d'une action. Au procès, et après l'enquête du demandeur close, M. Lount, conseil du défendeur, fit entendre celui-ci pour prouver que le bois rejeté à Hamilton n'était pas conforme au contrat. Il avait 8 autres témoins pour prouver ce fait. Le conseil du défendeur objecta à cette preuve, prétendant que l'appelant aurait dû inspecter le bois abord des chars, aux moulins du demandeur, que ne l'ayant pas fait, il ne pouvait plus l'inspecter et le rejeter à Hamilton; qu'il ne pouvait plus alors exercer que son action en dommages ou prouver l'infériorité de la qualité en déduction du prix du contrat. Cette objection fut maintenue par l'hon. juge qui déclara que la preuve offerte était inadmissible comme défense à l'action et ne pouvait servir qu'à établir une réclamation de dommages ou en réduction du prix du contrat.

En conséquence de la décision de l'hon. juge, aucun des huit autres témoins prêts à établir le fait que le bois n'était pas conforme au contrat ne fut entendu, et il s'ensuivit entre les conseils un arrangement par lequel on convint de suspendre le procès et de laisser entrer un jugement pour $1,325 et les frais, sans préjudice aux droits du défendeur de faire motion pour faire mettre de côté la décision du juge. Par cet arrangement, tout ce qui aurait eu lieu après cette décision devait être considéré comme non avenu, si la décision était annulée. Le montant de la réduction mentionnée alors ne représentait pas la valeur de la différence entre le bois mentionné au contrat et celui qui avait été livré puisque la preuve en avait été interdite.

La principale question que soulève cet appel est de savoir si la décision de l'hon. juge déclarant que l'appelant n'avait aucun droit d'inspecter et de rejeter le bois à Hamilton est fondée en loi.

Cette question doit être examinée et décidée sans

égard à la réduction de $90 consentie par l'appelant. Il est évident que ce montant n'a été admis que parce que l'appelant avait confiance de faire casser la décision de l'hon. juge, et avait aussi la conviction que s'il réussissait à faire entendre ses témoins il établirait la suffisance de ses offres. Peut-on maintenant s'appuyer sur cet arrangement pour en conclure comme l'a fait la Cour d'Appel que l'insignifiance de la réduction $90, est une preuve que le contrat a été rempli ? C'est oublier que cette admission n'a été donnée que pour un but particulier, et c'est violer la convention des parties que de s'en servir pour empêcher l'examen de la question que cette admission avait pour but unique de soumettre à la revision d'un autre tribunal.

Ces arrangements entre les parties, en face de la cour, lorsqu'elle y donne son approbation, ont la force d'un contrat judiciaire qui est aussi obligatoire que la chose jugée. La partie qui y a donné son consentement ne peut plus le rétracter. (1).

Le contrat de vente dont il s'agit n'a rien déterminé au sujet du lieu de l'inspection. L'intimé devait fournir du bois venant de trois établissements différents. Il l'a expédié en différents temps et sans en donner avis à l'appelant qui n'a jamais eu l'occasion d'en faire l'inspection ailleurs qu'à Hamilton.

La prétention de l'intimé, qu'il devait le livrer à bord des chars est contredite et par lui-même et par la correspondance et par le fait qu'à l'exception d'une seule charge de char tout le bois a été livré à Hamilton.

Dans le silence des parties à cet égard, il faut en conclure que l'appelant avait droit d'inspecter et de rejeter le bois à Hamilton.

Indépendamment de cela, la vente d'articles non encore en existence, lors même que la propriété est passée à l'acheteur, ne lui enlève pas le droit de les ins-

(1) *Holt* v. *Jesse* 3 Ch. D. 177.

1886

THOMSON v. DYMENT.

Fournier J.

pecter et de les rejeter, dans un délai raisonnable. La loi à cet égard est clairement exposée dans la cause de *Pope* vs *Allis* (1):

The authorities cited sustained this proposition, that when a vendor sells goods of a specified quality, but not in existence or ascertained, and undertakes to ship them to a distant buyer when made or ascertained, and delivers them to the carrier for the purchaser, the latter is not bound to accept them without examination. The mere delivery of the goods by the vendor to the carrier does not necessarily bind the vendee to accept them. On their arrival he has the right to inspect them to ascertain whether they conform to the contract, and the right to inspect implies the right to reject them if they are not of the quality required by the contract.

Cette décision doit avoir d'autant plus d'application à la présente cause qu'elle est fondée sur les précédents anglais qui y sont cités, et que les circonstances de la cause sont parfaitement analogues à celles mentionnées dans cette décision. Les jugements contraires de la Cour d'Appel ne saura't prévaloir contre cette autorité ni contre celle de *Grimoldby* v. *Wells* (2) où Brett J. s'exprime ainsi au sujet du droit d'inspection :

There is here a contract for the sale of goods, and by agreement they are to be delivered before a fair opportunity for inspection arises, for it cannot properly be said that it would be reasonable to hold the defendant bound to examine where they were delivered to him at half way of the journey.

La doctrine énoncée dans cette autorité par l'hon. juge est sans doute celle qui devait régler l'effet du contrat en question dans cette cause. Pour cela il faudrait permettre la preuve qui a été refuseé, car ce n'est que par ce moyen que l'appelant pouvait établir si le bois livré à Hamilton était des description et qualité définies par le contrat. Je suis d'opinion qu'elle aurait dû être permise. Je dois ajouter que je concours entièrement dans l'opinion exprimée par l'hon. juge Henry dans les notes qu'il a eu l'obligeance de me communiquer. L'appel devrait être alloué et un nouveau procès ordonné.

(1) 115 U. S. R. 363.

(2) L. R. 10 C. P. 391.

1886

THOMSON v. DYMENT.

Henry J.

HENRY J.—By means of a correspondence entered into between the parties to this suit, the respondent, in 1884, agreed to sell to the appellant certain dimension lumber to be shipped to Hamilton, where the appellant resided.

The defence set up is that certain shipments, in whole or in part, were inferior in quality and not according to the contract, and that the appellant declined to receive the same. Some shipments were accepted.

When at the trial the counsel of the appellant was proceeding to adduce evidence to sustain the defence, the counsel of the respondent objected to any evidence to sustain it, but agreed that evidence in reduction of damages should be received, and his contention was sustained by the presiding judge. The contention of the respondent's counsel was that the appellant had no right of inspection at Hamilton but that it should have been made when the lumber was put on board the cars. It is shown that the lumber was shipped from three different mills of the respondent and from time to time. No notice was given the appellant of any of those shipments. How then could it be assumed that the appellant could have by any possibility made any inspection? It may be gathered from the correspondence and otherwise that the appellant was to pay the railway charges, but that, in my opinion, does not affect the contract otherwise. Such payment only affects the price. Suppose the respondent had agreed to deliver the lumber free of all expense at Hamilton, would not the right of inspection there be at once admitted, and when we consider that if the cost of transit was agreed to be paid by the appellant the respondent sold to that extent at a lower rate. The respondent agreed to put free on board the cars consigned to the appellant a particular quality and description of

1886

THOMSON v. DYMENT.

Henry J.

lumber, and the substantial question is: Did he do so? How can he claim that the appellant accepted the lumber shipped when he knew that the latter not only had not accepted the inferior lumber but was not given an opportunity of doing so?

It is shown that the appellant required and contracted for a particularly described article and the respondent agreed to supply that to him. Suppose a builder having a contract for the erection of a house is required to use dimension material and another agrees to supply the same and to put it free on board the cars of a railway; he ships it but without any notice to the party purchasing it, and when it reaches the place of delivery, and is found wholly unsuitable, would it not be monstrous to decide that the builder was bound to receive it and pay for an article he neither wanted or contracted for? The proposition would be monstrous, illegal and inequitable, and what have we here but substantially that same proposition?

I will put another case. A merchant in Halifax undertakes to ship to another at Montreal a quantity, say one hundred barrels, of herrings, sound and of good quality, and agrees to put them free on board the cars at the price agreed upon. The number of barrels of herrings are shipped, but on reaching Montreal are found to have been unsound when shipped and of inferior quality. Is the consignee in such a case obliged to accept the consignment? Is he required to take what he did not want or purchase? Who can be found to contend that he would, and yet it is contended the appellant is bound here. Would not the merchant in Montreal be entitled to refuse acceptance of the fish? And could he not claim to be reimbursed for the freight if he paid it and such damages for the breach of contract as he could prove? So in this case the appellant, in my opinion, is entitled to claim, in respect of any of the

1886

THOMSON v. DYMENT.

Henry J.

shipments that on inspection in Hamilton turned out different from the contract, reinbursement of the freight paid by him and special damage if proved.

The contract in this case was, in effect, that the respondent would ship on board the cars the lumber according to the contract, and his right to recover was based on showing that the lumber so shipped was so. He did not attempt on the trial to prove it, but objected to the appellant showing the opposite by evidence that when the lumber reached Hamilton it was not according to the contract. I am of the opinion that such evidence was improperly rejected.

We need not speculate on the question of the right of the appellant to claim the property so shipped. It was, no doubt, his, but subject to his right to reject it. He had no doubt an insurable interest in it when shipped, but considerations of such questions do not affect the issues raised in this case.

On the part of the appellant it is shown, and uncontradicted, that on the learned judge deciding at the trial that the appellant could not inspect and refuse to accept the lumber alleged to be not according to the contract at Hamilton the right to have that judgment reviewed on appeal was agreed to, but that evidence should be received in reduction of the price agreed upon, or by cross action in case the decision of the learned judge upon that point should be affirmed. That after some evidence was given as to the value of the lumber independently of the question of its being according to the contract, it was agreed that $90 should, in that event, but only in that event, be considered as the sum to be deducted. That agreement does not in any way affect the consideration of the other and more important question. Our judgment is, therefore, required upon the latter subject. It is alleged too in the appellants factum, and tacitly admitted, that he had several witnesses to

1886

THOMSON v. DYMENT.

Henry J.

prove that the lumber was not according to the contract, but that the learned judge having refused to admit evidence on the point they were not examined. We must, therefore, not fail to mark the distinction between evidence of the value of an article and evidence as to an article being according to contract. A man is bound to accept only what he specifically bargains for, although the article offered is worth in the market even more than that contracted for. The factum of the respondent put the case fairly thus :—

The question in issue between the parties is the one simple question of law whether under the circumstances the appellant had the right of rejection at the place and in the manner mentioned above.

The contract was to deliver 200,000 feet of plank two inches thick, from six to 12 in width and eighteen feet long, to be good, sound, square edged stuff, red and white pine fit for car flooring. The appellant alleges in his statement of defence, that the lumber refused by him was "neither good, sound square edge stuff" of the size agreed for, nor of the proper quality. Issue was taken thereon and that is the only one legitimately before us. It is no question like that of a purchaser accepting an inferior article and refusing to pay the full contract price. In such a case the supplying party has failed to supply the proper article, and the purchaser may either demand a reduction in price or counter claim for damages. We must not confound the two positions. Where a party refuses to accept an article different from that contracted for, I can find neither any law or equity to force him.

On the trial the appellant was prevented by the learned judge from showing that the lumber was not according to the contract.

It cannot be denied that if the goods shipped or tendered are not the kind of goods agreed for, or where the description of the goods is not answered by the goods offered, that the right of rejection is still with

the buyer, notwithstanding shipment and delivery, as in that case there is a total want of fulfilment of the contract or a breach of a condition precedent on the part of the vendor. See *Chanter* v. *Hopkins* (1); *Bowes* v. *Shand* (2); Benjamin on Sales (3).

The appellant was not allowed to prove such a legal defence as every principle of justice requires and the law permits him to do. He is therefore, in my deliberate judgment, entitled to a new trial. I think therefore, the appeal should be allowed and a new trial granted with costs in all the courts.

TASCHEREAU J.—I am of opinion that this appeal should be dismissed upon two grounds. 1st, Because, under the circumstances as disclosed by the evidence, the property in the goods passed to the vendee at the time of shipment; 2nd, on the ground that the appellant having received, paid for and accepted a substantial part of the goods his right of rejection was gone.

GWYNNE J.—I find it difficult to understand how the misunderstanding in this case, which occasioned this appeal, has arisen.

The defendant pleaded a right to reject lumber forwarded to him by the plaintiff under a contract of purchase upon the ground that the lumber so rejected was not sound, good, square edge stuff, fit for car flooring, which, as he said, was the lumber contracted for.

When defendant's counsel, having called the defendant as a witness on his own behalf, was proceeding to examine him upon the quality of the lumber, counsel for the plaintiff objected to any such evidence being given for the purpose of establishing the defence set up

(1) 4 M. & W. 399.
(2) 2 App. Cas. 455.
(3) Pp. 896, 6 and 596 Eng. Ed., and secs. 887, 8 and 600 *et seq.* Am. Ed.

1886

THOMSON v. DYMENT.

Gwynne J.

in the statement of defence, insisting that to entitle the defendant to reject the lumber he should have inspected it at the mills before the lumber was forwarded. The learned judge concurred in this view, but said he would receive the evidence subject to the objection, and he ruled that the defendant should have leave to file a counter claim. The counsel for the defendant disputed this point of law, insisting that the contract, which, as he contended, appeared in a letter which he relied upon, did not make the lumber deliverable on the cars, but to the defendant at Hamilton. The court then adjourned. When the court met again next morning, the defendant's counsel stated that he had decided not to enter a counter claim, and to offer no evidence as to quality, but to go to the jury for the sole purpose of determining what the contract was. Plaintiff's counsel then stated that he was quite willing that the defendant should give evidence that the lumber was not according to contract, and also as to quality with a view to reduction of the price. Defendant's counsel then stated that he would go on to give evidence as to a reduction in the price and to dispose of the whole case, and accordingly he called the defendant and went largely into evidence as to what the contract was, and as to reduction in the price by reason of defect in quality. Now, I do not see why the plaintiff's counsel in the first instance objected to the evidence as to defect in quality being gone into, for it was given in the result largely, although not, as is now said, to the extent it could have been gone into, as defendant had as he said, many witnesses in court who could have spoken to that point. The evidence of defect in quality offered to reduce the price might have proved sufficient to show that the quality was so utterly defective, and so unsuitable for the purpose for which the lumber was purchased, that it could not be said to have supplied the

contract, in which latter case, as was admitted by the plaintiff's counsel, the defendant might have rejected the lumber as he did. And it was also admitted that it was open to the defendant, if the evidence supported the contention, to have it put to the jury to determine whether the lumber was so defective in quality that it could not be said to supply the contract. So that in reality there appears to have been no reason why the defendant should not have offered all the evidence he had for the purpose of establishing the lumber to have been so defective in quality. But what took place was that after examining the defendant himself and two or three other witnesses called by the defendant, and after reading certain letters which had passed between the parties, the learned judge expressed the opinion that the contract was not as the defendant contended, but as the plaintiff contended that it was. Counsel for the defendant accepted this opinion which, plainly, materially affected the defendant's contention as to his right of rejection of the lumber, which he rested chiefly upon the contention that the lumber was purchased for a special purpose, namely, for car flooring, and for which, as was contended, it was wholly unsuitable, but which purpose was not expressed in the contract as it was found to be in the opinion of the learned judge, and the purpose for which, as the defendant contended, the lumber had been purchased not being in the contract might have rendered useless the evidence of the other witnesses which the defendant had in attendance. Under these circumstances defendant's counsel, not disputing the correctness of the learned judge's opinion as to the terms of the contract nor asking that the question should be submitted to the jury, agreed with the plaintiff's counsel that if the defendant was not entitled to

1886

THOMSON v. DIMENT.

Gwynne J.

reject the lumber as he did a verdict should be rendered for the plaintiff for the amount claimed by him, less the sum of $90.00, as the difference between the value of the lumber delivered and that contracted for, and it was agreed that the defendant's consenting to such verdict was not to prevent his moving in term against the ruling of the learned judge as to the defendant's right to reject the lumber. But the verdict must be taken to have been a fair settlement of the difference in value between the lumber delivered and that contracted for, and the plaintiff's contention as to the terms of the contract, as to which there is now no dispute, must, under the circumstances stated above, be taken to be correct, so that the verdict cannot but have a very material effect upon the question involved in such action for if the reduction in value was no more than $90.00, which amounted to 4½ per cent., such a difference never would have justified a rejection of the lumber, assuming Hamilton to have been the place where it should have been inspected. I think, therefore, that this appeal should be dismissed with costs for substantial justice appears to have been done by the deduction of $90.00 from the amount demanded, which sum must be taken to be the true amount of the difference in value between the lumber delivered and that contracted for, so that no useful purpose could be obtained by throwing open the case before another jury whether the lumber should or not have been inspected by the defendant before it was loaded on the cars at the mills, to be forwarded to him at Hamilton. The defendant must be taken to have accepted the opinion of the learned judge as to the terms of the contract, establishing it to be as the plaintiff contended, and not as the defendant contended it to be, and upon the terms of the contract being as the defendant claimed them to be, the whole

force of the defendant's claim of right to reject the lumber was rested.

1886

THOMSON v. DYMENT.

Gwynne J.

Appeal dismissed with costs.

Solicitors for appellant: *Bain, Laidlaw & Co.*

Solicitors for respondent: *McCarthy, Pepler & McCarthy.*

DAME JULIA GREGOIRE ET VIR., (PLAINTIFFS) ..... APPELLANTS;

AND

JOSEPH GREGOIRE ET AL., (DEFENDANTS) ..... RESPONDENTS.

1886

*May 18, 19.

*Dec. 7.

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

Tutor and minor—Sale prior to 1st Aug. 1866—*Action to annul—Prescription—Arts* 2243, 2253, *C.C.*

Held, affirming the judgment of the court below, Fournier and Henry JJ. dissenting, that the action to annul a sale made in 1855 by a minor emancipated by marriage to her father and ex-tutor (without any account being rendered, but after the making of an inventory of the community existing between her father and mother) of her share in her mother's succession, was prescribed by ten years from the date when the minor became of age (1). *Moreau* v. *Motz* (2) followed.

APPEAL from a judgment of the Court of Queen's Bench for Lower Canada (appeal side) (3) reversing the judgment of the Superior Court in favor of the appellants (plaintiffs).

The appellant Dame Julia Gregoire instituted the present action against her brothers, the respondents, as universal legatees of Joseph Gregoire Sr. their father, to annul and set aside the inventory of community of said Joseph Gregoire Sr. made in 1848,

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

(1) Arts. 2243, 2253 C. C. (2) 7 L. C. R. 147.
(3) M. L. R. 2 Q. B. 228.

1886

GREGOIRE v. GREGOIRE.

and also to annul and set aside a deed of sale of the 9th July, 1855, made by her husband and herself to her father, Joseph Gregoire Sr., of her rights in the estate and succession of her mother, and to have the respondents render an account of the administration of her property by the said Joseph Gregoire Sr. as her tutor, from 1848 to 1854.

The conclusion of the declaration is in substance as follows:

1o. That the pretended inventory prepared by the Notary Lukin be declared null and irregular, and that the respondents be ordered to prepare a new inventory of the property of the community heretofore existing between the said Joseph Gregoire and Sophie Dupuis.

2o. That the deed of the 9th July, 1855, be declared null, as having been made in violation of art. 311 of the Civil Code.

3o That Marie Simard (the second wife of the said Joseph Gregoire Sr.) be *mise en cause* to hear it declared that the first community heretofore existing between Joseph Gregoire and Sophie Dupuis has never been dissolved, provided the appellants upon the production of a new inventory, and after having deliberated thereon, choose to continue the said community.

4o. That the respondents be condemned to render to the appellant the account of tutorship which Joseph Gregoire should have rendered to her.

The respondents to this action pleaded:

1o. That this action being personal, or movable, could not be taken by the wife, the appellant, under the régime of community of property, but only by her husband.

2o. That the said inventory of 1848 is good and valid, and that the omission of the signature of Joseph Gregoire Sr. to the last attendance is immaterial and of no importance, the notary having signed himself and

having declared that the Joseph Gregoire has signed, and that such omission is covered or remedied by the closing of the inventory by the said Joseph Gregoire Sr., under oath before the judge;

3o. That the prohibition contained in art. 311 of the Civil Code does not apply to the deed of sale of the 9th July, 1855, as such sale is not made by the appellant alone, but by the appellant and her husband to Joseph Gregoire, Sr., and as there was community of property between the appellant and her husband, the latter had legal authority and full power to make any settlement with Joseph Gregoire Sr., relative to his administration and account as tutor to his wife without a previous detailed account of tutorship;

4o. The demand of the nullity of the deed of sale of the 9th July, 1855, is prescribed by ten years from the date of such deed or from the majority of the appellant.

The facts of the case, admitted by the parties, are as follows:

Joseph Gregoire sr., and Sophie Dupuis, the father and mother of the parties in this cause, were married on the 22nd September, 1829, under the régime of community of property.

Sophie Dupuis died intestate on the 20th February, 1848, leaving seven children issue of her said marriage, all minors, to whom the said Joseph Gregoire, their father, was appointed tutor in July, 1848; forthwith the said Joseph Gregoire had the inventory of the community of property which had existed between him and the Sophie Dupuis made before M. J. B. Lukin, notary, and the said inventory was judicially closed on the 24th October, 1848.

The appellant, Julie Gregoire, married Thomas Girard on the 20th February, 1854, and there is community of property between them according to the laws of the

1886

GREGOIRE v. GREGOIRE.

Province of Quebec. Civ. Code. art. 1260 et seq.

On the 9th July, 1855, Thomas Girard and his wife, the appellant, sold to the said Joseph Gregoire, sr., all the rights of the appellant in the estate and succession of her deceased mother.

On the 30th June, 1856, Joseph Gregoire, sr., married a second wife, Dame Marie Simard, the *mise en cause*, under the régime of community of property.

On the 13th of October, 1881, Joseph Gregoire, sr., died, leaving the defendants, respondents, his universal legatees, under his last will dated 23rd September, 1881.

The principal question which arose on this appeal was whether the action to annul the sale made in 1853 by the appellant, Julie Gregoire, then a minor, emancipated by marriage, to her father and ex-tutor was prescribed by ten years or thirty years.

Geoffrion for appellants.

Paradis for respondents.

The authorities and cases cited by counsel are reviewed in the judgments of the courts below, reported in Montreal Law Reports 2 Q. B. p. 229, and in the judgments hereinafter given.

Sir W. J. RITCHIE C.J.—In view of the confessedly contradictory authorities with reference to the prescription of ten or thirty years, as applicable to the matters in controversy, and in view of the jurisprudence of the Province of Quebec as enunciated in the case of *Moreau* v. *Motz* (1), decided some 29 years ago and not questioned but acquiesed in since that time, I do not feel myself justified in overruling that case and reversing the judgment of the Court of appeal.

FOURNIER J.—L'action des Appelants a pour but: 1° De faire déclarer nul l'inventaire fait par feu Joseph Gregoire des biens de la communauté, qui avait existé entre

(1) 7 L. C. R. 148.

lui et sa défunte épouse, Sophie Dupuis, en présence de mtre Lukin, les 24, 25 et 28 septembre 1848; 2° Aussi de faire déclarer la nullité d'un acte de vente du 9 juillet 1855, consenti par l'Appelante et son mari en faveur du dit Joseph Grégoire, son père et tuteur, de ses droits tant mobiliers qu'immobiliers dans la succession de sa mère; et 3° subsédamment, de faire condamner les représentants légaux du dit feu Joseph Grégoire à lui rendre compte de la gestion et administration que ce dernier a eue des biens de l'Appelante, comme son tuteur, depuis 1848 à 1854.

Les moyens de nullités allégués contre l'inventaire sont:—que la dernière et la plus importante des différentes vacations de ce prétendu inventaire n'a pas été signée par le dit Joseph Grégoire ni par les estimateurs qui avaient été choisis pour faire l'évaluation des biens meubles, et que cet acte non terminé n'a aucun caractère d'acte authentique, et ne pourrait tout au plus que servir de mémoire pour la confection de l'inventaire demandé.

La nullité de l'acte de vente du 9 juillet 1855 est demandée sur le principe que le dit Joseph Grégoire n'ayant jamais rendu compte à l'Appelante, tout contrat ou traité entre lui et sa pupille est frappé de nullité absolue.

Que dans tous les cas, Joseph Grégoire n'ayant jamais rendu compte et le dit acte de vente n'en pouvant tenir lieu, les représentants légaux sont tenus d'en rendre un à l'Appelante.

La déclaration allègue aussi des menaces faites par le dit Joseph Grégoire de déshériter ceux de ses enfants qui voudraient invoquer la nullité de son inventaire, et des promesses que si on ne le dérangeait pas il partagerait ses biens également entre tous ses enfants. La défense à cette action consiste, 1° à nier le droit d'action de l'Appelante parce qu'elle est commune en biens avec

1886

GREGOIRE v. GREGOIRE.

Fournier J.

son mari; 2° à soutenir que l'inventaire, quoique non signé dans la dernière vacation, est valable et que l'omission de cette signature est réparée par la clôture en justice; 3° que la prohibition de l'art. 311 ne s'applique pas au cas actuel parce que le mari de l'Appelante en sa qualité de commun en biens avec elle avait droit de faire tous règlements quelconques avec le tuteur, Jos. Grégoire, sans aucun compte détaillé de la tutelle; 4° que l'action en nullité de l'acte du 9 juillet est prescrite par dix ans.

Marie Simard, seconde épouse de Joseph Grégoire, mise en cause comme commune en biens, a invoqué les mêmes moyens de défense que les représentants de son mari.

Les questions soulevées en cette cause sont au nombre de quatre: 1° l'Appelante seule, mais avec l'autorisation de son mari, pouvait-elle intenter l'action en reddition de comptes; 2° la nullité de l'inventaire; 3° la nullité de l'acte de vente du 9 juillet 1885; 4° quelle prescription peut couvrir la nullité de l'inventaire et celle de l'acte de vente du 9 juin 1885?

Pour obvier à l'objection que l'action a été prise par l'Appelante seule avec l'autorisation de son mari, celui-ci a demandé à être reçu partie intervenante. Il est certain que cette demande ne peut lui être refusée, car il est une des parties intéressées dans cette action, en sa qualité de commun en biens avec son épouse; il est comme tel maître des actions de la communauté. Sa demande d'intervenir a rendu inutile l'examen de la question de savoir si l'action prise par la femme seule, bien que dûment autorisée, était légalement intentée. L'intervention doit être accordée, et en conséquence le mari sera demandeur conjointement avec sa femme, car la présence de celle-ci est indispensable vû qu'il s'agit aussi de ses droits immobiliers dans l'action.

2. L'omission d'avoir fait signer par Joseph Grégoire,

le requérant à l'inventaire et tuteur de ses enfants, deux des vacations de l'inventaire, est-elle suffisante pour rendre cet inventaire nul ? D'après l'article 1307 C. P. C., l'inventaire doit être fait en forme authentique ; l'article 1308 déclare qu'il est composé de deux parties, la première, ou le préambule, énonçant les noms et qualités des parties à l'inventaire ; la deuxième partie est l'inventaire proprement dit et contient, 1° l'indication du lieu où l'inventaire est fait ; 2° la description des biens et des effets mobiliers et l'estimation qui doit en être faite à sa juste valeur par deux estimateurs assermentés ; 3° la désignation des espèces en numéraire ou autres valeurs ; 4° la mention des papiers, lesquels doivent être cotés par premier et dernier et paraphés de la main d'un des notaires ; 5°, 6°, 7°, etc., ne concernent pas la question à décider. Ces articles ne font que résumer l'ancien droit sur ce sujet.

Merlin (1), en traitant des formalités de l'inventaire, dit formellement que chaque vacation de l'inventaire doit être signée ; il s'exprime en ces termes :

La minute de l'inventaire doit être signée tant à l'intitulé qu'à *chaque vacation*, et à la fin, par les officiers qui y ont procédé, par les parties et par les témoins, lorsqu'il y en a, sinon il doit être fait mention du refus de signer et des causes de ce refus.

La signature du dit Joseph Grégoire, partie principale au dit inventaire en son propre nom et aussi en sa qualité de tuteur, était donc indispensable pour la validité des vacations qui n'ont pas été signées. Il avait signé le préambule, qui n'est que de forme et les deux vacations qu'il n'a pas signées sont précisément comme le dit le Code de Procédure, celles qui forment l'inventaire proprement dit. En effet celle du 25 juillet 1848 contenait une liste d'effets, et celle du 28 septembre contenait l'énumération des dettes actives et passives, immeubles et autres valeur. C'était là tout l'inventaire et il n'a pas été signé par Grégoire qui avait sans doute

(1) Vo Inventaire.

1886

GREGOIRE v. GREGOIRE.

Fournier J.

ses raisons pour cela. Dans tous les cas il était de rigueur de faire mention des causes de son refus de signer les vacations qui sont les seules qui établissaient contre lui les droits de ses enfants. A-t-il refusé de le faire parce que sa déc aration des faits était incomplète ? On pourrait le croire, si on en juge par sa conduite subséquente ; quoi qu'il en soit, c'est un fait incontestable que l'inventaire n'a pas été signé et qu'en conséquence il n'est pas seulement nul pour irrégularité mais parce qu'il n'a jamais existé.

On a prétendu couvrir cette nullité par la production d'un certificat du protonotaire constatant que l'inventaire avait été clos en justice. L'honorable juge Chagnon dans ses notes a déclaré que cette preuve était insuffisante et qu'un jugement de clôture d'inventaire, pas plus que tout autre jugement, ne pouvait être prouvé que par la production d'une copie authentique du jugement même. Cette proposition est sans doute parfaitement correcte ; mais la production du jugement lui-même aurait-elle pu faire une différence et couvrir la nullité dont il s'agit? Il est évident que non, parce que l'acte de clôture ne peut couvrir l'omission des formalités prescrites pour les inventaires. Merlin le dit positivement au mot "Clôture d'inventaire." Si, dit-il, les formalités prescrites pour les inventaires, n'ont point été remplies, l'acte de clôture, quoiqu'il soit en bonne forme, ne peut couvrir les omissions. C'est pourquoi par arrêt du 12 février 1682, rendu à la grande Chambre, sur les conclusions de M. Talon, il a été jugé que la minute de l'inventaire signée des parties et d'un seul notaire, quoique la clôture eût été mise sur la minute, n'avait point dissout la communauté.

Dans le cas cité c'est un des notaires qui avait omis de signer, dans celui dont il s'agit l'omission est encore plus grave, car c'est la partie principale qui a refusé, ou du moins a négligé de contracter les obligations résul-

tant de l'inventaire en omettant d'y apposer sa signature. Il y a analogie parfaite entre les deux cas, et par conséquent même raison de dire que la clôture d'inventaire, en la supposant légalement prouvée n'aurait pu couvrir la nullité résultant du défaut de signatures.

Et dans le cas actuel comme dans celui cité par Merlin, il faut en conclure qu'il n'y a pas eu de dissolution de communauté entre Joseph Grégoire et ses enfants, si l'action de l'Appelante n'est pas prescrite, ce que nous verrons plus loin.

La troisième question au sujet de la nullité de l'acte de vente du 9 juin 1855, ne peut souffrir aucune difficulté. Lors de la passation de cet acte de vente, Joseph Grégoire, père et tuteur de l'Appelante, encore mineure, n'avait pas, comme on vient de le voir, fait inventaire de sa communauté de biens avec Dame Sophie Dupuis, sa défunte épouse. Il n'y avait eu qu'un commencement d'acte resté incomplet et conséquemment, sans effet. Il n'avait alors rendu aucun compte à l'Appelante et ne lui en a jamais rendu depuis. Cependant par cet acte auquel intervint Thomas Girard le mari de l'Appelante, Joseph Grégoire acheta de sa pupille, autorisée par son mari, pour la considération y mentionnée : " tous les droits successifs mobiliers et immobiliers, fruits et revenus d'iceux, demandes, actions rescindantes et rescisoires que la dite venderesse peut ou pourrait avoir, demander et prétendre dans la succession de feu Sophie Dupuis sa défunte mère, en son vivant épouse du dit acquéreur en quelques lieux et endroits que les dits biens se trouvent être, assis et situés, en quoi qu'ils puissent consister et à quelque somme que le tout puisse se monter sans aucune exception ni réserve de la part des dits vendeurs."

Dans cette acquisition de tous les droits mobiliers et immobiliers de l'Appelante dans la succession de sa mère, même les fruits et revenus, lorsqu'un inventaire

1886

GREGOIRE v. GREGOIRE.

Fournier J.

n'en avait pas même été fait régulièrement et qu'aucune reddition de compte des dits biens n'avait encore été faite, il est évident que l'Appelante était tout à fait à la merci de son tuteur qui devait avoir une connaissance exacte de la valeur des biens de la succession, tandis qu'il la tenait dans une ignorance complète au sujet de ces mêmes biens.

En cour inférieure, pour éviter l'opération de l'art. 311 C. C., on a prétendu que l'inventaire quoique irrégulier et l'acte de vente du 9 juin 1855 pouvaient être considérés comme équivalant à une reddition de compte informe, afin de pouvoir faire application à cette cause de l'article 2258 ; mais cette prétention est tout à fait insoutenable. C'est confondre deux choses bien différentes, l'inventaire et la reddition de compte, ayant chacune d'elles un but spécial et réglées toutes deux particulièrement par des articles différents du Code Civil et du Code de Procédure. Il est vrai que l'inventaire, en le supposant régulier, devrait contenir le détail des biens mobiliers, et leur estimation, les dettes passives, etc. ; mais s'il doit contenir la description des immeubles, il n'en contient pas l'estimation, et certainement qu'il ne contient rien de la gestion du tuteur depuis le 28 septembre 1848 jusqu'au 9 juin 1855, date de la vente. Ce que ce dernier a pu dépenser ou recevoir pendant ces sept années là, rien ne le fait voir. Quel montant a-t-il fait payer à la mineure pour sa part des frais d'inventaire et autres procédés pour nomination du tuteur, frais d'enterrement, etc. ; qu'avait-il alors reçu des dettes actives et quelles dettes passives avait-il acquittées ? Il est impossible de le dire et c'est à tort que la cour a supposé qu'on pouvait facilement en faire l'estimation parce qu'il y avait un inventaire et que l'on avait dû s'en servir pour cet objet. Cette supposition est contredite par l'acte du 9 juin 1855 qui, loin de s'appuyer sur cet inventaire, ne fait même pas mention

de son existence. Il n'y avait certainement qu'une reddition de compte qui pouvait éclairer l'Appelante sur sa véritable position. C'est précisément pour empêcher des abus semblables à celui dont l'Appelante se plaint que l'article 311 a été adopté. En éluder l'effet au moyen de cette confusion d'idées, qui fait de l'inventaire l'équivalent de la reddition, c'est rendre l'article 311 tout à fait inutile. Désormais tout tuteur qui aura fait non pas un inventaire irrégulier, mais même un inventaire tout à fait en règle, pourra transiger comme bon lui semblera avec son mineur sans rendre compte. Il aura fait un inventaire constatant qu'il avait une succession opulente en mains, il la gère pendant sept ans, comme Grégoire, en diminue considérablement la valeur par sa mauvaise administration; et ne se sentant pas en état de faire une reddition sans faire voir sa maladministration, il aura recours à l'expédient de Grégoire, fera une transaction avec son mineur, sans lui donner connaissance de sa position. Ce qu'a fait Grégoire tout le monde peut le faire à l'avenir, si ce jugement est confirmé, et la protection accordée aux mineurs par l'article 311 aura cessé d'exister. Je ne vois aucun motif de pas donner effet à cet article en déclarant nul l'acte du 9 juin 1855.

La dernière et la plus importante question, dans l'ordre que j'ai suivi, est celle de savoir, laquelle des prescriptions de dix ans, ou de trente ans, peut couvrir la nullité de l'inventaire et celle de l'absence d'une reddition de compte et mettre fin à l'action en cette cause. La cour Supérieure a décidé que c'était la prescription de trente ans. Son jugement a été infirmé par la cour du Banc de la Reine qui a maintenu que ce devait être celle de dix ans. Cette cour n'a touché à aucune des autres questions.

Les transactions dont il s'agit ayant eu lieu avant la publication du Code Civil, c'est en vertu de l'art. 2,270

1886

GREGOIRE v. GREGOIRE.

Fournier J.

C.C., aux lois antérieures au Code qu'il faut avoir recours pour la décision de cette question.

Dans une cause qui a beaucoup d'analogie avec la présente, celle de *Motz* vs. *Moreau*, cette question de prescription a fait le sujet de dissertations très savantes et a été jugée contradictoirement par nos cours. La cour Supérieure, composée de trois juges, a décidé que les transactions intervenues entre un tuteur et des mineurs devenus majeurs, sans qu'il ait été fait un bon et loyal inventaire, sans reddition de comptes et sans production de pièces justificatives, sont nulles de plein droit, et que l'action pour les faire annuler n'est prescriptible que par 30 ans.

La cour du Banc de la Reine présidée par sir L H. LaFontaine, Baronet, décida que l'action en nullité, portée par l'Intimé, était prescrite par le laps de dix années écoulées depuis la passation des actes incriminés.

Dans l'espoir de mettre fin à ce conflit, la cause fut portée au Conseil Privé, mais la question de prescription n'y fut pas décidée. L'un des honorables juges de la cour du Banc de la Reine commet à ce sujet une erreur qui a dû être la raison déterminante de son jugement, en déclarant s'il est correctement rapporté, que le jugement de la cour du Banc de la Reine maintenant la prescription de dix ans a été confirmé par le Conseil Privé. Cette assertion est certainement erronée. La confirmation de ce jugement n'a porté que sur le fait que l'Appelant Motz avait eu une connaissance complète que l'inventaire n'était pas correcte et qu'il le savait lorsqu'il a fait les transactions attaquées. Les honorables membres du Conseil Privé s'expriment à cet égard comme suit :

But although the Appellant may have been entitled to institute the suit, it does not follow that he was to succeed in it, and seeing that the transaction of 1831 was entered into with full knowledge on the part of the Appellant that the inventory was not correct and was followed by the transaction of 1841, which in their Lordships'

judgment was, or was tantamount to, a release, they are of opinion that the Appellant was not so entitled to succeed.

Leurs Seigneuries n'ont adopté cette conclusion qu'après avoir eu le soin de déclarer qu'ils évitaient de trancher la question de prescription.

Neither do their Lordships think it necessary, in determining the case, to enter into the question so much discussed in these papers, and debated at the argument at the bar, whether the ten years prescription does or does not bar the Appellants' claim. They assume in favour of the Appellant that it does not.

Leur jugement se termine par le renvoi de l'appel de Motz, sans frais, mais en ajoutant une considération qui fait voir que Leurs Seigneuries penchaient fortement en faveur de la prescription de trente ans:

But their Lordships highly disapprove of transactions of this description entered into by persons standing in confidential relations.

D'après ces citations il est évident que le Conseil Privé loin d'avoir adopté la prescription de dix ans, comme on le fait dire à l'honorable juge Tessier, penchait plutôt en faveur de celle de trente ans, puisqu'il n'a pas écarté l'action et qu'il a fortement censuré des transactions de ce genre.

La cause de *Sykes* v. *Shaw* (1) citée comme une confirmation de l'opinion adoptée dans celle de *Motz* v. *Moreau* en diffère essentiellement. Les rapports de pupille et de tuteur n'ayant jamais existé entre les parties à l'acte attaqué il ne pouvait y avoir lieu à une reddition de compte de tutelle. L'honorable juge Meredith s'exprime ainsi à cet égard :

In the second place it does not appear that her father *was ever appointed tutor*.

And thirdly, if the deed impugned had not been passed the account that Noah Shaw would have had to render to his daughter, Sarah Caroline Shaw, would have been that of *grévé de substitution*, in favor of the *substituée;* and not that of a tutor or protutor to a person who had been his ward.

Il est évident que dans ce cas la question dont il s'agit en cette cause ne se présente pas dans celle de

(1) 15 L. C. Rep. 304.

1886
GREGOIRE
v.
GREGOIRE.
Fournier J.

Sykes v. *Shaw*. En référant au jugement rapporté à la page 320 du L. C. R., 15 vol., on voit que la cause fut décidée principalement sur le motif que Noah Shaw, partie à l'acte attaqué, n'avait pas été mis en cause et qu'aucun procédé n'avait été adopté pour faire prononcer contre lui la nullité de l'acte que l'on opposait à Sykes qui n'était qu'un tiers-détenteur. Puisqu'il n'y avait pas de relation de tuteur à pupille, la prescription qui pouvait s'appliquer était donc celle de l'article 2258 et non celle de l'article 2243.

La cause de *Pierce* v. *Butters* (1) citée aussi dans le même but que la précédente n'a, non plus, aucun rapport à la question à décider en cette cause. C'était évidemment le cas de faire l'application de l'article 2258 C. C., puisque, comme on le voit par les considérants du jugement, il y avait eu reddition de compte. A la page 170, 24 L. C. J., le jugement dans la cause de *Riendeau* v. *DeGrosseiller* est cité :

Considérant que le Défendeur, appelant, en sa qualité de tuteur de la Demanderesse, intimée, a, dès longtemps avant l'institution de l'action en cette cause, rendu à sa dite pupille alors émancipée par mariage, et assistée d'un curateur légalement élu à cette charge, compte de son administration des biens de la dite demanderesse, intimée, ainsi qu'il appert par le compte rendu du 23 mars 1870, etc.

Un autre considérant de ce jugement, c'est que la Demanderesse ne pouvait demander au Défendeur une reddition de compte sans en même temps demander à ce que le compte déjà rendu par le dit Défendeur et accepté par la Demanderesse fut mis de côté et qu'elle fut relevée de son acceptation. Il en fut de même dans la cause de *Pierce* v. *Butters* (1) ; l'action fut renvoyée, parce qu'il y avait eu une reddition de compte dont l'annulation n'était point demandée. Dans le cas qui nous occupe, comme il n'y a jamais eu de reddition de compte, il n'y avait par conséquent pas lieu à en demander l'annulation. Mais les conclusions de l'Appelante sont suffisantes pour obvier à cette objection, si

(1) 24 L. C. J. 167.

elle pouvait s'élever ici, parce qu'elles demandent spécialement l'annulation de l'acte de vente du 9 juin 1855, opposé comme ayant l'effet d'une reddition de compte.

Ce qui précède suffit pour faire voir qu'il n'y a point de jurisprudence établie sur la question en débat, car pour en établir une il faudrait une suite de jugements uniformes formant un usage sur une même question. Loin de là, nous n'avons que la décision isolée de *Motz* et *Moreau* qui n'a pas reçu l'approbation du Conseil Privé, comme on vient de le voir.

C'est donc dans la loi et non dans des décisions, pas même celles rendues en France, qu'il faut aller chercher la solution de la question de savoir si c'est la prescription de trente ans qu'il faut appliquer au cas actuel. Pour savoir quelle était la loi en force à ce sujet avant le Code Civil, il n'est heureusement plus nécessaire de compulser les anciennes autorités, comme l'ont fait avec tant de soin les savants juges dans la cause de *Motz* et *Moreau*. Le droit, à ce sujet, avant le Code, a été si bien exposé dans le factum du savant conseil de l'Appelante, que je me contenterai d'y donner mon adhésion entière; mais je dois ajouter que je crois qu'il n'est plus nécessaire d'aller aussi loin pour trouver la solution que nous cherchons. Elle est dans le Code Civil.

Je crois qu'il ne nous reste plus qu'à savoir si le code n'a pas tranché la question tant pour les transactions antérieures à sa publication que pour celles qui lui sont postérieures. L'article 2243 déclare que l'action en reddition de compte et *des autres actions personnelles* du mineur contre le tuteur relativement aux faits de la tutelle se prescrivent par trente ans. Cet article est donné comme étant la loi antérieure au Code. Lorsqu'il a été adopté par les codificateurs, la cause de *Motz* et *Moreau* avait alors été jugée par la cour Supérieure, le 5 septembre 1855; par la cour du Banc de la

1886

GREGOIRE v. GREGOIRE.

Fournier J.

Reine le 10 mars 1857, et par le Conseil Privé le 8 février 1860. Deux des codificateurs, les honorables Caron et Morin avaient pris part au jugement, l'un dans la cour Supérieure et l'autre dans celle du Banc de la Reine, et avaient été d'opinions différentes sur cette question. Cependant tous deux chargés comme codificateurs de déclarer quelle était la loi en force à cet égard, ont déclaré que la prescription applicable était celle de trente ans. Ils paraissent ne l'avoir fait qu'après beaucoup de considération, et en ayant présentes à la mémoire les opinions qu'ils avaient exprimées à ce sujet dans la cause de *Motz* et *Moreau*, ainsi que celles de leur collègues auxquelles il est sans doute fait allusion dans le paragraphe suivant de leur rapport sur le titre De la Prescription, en date du 10 décembre 1862:

L'article 80 *bis* est pour faire cesser le doute entretenu par quelques-uns qui regardent les actions dont il s'agit comme prescriptibles par dix ans de même que celle en restitution. Il n'y a pas de raison particulière de décider ainsi. Au chap. 6e du "Temps requis pour prescrire," l'article 8 *bis* est ainsi conçu: "La prescription de l'action en reddition de compte et des autres actions personnelles du mineur contre le tuteur relativement aux faits de la tutelle, a lieu conformément à cette règle et se compte de la majorité." C'est précisément, mot pour mot, le texte de l'article 2243.

On voit par ces citations que les codificateurs savaient qu'il y avait eu une différence d'opinion à ce sujet et ils déclarent expressément, pour faire cesser ce doute, qu'il n'y avait pas de raison particulière de décider ainsi. Lorsqu'on considère qu'ils avaient mission spéciale de déclarer quelle était la loi alors en force; que la clause 6 du chapitre 2, Statuts refondus du Bas-Canada, les obligeait en rédigeant les codes de n'y incorporer que les dispositions qu'ils tiendraient pour être alors réellement en force, en leur enjoignant de plus de citer les autorités sur lesquelles ils s'appuyaient pour juger qu'elles l'étaient ainsi; lorsque cet article a été rapporté à la législature, approuvé par elle et que le travail des

commissaires a maintenant force de loi, quelle importance peut-on ajouter à la décision de *Motz* et *Moreau* et à celles citées plus haut? Elles doivent être sans effet, comme contraires à la loi. Ceci me paraît d'autant plus certain que le statut 29 Vict. chap. 41, passé pour donner à l'œuvre de la codification le caractère d'acte législatif, déclare positivement dans son préambule que les codificateurs " *n'ayant incorporé que les dispositions qu'ils ont considérées être actuellement en force.* Cette déclaration est si importante pour la solution de cette question que je crois utile de la citer au long :—

Considérant que les commissaires nommés sous l'autorité du second chapitre des Statuts Refondus pour le Bas-Canada, etc., etc., ont complété cette partie de leur œuvre appelée dans cet acte le *Code civil du Bas-Canada,* n'y ayant incorporé que les dispositions qu'ils ont considérées être actuellement en force, et ayant cité les autorités sur lesquelles ils se sont appuyés pour juger qu'elles l'étaient ainsi, et qu'ils ont suggéré les amendements qu'ils croient désirables, mentionnant ces amendements séparément et distinctement, accompagnés des raisons sur lesquelles ils sont fondés et qu'ils se sont en tous points conformés au dit acte à l'égard du code et des amendements ; et considérant que le code avec les amendements suggérés par les commissaires, a par ordre du gouverneur été soumis à la législature pour qu'il puisse avec les amendements que la législature pourra adopter, être *déclaré loi par acte législatif* ; et considérant que tels amendements suggérés et tels autres amendements qui sont mentionnés dans les résolutions contenues dans la cédule ci-annexée ont été finalement adoptées par les deux Chambres : à ces causes, etc.

La section 6 de cet acte pourvoit à la manière de mettre le code en force par proclamation, et déclare que depuis la date de la dite proclamation, *le dit code aura en conséquence force de loi.* Ce code, qui a force de loi est celui que le préambule déclare ne contenir que les lois considérées actuellement en force lors de sa publication. S'il était possible d'ajouter quelque chose pour faire voir qu'un article du code déclarant le droit avant sa publication doit s'appliquer à toutes transactions, quelles soient antérieures ou postérieures à sa date, on

1886

GREGOIRE v. GREGOIRE.

Fournier J.

pourrait encore invoquer la déclaration suivante du Conseil Privé: *Kierzkowski* v. *Dorion* (1).

Dans cette cause il s'agissait de la loi antérieure au code au sujet de l'usure.

The Civil Code of Lower Canada, which, though not established in 1866, embodies all such provisions relating to civil matters as were in force at the time of the passing of the act respecting the codification of the laws of that province, may properly be referred to for the law on this point.

Ces autorités me paraissent établir jusqu'à l'évidence que l'article 2243, nonobstant la décision contraire de la cause de *Motz* v. *Moreau*, était et doit être considéré comme la loi en force avant le code au sujet de la prescription de trente ans. En éluder l'application, pour la raison que l'inventaire serait l'équivalent de la reddition, afin de pouvoir appliquer à la cause actuelle l'article 2258, me paraît une violation flagrante de la loi. Par tous ces motifs, je suis d'avis que l'appel doit être accordé.

HENRY J.—If there is no special enactment in the code to regulate the prescription of the action which has been brought, it necessarily comes under the thirty years prescription of art 2243, which provides:

That the prescription of the action to account and of other personal actions of minors against their tutors, relating to the acts of the tutorship takes place comformable to this rule (that is prescription of thirty years) and is reckoned from the majority.

The action here is a personal action of a minor against her tutor. The sale made in this case does not in any wise refer to an inventory having been made, nor does it disclose to what amount the inventory came or in what year it was completed. It seems to me that in this case the question of inventory is confounded with the question of account. The inventory having been made during the plaintiffs' minority, surely he is entitled to an account of the monies administered

(1) 14 L. C. Jur. 46.

1886

GREGOIRE v. GREGOIRE.

Henry J.

by his tutor in virtue of that inventory if not entitled to have the inventory itself set aside? The defendant has never accounted to the plaintiff and does not pretend to have done so, but contends that the sale which he has made is a settlement, and after ten years the action is prescribed. Art 2258 relied upon, I do not think, is applicable to this case, for it is not an action to rectify the tutor's account, as none has been rendered, and it is not action in restitution for lesion, but an action to account. The latter part of art. 2258 does not apply to transactions between wards and tutors, as another article of the Code, art. 2243, provides what prescription applies in such a case.

We have had the decision of *Moreau* v. *Motz* (1) brought to our notice, but that was decided before the Code; when the Code was enacted, it will be seen by the report of the codifiers, that although *Moreau* v. *Motz* had been decided, the codifiers did not alter what they believed to be the law, and left art. 2243 as it now stands.

I have not been referred to any other case where the point has been decided authoritatively since the Code. True, that case went to the Privy Council, but they did not decide the case upon that ground, and therefore we are left to decide the question upon the law as we find it in the Civil Code. In my opinion, I think the prescription of 30 years is alone applicable. I have read the reasons given by my brother Fournier, and agree with his view of the case.

TASCHEREAU J.—Was this action prescribed by ten years? The Court of Appeal has decided that it was and I am of the same opinion. The law applicable here is the law as it was before the Code. There are certainly a number of authors who are of opinion that the thirty years prescription is the only one that can defeat an action of this kind, but they have no text of law

(1) 7 L. C. R. 147.

1886

GREGOIRE v. GREGOIRE.

Taschereau J.

in their favor, whilst respondent has to support the ten year prescription the express terms of the ordinances of 1516, 1535 and 1539 (1).

The question was always one upon which a great difference of opinion seems to have existed, and the jurisprudence itself on the question seems to have been waivering. The question is consequently not free from doubt, but the judgment of the court below is supported by such strong authorities that it is impossible for me to say that it was clearly erroneous.

Ferrière, Traité des tutelles (2), says that the jurisprudence at Paris is that the ten years prescription is the one applicable against an action to annul a deed passed by the minor with his tutor, the ten years to run from his majority, if the deed was passed while he was still a minor, and from the date of the deed, if passed since his majority. This author adds that at Toulouse, Dijon and other places, the thirty years prescription is the one held to be applicable. And it is that diversity of jurisprudence between the different parliaments that has, no doubt, given rise to the controversies amongst the authors on the question. This same Ferriere (3) adds that, whilst at Paris a simple discharge of the obligation to render an account by the minor to the tutor would have been prescribed by thirty years only, yet a transaction which must be presumed to have been preceded or accompanied with some discussion between the parties on their respective rights was held to be prescribed by ten years. The deed of sale in question here clearly falls under the last description.

In Bardet Arrêts (4) a judgment of the Parliament of Paris, of April 7th, 1633, also clearly in point, is reported. It is there held that a contract by a minor with his tutor, without an account, cannot be attacked after ten years.

(1) 1st Duplessis 508.
(2) P. 352.
(3) Loc. cit.
(4) Vol. 2 liv. 2 ch. 19.

In Arrêts de Louet (1) not less than six cases are given in which the courts held that the ten years prescription defeated the action. The other cases there reported are not cases in which transactions between the minor and tutor had taken place, but cases in which a discharge pure and simple from rendering an account had been given by the minor, thus supporting the distinction made by Ferrière, as above noted. In the 1st Vol. of these Arrêts de Louet, Brodeau, its commentator, gives his interpretation of the Arrêts cited at page 738 of the 2nd Vol. in no ambiguous terms (of ten years):

La même fin de non recevoir a lieu à l'égard des transactions passées avec les tuteurs sur la reddition du compte, *non visis tabulis.*

There are cited Arrêts of Province and Toulouse where the thirty years prescription is applied.

In Henry's treatise (2) a case clearly in point is reported. It is there held that if a minor, emancipated by marriage, has discharged by a simple quittance or a transaction *non visis tabulis* her tutor from the obligation to render an account, she has only ten years to attack that discharge. And Brodeau, on this Arrêt, says:

Cette jurisprudence est certaine au Parlement de Paris..... La jurisprudence au Parlement de Toulouse *est contraire.*

In Jurispr. franc, Prevôst de la Jannès (3) speaking of the prescription of ten years against the minor, says:

L'ordonnance du 1539 veut même qu'ils se pourvoient dans le même temps contre des actes nuls qu'ils auraient passés, si la nullité n'a point d'autre cause que leur minorité.

In Lacombe Recueil de Juris fr. (4) we read:

Mineur n'est recevable à se pourvoir, après les dix ans de majorité, contre la transaction faite avec son tuteur avant le compte, et *non visis tabulis.*

And the author cites an *arrêt* of 19 Jan., 1602, in which, reversing a previous decision there mentioned, it was specially held that the provisions of the ordinance of 1510 and 1539, which enact that all actions in res-

(1) Vol. 2 p. 738.
(2) P. 997.
(3) Vol. 2 p. 370.
(4) V. Restitution p. 595.

1886

GREGOIRE v. GREGOIRE.

Taschereau J.

cision of contracts passed during minority must be brought within the 10 years of majority, apply to contracts or deeds passed by a minor with his tutor in discharge of the obligation to account, even when no inventory has been made by the tutor.

Bretonnier quest. (1) verified in Guyot Vo. Rescision; after mentioning that formerly, at Paris, the 30 years rule was held to apply in such cases, says:

Now, the jurisprudence of the Parliament of Paris is that the minor who wishes to attack the transactions passed between him and his tutor, of any nature whatsoever, must do so within the 10 years of his majority.

In Pratique de Lange (2) after saying that the discharge granted by a minor to his tutor without an account, is null, adds:

Mais il n'y a en ce cas que dix ans du jour de sa majorité pour se faire restituer, au lieu qu'il aurait eu trente ans pour se faire rendre compte sans cette décharge.

In Ferrière Science des Notaires (3).

Quoique le compte soit clos et arrêté, le tuteur est toujours réputé comptable, nonobstant toutes les transactions qu'ils auraient pu passer ensembles. Mais suivant la jurisprudence, le mineur doit se pourvoir dans les dix ans de sa majorité contre les transactions qu'il aurait passées avec son tuteur, sans qu'au préalable il y eût eu de compte présenté, débattu et arrêté: en quoi l'ancienne jurisprudence n'est plus suivie, en ce qu'elle donnait au mineur, pour se pourvoir, contre ces sortes de transactions, trente ans, à compter du jour de leur majorité.

These authorities have received the sanction in more modern times of the highest tribunals in France.

In *re* Chavy in the Court of Appeal of Riom, on the 21st March, 1804, (30 Vent. an. 12) in a case, falling under the law as it was before the code, where one of the parties insisted upon the nullity of a transaction between a minor, after he had attained his majority, with his tutor, before the tutor had rendered his account: *Held*, that art. 475 of the code, by which the ten years prescription against such a demand is decreed

(1) P. 63. (2) Vol. 1st p. 499.
(3) 2 Vol. P. 303.

1886

GREGOIRE v. GREGOIRE.

Taschereau J.

is nothing but a reproduction of the pre-existing law, and specially of the ordinances of 1510 and 1539, and that the right to invoke such nullity is prescribed by the ten years which have elapsed between the demand and the transaction in question.

On the 15th November, 1808, in *re* Vincent (1), the same tribunal rendered a similar decision.

In re Hermel, (2) on the 16th April, 1822, in the Court of Cassation, in a case upon the same question, where the appellant asked the reversal of the judgment of the court below, by which the ten years prescription before the Code had been held to defeat such an action :

Held, that, as before the Code, the authors and the courts were divided on the question whether it was the 10 or the 30 years that applied to such cases, it was impossible for the Court of Cassation to hold that there was error in the judgment of the court below.

On the 3d August, 1829, in re Peignot, (3) in the Court of Cassation, held :

That under the ordonnance of 1539, and according to the jurisprudence of the Parliament of Paris during the last period before the revolution, minors had only ten years from their majority to attack the transactions made with their tutors, of any nature whatsoever, and *visis aut non visis tabulis.*

The case of *Moreau* v. *Motz* (4) has been referred to in the court below, and I have nothing to add to what the learned judges said as to its ruling. The Privy Council, however, did not decide the point of prescription. As to the law as it is now under the Code, I have not to determine. I feel bound to say, however, that my not doing so must not be interpreted as if I were of opinion that the result would have been dffferent under the Code, or as if I did not agree with what has been said on this point by the learned judges as appears by the report of the case in the Montreal Law reports, 2 Q. B. p. 229.

This disposes of the case, since, of course, the sale

(1) S. V. 80. 2. 440.
(2) S. V. 22. 1. 56.
(3) S. V. 29. 1. 341.
(4) 7 L. C. R. 147.

1886

GREGOIRE v. GREGOIRE.

being held good, the question raised by the appellants as to the inventory falls to the ground for want of interest.

Taschereau J.

GWYNNE J. concurred with Taschereau J.

Appeal dismissed with costs.

Solicitors for appellants; *Geoffrion, Dorion, Lafleur, and Rinfret.*

Solicitors for respondents: *Paradis and Chassé.*

1886

Mar. 9, 11 & 12.

*June 22.

THOMAS H. D. JONES, (Opposant for payment in the Superior Court.) APPELLANT;

AND

WILLIAM FRASER, (Plaintiff contesting opposition in the Superior Court)..... RESPONDENT.

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

Will, construction of—Legacy—Alienation of property bequeathed by testator, effect of—Partition—Estoppel—Cross appeal.

W. F. by his will bearing date 11th February, 1833, *inter alia* devised to M. his daughter by an Indian woman and to E. and M. his daughters by another woman, a defined portion of the seigniories of Temiscouata and Madawaska, and the balance of said property to his sons W. and E. A short time after making his will, the testator, who was heavily in debt, received an unexpected offer of £15,000 for the said seigniories, and he therefore sold at once, paid his most pressing debts, amounting to £5,400, and the balance of £9,600 was invested by loaning it on security of real estate.

At his death, his estate appearing to be vacant as regards the £9,600, a curator was appointed.

On the 27th September, 1839, the parties entitled under the will proceeded to divide and apportion their legacies, basing their calculations upon the approximate area of the seigniories devised, and received the collected part of the sums allotted to each by the partition.

---

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

1886

JONES v. FRASER.

In an action brought by W. F. the respondent, who was residuary legatee, against the curator in order to make him render an account, the court ordered the curator to render an account, which he did, and he deposited $50,000 and other securities. On a report of distribution being made, W. F., (the respondent) filed an opposition claiming his share under the will. This opposition was contested by J., the appellant, on the grounds: 1st that the legacies were revoked, and that in his capacity of universal legatee to his mother, (the legitimate child, he alleged, of the testator and the Indian woman who was *commune en biens* with the testator) he was entitled to one-half of the proceeds of the said £9,600; and 2nd, that in the event of his claim to legitimacy and revocation of the legacy being rejected, as by the will the daughters were exempt from the payment of the debts, he should, as representing one of the daughters, be entitled to her proportion of £15,000, the net proceeds of the sale.

Held, affirming the judgment of the court below, that J. (the appellant), not having at the death of his mother, repudiated the *partage* to which she was a party, but on the contrary having ratified it and acted under it, was estopped from claiming anything more than what was allotted to his mother.

Per Strong, Fournier and Taschereau JJ.—That under the law prior to the Code the sale of the seigniories which were the subject of the legacy in question in this cause, had not, considering the circumstances under which it was made, the effect of defeating the legacy.

Semble, per Henry J.—That there was a revocation of the legacy.

The judgment of the court below held that as the testator declared that the daughters should not be liable for the payment of his debts, partition, as regards them, should be made of the sum of £15,000, the price obtained from the sale of the seigniories bequeathed, and not of the £9,600 remaining in his succession at his death.

On cross appeal to the Supreme Court of Canada,

Held, that on the pleadings before the court no adjudication could be made as to the sum of £5,400 paid by the curator for the debts, and that in the distribution of the moneys in court all that J., (the appellant) could claim to be collocated for, was the unpaid balance (if any) of his mother's share in the moneys, securities, interest, and profit of the said sum of £9,600 in accordance with the partage of the 27th September, 1839.

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

1886

JONES v. FRASER.

Ritchie C.J.

The facts and pleadings are fully stated in the report of the case in Volume 12 Quebec Law Reports, 327.

Pouliot for the appellant and respondent on cross appeal. *Irvine* Q. C. and *Casgrain* for respondent and appellant on cross appeal.

SIR W. J. RITCHIE C. J.—I have had an opportunity, through the kindness of Mr. Justice Taschereau, of perusing the judgment which he has written in this case, and I entirely concur in the conclusion at which he has arrived.

There are two points on which I do not think it necessary to express any opinion, one as to the validity of the marriage as affecting the legitimacy of the plaintiff's mother, the other, as to the alleged revocation in the will. Mr. Justice Taschereau has made it clear that it does not lie in the mouth of the appellant to raise these questions. If I had thought it necessary to decide them I should have desired to give them further consideration.

STRONG J.—I also concur in the opinion of Mr. Justice Taschereau. and make the same reservations as His Lordship the Chief Justice. As regards the question of the validity of the marriage that, it seems to me, does not arise, and I do not feel called upon to give an opinion concerning it.

There is another point which does seem to enter into the case to some extent, and to call for an expression of opinion, and that is the question of the revocation in the will. I think there was no revocation of this legacy, but I agree with Mr. Justice Taschereau, that the parties so dealt with each other, in respect to conflicting claims, and with respect to the money under this will, that to apply an English phrase to French law, they have estopped themselves from raising this question.

1886

JONES v. FRASER.

Fournier J.

FOURNIER J.—I concur in the judgment of Mr. Justice Taschereau, with the same reservation as regards the legitimacy of the plaintiff's mother as expressed by His Lordship the Chief Justice.

HENRY J.—I also concur in the judgment of Mr. Justice Taschereau, with the same reservations. I would be inclined to hold that there was a revocation of the legacy, but as the parties, for thirty or forty years have adopted it, and also because, if the will is not sustained the property would revert to the Crown, I am of opinion for the reasons expressed in the judgment of my brother Taschereau, that the parties are too late now in asking to have it set aside. The other questions, that of *res judicata* and others, I have not thought it necessary to consider.

TASCHEREAU J.—This case presents no difficulty.

The appellant Jones bases his claim to a share of the monies now in court upon the legitimacy of Margaret Fraser, his mother, and upon the revocation of the legacy of the seigniories of Temiscouata and Madawaska by the sale thereof made by Fraser subsequently to his will.

It would obviously be useless for him to succeed on the question of legitimacy, (except as to his grandmother's share as *commune en biens*, which I leave aside for a moment), if he failed on his contention that this legacy was revoked, for, if the legacy stands, all of these monies unquestionably go to the legatees. On the other hand, he would not, in any way, benefit by a judgment declaring the legacy revoked, if he failed on the question of legitimacy, for, in that case, all of these monies would escheat to the Crown.

Under these circumstances I think it proper to consider first the question of the revocation of the legacy.

According to the law then in force, if this sale of these seigniories was made by Fraser, *necessitate urgente*, it did not carry revocation of the legacy. The question

1886

JONES v. FRASER.

Taschereau J.

then resumes itself into a simple one of fact, which, as such, has been found against the appellant by Chief Justice Meredith and the five judges of the Court of Appeal. Upon him therefore rested the onus of establishing that such a finding was clearly erroneous. He has, in my opinion, failed to do so. The disposal Fraser made of these monies is, to my mind, strong evidence that it was as representing these seigniories and, as it were, in exchange and in subrogation of them that he thereafter held these mortgages, and as it was then clear law, that where a testator exchanged a property that he had previously bequeathed by his will, even not *ex necessitate*, the legacy was not revoked but the property received in exchange passed ex-the legatee (1). We must hold that here likewise, these monies passed to the legatees as the seigniories would themselves have passed under the will. But, were it otherwise, can the appellant now be admitted to plead the revocation of this legacy? Is he not debarred by his own conduct from the right to now assail it? Let us see in what position he stands.

At Fraser's death, 49 years ago, Margaret, the appellant's mother, accepted the legacy in question, thereby repudiating the said Fraser's succession. Art. 300, Coutume de Paris; art. 712, C.C; *Richer* v. *Voyer* (2). Subsequently by her own will, she instituted the appellant her universal legatee and, as such, he is now her sole legal representative. How could he, under these circumstances, get over his mother's repudiation of her father's succession? Arts. 654, 866 C. C. Compar. Demolombe (3); Laurent (4). But supposing he could get over that difficulty, how could he get over his own acceptance of his grandfather's legacy?

When his mother died, 25 years ago, he might have

(1) 2 Bourjon, 399; 5 Saintespès-Lescot, 110; Merlin Vo. Subrogat. de choses.

(2) 5 Rev. leg. 591.

(3) Vol. 14, Nos. 513 *et seq.* and Vol. 22, Nos. 594 *et seq.*

(4) Vol. 14 p. 593.

refused the said legacy and treated it as lapsed. But what did he do then and since? Did he ever renounce it? Certainly not; but, on the contrary, has accepted it, and has received as such legatee, and in virtue of his grandfather's will, all he could get of the sums included in his mother's lot by the deed of 1839, and besides this, as her universal legatee, all the interests that remained unpaid at her death. He now holds and detains these sums. And yet, when the respondent claims his share of this very same legacy he, the appellant, retorts to him that it has been revoked. But, if not revoked, if good for the appellant, why also not revoked and good for the respondent? Could the appellant so first pocket his share of it and then impeach its validity? I do not think so, and his conduct, as I view it, is against the position he now takes, a *fin de non recevoir*, an estoppel, which it would have been no easy matter for him to overcome, had he been otherwise successful on this part of the case.

And there is another remarkable instance where he again clearly did not treat this legacy as revoked. I allude to his petition upon which he obtained from the Crown the abandonment of all claim to these monies, on the ground that this legacy stood unrevoked. Would he now say that he misinformed the Crown, or that he obtained that abandonment fraudulently? Would he say that it is fraudulently that he got all the monies he has received as legatee, or that it is fraudulently that he holds them?

I am of opinion that this legacy must be considered as not revoked, and that the monies in question consequently passed in the same manner and proportions as the seigniories would themselves have passed under the will. It is therefore unnecessary for me to determine hypothetically who would be entitled to these monies, had there been no legacy. I deem it

1886

JONES v. FRASER.

Taschereau J.

only proper to add, however, that if I therefore do not enter into the question of legitimacy, the appellant must not infer from my silence on this point, that I have any doubt upon the correctness of the judgment of the Court of Queen's Bench thereupon.

The question of *res judicata* it is also needless for me to determine. I may say, however, that I have not so far heard or read anything in the case which makes it at all doubtful in my mind, 1st, that the principal allegation of Fraser's declaration was that this legacy was not revoked, and that the primary object of his action was to have it so declared; 2nd, that Jones by his *défense en fait* and other pleas asked for the dismissal of that action on the ground that the legacy was revoked, and 3rd that the Chief Justice determined that it was not revoked. And I have failed to appreciate the soundness of the reasoning, which would give to any court, in face of that judgment, the right, now or ever, to dismiss Fraser's said action and authorize the curator to re-pocket the monies in question. Neither do I understand, as I read the Chief Justice's judgment, that he reserved to himself or to any one else the power to do so.

Now, on Jones' opposition, if the issue, the principal issue as raised by Fraser's plea, is not again the revocation or non-revocation of that legacy, I have failed to understand the case. For, as I have shown, how can Jones claim any of these monies as part of his grandfather's *intestate* succession, without first establishing that they fell into that succession, or in other words, that they were not bequeathed by the will? Bonnier (1); Boitard (2); Demolombe (3); *Shaw* v. *St. Louis* (4); Delvincourt (5); *Re Billon* (6); *Re Lambin* (7).

As to the partage of 1839, there is no doubt that it

(1) Nos. 299, 862.
(2) 2 Vol. 203.
(3) 30 Vol. 287, 291.
(4) 8 Can. S. C. R. 385.
(5) 71, 1, 100.
(6) S. V. 73, 1, 292.
(7) S. V. 76, 1, 448.

did not then bind the appellant and that he had a perfect right to repudiate it at his mother's death. But it is now clearly too late for him to do so. Demolombe (1); Solon, Nullites (2); Binet 11th, Nullites (3).

Not only did he not repudiate it then, but he unequivocally ratified it by claiming and receiving the capital sums put in his mother's lot by that deed. Only one of these sums besides those received from the curator himself is clearly in evidence, on the part of the record printed upon this appeal (£150 from Vincent Dube) but that is sufficient. There really was no *partage* at all necessary at Fraser's death, for in a case like this, where *créances* compose a succession, the law divides them between the heirs or legatees according to their shares in the estate. Art. 1122 C. C. (4); Demolombe (5); 11 Duranton, (6); Pothier, Obligations (7).

If, here, for instance, these seignories were 18 leagues in front, the three daughters being given six leagues, they were entitled to one third of each and every one of the capital sums due to Fraser at his death, this one-third being sub-divided between them in equal parts. They however agreed to divide them otherwise, the appellant has acquiesced in it, and he is now debarred from complaining of it. Did he ever at any time during the 25 years that his mother is dead, ask for another *partage*? Or has he ever ignored his mother's doings and relied on the division that the law made of these sums? Never. He has on the contrary acted under and taken advantage of the division then made. He had no right whatsoever to receive, for instance, the £150, due by Vincent Dubé, I have alluded to, if not for that deed of 1839. By the will alone, it was only a small portion of that sum that he was in law

(1) 691, 694.
(2) 2, Nos. 407, 447.
(3) 1 Vol. 234 Seq.
(4) Oblig. Nos. 299, 317.
(5) 26 Vol. Nos. 541 & Seq.
(6) Nos. 269, 274.
(7) Nos. 299, 317.

1886

JONES v. FRASER.

Taschereau J.

entitled to. And what is the acquittance he gave to the Curator in 1873, for, if not for his share under that partage? But, says he, I gave that acquittance under reserve of all my rights. That is so. But reservations of that kind are of no avail. *Facta potentiora sunt verbis, et actus protestationis contrarius tollit protestationem* (1).

As to the community of property between Fraser and the Indian woman, had they been legally married, it would undoubtedly have entitled Margaret Fraser to one-fourth of these £9600. But here again, the deed of 1839, which stands in full force and effect, would preclude her from the right to claim any more than what was thereby allotted to her and accepted by her as her share of these £9600. And the appellant, I repeat it, stands in her shoes, is bound by her acts, and has moreover unequivocally ratified that deed.

As to the contention that the six leagues bequeathed to the daughters were worth more than the rest of the seigniories, it is not proved. The evidence is altogether against it. But were it otherwise here again the appellant is met by the deed of 1839, as his mother's representation, and by his own acts of acquiescence in that deed.

There remains the claim made by Jones in relation to the sum of £5,400 paid by the late Fraser himself in settlement of his debts out of the proceeds of the sale of these seigniories. Jones contends that as by the said Fraser's will, his mother's shares was to be free from the payment of all debts, he is entitled to receive from the estate a share of this sum of £5,400. Mr. Irvine has argued with great force on Fraser's part, as cross appellant, that Jones' contention is unfounded, that, by the express words of the will, it was the debts the testator would leave at his death, that the daughters were exempted from; that the debts he himself

(1). Solon, 2 des Null. 436.

paid were not debts of his estate, and not covered by that clause of the will: that the will speaks from the death, and must be read as bequeathing to his daughters one-third of the £9,600, with exemption from his debts left at his death. In support of this contention may be cited a passage in Montvallon, des Successions (1), where it is said that if a testator pays debts which by his will he had obliged one of his legatee to pay, he is presumed to have discharged the legatee of the obligation to pay them. Moreover, I do not think that the merit of this part of Jones' claim can be determined in this case, and the cross-appeal on this point, as well as on the partition of 1839, should be allowed That amount of £5,460 was not included in the plaintiff's action, never was in the the curator's hands, and is not included in Chief Justice Meredith's judgment. It is not then in court, and does not form part of the monies now in question. We decide whether or not, and to what extent, Jones is entitled to the £9,600 deposited by the curator, and that ends the case. His claim as to to the £5,400 comes in this case in the nature of an opposition *en sous-ordre* which has no *raison d'être* here. We, therefore, express no opinion on this part of Jones' claim, and leave him to exercise whatever rights he may have in relation thereto, if any, by direct action or otherwise as he may think fit.

The appeal should be allowed without costs, the cross-appeal allowed with costs, and Jones' opposition dismissed with costs, except as to any part of the monies and securities, interest and profit which may still be due to him in virtue of the partition of 1839, in accordance with the partage of the monies in question are to be distributed, if any, for which he must then be collocated.

The parties may perhaps agree as to what is the

(1) Page 558.

1886

JONES v. FRASER.

Taschereau J.

amount of the sum thus remaining due to Jones. Failing such understanding, we will see how to get it established, so as, if possible, to get it to form part of the judgment of this court, before the minutes are settled.

GWYNNE J.—In this case I concur in the judgment of my brother Taschereau—that the appeal be dismissed and the cross-appeal allowed with costs.

Appeal dismissed and cross-appeal allowed with costs.

Solicitors for appellant: *Tessier & Pouliot.*

Solicitors for respondent: *Laru*e, *Angers & Casgrain.*

1885

*March 7.

*June 22.

THE ATTORNEY GENERAL OF CANADA, (INTERVENANT IN THE COURT BELOW)..... } APPELLANT;

AND

THE CITY OF MONTREAL (PLAINTIFF IN THE COURT BELOW)..... } RESPONDENT.

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

Property occupied under lease by Militia Department—Not liable to municipal taxation—Prerogative of the Crown—10-11 *Vic. ch.* 17—23 *Vic. ch.* 61 *sec.* 58—*C. S. L. ch.* 4 *sec.* 2—37 *Vic. ch.* 51 *sec.* 237 *Q.*—*Mun. Code L. C. art.* 712—36 *Vic. ch.* 21 *sec.* 18 *Q.*—*Reasons for judgment.*

The Dominion Government having leased certain property in the city of Montreal for the use of Her Majesty, with the condition that the Government should pay all taxes and assessments which might be levied and become due on the said premises during the term of the lease, the corporation of the city of Montreal brought an action against the owners of the property for the municipal taxes accruing during the period of time the said property was so leased to and occupied by the Government of the Dominion of Canada.

---

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

1885

ATTORNEY GENERAL OF CANADA v. CITY OF MONTREAL.

On an intervention fyled by the Attorney General of Canada praying that the action be dismissed:

Held, reversing the judgment of the court below, Strong J. dissenting, that the property in question was exempt from taxation under C. S. L. C. ch. 4 sec. 2. *Corporation of Quebec* v. *Leaycraft* distinguished (1).

APPEAL from a judgment of the Court of Queen's Bench for Lower Canada (appeal side), affirming the judgment of the Superior Court in so far as the intervention of the present appellant had been dismissed, and in so far also as the defendants in the suit had been condemned to pay the taxes claimed. The facts and pleadings are fully set out in the judgment of Strong J. hereinafter given.

Church Q.C. appeared on behalf of the appellant, and *Roy* Q.C. on behalf of the respondents.

The following statutes and authorities were referred to by counsel:—

For appellant: Cons. Stats. L. C. ch. 4 sec. 2; Quebec Interpretation Act, 31 Vic. ch. 7 sec. 5 (P.Q.); 37 Vic. ch. 51 sec. 237 (P.Q.); 36 Geo. III. ch. 9 sec. 62; 10 and 11 Vic ch. 17; B. N. A. Act sec. 125; 23 Vic. ch. 61 sec. 58; Maxwell on Statutes (2).

For respondent: *The Corporation of Quebec* v. *Leaycraft and the Attorney General, Intervenant* (1); Harrison's Municipal Manual (3); Cons. Stats. L. C. ch. 1 secs. 8 and 9.

Sir W. J. RITCHIE C.J.—As to the contention founded on the clause in the lease in relation to the payment of taxes by the Crown, this, in my opinion, has nothing whatever to do with this case; it is merely a matter of contract between the lessor and lessee, with which the corporation of Montreal has nothing whatever to do; that provision merely amounts to this, if the land is not exempt then the crown, as between lessor and lessee, agrees with the lessor to pay

(1) 7 Q. L. R. 56.
(2) Pp. 2, 49, 51.
(3) Pp. 609, 610.

1885

ATTORNEY GENERAL OF CANADA v. CITY OF MONTREAL.

Ritchie C.J.

all and every the taxes, of whatever nature they may be, that may arise or become due and exigible upon the said premises during the period of the lease, but if the land is not legally assessable by reason of an exemption in favour of the crown, then no taxes could arise or become due and exigible, and therefore none are to be paid by either the lessor or lessee, and so the clause, no doubt introduced by the lessor *ex majori cautelâ*, becomes of no effect.

Indeed, the plaintiffs, in their declaration, do not pretend to claim the right to assess on any such ground, "Their claim is that the defendants are indebted to them in the sum of $1,832.12 for assessments or taxes imposed according to law, and the by-laws of the corporation on the immovable property belonging to the defendant's, situate, &c., for the years '74, '75, '76. This is perfectly intelligible, and if these taxes have been imposed on defendants according to law, they are recoverable, and this brings up the simple and only question in issue: Were they imposed according to law? The corporation can get no right to assess property not assessable by reason of any contract entered into between private individuals, be they the proprietor and his lessee or any other parties, in reference to the property. Their only right to assess is by virtue of authority of the legislature, and if the legislature has given no such authority, what right have they to levy any assessment? If, therefore, this property is by law exempt from assessment, that ends the matter, and this, as I have just said, is the only question in the case. It is admitted that Her Majesty, by the Government of the Dominion of Canada, occupied the property for which the taxes are claimed in virtue of the leases produced and these leases show that the property was for the use of the militia department, and that department had the right to erect all rifle ranges necessary for rifle practice and temporary sheds and tents which may be

1885

ATTORNEY GENERAL OF CANADA v. CITY OF MONTREAL.

Ritchie C.J.

required. It cannot, I should think, be disputed that the property of the crown, or property occupied by Her Majesty or Her servants for Her Majesty, is exempt from taxation, and it seems to me equally beyond dispute that this exemption can only be taken away by express legislative enactment. It is not necessary to go back to the old authorities which all establish and recognize this royal prerogative because in the case of the *Mersey Docks* v. *Cameron* (1) Mr. Justice Blackburn read the opinion of the majority of the judges which was adopted and acted on by the House of Lords and in which he thus enunciates the law on this subject:

> The crown not being named in the statute of Elizabeth is not bound by it; and consequently the overseers cannot impose a rate on the Sovereign in respect of lands occupied by Her Majesty, nor on those occupied by Her servants for Her Majesty. The exemption depends entirely on the occupier and not on the title to the property. The tenants of the crown property, paying rent for it, are ratable like other occupiers.
>
> On the other hand, where a lease of private property is taken in the name of a subject, but the occupation is by the Sovereign or Her servants on Her behalf, the occupation being that of Her Majesty, no rate can be imposed; *Lord Amherst* v. *Lord Sommers* (2). So far the ground of exemption is perfectly intelligible but it has been carried a good deal farther, and applied to many cases in which it can scarcely be said that the Sovereign or the servants of the Sovereign are in occupation.

In this case is there any statute depriving the crown of this exemption? None whatever. On the contrary there are statutes of Quebec distinctly, in my opinion, recognizing this exemption and relieving the property of the crown and property occupied by officers of the Crown for the public service from taxation, even if such statutes were, in view of the royal prerogative, requisite or necessary. They are as follows: 10 & 11 Vic. Ch. 17; Cons. S. L. C. ch. 4 sec. 2; 23 Vic. ch. 61 sec. 58 and ch. 56 secs. 8 and 9.

It is therefore for the city of Montreal to show a

(1) 11 H. L. Cas. 443. (2) 2. T. R. 372.

1885

ATTORNEY GENERAL OF CANADA v. CITY OF MONTREAL.

Ritchie C.J.

special right given in express terms to tax property held for Her Majesty. It has not this right under its charter in force during the years in question, viz: 37 Vic. ch. 51. On the contrary, that act expressly declares by section 237:—"This act shall not affect in "any manner the rights of Her Majesty, her heirs and "successors."

'The only right to tax the crown which the city of Montreal ever had was that expressly conveyed by 36 Geo. III. ch. 9 sec. 62, which conferred that power, not upon the corporation of Montreal (for none existed), but upon justices of the peace therein named. Section 57 of this act provides that assessments may be levied upon the "occupier or occupiers (not the proprietors) of "lands, lots, houses, etc.;" and section 62 declares that it is expedient that "public buildings, dead walls and "void spaces of ground belonging to government or "societies," etc., etc., should be assessable; and, as amplification and explanation of the term "belonging "to," we find in the same section a provision that a particular fund shall be drawn upon for these assessments upon property which may "belong to His "Majesty or be occupied for his use."

These sections show that a right then existed to tax the property held or occupied by the Government; but it is not now maintainable—

"First. Because all former acts affecting the respondents have been repealed by their present charter (1).

"Second. But chiefly because this right to tax was expressly taken away by 10-11 Vic. ch. 17, which reads as follows:—

"An Act to exempt the property of the Crown from local rates and taxes in Lower Canada.—Whereas, by the laws of that portion of the province formerly the Province of Upper Canada, all property held by or in trust for the Crown is exempt from local taxes and assessments, and it is expedient that such property should be so exempt in that portion of the Province formerly Lower Canada: Be it therefore enacted by the Queen's Most Excellent Majesty, by and

(1) See sec. 241 of 37 Vic. ch. 51. Q.

with the advice and consent of the Legislative Council and of the Legislative Assembly of the Province of Canada, constituted and assembled by the virtue of and under the authority of an act passed in the Parliament of the United Kingdom of Great Britain and Ireland, and intituled, 'An Act to reunite the Provinces of Upper and 'Lower Canada, and for the government of Canada;' and it is hereby enacted by the authority of the same, that, from and after the passing of this act, so much of the sixty-second section, or of any other part of the act of the Legislature of Lower Canada passed in the thirty-sixth year of the reign of King George the Third, and intituled, 'An Act for making, repairing and altering the highways 'and bridges within this Province, and for other purposes,' or of any other act or law in force in that portion of this province for merly the Province of Lower Canada, as authorizes the imposing of any local rate or tax on any property belonging to Her Majesty, or held in trust by any officer or party for the use of Her Majesty, or the demand of any sum of money as commutation for any statute or other labour on any highway in respect of such property, or the performance of such statute labour, or the payment of any such rate or tax imposed on any such property out of the public moneys of this province, shall be and is hereby repealed; and hereafter all such property as aforesaid, in whatever part of this Province the same shall be situate, shall be exempt from all local rates and taxes, statute or other labour on any highway, or commutation for the same, any act or law to the contrary notwithstanding; provided always, that any arrears of such rates or taxes accrued and payable in Lower Canada before the passing of this act, may be paid as if this act had not been passed.

The Confederation Act, Article 125, lays down the general rule, that no property belonging to Canada or any one of the Provinces shall be liable to taxation.

"The article was, moreover, only another way of declaring the principle which the C. S. L. C., cap. 4, sec. 2, had already enunciated; *i e.*, the exemption of any property belonging to or held in trust by any officer "or party." The section is as follows:—

"2. All property belonging to Her Majesty, or held in trust by any officer or party for the use of Her Majesty in whatever part of this Province the same is situate, shall be exempt from all local rates or taxes, statute or other labor on any highway, or commutation for the same; but any arrears of such rates or taxes accrued and payable in Lower Canada before the twenty-eighth day of July, one thousand eight hundred and forty-seven, may be paid as if this Act had not been passed.—10-11 Vic. cap. 17. See also 23 Vic. cap. 61 sec. 58.

1885

ATTORNEY GENERAL OF CANADA v. CITY OF MONTREAL.

Ritchie C.J.

"The section of the Consolidated Statutes already quoted refers to 23 Vic. cap. 61 sec. 58, which reads as follows:—

"58. All public buildings intended for the use of the Civil Government, for military purposes, for the purposes of education or religious worship, all property belonging to Her Majesty, or held in trust by any officer or person for the use of Her Majesty, all parsonage houses, burying grounds, charitable institutions and hospitals duly incorporated, and the lands upon which such buildings are erected, shall be exempt from all assessments or rates imposable under this act.

Ch. 1 sec. 8 of the C. S. L. C. declares that

The said Consolidated Statutes shall not be held to operate as new laws, but shall be construed and have effect as a consolidation and as declaratory of the law as contained in the said acts and parts of acts so repealed, and for which the said Consolidated Statutes are substituted. 23 V. c. 56 s. 8.

9. But if upon any point the provisions of the said Consolidated Statutes are not in effect the same as those of the repealed acts and parts of acts for which they are substituted, then as respects all transactions, matters and things subsequent to the time when the said Consolidated Statutes take effect, the provisions contained in them shall prevail, but as respects all transactions, matters and things anterior to the said time, the provisions of the said repealed acts and parts of acts shall prevail. 23 V. c. 56 s. 9.

These statutes seem to me distinctly to indicate that so far from depriving property occupied by the Crown of exemption from taxation, the intention of the legislature was to grant exemption, certainly not to take from the Crown that which belonged to it by royal prerogative.

I do not think the case relied on by the plaintiffs of *Corporation of Quebec* v. *Leaycraft and the Attorney General* (1) is in the least degree in point; that was the case of a warehouse owned and occupied by a private individual for warehousing goods of parties who did not wish to pay the duties immediately, and of which warehouse the crown was neither the owner nor occupier. The only connection the crown had with the warehouse being the right to put a lock on it,

(1) 7 Q. L. R. 56.

1885

ATTORNEY GENERAL OF CANADA v. CITY OF MONTREAL.

Ritchie C.J.

the key of which was kept by a customs officer to prevent the goods being removed till the customs duties were paid or satisfied. The actual beneficial occupation being in the proprietor who received the consideration for its use as a warehouse, and in the owners of the goods placed there for safe custody, and for which they paid the proprietor the warehouse dues, the crown having therefore no title to or occupation of the premises, beneficial or otherwise, but the same belonging to and being in the occupation of private individuals, there was, in my opinion, no pretense for saying that the property was exempt from taxation. But in this case the property in question being under lease to the crown, and occupied by officers and servants of the crown, it is, in my opinion, clearly exempt from municipal taxation by the corporation of Montreal.

I regret very much that we have not had the advantage to be derived from a perusal and consideration of the reasons which led the judges of the Court of Appeal to the conclusion at which they arrived. I have so repeatedly pointed out the grave inconvenience, and it may be possible injury, resulting to litigants from a non-compliance in so many cases, particularly from the Province of Quebec, with the rule of this court, made under and by virtue of the Supreme Court Act, which gives to the rules of the Supreme Court force of law, requiring such reasons to form part of the case, that I suppose it is useless to repeat them now. I would add, however, that in justice to the court appealed from and to ourselves, I think we should, as a court of appeal, know the reasons on which the court below acted. If it has been thought necessary by statute to provide that the reasons of the judges on appeals before the Privy Council should be transmitted, it seems to be quite as important that we should have them in appeals before this court.

STRONG J.—In this case the principal action was in-

1885

ATTORNEY GENERAL OF CANADA v. CITY OF MONTREAL.

Strong J.

stituted by the city of Montreal against Les Dames de la charité de l'Hôpital Général de la cité de Montreal (commonly called the Grey Nuns) to recover the municipal taxes assessed upon certain immovable property belonging to the defendants and situated in the city of Montreal for the years 1874, 1875 and 1876, amounting in the aggregate to the sum of $1,984.46. The defendants pleaded a peremptory exception to the effect that they were not liable to pay the taxes claimed by the plaintiffs inasmuch as during the years in respect of which those taxes were assessed they were not in possession of the land, which was leased to the Minister of Militia for the use of the Crown during all the time mentioned in the action, and that Her Majesty's Government for the Dominion of Canada which had so leased the land had charged itself with the payment of the taxes and assessments, and that the city of Montreal cannot by law recover any tax or assessment in respect of lands occupied by Her Majesty for the Government of the Dominion, and the exception sets forth three leases each for the term of one year covering the period from 1st of April, 1874, to 5th of March, 1877, and alleges that since the last mentioned date the lease has been continued by "*tacite reconduction.*"

To this plea the plaintiffs filed an answer alleging that during the time for which the taxes were assessed the defendants were proprietors of the lands and in receipt of the revenues and profits thereof.

On the 26th September, 1878, the then Attorney General of the Dominion, acting for and in the name of Her Majesty, intervened in the action and subsequently filed a plea to the same effect as that of the defendants to the principal demand, producing as exhibits the three leases mentioned in the defendants plea, which each contained a clause by which the Minister of Militia for the Crown undertook to pay taxes and indemnify the lessors against the same. And to this plea by

the Attorney General the plaintiffs filed an answer in all respects similar to that filed in response to the exception of the principal defendants. No facts being in dispute the cause was heard in the Superior Court upon an admission that the taxes claimed were in accordance with the assessment roll and that the Crown had had possession during the time alleged under the leases mentioned. The Superior Court on the 8th November, 1880, rendered a judgment dismissing the defence of the Grey Nuns, the principal defendants, and condemning them to pay the amount claimed in the action and also dismissing the contestation of the action by the Attorney General and adjudging that the "intervenant" was bound to indemnify the principal defendants from all the consequences of the judgment against them.

Against this judgment the Attorney General appealed to the Court of Queen's Bench, which rendered a judgment dismissing the appeal so far as the judgment upon the principal demand is concerned, and reforming the judgment upon the intervention by substituting an order of dismissal of the intervention for the adjudication of the Superior Court that the Crown should indemnify the defendants.

From this latter judgment the Attorney General now appeals to this court.

I am unable to concur in the view taken by the majority of this court, that the judgment of the Court of Queen's Bench was erroneous. By the leases which form part of the record (having been produced as exhibits,) it appears that the lands in question were leased by the Grey Nuns to the Minister of Militia in his official capacity for the purposes of a rifle range. The lands were therefore, I fully concede, to all intents and purposes leased for the use of the Crown, and the possession and enjoyment had under the leases was the possession and enjoyment of the Crown, and the Crown

1885

ATTORNEY GENERAL OF CANADA v. CITY OF MONTREAL.

Strong J.

and the defendants are therefore in the same position exactly as if the lease had been directly to Her Majesty. But I am unable to see any ground in this for exempting the proprietors from taxation. The taxes are not claimed from the Crown by the city. The only statutory enactment which is pointed to as authorising such an exemption is that contained in the Consolidated Statutes of Lower Canada, ch. 4 sec. 2, by which it is enacted that:

> All property belonging to Her Majesty, or held in trust by any officer or party for the use of Her Majesty, in whatever part of this Province the same is situate, shall be exempt from all local rates or taxes, statute or other labor in any highway, or commutation of the same; that any arrears for such rates or taxes accrued and payable in Lower Canada before the 28th July, 1847, may be paid as if this act had not been passed.

There is manifestly nothing in this section exonerating proprietors who may happen to have the good fortune to have the Crown as tenants of their immovable property from such rates, taxes and assessments as may be imposed by the city authorities pursuant to the terms of the act of incorporation of the city of Montreal. These taxes are not imposed in respect of the leasehold interest, but in respect of the proprietorship of the land which is of course absolutely in the defendants, the Crown having a right to enjoy it only, under a mere personal contract, in no way operating as a dismemberment of the property or conferring any real right whatever. It cannot therefore be said that these taxes are imposed upon property "belonging to or held in trust" for the Crown so as to bring it within the terms of the enactment quoted. There is no use in referring to anterior enactments, if any could be referred to, authorizing such an exemption as is claimed, for by the 8th and 9th sections of the Interpretation Act (Cons. Stats. of Lower Canada, cap. 1) the provision contained in chap. 4, section 2, already extracted, is to be deemed declaratory of such former laws, and if in anything it differs from them it is to be taken, as regards the future,

as substituted for such anterior legislation.

It being impossible, therefore, to rest the defence upon any positive legislation, resort is had to an argument derived rather from the doctrines of political economists than from any juidical principles. It is said, as I understand this argument, that the pretensions of the defendants and of the Attorney General must, irrespective of any statutory exemption, be taken to be well founded, because there being no direct authority to tax the crown (which I entirely admit) this assessment is indirectly a proceeding levying taxes on the crown, inasmuch as the crown, being bound to indemnify its lessors against the payment, will ultimately have to bear the burden. If I was not a single dissentient judge in this court I should have thought that this argument is so obviously fallacious as scarcely to call for observation, but as I differ from the other members of the court I am bound to assume that it is not so untenable as it appears to me and is entitled to respectful consideration.

There is no doubt that the city of Montreal cannot tax the property of the crown. This I freely admit. The crown cannot be affected by a statute giving powers of local taxation to a municipal body unless it is expressly named and express powers to tax its property are conferred, which is not the case in the Montreal Act of Incorporation. But as I have already said there has been no attempt to impose a tax upon the crown. This argument, therefore, must mean that the incidence of the tax is such that the burden of it will fall ultimately upon the crown. No legal authority can be cited in support of such a position. The theories of authors who treat of a speculative science like political economy are not, in my opinion, proper elements of judicial decisions, except only in those cases where the draftsmen of Acts of Parliament having unfortunately borrowed terms from the nomenclature of that science, the courts

1885

ATTORNEY GENERAL OF CANADA v. CITY OF MONTREAL.

Strong J

are forced to place an interpretation upon them in order to construe the act.

I know nothing about the incidence of this tax—all I say is that the Montreal Incorporation Act authorizes the city to tax proprietors in respect of their immovable property, and the powers conferred by it have been followed by the city, for the Grey Nuns, the principal defendants in this action, and no one else are the owners of the full property in the lands upon which these taxes have been imposed, and upon this short ground alone it seems to me very clear that the judgment of the Court of Queen's Bench is free from error and ought to be affirmed, and this opinion, it appears to me is fully sustained by the case of *Leaycraft* v. *The Queen* (1).

I may add, however, that the argument which is professed to be derived from the economists seems to me particularly unfortunate, for, without professing to decide this case on other than the purely legal grounds already stated, it is not out of place to say that the authorities which the defendants are driven to invoke do not support their pretensions, for, viewed in the light of the doctrines taught by political economy, this tax is to all intents and purposes a tax upon rent, and according to a consensus of the best authorities in that science, a tax upon rent (using the word in its popular sense), being a tax upon the profits of the land is a burden falling upon and ultimately to be borne by the proprietor, and not by the tenant or occupier, even in a case which does not occur here, where such tenant or occupier may be bound to pay the tax in the first instance, the theory of course being that the tenant who has to pay taxes pays so much less rent for the land. Consequently there is no pretence for saying that owing to the incidence of the tax this is in effect a burden imposed upon the crown. Something was said in argument to the effect that if the taxes are held

(1) 7 Q. L. R. 56.

to be legally imposed, that this is tantamount to holding that the moveable property of the crown on the lands in question is liable to seizure. The plain answer to this, however, is that no such result necessarily follows.

I am of opinion that the appeal should be dismissed.

Strong J.

FOURNIER J.—concurred with Sir W. J. Ritchie C.J.

HENRY J.—I think that the corporation have no right to impose a tax on this property. It was leased to the government for a military purpose, and it was one of the terms and conditions of the lease that the government should pay the taxes. If that had not been inserted in the agreement the government would have had to pay the rent representing such taxes; but having taken upon itself to clear the other parties of the taxes, it clearly shows that the taxes will have to be paid by the government, if the attempt of the corporation is successful.

I agree with the majority of this court that the corporation has no power to levy the taxes on these premises for the period of time they were occupied by the Dominion Government.

TASCHEREAU J.—I am also of opinion that this appeal should be allowed. This property is held in trust by the Minister of Militia for the use of Her Majesty, and, under the very terms of ch. 4 sec. 2. C. S. L. C. is exempt from taxation. Moreover, it is for the respondent to show a right to tax this property, not for the crown to show an exemption. A tax upon a property held and occupied, as this one, by the crown for public purposes must necessarily fall upon the Crown; that is to say, be paid out of the revenues of the Dominion. In the very terms of the B. N. A. Act, the city of Montreal is not authorized and cannot be authorized to levy the funds necessary for the

1885

ATTORNEY GENERAL OF CANADA v. CITY OF MONTREAL.

Taschereau J.

administration of its municipal government upon the inhabitants of the rest of the Dominion, and I am sure that the legislature did not intend to authorize them to do so. It would have been granting them powers withheld from and refused to the other municipalities of the province. For under art. 712 of the Municipal Code, as amended by 36 Vic. ch. 21 sec. 18, properties occupied, as this one is, by the Government, are specially exempted from taxation.

Appeal allowed with costs.

Solicitors for appellant: *Chapleau, Church, Hall & Nicholls.*

Solicitor for respondents: *Roüer Roy.*

1885

*Mar. 19, 20.

*June 23.

DANIEL McLEAN .....APPELLANT;

AND

NICHOLAS GARLAND. .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Assignment for benefit of creditors—Preference—R. S. O. Cap. 118 *sec.* 2—*Creditors named in schedule—Assignee not bound to confine distribution to.*

An insolvent made an assignment for the benefit of his creditors. The deed purported to be for the purpose of satisfying, without preference or priority, all the creditors of the insolvent, and the trust was declared to be: 1. To pay in full the debts of the several persons or firms named in a schedule to said deed, or, if not sufficient to pay the same in full, to divide the assets of the insolvent estate *pro ratâ* among such scheduled creditors, and: 2. To pay the surplus, if any, to the said insolvent. It appeared that there was a small creditor of the insolvent whose name was not on said schedule.

Held, per Ritchie C.J. and Fournier and Taschereau JJ., reversing the judgment of the court below, Henry J. dissenting, that the consideration for the deed, as expressed on its face, was that there should be a distribution of the estate of the insolvent among all his creditors, and the assignee was not bound to confine such distribution to the creditors named in the schedule.

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

1885

MCLEAN v. GARLAND.

Per Strong J.—That the assignee was confined to the schedule, but effect must be given to the word "intent" in the statute and as the evidence showed that a *bonâ fide* effort was made to ascertain the names of all the creditors before the execution of the deed, it did not appear that the insolvent intended to prefer the scheduled creditors and the deed, therefore, was not void under R. S. O. cap. 118 sec. 2.

Semble, per Strong J.—That the word preference in R. S. O. cap. 118, sec. 2, imports a "voluntary preference" and is not applicable to the case of a deed obtained by a creditor or creditors who to obtain it have brought pressure to bear on the debtor.

APPEAL from a decision of the Court of Appeal for Ontario (1) affirming the judgment of the Common Pleas Division (2) in favor of the respondent.

The material facts affecting this appeal are as follows:—

In 1882 one Thompson, a trader, being in difficulties and pressed by the respondent Garland who had issued a writ against him, went to Toronto and held a meeting of his creditors, at which meeting it was determined that Thompson should assign his estate to the Appellant McLean for the benefit of all his creditors. Before executing the deed of assignment a son of McLean went over all his books with the insolvent and made out what was supposed to be a complete list of the creditors. The deed was then prepared and executed by Thompson and by McLean. It provided for the payment of certain rents and taxes, and then for the payment in full, or *pro ratâ* as far as the assets would extend, of the debts of the creditors mentioned in a schedule annexed.

The respondent, Garland, having obtained judgment against Thompson, issued an execution, and the sheriff made a levy upon the goods assigned to McLean by the aforesaid deed. An interpleader issue was ordered to be tried to determine the title in said goods, and on the trial in the Common Pleas Division judgment was given for the Respondent and execution creditor Gar-

(1) 10 Ont. App. R. 405. (2) 32 U. C. C. P. 524.

1885

McLEAN v. GARLAND.

land, who had produced evidence to show that one Sinclair was a creditor of Thompson for a small amount and had not been included in the scheduled list of creditors, the court holding that this made the deed preferential of the creditors who were included and, consequently, void. On appeal to the Court of Appeal the judges of that court were equally divided in opinion and the appeal was dismissed. McLean then appealed to the Supreme Court of Canada.

W. *Cassels* Q. C. and *Galt* for the appellant.

The deed was made between Thompson, the debtor, and McLean, the appellant, and both are bound by the recital to treat this deed as one for the benefit of all Thompson's creditors. *Carpenter* v. *Buller* (1); Chitty on Contracts (2).

The appellant subimts: (1.) That the deed of assignment in question was made and executed for the purpose of paying and satisfying ratably and proportionably, and without preference or priority, all the creditors of A. W. E. Thompson their just debts within the meaning of R. S. O. ch. 118 sec. 2.

(2). That this appears not only by the deed itselt but by the strongest affirmative evidence.

(3). That if Sinclair were a creditor he could have proved his claim and ranked on the estate, and that if necessary the schedule can be amended by adding his name.

(4). That if Sinclair's trifling debt was excluded by accident, this cannot have the effect of avoiding the deed.

(5). That no debt from Thompson to Sinclair was proved by the respondent.

(6). That the Respondent's name being upon the schedule it is not competent for him to complain that the name of some other creditor is not there. Sinclair's claim was produced for the first time at the trial, and

(1) 8 M. & W. 209. (2) 11 Ed. pp. 85-90.

Thompson having by that time removed to the North-West, it was impossible to make any inquiries into it.

The following authorities were cited: *Kerr* v. *Canadian Bank of Commerce* (1); *Brayley* v. *Ellis* (2); *Alexander* v. *Wavell* (3).

Robinson Q.C. and *Walker* for the respondent.

The said deed of assignment was made for the payment of those creditors only who were mentioned in the schedule annexed to the deed, after the payment of rent, charges and assessments, &c., which were made a first charge on all the assets assigned. As a matter of fact certain creditors, namely, Alexander Sinclair and J. and J. Taylor, were excluded altogether from any benefit under the deed, and therefore the deed was and is invalid as against the respondent, an execution creditor of the assignor. Creditors could not be added to the schedule.

Drever v. *Mawdesley* (4); *Gault* v. *Baird* (5); *Buvelot* v. *Mills* (6); *Wood* v. *Rowcliffe* (7); *Kingston* v. *Chapman* (8); *Sellin* v. *Price* (9).

Even if the deed could be reformed as between the assignor and assignee, the immediate parties to it, it could not be reformed so as to affect the rights of creditors who were not parties to it. After the rights of an execution creditor had intervened, the deed could not be reformed so as to prejudice his rights and after any creditor became a party to it by filing his claim with the assignee, or in any other way intimating his willingness to accept the provisions of the deed, the deed could not be reformed, and he would have the right to insist upon having the assets distributed among those creditors only who are mentioned in the schedule.

(1) 4 O. R. 652.
(2) 9. Ont. App. R. 565.
(3) 10 Ont. App. R. 135.
(4) 16 Sim. 511.
(5) 4 Ont. App. R. 643.
(6) L. R. 1. Q. B. 104.
(7) 6 Ex. 407.
(8) 9 U. C. C. P. 130.
(9) L. R. 2 Ex. 189.

1885

McLEAN v. GARLAND.

The onus of proving that all creditors were included in the schedule was on the appellant, and without calling the assignor as a witness there could not be, and there was, no evidence of that fact. *Watts* v. *Howell* (1).

The recitals in the deed cannot control or enlarge the operative words in it unless the latter are ambiguous. *Ingleby* v. *Swift* (2); *N. W. R'y. Co.* v. *Whinray* (3). *Buvelot* v. *Mills* (4).

SIR W. J. RITCHIE C.J.—The consideration for making this deed, as expressed on its face, was that there should be a fair and equitable distribution of the debtor's property amongst his creditors, for the purpose of paying and satisfying, ratably and proportionately, and without preference or priority, all the creditors their just debts. This consideration is not limited to a distribution among the parties named in the schedule. The trustee having accepted the property in this case, is he not bound, notwithstanding a mistake in the schedule, to distribute the funds in accordance with the consideration on which he received them, that is, among the persons mentioned in the schedule, assuming them to be all the debtor's creditors? But if it should be that by accident or inadvertence a creditor is omitted, then, in accordance with the condition on which the deed was made, and the property received by the assignee, should not the distribution be among all the creditors?

I therefore think, that having received the property on the consideration of distributing it ratably among all the grantor's creditors, the trustee could not withhold a ratable proportion from any, and if he did so the creditor accidentally omitted would have a right to enforce payment of his ratable, proportional share with the creditors mentioned in the schedule.

(1) 21 U. C. Q. B. 255.
(2) 10 Bing. 84.
(3) 10 Ex. 77.
(4) L. R. 1 Q. B. 104.

1885

McLEAN v. GARLAND.

Ritchie C.J.

I am not satisfied that there was a debt proved to be due to Sinclair, but if there was I think the assignment was made *bonâ fide* and without any intent whatever to defeat or delay creditors or to give any creditor a preference over any other creditor or creditors.

STRONG J.—I am of opinion, with the majority of the Court of Appeal, that there was sufficient *primâ facie* evidence of the delivery of the goods sold by Alexander Sinclair to the assignor Thompson for the price of $26.86. The receipt given was, it is true, nominally by the warehousemen who were to keep the goods until they could be forwarded, but, as I understand, the same warehousemen were also the carriers or the agents for the carriers who were to take the goods to their destination, in which case the delivery was also a delivery to the carrier for the present purpose, though the liability of the carriers as such did not of course begin until they were actually shipped. Moreover, Sinclair says he wrote several letters to the debtor, but received no answer. It is to be presumed that these letters were received. And there is an inference in the case of letters of this kind that silence imports acquiesence. On the whole, I think the case could not well be decided on this ground against the respondent, more especially as much turns on the construction of Sinclair's evidence which presents some ambiguity, and the learned judge who presided at the trial has interpreted it in favor of the respondent.

I also entirely agree with the learned judges in the Court of Appeal who held that on the construction of the deed Sinclair was not entitled to the benefit of it. The operative parts of a deed always control the recitals, and the trusts here declared are expressly for the scheduled creditors and no one else. If authority is required for this proposition the case of *Buvelot* v. *Mills* (1), referred to by Mr. Justice Osler in

(1) L. R. 1 Q. B. 104.

1885

McLEAN v. GARLAND.

Strong J.

delivering the judgment of the Court of Common Pleas seems directly in point. Further I cannot agree with the dictum in *Thorne* v. *Torrance* (1) that the trustee has any right to add to the list of creditors, nor that on the strength of the mere recital in the deed that it was intended for the benefit of all creditors, taken by itself alone, and without more, a Court of Equity could interfere to rectify the omission in the schedule.

But I feel compelled to dissent from the court below and on the same grounds as those the learned Chief Justice of the Common Pleas has very forcibly put forward as the principal reasons for the judgment he has given. The statute R. S. O. c. 118, sec. 2, as it seems to me, is nothing more than a re-enactment of the statute 13 Eliz. with something added which the statute of Eliz. did not provide for, that addition being the avoidance of deeds made by an insolvent with intent to give one or more of his creditors a preference over the others or one other of such creditors. The exceptions are enacted for greater caution and have nothing to do with the present question. The real point for decision when it is sought to invalidate a deed under this sect. 2 must in every case be:—Is it sufficiently proved that the deed was made with intent to give a preference? And the answer to this must depend on all the evidence, extrinsic as well as that contained in the deed itself. If there is no extrinsic evidence shewing how the benefit of the trusts came to be witheld from certain creditors, or from one certain creditor, the conclusion must be inevitable. It must be presumed that the assignor intended the necessary consequence of his act, which would be to give creditors who, by the express words of the deed, were entitled to the benefit of the trusts declared by it, a preference over other creditors not included in its terms; the result being unavoidable that the deed is void under this section of the statute. This, however, does not

(1) 18 U. C. C. P. 35.

preclude the possibility of shewing by extrinsic evidence that the surrounding circumstances attending the execution of the deed were such as to rebut any presumption of an intent to prefer. If the mere effect of the deed itself was to be conclusive then the word "intent" might as well be stricken out of the statute altogether. It must also be remembered that as the statute originally stood on the statute book it contained certain penal clauses, by one of which the "intent," not to prefer, it is true, but to defraud, creditors, was made punishable as a misdemeanor. The intent so referred to in the penal clause, being the same intent as avoided the deed in one of the events provided for in the section now represented by this second clause, was of course to be arrived at by the same evidence, and no one can doubt that on such a prosecution all the surrounding circumstances would be admissible to shew the absence of fraudulent intent. And if so the intent would be ascertainable in the same way when the issue was on the validity or invalidity of a deed, and, to carry it still one step further, also when the enquiry was as to the intent to give a preference, for we cannot suppose, without putting an arbitrary construction on the act, that the deed in the latter case was to be held conclusive of the intent any more than in the former.

Again, as the learned Chief Justice of the Common Pleas has put it, the preference cannot be shewn without admitting evidence dehors the deed, and whenever extrinsic evidence is admitted to establish any proposition reason and authority both require that extrinsic evidence should likewise be admissible to counteract it.

Then the cases on the statute of Eliz. which have determined that in the case of a deed expressing to be made for a mere nominal consideration, and so on its face a mere voluntary conveyance and therefore void as against creditors, evidence is admissible to shew

1885

McLEAN v. GARLAND.

Strong J.

that in fact a valuable consideration was given, are also strong authorities in favor of the appellant in the present case.

On the whole, therefore, it seems to me very clear that evidence was admissible to rebut the presumption that a preference was intended, which certainly did arise as soon as it was shewn that there was a creditor from whom the benefit of this deed was withheld.

This reduces the question to one of the sufficiency of the evidence for the purpose referred to. Now it is shewn, that this assignment was not the mere voluntary act of the debtor himself, but was made at the instance of his creditors; that finding himself about to be pressed by the defendant's execution he went to Toronto and laid the state of his affairs before an informal meeting of a number of his creditors there; that this meeting resolved that an assignment for the benefit of creditors, that is, as Mr. McLean in his evidence states, for the benefit of all the creditors whose names could be ascertained, should be made; hat for the purpose of ascertaining exactly what Thompson's liabilities and assets were Mr Isaac McLean, the appellant's son, went to Thompson's place of residence and business at Gore Bay, on Manitoulin Island, and there, by examination of the books and inquiries of the insolvent himself, endeavoured by every means in his power to ascertain the names of all the creditors; and that from all the information he was able to acquire from Thompson, and to gather by searching and examining the books and papers, he "made out a full "and complete list of his creditors so far as he told me "and so far as the books shewed" There is nothing in the finding of the learned Judge who presided at the trial to shew that he did not give credit to the evidence of the appellant and to that of Isaac McLean, and I see therefore no reason why the evidence of both should not be considered as entitled to consideration;

more especially as it is uncontradicted and is in accordance with all the probabilities.

Then we have the fact that all parties to the deed and all parties interested under the deed who were privy to and cognizant of its execution, intended to include all creditors, but that one creditor whose debt only amounted to the small sum of $\$26\frac{86}{100}$ was by inadvertence and accident unintentionally omitted from the schedule and so not *primâ facie* entitled under the trusts declared. Further, we have this direct evidence confirmed by the inferences to be drawn from the circumstances of the case; for it surely cannot be presumed that the debtor, who had taken pains to communicate his insolvent condition to the general body of his creditors with a view to insuring a fair distribution of his estate, and who had submitted himself to their direction and was acting under those directions in making this assignment, designedly, and with intent to give a preference over this one creditor to whom he owed $\$26\frac{86}{100}$, suppressed his name in order that he should be excluded from the deed. Such a presumption would be against all the facts and all the probabilities, and I therefore conclude that upon the evidence of the circumstances preceding and attending the execution of the deed, and assuming that the validity of the assignment depended on the intention of the debtor alone, any presumption of an intent to prefer arising from the fact of Sinclair's debt having been omitted from the schedule is sufficiently rebutted.

But I do not wish to be understood as conceding that even if it had been distinctly proved that Thompson designedly concealed this debt it would make any difference, for I should be prepared to hold, if it were necessary to do so, that where a deed is made, as this deed was, at the instance and upon the request of creditors the section in question does not apply unless the creditors are themselves parties to the intent to

1885

McLEAN v. GARIAND.

Strong J.

give a preference or have notice of the debtor's design so to do and acquiesce in it.

Further, I desire to express no opinion whether a deed given as this manifestly was under pressure from creditors can in any case, even when the creditors obtaining it are preferred, be avoided as a preference under this second section, for as I have had occasion to say before, in cases arising under the late Insolvent Act, I consider the word *preference* as importing a *voluntary preference* and not applicable to the case of a deed obtained by a creditor or creditors who to obtain it have brought pressure to bear on the debtor. But whether this applies to the case of a general assignment of all the debtor's property is a point requiring further consideration, and which does not, in the view I take of the evidence, call for decision in the present case.

That the conclusion I arrive at imposes no hardship upon the omitted debtor is, I think, apparent from the consideration that upon the facts here proved relief on the head of accident and mistake would be granted as of course in a Court of Equity. We have the deed reciting an intention to assign the property comprised in it upon trust for all creditors; we further have the facts proved that the utmost diligence was exerted in order to get a complete list of the creditors, thus carrying out the intention of the meeting of the Toronto creditors as far as it was possible to do so, and that it was only owing to the loose state of the insolvent's books and to his forgetfulness, that Sinclair's name was omitted; at least such must be the irresistible inference from the evidence. A very different case for relief in Equity is thus made from that upon which it was suggested relief could be obtained in *Thorne* v. *Torrance*, and I do not hesitate to say that in a case like the present relief would be accorded as of course, and that any party to

the deed who, upon a proper application being made to him before suit, should refuse to consent to a rectification, and who by such refusal would render resort to the court necessary, would be made liable for costs.

As regards the provisions respecting rent and assessments I read the deed as referring to rents and assessments which would be charges upon the land at the time of sale and which would of course in any Court have priority, inasmuch as the purchaser would be entitled to deduct these amounts from his purchase money, or if the lands should be sold subject to the charges the price obtained would be so much the less.

I am of opinion that the appeal should be allowed with costs both here and in all the Courts below.

FOURNIER and TASCHEREAU JJ. concurred with His Lordship the Chief Justice.

HENRY J—I have the misfortune to differ from my learned brethren in this case. The deed of assignment under R. S. O. ch. 118, is void unless it is for the benefit of all creditors: now it is not a question of intention that we are called upon to decide but one of fact. Here the party makes out a deed and wants to pay all his creditors; in carrying out his intention he makes it for the benefit of those creditors only who are mentioned in the schedule and leaves out one of his creditors. Now if he can by mistake leave out one creditor, why not two or three. Is it sufficient for him to say he intended to include him? Reading the document we find he has left out Alexander Sinclair from the schedule, and the learned Judge so found at the trial of the case, and upon the true legal construction of this document it rested on the respondent to prove that all creditors were included, and this he has failed to do.

We are told equity can rectify any mistake. I do not see how that comes in at all. A party to a deed can

1885

McLEAN v. GARLAND.

Henry J.

rectify a mistake, provided the mistake is a mutual one, but how can you reform a document so as to affect the rights of a person who was not a party to the deed at all? I must confess I cannot see how the principles of equity are applicable to such a case as the present.

With regard to taxes, I think the party had a right to provide for the payment of them in full, of taxes on the land out of the proceeds of the land; but I do not think he could prefer the payment of such taxes out of personal assets. I think this is going beyond the law.

I am therefore of opinion that this document is not complete and it is not one which the law provides for. The appeal should, in my opinion, be dismissed.

Appeal allowed with costs.

Solicitors for Appellant: *Caston and Galt,*

Solicitors for Respondent: *Walker and Scott.*

1886

*March 19.

*May 6.

CHARLES McCARRON *et al* (PLAINTIFFS)..... } APPELLANTS;

AND

THOMAS McGREEVY (DEFENDANT)....RESPONDENT.

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

Railway contract—Certificate of engineer—Necessity for—Laches.

McC *et al.* appellants entered into a contract with McG., (respondent) the contractor for the construction of the North Shore Railway between Montreal and Quebec to do and perform certain works of construction on a portion of the road, and by a clause in his contract agreed "to keep open at certain times and hours at his own cost and expense the main line for the passage of traffic or express trains run by McG. without any charge to the latter;" but there was a proviso that, "any time occupied on the road over and above what may be required by the hours hereinbefore mentioned, or any expense caused thereby, shall be paid by the contractor (McG.) on a certificate to that effect signed by the superintendent of the contractor."

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

1886

MCCARRON v. MCGREEVY.

On an action brought by appellants against respondent for damages caused by the interruption of the work on said road by the passing of respondent's trains;

Held, affirming the judgment of the court below, that it was the duty of the appellants to get the superintendent's certificate within a reasonable time, and not having taken any steps to obtain it until six years after the superintendent had left the respondents' employment, the failure to produce such certificate was sufficient ground for dismissing the appellants' action.

APPEAL from a judgment of the Court of Queen's Bench for Lower Canada (appeal side) (1) reversing the judgment of the Superior Court in favor of the present appellants.

The respondent was the contractor for the construction of the North Shore Railway between Quebec and Montreal, under a contract with the Provincial Government, and on the 30th March, 1877, by notarial instrument entered into before Samuel J. Glackmeyer, notary public, between the appellants and the respondent, the appellants undertook, in consideration of the payments and covenants stipulated in the said notarial instrument, to finish the tracklaying and ballasting for the respondent on the said North Shore Railway from Quebec to Portneuf, and as far beyond as "Patton's Contract shall begin," and also to do and perform all the works, more particularly detailed in the schedule annexed to the said agreement, for the prices therein detailed.

Prior to the bringing of their present action the appellants had sued the respondent for the sum of $37,000, alleged excess of work done by them and damages they claimed to have suffered.

In that suit judgment was rendered against the respondent for $15,423, reserving to appellants their recourse, if any, for an item of $5,290 on the ground that they had not produced the certificate of the respondent's superintendent, as required by the contract.

The present action was brought in the Superior

(1) 14 Rev. Leg. 422; S. C. 12 Q. L. R. 373.

1886

McCARRON v. McGREEVY.

Court at Quebec, by the present appellants against the respondent, to recover the sum of $7,970, $5,390 for the amount reserved, and $2,580 for alleged damages caused to the appellants by the interruption of the work upon their section by the passing in excessive numbers and at irregular intervals of appellants' trains. The declaration alleged that since the contract was completed the plaintiffs had demanded a certificate from one D D. MacDonald, the superintendent mentioned in the contract, but that the latter, at the instigation of respondent, had unjustly and fraudulently refused to deliver said certificate.

The other material facts and pleadings fully appear in the report of the case in 12 Q. L R. p. 373.

The ninth paragraph of the contract is the only one upon which any controversy between the parties arose, and is as follows :—

Ninth.—The said parties of the first part agree and bind themselves to furnish at their own costs and charges all labour and material to work the locomotive and cars; such as water, wood, oil, tools and implements of all kinds, except as otherwise stipulated, but that they will not have or exercise any control over the movements of trains except of those in use for track-laying and ballasting; on the contrary, will in all such movements be subject to the orders of the party of the second part. They shall also keep open at their own costs and charges the main line for the passage of traffic or express trains run by the said party of the second part, and all turnouts, sidings and switches, as well as the road bed, shall be kept in proper order for said traffic, and they will see that their trains are kept off the main line at the hours appointed by the time-table at the respective places, without any charge to the said party of the second part.

Nothing herein contained shall compel the party of the first part to take any precautions or means provided for passage of trains, except a train leaving Pont Rouge at or before seven o'clock in the morning, and Quebec at or after five o'clock and forty-five minutes in the afternoon; all special or trains required at different hours will be arranged for with the party of the first part and with their consent; any time occupied on the road over and above what may be required by the hours herein before mentioned and stipulated, or any expense caused thereby, shall be paid by party of the second part, on a certificate to that effect signed by the superintendent of

the party of the second part."

Larue Q.C. for appellants.

The appellants were entitled, under their contract, to charge for every train that went beyond Pont Rouge, even the regular train, and they had also a right to charge for every train between Quebec and Pont Rouge, except a train leaving Pont Rouge at or before seven o'clock in the morning, and Quebec at or after five o'clock and forty-five minutes in the afternoon.

The passage of all these trains imposed upon the appellants a very large increase of work not included in their contract.

On behalf of the respondent it is contended that the appellants cannot claim from the respondent, without a certificate of the superintendent, and that they could not demand nor obtain said certificate after the works were finished, or after the superintendent had left McGreevy's employ. We did all we could to obtain it, and we cannot be held responsible for the neglect of duty of respondent's employee.

Such an excuse cannot be held sufficient to enable the respondent to get rid of a legitimate debt.

Redfield Amer. Rly. Cas. (1); *Scott* v. *Liverpool* (2).

Irvine Q.C. for respondent.

It cannot be held that this is any such demand on the superintendent, Macdonald, for a certificate as would excuse the appellants from making the proof which the contract required of them. Macdonald could not be expected after that lapse of time, and whilst engaged in other work at a great distance from the place referred to in the contract, to certify to work of which he could then have had only a very imperfect recollection. No demand had ever been previously made upon him for such certificate, although an action had been brought and had been pending for a number of years covering these same items. The requirement of this certificate is peremptory, and no action can be maintained with-

(1) *Herrick* v. *Belknap's Estate* 305. (2) 28 L. J. Ch. 236.

1886

McCARRON v. McGREEVY.

out it, and indeed it would not be possible for the respondent otherwise to obtain reliable information as to claims of this nature.

The greater part of the apppellant's claim is in the year 1878. Their contract binds them to complete the works in 1877. There is nothing in the record to show on what terms the time was extended, or whether it was extended at all otherwise than by tacit consent. The right of the respondent to use the railway for the running of his trains without compensation to the appellants, could not be taken away without some express agreement.

Lastly :—The respondent refers the court with confidence to the evidence, and asserts that there is no proof whatever to justify the appellant's demand. There is no evidence of any particular detention causing any particular damage. The majority of the special trains of which complaint is made were run on Sundays, when presumably the appellants were not at work. Others were run at night, and generally there is no particular case shown causing damage to the appellants. This absence of proof without any attempt within any reasonable period to obtain the certificate of the superintendent, should be sufficient to dismiss the appellants' action

SIR W. J. RITCHIE C.J.—There is a very small question in this case. To enable the plaintiff to recover he was bound to produce the certificate of the engineer as to the correctness of his accounts. He never obtained these certificates nor did he attempt to obtain them until years afterwards when the party had left the employment, and then he did not take, even at that time, what I should consider the necessary steps to enable him to get the certificate.

Therefore I think the plaintiff in the suit cannot recover, and in looking at the evidence even if I thought he could recover, I should be greatly puzzled

1886

McCARRON v. McGREEVY.

Ritchie C.J.

to determine, if any amount, how much. I think the appeal should be dismissed.

STRONG J.—Concurred.

FOURNIER J.—I think the appeal should be dismissed. I agree with the judgment of the Court of Queen's Bench. The evidence shows that during all the time the work was going on the plaintiff never made any effort to obtain the certificate of the engineer, and six years afterwards they ask him for it when they are told that it cannot be supplied. I certainly think they have not complied with the condition and they have, therefore, no claim against the defendant.

HENRY J.—The parties appellant in this case cannot, I think, succeed on their appeal. When a party is to receive compensation consequent on the certificate of a certain engineer, it is to be assumed that the certificate will be obtained within a reasonable time, that is, when the party is employed and when the work is going on, and that a person should not wait five or six years when the memory of the engineer cannot be expected to serve him. Here were men making a claim for damages they claim to be entitled to several years before any claim was made by them. If their right to recover depends upon a certificate they cannot sustain the claim by other evidence without production of that certificate. I think the court below was perfectly right and this appeal should be dismissed.

TASCHEREAU J.—I am of the same opinion, and I also think that this is a frivolous appeal.

Appeal dismissed with costs.

Solicitors for appellant: *Larue, Angers and Casgrain.*

Solicitor for respondent: *George Irvine.*

1886
May 31.
*Nov. 8.

THE FEDERAL BANK OF CANADA (PLAINTIFFS) ..... } APPELLANTS;

AND

THE CANADIAN BANK OF COMMERCE (DEFENDANTS)..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH, MANITOBA.

Sale of land—Voluntary payment by purchaser—Execution against vendor—Lien of third party—Application of proceeds of sale—Interpleader act—Lands taken or sold under execution.

Where the purchaser of land voluntarily paid to the sheriff the amount of an execution in his hands in a *bonâ fide* belief that it was a charge upon the land,

Held, that a party having a lien on said land could not, under the Interpleader Act, claim the money so paid to the sheriff as against the execution creditor, even where he had relinquished his title to the land to enable the owner to carry out the said sale, and was to receive a portion of purchase money.

Semble, that as the lands were neither "taken nor sold under execution," the case was not within the Interpleader Act.

APPEAL from a decision of the Court of Queen's Bench, Manitoba (1) affirming the judgment in favor of the defendants on the trial of an Interpleader issue.

By an agreement under seal made between the Hudson Bay Co. and one Adamson the former agreed to sell to Adamson certain lots of land in Winnipeg. Adamson, being indebted to the Federal Bank of Canada, conveyed his interest in said lots to Renwick, the manager of that bank, by a deed absolute in form but intended only to operate as a mortgage. The Trustees of Knox Church, in Winnipeg, wishing to purchase the lots Renwick re-conveyed his interest in them to Adamson to enable him to get a legal title from the Hudson Bay

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

(1) 2 Man. L. R. 257.

1886

FEDERAL BANK OF CANADA v. CANADIAN BANK OF COMMERCE.

Co. Before the sale to the church was completed the Canadian Bank of Commerce had obtained judgment against Adamson, and placed in the sheriff's hands an execution which bound Adamson's lands. The trustees of Knox Church, believing this to be a charge upon the land they wished to purchase, paid the amount of the execution to the sheriff and received from him a certificate that the land was free from execution. The Federal Bank claimed the money so paid to the sheriff and an interpleader order was obtained to determine to whom it belonged. The judge who tried the issue under the interpleader order decided in favor of the Canadian Bank of Commerce, and the Court of Queen's Bench sustained his decision. The Federal Bank of Canada then appealed to the Supreme Court of Canada.

McCarthy Q.C. for appellants.

The issue agreed on by the parties was simply whether the proceeds of the sale of the lots 9, 225 and 226 of the Hudson's Bay Reserve was the property of the appellants as against the respondents.

Whether this fund was one subject to the sheriff's interpleader (1) is not now open to argument, for the respondents attended upon the granting of the order, and at least a portion of the order is by consent; the order was allowed to stand and was not moved against; the issue was duly settled between the parties pursuant to the order and was tried, and it is too late now to take objection. *Haldan* v. *Beatty* (2); *Wilson* v. *Wilson* (3).

The land was not subject to the execution in the sheriff's hands against Adamson because he had no beneficial interest therein, (1); Adamson was our trustee and he had no right to use the proceeds of this sale to pay off his own debt, and the mere fact of the

(1) Man. Con. Stat. Cap. 37 sec. 53.
(2) 43 U. C. Q. B. 614.
(3) 7 P. R. (Ont.) 407.

1886

FEDERAL BANK OF CANADA v. CANADIAN BANK OF COMMERCE.

vendor paying over the money into the sheriff's hands without our knowledge does not give it to the respondents as against us. *Engelback* v. *Nixon* (1); *Duncan* v. *Cashin* (2).

I also contend that there was a resulting trust. Lewin on Trusts (3); *Ex parte James* (4); *Gardner* v. *Rowe* (5).

The question of voluntary payment does not arise at all. It was to remove a cloud on appellant's title and the payment in this case comes within the principles laid down in *Valpy* v. *Manley* (6); *Snowden* v. *Davis* (7); *Carter* v. *Carter* (8).

Robinson Q.C. for respondents:

This is a case not provided for by the statute (9); *Harrison* v. *Wright* (10); and if so there is no right of appeal to this court, for even if the parties are bound by the consent to the judgment of the tribunal of first instance, it does not give the right of appeal.

But admitting there is a right of appeal, the money was voluntarily paid by the vendees on account of the respondent's execution, and there was no arrangement that the money should be paid to the sheriff as agent for the appellants if they were beneficially entitled to the land. *Wilson* v. *Ray* (11); *Morgan* v. *Boyer* (12); Moreover the transaction between Adamson and appellants was, in effect, a mortgage, and under the evidence the re-conveyance was intended to release the security. Lewin on Trusts (13); Then even if appellants had any title or interest in the land, there is no such trust manifested and proved by the evidence to meet the requirements of the 7 sect. of Statute of

(1) L. R. 10 C. P. 645.
(2) L. R. 10 C. P. 554.
(3) Ch. 9, par. 4.
(4) 9 Ch. 609.
(5) 2 Sim. & Stu. 346; 5 Russ. 258.
(6) 1 C. B. 594.
(7) 1 Taunt. 359.
(8) 5 Bing. 406.
(9) Con. stats. Man. Ch. 37, Secs. 53, 38.
(10) 13 M. & W. 816.
(11) 10 A. & E.
(12) 9 U. C. Q. B. 318.
(13) 7 Ed. p. 620.

Frauds. Browne on Statute of Frauds, sect. 89. *Gardner* v. *Rowe* (1).

SIR W. J. RITCHIE C. J.—The Canadian Bank of Commerce, having obtained judgment against one Robert Adamson, on the 4th Aug. 1883, caused a writ of *fieri facias de bonis* to be issued thereon directed to the sheriff of the Eastern Judicial District of the Province of Manitoba, and placed the same in his hands directing him to levy $3,513.34 and interest at 6 p. c. from the 4th Aug. 1883 and $6 for the writ and warrant thereon, besides sheriff's poundage, officer's fees, &c. On the same day the defendants caused to be issued and placed in the sheriff's hands, on the said judgment, a writ of *fieri facias de terris* with similar directions. The amount due on these executions was paid to the sheriff, who gives evidence of such payment as follows :—

Q.—You produce executions against Robert Adamson, in whose favour?

A.—The Canadian Bank of Commerce, fi. fa. goods and lands, dated 4th day of August, 1883, received same day at 11:30 a.m.

Q.—Did you ever receive any moneys on any executions or on this against Mr. Adamson, and if so, from whom?

A.—We received from Bain, Blanchard and Mulock $3,648.15 on 14th September, 1883.

Q.—Why was that paid to you?

A.—I was informed at the time it was paid as owing on some land in the city, being Mr. Adamson's land.

Q.—It was received as against lands, not as against goods?

A.—We had no goods received. It was understood at the time that it was some land that got into his name in some way.

Q.—And upon receiving that you gave a certificate that that land was free from execution?

A.—Yes.

Q.—You refused to give that certificate until that money was received?

A.—Yes.

Q.—Did you or not refuse to give that certificate until that money was paid?

(1) 2 Sim. & Stu. 347; 5 Russ. 258.

1886

FEDERAL BANK OF CANADA v. CANADIAN BANK OF COMMERCE.

Ritchie C.J.

A.—Yes; and immediately after we were notified by you or your firm that Mr. Renwick claimed the money in our hands as trustee or agent or something.

There is really no direct evidence in the case, that I can discover, to show to whom this money belonged, or for whom Bain, Blanchard and Mulock were acting, (beyond the statement of Mr. McKenzie in answer to this question "do you know who paid the money to the sheriff?" He says "I believe Mr. Blanchard acting for Knox Church,") though it is assumed, and probably quite correctly, that the money belonged to Knox Church and Blanchard made the payment for and on their account, and this is to be presumed in the absence of any evidence to the contrary. But of this there can be no doubt; that it was paid to relieve lands, standing in the name of the defendant Adamson, from the execution of the Canadian Bank of Commerce against Adamson, and by reason of which payment the sheriff gave a certificate that the land was free from execution, which certificate the sheriff refused to give until that money was received. Whatever may have been the dealing between Adamson and the Federal Bank or Knox Church, with which the Canadian Bank of Commerce do not appear to have had any connection, and whatever their rights, legal or equitable, as among themselves may be, the Federal Bank has shown nothing whatever, in my opinion, to justify their present claim. The money was paid in discharge of the judgment and execution of the Bank of Commerce with which the Federal Bank is in no way connected. The party who paid the money does not appear to complain, and puts forward no claim. The money, if paid by Knox Church as it appears to have been, was a payment by the purchaser of lands to satisfy an execution which the party paying undoubtedly believed was a charge upon the land. Whether it was so or not is a question not raised by him, he being no party to

1886

FEDERAL BANK OF CANADA v. CANADIAN BANK OF COMMERCE.

Ritchie C.J.

these proceedings, and it seems to me, so far as the Canadian Bank of Commerce is concerned, a wholly immaterial question.

At any rate, the party paying appears to have paid the money and obtained what he sought, the sheriff's certificate that the land was free from execution. Thus, the money was paid to the sheriff in satisfaction of the execution, and to and for the use of the judgment creditor, by which payment the judgment creditor's judgment and execution were paid and satisfied. What possible right can this give the Federal Bank to claim this money? Whatever their rights, legal or equitable, if they had any, in the property may have been, or may now be, they have not shown, so far as I can discover, as against the sheriff or the judgment creditors, any right whatever to this money, which was money had and received by the sheriff to and for the use of the judgment creditors. And even if they had established a legal right to, or an equitable interest in, this money, it does not appear to me that any such right or interest could be enforced in this proceeding because, as the Chief Justice of Manitoba observes:—

"The Interpleader Act only applies to the proceeds or value of "any lands or tenements taken or sold under any such proceeding, "and, as he says, the money here claimed is not the proceeds of any "lands or tenements taken or sold &c. This land was not, in fact, "either taken or sold."

I think the appeal should be dismissed.

STRONG J.—The facts material to be considered on the present appeal are not in any way controverted. They are as follows:—On the 29th of August, 1881, the Hudson's Bay Company contracted to sell to Robert Adamson certain lands in the city of Winnipeg, being lots No's. 9, 221, 222, 223, 224, 225, and 226 in block 4 as shewn in the plan of a certain survey by J. S. Dennis. The purchase money was $15,000, one-fifth of which

1886

FEDERAL BANK OF CANADA v. CANADIAN BANK OF COMMERCE.

Strong J.

was paid down, and the residue was to be paid in four equal annual instalments with interest at 7 p. c. This contract was embodied in an agreement under seal, bearing date on the day mentioned, which was executed by Mr. Brydges, the attorney of the Hudson's Bay Company duly authorised in that behalf, and by Adamson. On the 3rd of March, 1883, Adamson being indebted to the plaintiffs and present appellants, the Federal Bank, in a sum amounting to between $5000 and $6000, in order to secure this debt executed an absolute deed purporting to convey lot No. 9 to Mr. Thomas Renwick, who was then the manager of the Federal Bank, at Winnipeg. It is not pretended by the plaintiffs that this deed was intended to operate otherwise than as a mere mortgage security. Mr. Renwick being examined as a witness at the trial, proves this distinctly. On being shewn the deed, exhibit A, and being asked "For what purpose was that deed given to you,'? he says "I got it for security for the advances made by the Bank to Adamson."

The title being in this state and the trustees of Knox's Church, in Winnipeg, being desirous of purchasing this lot No. 9 and also lots 225 and 226 comprised in Adamson's purchase from the Hudson's Bay Company, as a site for a church, an agreement to sell to the trustees was come to between Adamson and the trustees, and thereupon Renwick, on the 26th of July, 1883, re-conveyed the lands, by an ordinary deed of grant and quit claim absolute in form without covenants, to Adamson. This deed purports on its face to have been made for the nominal consideration of $1. On the same day Frederick McKenzie, who had purchased or otherwise acquired Adamson's interest in lots 225 and 226, also re-conveyed these two lots to Adamson. These re-conveyances are alleged to have been made for the purpose of enabling Adamson to

make a title to the trustees of Knox's Church; in the words of Mr. Renwick "it was to facilitate the transfer from the Hudson's Bay Co. to the church people"; and Mr. McKenzie, in answer to an inquiry as to his reason, gives a similar answer. He says "because I knew I could not get the deed. They "(meaning the Hudson's Bay Co.) would not recognise "any one but Adamson, the original purchaser."

These were, of course, entirely inadequate reasons for this roundabout way of making the re-conveyance by Renwick, since Adamson could have conveyed just as as well without it, but the facts are just as stated. The price to be paid by the church trustees for the three lots, this lot 9 and Mr. McKenzie's two lots, was about $9,000, and Mr. McKenzie says it was agreed that this was to be apportioned $\frac{1}{2}$ to lot 9 and $\frac{1}{2}$ to his two lots. On the 4th of August, 1883, and previously to the execution of the conveyance by Adamson to the Church trustees, there was lodged with the sheriff of the Eastern District of Manitoba fi. fa's against the goods and against the lands of Adamson at the suit of the defendants, the Canadian Bank of Commerce. The fi. fa's were indorsed to levy $\$3513\frac{34}{100}$ and sheriff's fees and poundage and expenses of execution.

These writs of execution were lodged with the sheriff at 11.30 a. m., on the 4th of August, 1883. On the same day but, as I gather from the judgment of the Chief Justice of Manitoba, (who says the case was argued before the Court in Banc on that assumption) subsequently to the lodging of the writs of *Fieri Facias* and when the execution had already become a charge upon the lands, Adamson, by a deed of grant duly executed by him for the alleged consideration of $15,000, conveyed all these lots (9, 225 and 226) to the church trustees in fee.

The sheriff having refused to give the solicitors for

1886

FEDERAL BANK OF CANADA v. CANADIAN BANK OF COMMERCE.

Strong J.

the purchasers a certificate that the lands were free from execution until the money was paid they, on the 14th Sept., 1883, paid to the sheriff $3, 648.15, in satisfaction of the defendants' execution, and the sheriff thereupon gave the required certificate. The plaintiffs having claimed this money, the sheriff obtained a judgment order that the parties should interplead; and the interpleader issue so directed having been found in favor of the defendants by Mr. Justice Taylor who tried the case without a jury and a rule *nisi* to enter a verdict for the plaintiffs having been discharged by the Court of Queen's Bench, this appeal has been taken from the last mentioned judgment.

The question for the determination of the court is therefore purely one of law as distinguished from fact, and is, I think, easily answered when the rights of the plaintiffs under the conveyances already mentioned and of the defendants under their execution, have been properly considered and defined.

It should be premised that the legal title to the lands in question, up to the 14th Sept. 1883, the date at which the money was paid to the sheriff, the latest material date in the case before us, was outstanding in the original vendors the Hudson's Bay Company. They had not been paid their purchase money, and, of course, could not be compelled to convey until they were paid—indeed, they were not bound to receive the last instalment until the 29th of August, 1885. I think it probable that any difficulty which arose in procuring a conveyance from the Hudson's Bay Co. was not because they would not recognise an assignee of the purchaser, whose rights they could not ignore either under the general law or under the specific form of their contract in which they covenant to convey to the assigns of Adamson) but because, either the parties claiming under Adamson were not prepared to

pay the full amount of the purchase money, or because the officers of the company did not choose to anticipate the dates of payment fixed by the agreement for sale. Be this as it may it is to be borne in mind that the legal estate was always, up to the time the money was paid to the sheriff, in the Hudson's Bay Company, and the several conveyances executed dealt only with purely equitable estates and interests, and the defendants' execution was in like manner a charge on a mere equitable interest and did not bind any legal interest or estate. This is material inasmuch as equitable interests only being dealt with the priority of incumbrances and charges on such interests must depend on precedence in point of time and on that alone. The conveyance by Adamson to Renwick being, by the explicit admission of the latter, intended only to take effect as a mortgage to secure to the plaintiffs the debt due to them, it was of course competent for Adamson at any time to prove this and to have the deed cut down to and treated as a mere security and to redeem the land. So far therefore Adamson's equitable interest in these lands, under his contract of purchase, was vested in Renwick as a mortgagee for the benefit of the plaintiffs subject to an equity of redemption by Adamson. Then as regards the effect of the deed of the 26th of July, 1883, by which Renwick re-conveyed to Adamson for the alleged purpose of facilitating the completion of the sale to the church trustees, I have no difficulty in conceding to the fullest extent the argument of the learned counsel for the plaintiffs that the rights of the Federal Bank were not in the least degree prejudiced but remained entirely unaffected, at least as regards the present defendants, by this re-conveyance. I do not think the Statute of Frauds would have been any obstacle to a Court of Equity in affording the plaintiffs relief if Adamson had attempted to make an inequit-

1886

FEDERAL BANK OF CANADA v. CANADIAN BANK OF COMMERCE.

Strong J.

able use of the estate or interest which was re-vested in him by the re-conveyance, such a breach of trust would have been considered inequitable and fraudulent and numerous cases shew that the Statute of Frauds forms no bar to relief in such a case. It is true that if Adamson had acquired the legal estate under this re-conveyance and had conveyed that to a purchaser or incumbrancer for value without notice the case would have been different, and the latter obtaining a legal title would have been entitled to priority over the earlier equitable title. But the defendants here are not in the position of purchasers, or chargees for value without notice as regards the lien of their execution for two reasons: First, an execution creditor can have no better right or title, even when the execution binds a legal estate, than the execution debtor had, but is subject to the same paramount equities which bind the latter (1); and secondly, as already pointed out, the interest of the execution debtor bound by the execution was purely equitable and therefore the lien or charge of the execution was subject to all equities prior in point of date. Whilst I freely adopt this argument I cannot assent to another mode of arriving at the same conclusion which was also urged on behalf of the plaintiffs. It was said that inasmuch as the deed of the 26th of July, 1883, by which Renwick re-conveyed to Adamson, appeared on its face to be a mere voluntary deed for a nominal consideration, there was therefore a resulting trust in favor of Renwick. To this I cannot accede. The doctrine in question of a resulting trust when no valuable consideration appears on the face of the deed is, no doubt, applicable to common law conveyances

(1) *Wickham* v. *New Brunswick and Canada Railway Company*, L. R. 1 P. C. p. 75; *Whitworth* v. *Gaugain*, 3 Hare 416, 1 Ph. 728; *Beavan* v. *Earl of Oxford*, 6 DeG. M. & G. 507; *Kinderley* v. *Jervis*, 22 Beav. 34; Lewin on Trusts, (8 Ed). p. 247; Coote on Mortgages, (Ed. 5) p. 65.

but it does not, in my opinion, apply either to deeds operating under the Statute of Uses or to merely equitable conveyances. Mr. Lewin (1) it is true holds the contrary, but in two cases cited by him in a foot note to the text in which he advances the proposition, *Lloyd* v *Spillet* (2) ; *Young* v. *Peachy* (3); Lord Hardwicke expressly decided the contrary, and a very high authority on such a point, Mr. Sanders, in his work on Uses and Trusts maintains the same view. The point is, as it appears to me, of no practical importance in the present case, since the plaintiffs attain the same end in another way, and I only mention the point as it is of some importance as regards titles to lands in Ontario, since it would be a great innovation on the practice of conveyancing which has long prevailed in that province if in every conveyance in which a nominal consideration only was expressed it was to be held that a trust by operation of law resulted to the grantor.

We may therefore regard the plaintiffs as having been, at the time when the defendants' execution was lodged in the sheriff's hands, in the eyes of a Court of Equity the first incumbrancers—mortgagees—of this lot No 9; and in considering the case from this point of view we concede to the plaintiffs as high an equity as they can possibly pretend to.

Next to turn to the case of the defendants, we find that their execution debtor Adamson was, on the 4th of August, 1883, when they lodged their execution in the sheriff's hands, entitled to the equity of redemption in lot No 9, subject only to the mortgage to the Federal Bank, the plaintiffs.

What then was the effect of the defendant's execution on Adamson's interest in this land? It is well known that at common law and without aid from

(1) Lewin on Trusts, (Ed. 8) p. 144. (2) 2 Atk. p. 150.
(3) 2 Atk. 257.

1886

FEDERAL BANK OF CANADA v. CANADIAN BANK OF COMMERCE.

Strong J.

statute or the assistance of a Court of Equity by a decree for equitable execution, a legal execution has no effect on an equitable interest in lands. Here, however, a Statute of Manitoba (1) has provided that

> Under the writ of execution against lands, immediately upon its receipt by the sheriff shall be bound, and after the expiration of the time aforesaid, may be sold and conveyed, all or any lands, tenements, and hereditaments of the judgment debtor, wheresoever the same may be in this Province, both equitable and legal, and all his estate, right, title, and interest therein, of what nature and kind soever, &c.

It is therefore manifest that the defendants' writ of execution against the lands of Adamson bound his interest in this lot No. 9 from the date of its delivery to the sheriff on the morning of the 4th of August, 1883.

Therefore at the time Adamson sold and conveyed this land to the Trustees of Knox's Church, on the same 4th of August, 1883, he was the absolute owner of the equitable interest which he originally acquired under the contract of purchase with the Hudson's Bay Company, subject to two incumbrances, which were, first what was in substance if not in form a mortgage to the plaintiffs, and secondly a statutory charge *in invitum* by force of their execution in favor of the defendants. It cannot be disputed that a purchaser, finding the estate he buys encumbered, has a right to apply the purchase money in paying off the incumbrances, and that this right cannot be interfered with by the vendor. Further, the purchaser may pay off the incumbrances in such order as he may choose, subject, of course, to this, that such as are not paid off are left subsisting as charges upon the estate. Thus the property sold being subject to two successive mortgages the purchaser may, if he thinks fit, pay off the 2nd leaving the 1st unpaid. This in no way prejudices the first mortgagee, who in that case has no right to call

(1) Con. Stats. Man., ch. 83 ; amended sec. 60, ch. 11.

upon the second mortgagee to hand over to him the amount received in satisfaction of his debt. And if this is so in the case of a second mortgage no reason can be suggested why it should not apply where the second incumbrance is not a mortgage but a judgment, which, as in the present case, has, by means of an execution issued upon it, become a charge upon the land. The only way in which this right can be controlled is by some contract or agreement on the part of the purchaser. It is not, however, pretended here that the trustees of Knox's Church ever agreed to apply their purchase money in discharge of the plaintiffs' mortgage. All that is said by Mr. Renwick is that there was an agreement between him and Adamson that the proceeds of the sale should be applied to the payment of the Federal Bank. In answer to the question.

> As between Mr. Adamson and the Bank who were entitled to the proceeds? Mr. Renwick says "The Federal Bank were, because that was the express understanding I conveyed to him."

But it is not even suggested that the Trustees of the Church, or the defendants ever had notice of, much less that they were parties to, any such arrangement. And in the absence of contract they were in no way affected by it. The result is that the defendants' execution was paid off and, if the plaintiffs, as they insist, still retained their first mortgage, it was left remaining as the first incumbrance on Adamson's interest under the contract, and there is nothing now to prevent the plaintiffs from enforcing it, unless the trustees, having got in the legal estate, are able to shew that they were originally purchasers for valuable consideration without notice of the plaintiffs' rights.

This is the view of the case taken by Mr. Justice Taylor at the trial and which he has enunciated concisely, but none the less accurately, in the judgment

1886

FEDERAL BANK OF CANADA v. CANADIAN BANK OF COMMERCE.

Strong J.

which he then delivered. In this I entirely agree with him, and though I have written more fully it has been only with a view of ascertaining and defining the positions of the parties; for when this is once done all difficulty vanishes and the case can be at once solved by applying very plain and well settled principles.

If the re-conveyance to Adamson had been indispensable to have enabled him to convey his interest, and had the fact that that deed was executed only on the understanding that the purchase money should be applied in reduction of the plaintiffs' debt, and had notice to the defendants of this arrangement been proved, there might then have been some ground for saying that the defendants ought not to be permitted to retain the money—but even in that case I should doubt if the right of the purchaser to apply the money in paying off such incumbrances as he might select could be controlled.

The Chief Justice and Mr. Justice Killam reached the same result in another way. They determined that the money having been paid by a person entitled to pay it, the defendants having no notice of the arrangement were entitled to say that they were in the position of purchasers for valuable consideration, their execution being satisfied by the payment of the money to the sheriff, and the sheriff's certificate of discharge. The case of *Morley* v. *Pellatt* (1) entirely supports this view, and I think it furnishes an additional and independent reason for dismissing the appeal.

A further point suggested by the learned Chief Justice in the Court below was that there was no jurisdiction to entertain an appeal from Mr. Justice Taylor's decision, inasmuch as the case did not come within the 53rd section of the Manitoba Interpleader Act. (2) That provision only authorises an

(1) 8 B. & C. 722.

(2) Chap. 37 Con. Stats. of Manitoba.

interpleader by the sheriff in the case of lands when a claim is made against an execution creditor to the proceeds of lands or tenements "taken and sold" under any process, &c, the words of the statute being precisely the same as those of the C. S. O., chap. 54, sec. 10. I incline to think that this objection was well founded and, if so, the proceedings before Mr Justice Taylor were in the nature of an arbitration by consent and therefore final (1).

The appeal should be dismissed with costs.

FOURNIER and TASCHEREAU JJ. concurred.

HENRY J.—The plaintiffs, in the interpleader suit, claim that the money paid by the Trustees of Knox Church to the sheriff, under the circumstances, was their money.

The Respondents having a judgment against one Adamson, placed an execution in the sheriff's hands, by which whatever title Adamson had in the lands was bound.

The question as to what that title was never arose, nor has it arisen yet under the peculiar circumstances of this case. Then he having some title, the Trustees of Knox Church, wishing to get a certificate from the sheriff that the land was free from execution, undertook to pay, out of their funds, the amount of this execution.

The plaintiffs claim that this was their money. Now, to look at it in a business point of view, how could they claim it to be their money? No interest of theirs was taken, no title of theirs was interfered with. It was the mere title of Adamson, whatever it was, whether a legal or equitable estate we have no right

(1) *Shortridge* v. *Young*, 12 M. & W. 5. Churchill on Sheriffs p. 193 (Ed. 2nd). Cababé on Interpleader, p. 46. *Atty. Gen. Nova Scotia* v. *Gregory*, 11 App. Cas. 229.

1886

FEDERAL BANK OF CANADA v. CANADIAN BANK OF COMMERCE.

Fournier J.

nor business to inquire. The sheriff could have sold nothing but the interest of Adamson, and how could a third party come in and claim the money? If a party pays money by fraud he is entitled to relief, but I can see no ground the plaintiffs here have to relief. How can the Federal Bank claim money which they never paid and had no right to charge? How can they ask the Bank of Commerce to repay money to them to which they never had a claim?

Suppose this land had been sold by the sheriff and the purchasers should claim to be entitled to receive a conveyance of the title of Adamson in the lands purchased by him from the Hudson's Bay Company; the Federal Bank might have intervened, and said, "Adamson was merely our agent and therefore the purchaser must pay us our equitable claim."

But that is not the case here. The case is one of a very simple nature. The money was paid by Knox Church to the sheriff and he having handed it over to the execution creditors it bars all claims. I think, therefore, that the appeal should be dismissed with costs.

I may say, in addition, that the statute only affects cases where the land is actually sold, but that it should apply to every case in which an execution is put in the Sheriff 's hands I think was never the intention. I also agree with Mr. Justice Strong's remarks on the case.

GWYNNE J.—I think the appeal must be dismissed upon both of the grounds argued.

1st. that the case is not one for interpleader, and 2nd that the Federal Bank having as they admit conveyed back to Adamson all interest they had in the land for the express purpose of enabling him to perfect his title thereto and then to sell the land to Knox

1886

FEDERAL BANK OF CANADA v. CANADIAN BANK OF COMMERCE.

Gwynne J.

Church Congregation, they the Federal Bank not appearing in that transaction but contenting themselves with Adamson's promise to pay them out of the monies he should receive on the sale, and the fi. fa. having been paid off and satisfied by the vendees of Adamson for the express purpose of discharging their vendor's land from the operation of the fi. fa. and to complete their title without the Bank of Commerce, so far as appears, having had any notice of the Federal Bank having ever had, or that they claimed to have any interest in the land, the money so paid to the sheriff was, in my opinion, money paid to the use of the Bank of Commerce and cannot be recovered by the Federal Bank either from the Sheriff or the Bank of Commerce. The Federal Bank must bear the consequences of their own act in enabling Adamson to deal with the property as his own.

Appeal dismissed with costs.

Solicitors for appellants: *Archibald, Howell, Hough & Campbell.*

Solicitors for respondents: *Aikins, Culver & Hamilton.*

THE V. HUDON COTTON COMPANY, HOCHELAGA (DEFENDANTS)... } APPELLANTS.

AND

THE CANADA SHIPPING COMPANY (PLAINTIFFS)..... } RESPONDENTS.

1882

*Nov. 21 & 22.

1883

*April 30.

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

Plea of tender and payment into Court acknowledgment of liability—Agent—Contract by, for undisclosed principal—Sale with privilege of taking bill of lading, or reweighing at seller's expense—Pleading.

An action was instituted by the Canada Shipping Co., to recover $3,038.43, being the price of 810 tons, 5 cwt. of steam coal sold

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

1882

V. HUDON COTTON CO. v. CANADA SHIPPING CO.

by their agents, Thompson, Murray & Co., through T. S. Noad, broker, as per following note:

No. 3, 435. Montreal, 13th Aug., 1879.

Messrs. Thompson, Murray & Co.:—

"I have this day sold for your account, to arrive, to the V. "Hudon Cotton Mills Company, the 810 tons, 5 cwt. best South "Wales black vein steam coal, per bill of lading, per 'Lake "'Ontario,' at $3.75 per ton, of 2,240 lbs, duty paid, ex ship; "ship to have prompt despatch.

Terms, net cash on delivery, or 30 days, adding interest, buyer's "option.

"Brokerage payable by you, buyer to have privilege of taking bill of "lading, or reweighing at seller's expense."

The defendants pleaded, 1st, that the contract was with Thompson, Murray & Co., personally, and that the plaintiffs had no action; and by a second plea, that the cargo contained only 755 tons, 580 lbs., the price of which was $2,868.72, which they had offered Thompson, Murray & Co., together with the price of 10 tons more, to avoid litigation, in all $2,890.72, which they brought into court, without their acknowledging their liability to plaintiffs, and prayed that the action be dismissed as to any further or greater sum.

Held, per Ritchie C.J. and Taschereau and Gwynne JJ., that that it was unnecessary to decide the question as to whether the action could be brought by the undisclosed principal, for by their plea of tender and payment into court the defendants had acknowledged their liability to the plaintiffs, although such tender and deposit had been made "without acknowledging their liability;" Fournier and Henry JJ. dissenting.

Per Strong J.—That the action by respondents (undisclosed principals) was maintainable.

Per Fournier and Henry JJ, that the action by respondents (undisclosed principals) was not maintainable and that the appellants were not precluded from setting up this defence by their plea of tender and payment into court.

At the trial it was proved that the defendants agreed to take the coal as per bill of lading without having it weighed. They, however, caused it to be weighed in their own yard, without notice to the vendors, and the cargo was found to contain only 755 tons, 580 lbs. About three weeks after having received the bill of lading, when called upon to pay, they claimed a reduction for the deficiency.

Held, Fournier and Henry JJ. dissenting, that the appellants had no right to refuse payment for the cargo on the grounds of defi-

1882

V. HUDON COTTON CO. v. CANADA SHIPPING CO.

ciency in the delivery, considering that the weighing was made by the defendants in the absence of the plaintiffs and without notice to them, and at a time when the defendants were bound by the option they had previously made of taking the coal in bulk.

APPEAL from a judgment of the Court of Queen's Bench for Lower Canada (appeal side) (1) reversing the judgment of the Superior Court, dismissing the plaintiff's (respondents) action. The facts and pleadings are fully stated in the judgments hereinafter given.

Beique and *Trenholme* for appellants:

1st. As to compatibility of pleas:

See C. P. C. art. 146. *DeMontigny* v. *The Watertown Agricultural Ins. Co*, not reported; *Leclerc* v. *Girard* (2); *Middlemiss* v. *Procureur General of Quebec* (3).

2nd. As to first plea:

(1) Authorities cited by Sir A. A. Dorion: (2 Dorion's Q. B. B. 356.)

(2) Civil Code of Quebec, arts. 1023 and 1028; Pothier Obligation (4); Maynz (5); Demolombe (6); also Civil Code, arts. 1206 and 1234.

Cujacius (7); Vinnius Institutes (8).

Molitor Obligations (9); Hunter's Roman law (10); Bell Commentaries (11).

Domenget, Mandat (12); Sirey, code de. com. (13); Pardessus (14).

As to agency of broker; Civil Code art. 1735. *Syme et al* v. *Howard* (15); Wharton on agency (16); *Browning*

(1) 2 Dorion's Q. B. R. 356.
(2) 1 Q. L. R. 382.
(3) 7 Rev. de Leg. 255.
(4) No. 82.
(5) Vol. 2 pp. 189 & 190.
(6) Vol. 1 of contracts No. 287.
(7) Commentaire de verbo ob. L. 79, and Digest 14. 1. 18.
(8) B. IV. T. VII. No. 2 & 3.
(9) Chap. IV. No. 52.
(10) Verbo Agency pp. 441, 443.
(11) 1 vol. p. 510.
(12) Vol. I, Nos. 384 and 388; Vol. II, Nos. 802 and 855.
(13) Art 92, Nos. 12 and 14, and authorities there cited.
(14) 2 vol. No. 573.
(15) 1 L. C. J. 19.
(16) Sec. 723.

1882

V. HUDON COTTON CO. v. CANADA SHIPPING CO.

v. *The Provincial Insurance Co.* (1).

3rd. On second plea.

Code of L C. arts. 2390, 2420, 2421, 2422, 2424.

Abbott on Shipping (2); Kerr on Fraud and Mistake, *verbo* misrepresentation (3); Taylor on Evidence (4).

Laflamme Q. C and *Davidson* Q. C. for respondents, relied on Arts: 1701, 1716, and 1735 C. C.; Pothier Mandat, No. 88, and other authorities referred to in the judgments of this court.

Sir W J. Ritchie C.J.—Was of opinion that the appeal should be dismissed for the reasons given by Taschereau J.

STRONG J.—I am for affirming the judgment upon the following grounds: First, that the action is maintainable by the respondents. Arts. 1716 and 1727 of the Civil Code, which make the principal liable to third persons, even although the agent may have contracted in his own name, and as a principal, thus assimilating the law of Quebec to the English law, must, I think, be considered by an extensive construction as also making third persons so contracting with the agent liable reciprocally to the principal, since it must proceed on the implication that in such a case a contractual obligation between the principal and the third person shall be considered to have been created by the contract of the agent. From the terms of the articles and from the report of the commissioners, it appears to have been intended to make this provision accord with the doctrine of Pothier, Mandat (5); see also Molitor, Droit Romain (6), and the corresponding rule of English commercial law which, as is well known, differs in this respect from the modern French law.

(1) L. R. 5 P. C. 263.
(2) Chap. 11 sec. 1.
(3) Pp. 22, 66, of English edition.
(4) Vol. 1 p. 356, section 491.
(5) No. 38.
(6) Tome 2 p. 149 Ed. 2.

1883

V. HUDON COTTON CO. v. CANADA SHIPPING CO.

Strong J.

As to the right to compensation or recoupement in respect of shortage, I am clearly of opinion that all right to this was waived by the appellants when they received the coal without insisting on its being weighed at the ship's side. They thus got the chance of any advantage which might accrue to them from overweight, and it would be out of the question now to say that they should, after having declined a weighing according to the ordinary course of business, in the presence of the respondent, be entitled to claim an allowance for shortage which they allege they have found on an *ex parte* weighing made in their own yard, after having taken delivery in the manner before mentioned. The appeal should be dismissed with costs.

FOURNIER J.—Les faits qui ont donné lieu au présent litige sont en résumé comme suit : —

Le 13 août 1879, J. S. Noad, courtier, de Montréal, vendit à l'appelant pour le compte de Thompson, Murray et Cie., marchands, une cargaison de charbon alors à bord du vaisseau des intimés, appelé le " Lake Ontario," attendu d'un jour à l'autre à Montréal. Cette vente fut faite à raison de $3.75 par tonne de 2,240 livres, et de plus aux conditions notées comme suit sur le carnet du courtier :

To wit.

No. 3435. Montreal, 13th Aug., 1879.

Messrs. Thompson, Murray & Co.,

I have this day sold for your a/c to arrive, to the V. Hudon Cotton Mills Co., the 810 tons 5 cwt. best South Wales black vein steam coal per bill lading, p. Lake Ontario, at 3.75 p. ton of 2240 lbs, duty paid, ex ship, ship to have prompt despatch.

Your obedient servant,

J. S. NOAD, Broker.

Terms net cash on delivery or 30 days adding interest. Buyer's option. Brokerage payable by you.

Buyer to have privilege of taking B/L or reweighing at sellers expense.

Un mémoire de cette vente fut remis à Messrs. Thompson, Murray & Co., et un autre à l'appelante.

1883

V. HUDON COTTON CO. v. CANADA SHIPPING CO.

Fournier J.

A l'arrivée du "Lake Ontario," celle-ci au lieu de prendre livraison du chargement après avoir fait peser de nouveau, accepta la quantité déclarée dans le connaissement.

Cependant comme la livraison se faisait auprès de sa manufacture, l'appelante fit peser la cargaison avec soin, et avec des balances vérifiées, mais sans avis aux intimés. Le résultat constata qu'il y avait cinquante-cinq tonnes de moins que la quantité mentionnée dans le connaissement. Avis de ce déficit fut donné à Thompson, Murray & Co., avec offre du prix de la quantité de tonnes reçues, et de plus le prix des dix autres tonnes. Ces offres furent refusées et les intimés intentèrent leur action pour la quantité mentionnée dans le connaissement.

L'appelante répondit à cette action : 1o qu'elle avait contracté avec Thompson, Murray & Co., personnellement et que les intimés n'avait aucun droit d'action contre elle. 2o que la cargaison ne contenait que 755 tonnes et 580 livres dont le prix se montant à $2,868.72 avait été offert à Thompson, Murray & Co, avec en outre le prix de dix tonnes de plus, en tout $2,890.72. Cette somme fut déposée en cour, mais avec déclaration spéciale que c'était sans admettre aucune responsabilité envers les intimés. 3o l'appelante invoquait l'usage du commerce au sujet du déficit ou surplus dans les ventes faites d'après la quantité portée au connaissement comme suit :—

That in purchasing said cargo of coal and in making option to receive the same as per bill of lading instead of having said coal weighed at the expense of the vendor, the said defendants never agreed or intended, and could never have been understood, according to the custom and usage of trade, to have agreed or intended, to assume the risk of a deficiency in said coal of more than ten tons.

Enfin l'appelante plaidait fraude, en alléguant que l'intimé savait que le commandant du "Lake Ontario" était dans l'habitude de signer des connaissements con-

tenant de fausses déclarations de quantités.

L'intimé répondit spécialement que le connaissement avait été régulièrement signé, les droits de douane payés suivant la quantité vendue, que la charge avait été acceptée par l'appelante, qui n'avait jamais offert de la rendre. A cette dernière allégation l'appelante répondit qu'elle n'avait pu faire la remise du charbon parce qu'il se trouvait mélé avec d'autre, et que d'ailleurs elle n'était pas obligée de le rendre.

Après enquête et audition au mérite, l'action fut renvoyée par le jugement de la Cour supérieure.

Les questions soulevées par les faits de cette cause sont 1° Le commettant peut-il porter une action sur un contrat fait personnellement par un agent qui n'a pas fait connaître le nom de son commettant?

La deuxième question ne devrait pas être seulement de savoir si l'appelante est obligée de payer la quantité de charbon mentionnée dans le connaissement, ou bien si elle a droit à une diminution de prix en proportion du déficit constaté par le pesage qu'elle a fait faire. En vue du plaidoyer invoquant l'usage du commerce, ne devrait-on pas se demander, de plus, si une vente, faite dans les circonstances de celle dont il s'agit, ne se trouve pas tacitement sujette à certaines conditions acceptées par l'usage général du commerce concernant le surplus ou déficit dans la quantité spécifiée dans des ventes de cette nature?

Quant à la première question la manière dont s'est opérée la vente en question fait voir bien clairement que les parties au présent procès, n'ont jamais fait ensemble le contrat sur lequel l'action est fondée. Ce contrat a été fait par l'intermédiaire de J. S. Noad, entre Thompson, Murray & Co., d'une part, et l'appelante de l'autre, ainsi qu'il est constaté par les écrits échangés entre eux à ce sujet, exhibits 12 et 14. Ces écrits ne font aucunement voir que Thompson, Murray

1883

V. HUDON COTTON CO. v. CANADA SHIPPING CO.

Fournier J

& Co., n'étaient que des agents de l'intimé dans cette transaction. Il est vrai que celle-ci a produit un mémoire de cette vente dans lequel le mot agent a été inséré ; mais il est évident que cette addition a été faite après coup dans le but, sans doute, de faire disparaître une difficulté que l'on appréhendait sur l'existence du droit d'action. Cette addition qui ne se trouve pas dans le mémoire livré à l'appelante ne peut aucunement affecter sa position. Il résulte certainement de ces écrits que le contrat a été fait entre Thompson, Murray & Co., et l'appelante, et non pas entre celle-ci et l'intimé. Il n'y a partant aucun lien de droit entre elles et conséquemment pas de droit d'action de la part de l'intimé contre l'appelante. Indubitablement Thompson, Murray & Co., parties au contrat, avec l'appelante ont droit de réclamer d'elle l'exécution de ce contrat, et aucune action n'aurait dû être intentée sans les mettre en cause, afin d'éviter à l'appelante les dangers d'une seconde action.

Maintenant les faits n'étant pas douteux que la vente en question a été faite par Thompson, Murray & Co., sans divulguer leur qualité d'agents, la loi reconnaît-elle à leur commettante (l'intimée) le droit d'intenter une action sur un contrat auquel elle n'était pas partie? A cette question, deux réponses contraditoires se présentent. L'une, d'après le droit anglais, est dans l'affirmative, l'autre d'après le droit français dans la négative. Il est clair que ce n'est pas dans le droit anglais que l'on doit chercher la solution d'une telle question. Ce droit n'est pas en force dans la province de Québec, en matière de contrat.

Les règles de la preuve en matières commerciales seulement y ont été admises. Adopter en matière de contrat un principe tiré du droit anglais, différant du droit français sur le même sujet, ce ne serait plus une application de la loi, une interprétation, mais ce serait

un acte législatif, substituant un système de droit à celui qui est en force dans la province de Québec. Quelqu'avantageux que puisse être sous certains rapports la solution offerte par le droit anglais, elle ne peut être acceptée sans violer l'esprit du code civil. Il est donc tout à fait inutile d'aller chercher de ce côté-là des autorités sur cette question. C'est uniquement dans le droit français que nous devons en trouver la solution.

Les autorités ne manquent pas sur le sujet.

Dans le droit romain le mandataire traitait toujours en son propre nom, et le mandant n'avait pas d'action contre les tiers, ni ceux ci contre le mandant. Plus tard, une action équitable fut accordée par le prêteur contre le mandant, en faveur des tiers ; mais la réciprocité ne fut pas admise en faveur du mandant. Dans le droit français, tel qu'exposé par Pothier, Mandat (1), cette réciprocité n'a pas été admise non plus. Le droit d'action est reconnu en faveur du tiers contre le mandant dont le mandataire n'a pas divulgué le nom. Mais il n'est pas accordé au mandant dans le même cas. Les codificateurs du Code Civil de la Province de Québec ont adopté la doctrine du Pothier et l'ont consignée dans les articles 1716 et 1727. Mais ils n'ont pas été plus loin. Ils n'ont pas jugé à propos d'accorder au mandant dont le nom n'avait pas été révélé aux tiers une action contre ceux-ci. Il eut peut-être été plus logique d'admettre le réciprocité du droit d'action en pareil cas,—mais puisqu'ils n'ont pas jugé à propos d'en faire même la suggestion à la législature, les tribunaux peuvent-ils suppléer à cette omission ? Sans doute que non. Ce serait peut-être une amélioration, mais nous n'avons pas le pouvoir de la décréter. A l'origine il n'y avait aucun droit d'action parce que le mandataire traitait toujours en son propre nom, plus tard l'action fut accordée aux tiers contre le mandant,

(1) Au No. 881.

1883

V. HUDON COTTON CO. v. CANADA SHIPPING CO.

Fournier J.

— c'était une amélioration, un progrès,—c'en eût été un autre, si l'action eût été accordée au mandant contre les tiers; mais elle ne l'a pas été comme on peut s'en assurer par le rapport des codificateurs à ce sujet (1).

Il y a cinq articles dans cette section, le premier numéroté 23, proclame la règle générale de la responsabilité du mandant et diffère peu de l'article 1998 du code Napoléon. Troplong cependant interprète de manière à ne pas lier le mandant lorsque le contrat est au nom du mandataire sans déclaration du nom du principal, excepté dans quelques cas particuliers. Cette interprétation est en harmonie avec la doctrine du droit romain; mais elle est en opposition directe avec celle de Pothier, qui est d'accord avec les lois anglaise, écossaise et américaine. L'article soumis est basé sur l'exposé de la règle de Pothier et comprend tous les actes du mandataire soit qu'il ait agi en son propre nom ou en celui du mandant. Les seuls cas exceptés sont ceux mentionnés dans l'article.

On voit que les codificateurs n'ont adopté que l'opinion de Pothier qui reconnaît le droit d'action des tiers contre le mandant et rien de plus. Les articles de notre code ne diffèrent pas en principe de ceux du code français, on peut citer l'opinion des commentations sur ce dernier comme applicables à la solution de cette question.

Troplong, Du Mandat (2).

Vide aussi Nos. 523 & 535.

Le mandataire agissant en son propre nom s'oblige directement, avons-nous dit. A cette proposition viennent se joindre deux règles que je trouve constatées par les monuments les plus importants de la jurisprudence.

Savoir: Que le silence gardé sur l'existence du Mandat, fait 1o. Que le mandant n'a pas d'action contre les tiers; 2o. Que les tiers n'ont pas d'action contre le mandant.

Quando mandatarius, says Casaregis, *simpliciter contrahit, non expressio mandato, adeo in eo redicatur contractus, ut mandanti amplius contra tertium nulla competere possit actio.*

Et plus bas il ajoute ces paroles remarquables: *Respectu habito ad tertium, mandans consideratur ut persona extranea.*

Ainsi point d'actions contre les tiers de la part du mandant.

(1) Observations des codificateurs; Mandat, Ch. III, Section II, Obligations envers les tiers (article 1727).

(2) No. 522.

Laurent (1):

Quels seront dans cette hypothèse (dans le cas où le mandataire a traité en son nom personnel avec les tiers, sans dire qu'il agit comme mandataire) les rapports du mandant avec les tiers? Il n'y a aucun lien entre le mandant et les tiers, puisque les tiers n'ont pas traité avec le mandant: celui-ci étant étranger à la convention, il ne peut s'en prévaloir contre les tiers, de même que les tiers ne peuvent s'en prévaloir contre lui.

Sebire & Carteret (2); DeLamarre & Le Poitvin (3); et aussi Duranton (4):

Il n'est pas douteux, quand le mandataire a traité au nom du mandant, que celui-ci peut agir directement contre le tiers avec lequel le mandataire a traité, et, réciproquemement, que le tiers peut agir directement contre le mandant, mais il n'en est pas de même quand le mandataire a traité en son propre nom, ainsi que cela avait constamment lieu chez les Romains, et comme on le voit parfois chez nous en matière de mandat ordinaire, et presque toujours quand c'est un commissionnaire qui traite. Dans ce cas, le mandant a besoin, pour agir contre le tiers, de se faire céder l'action du mandataire contre le mandant, pour agir contre ce dernier; autrement, l'un et l'autre n'exercerait que l'action générale de l'art 1166, et au nom de leur débiteur.

Je n'en repéterai pas ici toutes les citations; je me contenterai de référer aux notes du Juge en Chef, Sir A. A. Dorion qui en contiennent une longue énumération, ainsi qu'au factum de l'appelante qui en contient plusieurs autres. Pour les raisons adoptées par l'Honorable Juge en Chef et par l'Honorable Juge Ramsay je suis d'opinion avec eux que l'intimée n'a pas droit d'action contre l'appelante en vertu de la vente faite à cette dernière par Thompson, Murray & Co.

Un des motifs du jugement de la majorité de la Cour du B. R., est que l'appelante ayant offert $2,390.72, seul montant dû, d'après le contrat, suivant elle, s'est par cette offre désisté de son objection contre l'existence du droit d'action. Cette proposition serait juste, si l'offre eût été faite sans réserve. Mais comme au con-

(1) Vol. 28 No. 62.
(2) Vo. Commissionnaire, Nos. 12, 82, 83, 121.
(3) Tome 1 p. 25.
(4) Vol. 18 No. 262.

1883

V. HUDON COTTON CO. v. CANADA SHIPPING CO.

Fournier J.

traire elle n'a été faite qu'avec la déclaration formelle que c'était sans aucunement admettre qu'elle était endettée envers l'intimée, cette offre ne peut avoir l'effet de priver l'appelante du bénéfice de son autre moyen de défense. Dans l'ordre des plaidoyers c'est la question de l'existence du droit d'action qui doit être décidée la première. Si elle est décidée en faveur de l'appelante, elle met fin à la contestation et l'action doit être renvoyée. Ce n'est que dans le cas où la décision est contraire à l'appelante que le second plaidoyer doit être examiné et qu'il peut y avoir lieu de déclarer si les offres sont suffisantes ou non. Cette manière de plaider est d'ailleurs conforme au Code P. C. et à la pratique suivie dans la cour de la province de Québec, et ne peut pas être invoquée contre l'appelante comme une rénonciation de sa part à son premier plaidoyer. Elle est aussi conforme à l'autorité de Carré et Chauveau. En traitant de l'ordre des plaidoyers il s'exprime ainsi (1):

La première c'est qu'on peut se borner à ne présenter que les exceptions de procédure, en se réservant toutefois de procéder au fond au cas qu'elles fussent rejetées; et alors c'est au défendeur à plaider le premier, parce qu'il est demandeur en exception: *Reus excipiendo fit actor.* La seconde c'est que les exceptions de procédure doivent nécessairement être opposées avant les exceptions de droit, qui, elles-mêmes, doivent être présentées avant les moyens du fond, puisqu'elles ont pour objet d'en éviter la discussion.

Néanmoins, comme les exceptions de droit peuvent être opposées en tout état de cause, à moins qu'on ait renoncé à celles qui ne tiennent qu'à l'intérêt privé, on n'aurait point à craindre qu'elles fussent rejetées pour n'avoir pas été opposées avant les défenses proprement dites.

Bioche Vo. Acquiescement (2):

Mais la partie qui plaide au fond *sous toutes réserves*, est réputée ne plaider que pour obéir à la justice, et non pour renoncer à ses droits, Cass. Ier Mai 1811, s. 11, 217, voir aussi Nos. 106 et 107.

Acceptant l'opinion que le droit d'action n'existe pas

(1) Proc. Civ. vol. 2 p. 153. (2) P. 49, No. 105.

il devient inutile à ce point de vue de s'occuper du second plaidoyer. Cependant je crois devoir faire l'observation qu'il ne me paraît pas avoir été pris en considération dans son ensemble. On a perdu de vue, je crois, le fait que l'appelante prétend que la vente dont il s'agit doit être considérée comme ayant été faite conformément à l'usage du commerce. D'après cet usage le surplus ou déficit ne doit pas excéder dix tonnes. Dans le cas contraire il donne lieu à une réclamation pour paiement de l'excédant ou pour diminution du déficit. L'usage invoqué a été prouvé de la manière la plus satisfaisante et l'appelante, dans le cas où le droit d'action existerait devrait en avoir le bénéfice.

On a semblé mettre en question le droit de l'appelante de faire un semblable plaidoyer à une action fondée sur un contrat et dire que tout au plus elle pourrait se porter demanderesse incidente. Cela n'est pas nécessaire d'après notre manière de plaider dans la province de Québec. Dans un cas comme celui-ci il y a lieu à l'exception tout aussi bien qu'à l'action *quanto minoris*. La jurisprudence et la pratique sont d'accord de depuis longtemps (1) à éviter la multiplicité des demandes incidentes, pour admettre la compensation plaidée par exception, pourvu que l'exception soit accompagnée de conclusions spéciales. La diminution du prix invoqué par l'appelante était bien plaidée.

En résumé je suis d'avis, 1° que l'intimée n'a pas droit d'action; 2° qu'en supposant que ce droit existât, l'appelante avait droit d'invoquer les modifications à son contrat apportées par l'usage du commerce.

Il y a en outre une allégation de fraude, mais elle n'a pas été prouvée.

Pour ces motifs je suis d'avis que l'appel devait être accordé.

HENRY J.—This action is brought against the

(1) Voir *Beaulieu* v. *Lee*, 6 L. C. R. p. 33.

1883

V. HUDON COTTON CO. v. CANADA SHIPPING CO.

Henry J.

appellants in this case to recover the value of a cargo of coal shipped by the respondents in their own vessel on a bill of lading signed by their own captain. The appellants purchased, not from the respondents, but from Messrs. Thompson & Murray, and they purchased from them, not as agents of the respondents, but as being the owners of the property, goods or chattels so purchased by the appellants. The real owner of the goods at the time was not disclosed to the purchaser. No doubt at one time, neither in France nor in Quebec could either of these parties bring an action, but the law of Quebec was changed to the extent that the party purchasing who deals with the agents of an undisclosed principal is entitled to bring an action against the principal. That is laid down in the code, but it goes no further; it does not say that the mandator shall have an action against the party who deals with his agents. But we are told that because there is an action allowed by the code against the mandator, therefore it works both ways. We may fairly assume that if it was intended by the code that that should be the case it would have been provided in the code as well that the mandator should have the right of action as that the party contracting with his agent should have the right of action against him. I therefore take the ground that this action will not lie under the present legislation in the Province of Quebec.

Then there is another objection that is taken by the party here; it is this: He said, "You purchased on this bill of lading, and you had the choice of purchasing the quantity mentioned in the bill of lading, or had the option of having it weighed at the expense of the sellers, Thompson, Murray & Co." Practically, they agreed to take it on the bill of lading, and, under ordinary circumstances, they might possibly be bound by it but

1883

V. HUDON COTTON CO. v. CANADA SHIPPING CO.

Henry J.

for two reasons. In the first place it was proved on the trial and uncontradicted, that there was a universal practice in Montreal of purchasing cargoes on bill of lading, and it was only intended to cover a deficiency of four or five tons; it was never understood, and never intended by the parties that the shortage should go beyond that in such a contract. If that was the case and the parties said they would go by the bill of lading, they would not be answerable for more than four or five tons, and not for such a deficiency as forty or fifty tons. Then, there is another question, which is an important one here. When these parties disclose themselves they must take the contract in all its relations, and imported into that contract is the fact that their captain signed the bill of lading, certifying that he had all this coal on board when he had not. Then is it proved that he had not? It is, for this reason, that every single load of that coal is weighed, and there is not the slightest suspicion of the correctness of such weighing, and it is clearly shown that the quantity short is fifty tons. Then the owner of the coal says to the buyers, "You must pay us for that amount of coal!" The others say, "No, we did not get that amount of coal." "But," says the owner, "If you did not get it, the sellers say you agreed to take it according to the bill of lading of Thompson, Murray & Co." They reply that they did not buy the bill of lading, but they bought a certain quantity of coal as guaranteed by the bill of lading. They did not become the endorsers of the bill of lading, but got their right to that property by purchase direct from Thompson, Murray & Co., who told them "we have got a bill of lading saying that the captain has received so many tons of coal on board." But the owners come in afterwards, after the amount is in dispute, and say "you are bound to pay us because

1883

V. HUDON COTTON CO. v. CANADA SHIPPING CO.

Henry J.

you agreed to take the quantity in the bill of lading." "It is true, we did agree," the appellants say, "but "we agreed through the false representations made by "your servant, the captain, that he had that quantity on "board, for which false representation you are answer- "able, and if there is liability upon us in one respect, "there is also liability on your part to counteract that." I am not sufficiently acquainted with the administration and procedure of the law in Quebec, but I believe I am justified in saying that under the pleadings and practice and administration of the law there, it is a good defence for those parties to come in and say, "we "did not get that coal, we bought it on the misrepresen- "tation of your servant, you never gave it to us." That being the case, and that being the law, I feel that this appeal ought to be allowed, and that these parties should be declared not liable to pay for coal which they never got. It is said, "you took the option at the time "and could have had it weighed in the presence of the "parties at the ship's side at the expense of the seller." I maintain that it is no matter where the coal is weighed if the evidence is sufficient to convince judge and jury that the quantity is as alleged, and that it is a correct weighing. The party was not obliged to get it weighed, and he was not obliged to give the other parties notice that he was going to weigh it. All that is required is to prove satisfactorily that the quantity was not there, and if it was not there, the question arises: Have those parties who represented that it was, the right to be paid for what they did not supply? I am of opinion that the appeal should be allowed.

TASCHEREAU J.—It is in evidence that Thompson Murray & Co. are the general agents at Montreal of the Canada Shipping Co., and well known to be such. Now, when the appellants bought coal from such a

firm, publicly known as the agents of the respondents, can they be said to have dealt with an undisclosed principal ?

Le nom du mandant (says Troplong) (1) peut s'attacher à l'acte par des circonstances de fait, par une certaine publicité de position, que les tribunaux doivent apprecier avec équité.

See also Bédarride (2). Leaving this question aside however, I am of opinion with the Court of Queen's Bench that the Hudon Company, in tendering as they have done and depositing in Court with one of their pleas, the sum of $2,890.72. as part payment for the coal in question, have acknowledged the Canada Shipping Co. as their vendors, and have admitted the said Canada Shipping Co.'s *locus standi* in this case. The contention that they cannot be bound by the admission contained in that plea, because by another plea or in the same plea they denied the plaintiff's rights altogether, or any privity of contract with them seems to me untenable.

The conclusion of their said plea of tender and deposit is as follows :

Wherefore, the said defendants without acknowledging any in debtedness towards the plaintiffs, and praying *acte* of their said tender and offer of twenty-eight hundred and ninety dollars and seventy two cents, further pray that said tender and offer may be declared good and sufficient and that said plaintiff's action for any further and greater amount may be dismissed, the whole with costs, including costs of protest and of exhibits *distraits* to the undersigned.

It is true that a party is allowed to fyle incompatible pleas, but it is not the less true that the offer of a confession of judgment, even only for a part of the amount demanded, or a plea of tender and payment, in court, must be held to be an admission by the defendant of the plaintiff's title as his creditor. In the case of a confession of judgment, the plaintiff may accept it, and in the case of a tender and payment in court, he is entitled

(1) Mandat 540.

(2) Du dol et de la fraude, No. 1240 seq.

1883

V. HUDON COTTON CO. v. CANADA SHIPPING CO.

Taschereau J.

to receive the monies paid in, without prejudicing his claim to the remainder. In *Marc Aurele* v. *Durocher* (1), though the defendant had offered, in one of his pleas, to confess judgment, he claimed that the action should be dismissed, Mr. Justice Johnson said:

> Still less importance attaches to the contention that this offer was made under reservation of all matters previously pleaded. It is intelligible that under the system of pleading that still exists in this country a defendant may plead everything he chooses, under reservation of everything else that he has already pleaded; that is to say, that he can go on contesting the action under as many new grounds as he pleases, reserving all that he has pleaded before tending to the same end, viz: the dismissal of the action; but I cannot understand how he can be allowed to reserve to himself the benefit of previous pretensions set up in order to get the action dismissed, while he admits that judgment ought to be rendered against him. A defendant may ask for the dismissal of an action against him for as many good reasons as he is able to give; but he surely cannot be allowed to ask in nineteen consecutive pleas that the plaintiff be sent out of court; and reserve to himself the benefit of all these pretensions in a twentieth plea admitting that the same plaintiff is entitled to judgment; or, in other words, asks to reserve means of defence which he expressly renounces.

What was said in that case by Mr. Justice Johnson about a confession of judgment applies with still greater force, it seems to me, to a plea of tender and payment in court.

In *Gorrie* v. *The Mayor of Montreal* (1) the defendants had pleaded a tender of part of the sum claimed with also a defence *au fonds en fait*. The Superior Court had dismissed the action altogether. The presiding judge, adopting the same ground as taken in the present case by the appellants, had said:

> The defendants admit the balance of £75, which is all the plaintiff is entitled to claim, but if the action does not exist, I can take no notice of such tender, it amounts to nothing.

The case, however, was carried to appeal, and the judgment was reversed, and defendants condemned.

(1) 18 L. C. J. 197.
(1) 8 L. C. R. 236, also in note 9 L. C. R. 375, to re *Boulanget* v *The Mayor*.

1883

V. HUDON COTTON CO. v. CANADA SHIPPING CO.

Taschereau J.

Judgment in appeal not reported; I have a note of it through the kindness of the prothonotaries of the Superior Court, Montreal.

Also in *Boulanget* v. *The Mayor of Montreal* (1) though a tender had been pleaded and a payment in court of the sum so tendered had been made, the Superior Court had dismissed the plaintiff's action altogether, but on appeal this judgment was reversed and it was held, Sir L. H. Lafontaine delivering the judgment of the court, that a plea in a case by which the defendant admits that a part of the sum claimed is due to the plaintiff, praying *acté* of the deposit of the sum so admitted, and also praying that the plaintiff's action for the surplus be dismissed, entitles the plaintiff to a judgment for the sum tendered and paid into court. In the present case, it is true, the defendant's plea denied entirely the indebtedness, but how could he do so, or what effect can this have, when he offered the plaintiff a part of the sum claimed.

The law is that if one pays a debt voluntarily, knowing what objections he could oppose to the payment, he is presumed to renounce his right to avail himself of such objections. And this even if he pays under protest and reserve. Solon Nullités says (2):

L'exécution volontaire.....est une véritable ratification; elle couvre toutes les nullités de la convention exécutée, lors même qu'en exécutant la partie ferait des protestations et des réserves pour pouvoir l'attaquer dans la suite. On concoit que ces réserves tombent devant une exécution contraire à laquelle on n'était pas obligé.

And Bédarride de la fraude (3):

Exécuter volontairement un acte qu'on sait être nul ou rescindable, c'est indiquer aussi positivement que possible qu'on renonce à l'attaquer désormais. Cela est si évident que les réserves qui accompagnaient l'exécution n'en atténueraient aucunement l'importance et n'apporteraient aucun obstacle à la fin de non-recevoir

(1) 9 L. C. R. 363.

(2) 2 vol. No. 436.

(3) No. 609.

1883

V. HUDON COTTON CO. v. CANADA SHIPPING CO.

Taschereau J.

qu'elle crée.

La réserve contraire au fait n'opère pas, lorsque l'exécution est libre is a maxim equally applicable to procedure (1), and to contracts and obligations, and the principles upon which it is based rule the pleas in a case, as well as the acts of the parties out of the case. If a party executes an act or performs an obligation under all the circumstances which would make such execution or performance a valid implied ratification of such act or obligation, the protest or reserve with which this execution or performance might be accompanied are of no avail and do not hinder the effect of the ratification.

Here, the defendants tendered as voluntarily as possible a part of the sum claimed; they did so with the full knowledge of their possible objections to the plaintiff's claim *in toto*: the protestations and reserves in their plea consequently fall to the ground.

Buchanan J. in *Bertrand* v. *Hinerth* (2), held that a *défense au fonds en fait* does not affect or impair the strength and force of admissions contained in another plea.

In *Monty* v. *Ruiter* (3), Berthelot J. held: "That in an action for false imprisonment, the admission of defendant in one of his pleas is sufficient proof of his having caused the arrest of the plaintiff, although another of the pleas is the general issue, and that such an admission relieves the plaintiff from the necessity of making other proof of the fact."

In *Viger* v. *Beliveau* (4), a plea of tender had been fyled with a plea of general issue, and the Superior Court had dismissed the actoin. The case was carried to appeal, and it was then held by Aylwin, Duval, Meredith and Monk JJ., that the defendant having ad-

(1) Bioche Vo. acquiescement No. 95.

(2) 25 L. C J. 168.

(3) 5 L. C. J. 50.

(4) 7 L. C. J. 199.

1883

V. HUDON COTTON CO. v. CANADA SHIPPING CO.

Taschereau J.

mitted by one of his pleas the existence of a verbal lease, the admission of this plea should be taken against him, although he had also pleaded the general issue, and that when there is a plea of tender for part of the sum claimed the action cannot be dismissed *in toto*.

In *Bussière* v. *Blais* (1), Mr. Justice Meredith, for the court, referring to an admission in the defendant's plea, says: "Here we have a very unequivocal recognition of the plaintiff's right of property; and according to a recent judgment of the Court of Appeals, the plaintiff has a right to the benefit of that admission, notwithstanding the *défense en fait* filed by the defendant."

Upon the question whether the defendants, present appellants, are entitled to claim a reduction for the alleged deficiency in the quantity of the coal, I concur fully in what the learned Chief Justice of the Court of Queen's Bench said for the court, as follows:

Upon the second question, we are, I believe, all of opinion that the respondent having made his option to take the cargo of coal for the quantity mentioned in the bill of lading, instead of having it reweighed with the sellers, as he was entitled to, cannot claim a reduction in the price on account of deficiency in the quantity, except on the ground of fraud, and there is no fraud proved in this case. It would be extremely dangerous to allow a purchaser who has chosen to receive delivery in bulk and without weighing, to assert, two or three weeks after such delivery, and after the coal has been mixed with other coal, so as to prevent any verification by the seller, that there was, according to his own calculation, a deficiency for which he was entitled to a reduction in the price of his contract. The respondents are, we consider, by the option which they have made to receive the coal in bulk, concluded against claiming a reduction of the price of the coal. Moreover, their laches in not giving notice of their intention to weigh the coal and in mixing it with other coal, so as to prevent verification, before they informed the sellers of the pretended deficiency, would in any ordinary case, be sufficient to reject their claim for a reduction, and

(1) 7 L. C. R. 245.

1883

V. HUDON COTTON CO. v. CANADA SHIPPING CO.

Taschereau J.

we are therefore of opinion that on both grounds, the tender made by the respondents is insufficient.

This seems to me unanswerable. The defendants, appellants here, having waived their right to have the quantity verified at the time of delivery, made the option to take the bill of lading as conclusive proof of the quantity They are estopped from now complaining of their own option. There certainly was no fraud on the part of the vendors; there may have been an error in the shipment of the cargo, or a part of it may have been jettisoned. Moreover, if the defendants, notwithstanding their option, thought that they had a claim for deficiency, they should have given notice to the plaintiffs of their intention to reweigh, and should certainly not have mixed the coal. Their mixing the coal with other in their yard was another acceptance of it, as sold per bill of lading. The delay in ascertaining that deficiency and notifying the plaintiffs of it was also too long. "Il suffit de remarquer que la verification doit être provoqué et faite dans le plus bref délai," says Pardessus No. 285. All the authorities are clear in the same sense.

I am of opinion that the appeal should be dismissed. It is unnecessary for me to consider the question decided affirmatively by the court appealed from, whether under our law, a principal can bring an action upon a contract made by his agent, when such agent contracted in his own name and without disclosing his principal. I do not wish my silence on this point, however, to be construed as throwing a doubt on my part on the correctness of the decision given by the court below on that part of the case.

GWYNNE J.—This is an appeal by the defendants in an action brought against them in the Superior Court of the Province of Quebec by the plaintiffs upon a contract alleged to have been entered into between the

plaintiffs and defendants through the intervention of a broker by bought and sold notes. The plaintiffs in their declaration, in short substance, allege that on the 13th day of August, 1879, the plaintiffs acting by a firm of the name of Thompson, Murray & Co, doing business at Montreal and general agents of the plaintiffs for the Province of Quebec, through James S. Noad of Montreal, broker, sold to the defendants at their request a certain cargo of best South Wales black vein steam coal, then on board the plaintiffs' ship, called the Lake Ontario, at the rate of three dollars and seventy-five cents per ton of two thousand two hundred and forty pounds, customs duty paid ex ship. That said cargo according to to the bill of lading of said ship contained eight hundred and ten of said tons and five hundred weight; that (among other things) it was stipulated as a condition of the said sale that the defendants should have the option of taking the said coal at the total weight appearing on the face of the bill of lading or of having said cargo reweighed at the expense of the seller and of paying for the exact number of tons so found to be contained in said cargo, that thereupon the said Noad on the said 13th day of August delivered to the defendants a bought note signed by him, setting out the said sale and said terms and conditions thereto attached, and on the same day delivered to said Thompson, Murray & Co. an identical note signed by him called a sold note, which last note is in the words and figures following (1).

That the ship arrived at Montreal on 3rd September; that the defendants thereupon elected and agreed to accept the said cargo according to the weight given to it on the face of the bill of lading, being entitled to any surplus and accepting the risk of deficit that might exist over or below the said bill of lading weight and

(1) See head note.

1883

V. HUDON COTTON CO. v. CANADA SHIPPING CO.

Gwynne J.

refused to have the same re-weighed at the expense of the vendor; that the said cargo was duly delivered to the defendants, duty paid ex ship as per bill of lading, on the 3rd of September, 1879; that said bought and sold notes and the invoice which was rendered to the defendants according to the usage and custom of trade in that behalf and the previous dealings between said parties bear the name of Thompson, Murray & Co., but said coal was ever the property of the plaintiffs, and plaintiffs were the principals in said transaction, and the said sale was made in plaintiffs' interest and on their behalf alone, as the defendants well knew; the declaration then alleges non-payment of the price agreed upon or any part thereof by the defendants. The declaration also contains a count for goods sold and delivered.

To this declaration the defendants plead, 1st. A general denial of all allegations in the declaration; that the defendants never had any dealings with the plaintiffs, but that in all transactions of which mention is made in the declaration, the defendants contracted only with the firm of Thompson, Murray & Co.

2nd plea. Admitting that the defendants, on the 13th August, 1879, bought from Thompson, Murray & Co., through Noad, a cargo of eight hundred and ten tons (of twenty-two hundred and forty pounds each ton) and five hundred weight of the best South Wales black vein steam coal, mentioned in the bill of lading thereof, as being on board the ship Lake Ontario, then on her voyage and expected to arrive within a few days at Montreal, at the price of $3 75 per ton admitting also the arrival and the delivery to the defendants of a quantity of coal which the defendants caused to be weighed on an approved scale, avers that instead of said coal weighing 810 tons, 5 cwt., as bought by defendants, and as men-

tioned in the bill of lading, it weighed only 755 tons and 580 lbs.; that by the custom and usage of merchants the vendor of a cargo of coal as per bill of lading is always understood to sell the quantity mentioned in the bill of lading without any large or important variance therefrom, the purchaser being at all events understood to pay only for the quantity delivered; that vessels of the class of the "Lake Ontario," in transporting coal are well known to the mercantile community not to vary to an extent exceeding five or six tons, the surplus or deficiency being always less than ten tons, but that the deficiency of the cargo in question was 55 tons; that in purchasing said cargo and in making option to receive the same as per bill of lading instead of having said coal weighed at the expense of the vendor, the defendants never agreed or intended, and could never have been understood according to the custom and usage of trade to have agreed or intended, to assume the risk of a deficiency in said coal of more than ten tons; that the plaintiffs, at the time of the shipment of the coal on board said vessel and at the time of said contract and of the delivery of the coal, were and are now the owners of said vessel; that the captain of the said vessel as servants of the plaintiffs in signing the said bill of lading, represented that the quantity named therein was on board the said vessel; and that it was on the faith of that representation and of similar representations made by said firm of Thompson, Murray & Co., that the defendants agreed to take the said cargo as per bill of lading without asking the reweighing thereof; that the said plaintiffs were and are aware that the said master of said vessel has been in the habit of signing bills of lading for cargoes of coal without ascertaining the quantity thereof, and have allowed him to do so, assuming themselves the re-

1883

V. HUDON COTTON CO. v. CANADA SHIPPING CO.

Gwynne J.

sponsibility incurred in consequence; that, to the knowledge of the plaintiffs, the said ship was not loaded in the ordinary and regular way, and said cargo was not weighed at the time when it was put on board the said vessel; that neither the plaintiffs nor Thompson, Murray & Co. paid for any more than the quantity of 755 tons and 580 pounds, the quantity delivered to defendants, and that said plaintiffs and Thompson, Murray & Co. well knew that the said cargo was not of the quantity of 810 tons, 5 cwt., but only of the quantity delivered to defendants as aforesaid, and that said Thompson, Murray & Co. in offering said cargo to be accepted for a cargo of 810 tons, 5 cwt., practiced a fraud upon the defendants.

The plea then alleges a tender to Thompson, Murray & Co. of $2,890.72, being at the rate of $3.75 per ton for 755 tons and 580 lbs. delivered to the defendants, and ten tons added as the extreme limit of variance allowed according to the custom of the trade together with interest thereon from the 3d September, 1879, which sum Thompson, Murray & Co. refused, and thereupon the defendants bring it into court and plead it as a payment into court in this cause.

To the first of these pleas the plaintiffs reply denying all the defendants' allegations therein to be true and reaffirming the truth of the allegations in the declaration.

To the second plea they reply that they were and are wholly ignorant of any weighing of said coal as alleged in the plea, and that they never had any notice thereof, and that the defendants chose to buy as per bill of lading instead of actual weighing, in the hope of making a profit thereby as they would have been entitled to do even had the surplus amounted to 50 or 60 tons.

The plaintiffs further specially deny that any such

1883

V. HUDON COTTON CO. v. CANADA SHIPPING CO.

Gwynne J.

custom and usage of merchants as alleged in said plea exists. That cargoes vary considerably in their delivery weights, and that the defendants accepted all risk in connection with the actual output of the cargo in question. That the said bill of lading was signed by the captain of the "Lake Ontario" in good faith, after the customary weighing at the point of shipment, and in the belief that the said bill of lading represented the *bonâ fide* weight of said cargo.

That said cargo was bought on account of and for the plaintiffs who paid the price thereof and the Canadian customs duties thereon, upon the basis of the total weight set forth in said bill of lading, and the defendants specially deny that the captain of the Lake Ontario ever to the knowledge of the plaintiffs acted in the manner falsely set forth in said plea, and they deny that the said ship was not loaded in the ordinary and regular way, and that the said cargo was not weighed at the time the coal was laden on board the vessel, as falsely alleged in said plea, and they aver that the defendants accepted said cargo according to said contract and their said option to take the same as per bill of lading, and for more than a month after said acceptance did not pretend or object that they were not liable because of any of the matters alleged in the said plea and they have never tendered back such cargo and the plaintiffs deny that they recognize the tender alleged in defendants' plea as made previous to the institution of the action, but insist upon its insufficiency. And for second answer to said second plea the plaintiffs say that the allegations of said plea are false and that the allegations of plaintiffs' declaration are true.

The above pleadings contain all the material issues joined between the parties in this action.

As to the first part urged by and on behalf of the defendants, namely: that the contract was with Thomp-

1883

V. HUDON COTTON CO. v. CANADA SHIPPING CO.

Gwynne J.

son, Murray & Co., who therefore should be the plaintiffs, it is not open to the defendants to urge that contention in the present action, for after a plea of payment into court the defendant cannot nonsuit the plaintiff nor take any objection however valid to the sufficiency of the cause of action to which he has so pleaded. *Wright* v. *Goddard* (1). The plea admits all material allegations in the declaration which the plaintiff might be compelled to prove in order to recover the amount paid in. *Dyer* v. *Ashton* (2); *Cooper* v. *Blick* (3); *Wright* v. *Goddard*.

Then, as to the allegations in the defendants' second plea to the effect that the plaintiffs were aware that their servant, the captain of their vessel, was in the habit of signing bills of lading for cargoes of coal without ascertaining the quantity thereof; and that to the knowledge of the plaintiffs their vessel was not loaded with the cargo in question in the ordinary and regular way, for that the cargo was not weighed at the time it was put on board the vessel; and that the plaintiffs paid for no more than the 755 tons and 580 lbs. delivered to the defendants; and that they knew the cargo, as delivered to the defendants, contained no more; all these allegations impose upon the defendants the burden of proving them and they have failed to do so. The case, therefore is made to rest upon the allegation of difference between the quantity as stated in the bill of lading and that delivered to the defendants, and the alleged usage of the trade in accepting delivery of a cargo as per bill of lading.

Upon this point, the contention of the plaintiffs is that when a purchaser of a cargo accepts, as the defendants did here, delivery of the cargo as per bill of lading, both vendor and purchaser assume the risk of any

(1) 8 A. and E. 144. (2) 1 B. & C. 3.
(3) 2 Q. B. 915.

1883

V. HUDON COTTON CO. v. CANADA SHIPPING CO.

Gwynne J.

variance, however great it may be, between the actual quantity delivered and that as stated in the bill of lading, so that in this case, if in truth only 100 tons had been actually delivered, the defendants must nevertheless pay for 810 tons, and if 1200 tons had been delivered, in fact, they should still only have to pay only for the 810 tons; on the contrary, the contention of the defendants is that it is well understood in the trade that in a vessel of the class of the Lake Ontario the difference should not exceed ten tons, and for such a variance it is admitted by the defendants that the vendor and purchaser alike assume the risk. The contention of the plaintiffs, if it should prevail, would establish a condition of things much more favorable to a vendor than to a purchaser, as it is more likely to occur that a cargo on board of a vessel should be less than the capacity of the vessel than that it should be, to any considerable extent, greater than the vessel's capacity; but the plaintiffs contention seems so to shock a sense of justice that no such usage as they contend for ever could, in my judgment, be permitted to prevail in law, and indeed it is not suggested in the evidence that such a usage is supposed to exist, or that, in fact, such a case ever occurred. The evidence seems to me to establish that a clearly proved variance of 55 tons out of a cargo of 810 tons, as alleged here, would be so utterly exceptional and unreasonable that the law could not justify the plaintiff's recovery for 810 tons, if in truth only 755 tons had been delivered; and if the plaintiffs here had had notice given them of the intended weighing by the defendants, on their own scales, of the cargo as delivered so as to enable the plaintiffs to check the weights, and if then it had been established beyond doubt that the alleged deficiency in the cargoes existed, and if the defendants had promptly asserted their claim and ascertained the deficiency so as to enable the

1883

V. HUDON COTTON CO. v. CANADA SHIPPING CO.

Gwynne J.

plaintiffs to assert their claim against their vendors to correct an error which, however it occurred, we must upon the evidence, take to have been an innocent mistake, I cannot doubt that the defendants would have been entitled to redress in this action. It is, however, suggested that although it is admitted that for such a deficiency as is alleged by the defendants if satisfactorily proved to have existed they are still entitled to redress, yet that they are not so entitled as a defence to the present action, and that to obtain redress they must bring an action upon the bill of lading.

I can see no foundation whatever for this positon. In fact the defendants had nothing to say to the bill of lading, in the sense of its having ever belonged to them as their property. They did not acquire their title to the cargo through any transfer to them of the bill of lading. It is not indeed suggested that it was assigned to them. They acquired their title by the contract contained in the bought and sold notes by which they might accept delivery either according to the statement of the qantity in the bill of lading or by weight over the ship's side, and they had no occasion even to look at the bill of lading, unless it might be to see whether the qantity stated in it was the same as was stated in their contract. The bill of lading as an evidence of property discharged its functions when the plaintiffs, who were the consignees and owners of the cargo, received the cargo. To admit that the defendants are entitled to redress and compensation for the alleged deficiency, if they bring their action upon a bill of lading which never was their property, seems to me to be a mockery of their complaint. However, inasmuch as the defendants gave no notice to the plaintiffs of their intended weighing of the coal upon the defendants' own scales, and so the plaintiffs had no opportunity to check the weights, and as the defend-

ants did not make prompt claim upon the plaintiffs for the alleged deficiency, I do not think it would be reasonable to hold the plaintiffs to be bound by the *ex parte* weighing of the defendants, upon the evidence given in the case, or to recognise a claim so tardily made by the defendants.

Appeal dismissed with costs.

Solicitors for appellants: *Beique, McGoun & Emard.*

Solicitors for respondents: *Davidson & Cross.*

(BY ORIGINAL BILL)

DENIS O'SULLIVAN ..... PLAINTIFF;

AND

WILLIAM HARTY AND CHARLES W. WELDON ..... } DEFENDANTS.

1884
* Nov. 28,
1885
* Mar. 16.

(BY ORDER OF REVIVOR)

JOHN KEHOE, EXECUTOR OF THE LAST WILL AND TESTAMENT OF DENIS O'SULLIVAN, DECEASED (PLAINTIFF) } APPELLANT;

AND

WILLIAM HARTY AND CHARLES W. WELDON (DEFENDANTS)..... } RESPONDENTS.

Time for appealing under S. and E. C. A. sec. 25—Whether from pronouncing or entry of judgment—Matters to be settled by registrar.

Where any substantial matter remains to be determined on the settlement of the minutes before the registrar, the time for appealing to the Supreme Court of Canada will run from the entry of the judgment, otherwise it will run from the date on which the judgment is pronounced. In the Province of Quebec the time runs in every case from the pronouncing of the judgment.

MOTION for leave to appeal when more than thirty days had elapsed since the pronouncing of the judgment, but within thirty days of the formal entry of judgment by the registrar of the court.

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

1884

O'SULLIVAN v. HARTY.

The judgment in this case was pronounced in the Court of Appeal on June 30th, 1884, the two following months being the vacation of the court On September 13th O'Sullivan deposited $500 and applied for leave to appeal, which was refused, the court holding that the application should have been made within thirty days from the date of the pronouncing of the judgment, as the vacation did not prevent the time from running.

A substantial question affecting the rights of the parties arose on the settlement of the minutes, and was subsequently brought before the court for decision. In consequence of this the judgment was not formally entered until November 14th, 1884.

On November 27th, 1884, O'Sullivan applied to a judge of the Supreme Court of Canada for leave to give security under sec. 31 of the Supreme Court Act as amended by sec. 14 of the Amendment Act of 1879. This application was referred to the full court.

D. A. O'Sullivan supported the motion.

J. L. Whiting contra.

Sir W. J. RITCHIE C.J.—This was a motion made in chambers for an order allowing an appeal to this court from the judgment of the Court of Appeal for Ontario, or for an order that the appellant may be at liberty to give proper security.

I have been a good deal embarrassed as to what should be done in this case. It is claimed that in Ontario the time for appealing should run from the time the judgment was pronounced, and that as the judgment in this case was pronounced before vacation, the application should have been made during vacation. I was of opinion at first that the party was not obliged to apply during vacation, but this application need not be decided on this point. The decision was pronounced in June, but the minutes were not settled

1885

O'SULLIVAN v. HARTY.

Ritchie C.J.

and entered until some time in the autumn. The question is whether the time runs from the date of the pronouncing of the judgment, or from the entry of the certificate. I understand the practice in Quebec to be that the judgment is always entered as of the date on which it was pronounced, and therefore no question can arise as to appeals coming from the Province of Quebec; and also in Ontario where there is simply a judgment declaring that the appeal is dismissed or allowed as the case may be, and there is nothing more to be done; but when the decision requires something more to be done at the settlement of the minutes, as in this case whether the plaintiff should be held personally liable for the costs, then I think that until the settlement of the minutes and entry of the certificate a party should not be compelled to take his appeal. I am therefore inclined to think the time ought to run in this case from the date of the entry of the certificate, which was entered on the 14th of November last.

STRONG J. was of opinion that the motion should be granted.

FOURNIER, HENRY AND TASCHEREAU JJ. concurred.

Motion allowed and leave to appeal granted.

Solicitor for appellant: *Robert Mahon.*

Solicitors for respondents: *Britton & Whiting.*

1885 THOMAS WALMSLEY (PLAINTIFF).....APPELLANT;
*Dec. 7.

AND

1886 KATE GRIFFITH, CARRIE L. GRIFFITH, GEORGE WRIGHT, PHILIP J. SLATER, J HORNBROOK, W. J. McCORMACK, JOHN DONOGH, WILLIAM BADENACH, WALTER H. BLIGHT, ROBERT DODDS AND A. G. ALLISON (DEFENDANTS)..... } RESPONDENTS.
*April 9.

Appeal—S. and E. C. Act sec. 25—When time begins to run—Substantial matters to be settled before entry of judgment—Dismissal of plaintiff's bill.

Where the Court of Appeal for Ontario reversed the judgment of the Vice Chancellor in favor of the plaintiff, and dismissed the action:

Held, that in such case no substantial question could remain to be settled before the entry of the judgment, and the time for appealing to the Supreme Court of Canada would therefore run from the pronouncing of the judgment. *O'Sullivan* v. *Harty* (1) distinguished.

MOTION to dismiss appeal on the ground that it was not brought within thirty days after the pronouncing of the judgment.

The suit in this case was brought for specific performance of an agreement by the defendants, the Griffiths, to sell certain lands to the plaintiff, and by the other defendants, the Oddfellows, to purchase the same lands from the plaintiff at an advance of the purchase price. The bill alleged collusion between the defendants to deprive plaintiff of the benefit of the agreement.

The defence of the Griffiths was that plaintiff had been their agent to effect a sale of the property to the

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

(1) 13 Can. S. C. R. 431.

1885

WALMSLEY v. GRIFFITH.

other defendants, but by fraudulently representing that he could not effect such sale induced them to sell to himself.

The Oddfellows alleged, in their statement of defence, that they had been damnified by the difficulties which had arisen between plaintiff and the Griffiths, and claimed, by way of cross-relief, a rescission of their contract and re-payment of the amount paid thereon. The defendants all denied the existence of any collusion between them as alleged.

The Vice Chancellor found that plaintiff was not the agent of the Griffiths, that the two contracts were independent, and decreed a specific performance with costs.

The Court of Appeal reversed this judgment, holding that the plaintiff was guilty of such concealment, or false representation, to the Griffiths as raised an equity against him sufficient to prevent the court from awarding specific performance.

The judgment of the Court of Appeal was rendered on October 15th, 1884. On October 21st, 1884, notice of appeal was served.

On the 19th November, notice of filing bond for security, and of an application for its allowance was served. The application was made to Osler J. A. and objection was taken that the thirty days limited for bringing the appeal by section 25 of the Supreme and Exchequer Court Act had expired.

On the 26th November, notice of motion to extend time for appealing under sec. 26 of the Supreme and Exchequer Court Act was served. This motion was heard by Patterson J. A. On the 3rd December, 1884, the motion was dismissed with costs.

On the 16th day of December, 1884, the certificates of the judgment of the Court of Appeal were settled and entered.

In the appeal of the Griffiths the certificate of the

1885

WALMSLEY v. GRIFFITH.

judgment was to the effect that it was ordered and adjudged that the appeal should be allowed with the sum of $601.06 costs, to be paid by the respondent, Walmsley, to the appellants, the Griffiths, and that the action in the court below be dismissed with costs.

In the appeal of the defendants, other than the Griffiths, the certificate was to the effect that it was ordered and adjudged that the appeal should be allowed with $507.26 costs, to be paid by Walmsley to said defendants, and the action dismissed with costs, and that Walmsley should re-pay to the said defendants the sum of $500, the amount of deposit paid by defendants to Walmsley, together with interest at six per cent., from the 17th February, 1882, making the sum of $580.

On the 19th December, 1884, the application for leave to give security pursuant to sec. 31 Supreme and Exchequer Court Act, as amended by sec. 14 of the Supreme Court Amendment Act, 1879, was made to Mr. Justice Henry in chambers, who enlarged the application to the 14th January, 1885.

On the 14th January, 1885, the application was heard by the Chief Justice of the Supreme Court in chambers, who dismissed the application with costs, being of opinion that where an application has been made under sec. 26 of the Supreme and Exchequer Court Act for an extension of time for appealing, alleging "special circumstances," to a judge of the court below who had a full knowledge of all the facts of the case and who had thought proper to dismiss the application made to him, a judge of the Supreme Court of Canada ought not to interfere.

His lordship also expressed a doubt as to whether an application could be made at all to a judge of the Supreme Court of Canada under sec. 31, as amended, after the expiration of the time limited for appealing by sec. 25.

1885

WALMSLEY v. GRIFFITH.

On the 15th January, 1885, the plaintiff made an application to Mr. Justice Burton for leave to pay into court to the credit of the cause, the sum of $1,000 as security for the defendant's costs of appeal to the Supreme Court; $500 as security to the Griffiths, and $500 as security to the defendants other than the Griffiths.

Judgment was reserved by Mr. Justice Burton till till the 4th November, 1885, when he allowed the application, being of opinion that the Supreme Court had decided in *O'Sullivan* v. *Harty* (on the 16th March, 1885,) that in all cases the time for appealing would run from the entry of the certificate of the judgment.

The defendants appealed from the order of Mr. Justice Burton to the full Court of Appeal, which court, on the 24th November, 1885, sustained the order. On the 3rd December, 1885, the case was filed in the Supreme Court of Canada.

On the 7th December, 1885, the respondents moved to dismiss the appeal.

The question to be decided was whether the time for appealing ran from the date of the pronouncing of the judgment of the Court of Appeal—the 15th October, 1884—or from the date of the entry of the certificates of such judgment—the 16th December, 1884.

Arnoldi for the defendants, the Griffiths, and *J. A. Patterson* for the other defendants, supported the motion.

J. B. Clark contra.

SIR W. J. RITCHIE C. J.—The proceedings in this case which gave rise to the present application were caused by a misunderstanding in the Court of Appeal as to the decision of this court in the case of O'*Sullivan* v. *Harty*. In that case the judgment of the Court of Appeal was not entered until November 14, 1884,

1886

WALMSLEY v. GRIFFITH.

Ritchie C.J.

although judgment had been pronounced on the 30th June, 1884, the delay having been occasioned by a substantial question affecting the rights of the parties having arisen on the settlement of the minutes. Such question was discussed before one of the judges, and subsequently before the full court before being finally determined.

On November 27, 1884, the respondent in the Court of Appeal applied to a judge in chambers of the Supreme Court of Canada for leave to give security under section 31 of the Supreme Court Act as amended by section 14 of the Supreme Court Amendment Act of 1879. This application was referred to the full bench which held that the time for appealing in that case, under section 25 of the Supreme Court Act, began to run from the 14th of November, 1884, the date of entry of the judgment of the Court of Appeal.

What we decided in that case was:

That where any substantial matter remains to be determined before the judgment can be entered the time for appealing runs from the entry of the judgment. Where nothing remains to be settled, as for instance in the case of the simple dismissal of a bill, or where no judgment requires to be entered, the time for appealing runs from the pronouncing of the judgment.

The Court of Appeal, however, appears to have been under the impression that this court had laid down a cast-iron rule that the time should run in every case from the entry of the judgment.

In this case I should have less hesitation in reaffirming the rule, because application to extend the time for appealing was made by the appellants to one of the judges who had heard the case in the Court of Appeal, who refused the application after considering all the circumstances of the case, and came to the conclusion that it was not a case in which the indulgence should

1886

WALMSLEY v. GRIFFITH.

Ritchie C.J.

be granted, and that the time should not be extended. The appellants then applied to me, and I came to the conclusion that I ought not to interfere with the decision of the judge of the court below, and I refused the application.

There being nothing to bring this case within the exception, as in the case of *O'Sullivan* v. *Harty*, I think we must act on that decision until some other rule is established. The present appeal comes within the rule heretofore acted on; we must therefore, I think, grant the motions and dismiss the appeal.

FOURNIER, HENRY, TASCHEREAU and GWYNNE JJ. concurred.

Motion granted and appeal dismissed with costs.

Solicitors for appellant: *Foster, Clarke & Bowes.*

Solicitors for respondents, the Griffiths: *Howland, Arnoldi & Ryerson.*

Solicitors for respondents, Geo. Wright and others: *Kerr, MacDonald, Davidson & Patterson.*

Solicitor for respondents, Hornbrook and McCormack: *John MacGregor.*

JOHN MARTLEY AND TRUMAN CELAH CLARK (DEFENDANTS)..... } APPELLANTS;

AND

ROBERT CARSON AND JOSEPH EHOLT (PLAINTIFFS)..... } RESPONDENTS.

1886

March 26.

*May 17.

Appeal—When time begins to run—S. and E. C. Act sec. 25—Entry of judgment—Varying minutes.

Where, after the minutes of a case decided by the Supreme Court of British Columbia were settled, the plaintiffs moved before the full court to have the minutes varied, and they were varied by striking out certain declarations respecting the rights of the

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

1886

MARTLEY v. CARSON.

plaintiff C. and the defendant M. respectively, and also with respect to the costs payable by the plaintiff E.

Held, that there being substantial questions to be decided before the judgment could be entered the time for appealing to the Supreme Court of Canada would run from the date of the entry of the judgment. *O'Sullivan* v. *Harty* (1) followed.

MOTION to dismiss appeal on the ground that it was not brought within thirty days after the pronouncing of the judgment.

This was an appeal from the Supreme Court of British Columbia, in an action respecting water rights brought by Carson and Eholt against the appellants Martley and Clark. Judgment was pronounced 20th August, 1885. On the 28th August the defendants (appellants) gave notice of appeal and security, and obtained from the plaintiffs (respondents) a consent to three months' further time being given to file the case. The three months having expired without the case being ready, the appellants applied in chambers to Ritchie C.J of the Supreme Court of Canada, for further time to appeal. This application was refused on the ground that the appellants had not satisfactorily accounted for the delay. On the 8th January, 1886, the minutes of the judgment were settled. On the 9th January the plaintiffs (respondents) moved before the full court of British Columbia to vary the minutes. The minutes were varied by striking out certain declarations respecting the rights of the plaintiff Carson and the defendant Martley respectively, and also with respect to the costs payable by the plaintiff Eholt. On the 26th of January, 1886, the judgment of the court below was entered. The appellants next day gave fresh notice and went on with the appeal.

Chrysler supported motion. *McCarthy* Q.C. *contra.*

By the court: Motion refused with costs.

Solicitors for appellant Martley: *Davie & Pooley.*

Solicitor for appellant Clark: *Charles Wilson.*

Solicitors for respondents: *Drake, Jackson & Helmcken.*

(1) 13 Can. S. C. R. 431.

THE CITY OF WINNIPEG (DEFENDANTS) APPELLANTS; 1887

AND

ARCHIBALD WRIGHT (PLAINTIFF).....RESPONDENT. *May 4. *May 11.

Appeal—Dismissed by Judge in chambers—Motion to rescind order—Special circumstances.

A party seeking an appeal obtained an extension of time for filing his case but failed to take advantage of the indulgence so granted, whereupon, on the application of the respondent, the appeal was dismissed by the judge in chambers. On motion to rescind the order dismissing the appeal:

Held, Strong and Gwynne JJ. dissenting, that under the circumstances of the case the court would not interfere by rescinding the judge's order and restoring the appeal.

MOTION to rescind an order made by Mr. Justice Taschereau, in chambers, dismissing the defendant's appeal.

The facts presented to the court on the motion were:

That judgment in the case was delivered in the Supreme Court of Manitoba on December 1st, A. D. 1886. That notice of appeal was duly given and the time for perfecting the security was extended to January 15th, 1887, and security was perfected on January 14th. That on March 15th an order was made by Mr. Justice Strong in chambers, extending the time for filing the case to April 8th. The case was not filed within the time allowed, and on April 25th, on application to Mr. Justice Taschereau in chambers, an order was made dismissing the appeal. The present motion was made to rescind the order of Mr. Justice Taschereau and have the appeal restored.

---

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

1887

THE CITY OF WINNIPEG v. WRIGHT.

The only ground upon which the motion was founded, and the delay in prosecuting the appeal accounted for, was, as appeared by the affidavits read, that from the length of the case and the pressure of work in the printing office it could not have been printed earlier, and the appellants offered to go to hearing during the then present sitting of the court.

McCarthy Q. C., in support of the motion, asked leave to read affidavits not before the judge in chambers, citing Chit. Arch. Q. B. Prac. (1), which the court granted. The learned counsel then read the affidavits excusing the delay, and contended that the motion should be granted as the plaintiff would not be prejudiced if the case was argued at the present sitting. The appeal could, under no circumstances, have been brought on before, and if there was any improper delay the infliction of costs would be sufficient punishment.

Gormully, *contra*, claimed that the court had no jurisdiction to entertain the motion. The matter can be dealt with by a judge in chambers, and there is no appeal from his decision. Citing Rev. Stats. Can. Ch. 135, sec. 53. *Kilkenny* v. *Fielding* (2).

McCarthy Q. C. in reply referred to *Regina* v. *Mayor &c*, *of Maidenhead* (3).

Sir W. J. RITCHIE C.J.—This is a case in which the proceedings were entirely regular. The appellants obtained an extension of time in the court below to enable them to perfect their security, which was accomplished on the 14th of January. This gave them until the 14th of February to file their case which they did not do, but on the 15th of March they obtained, by an order of a judge of this court, a further extension of time until the 8th of April to enable them to file their case.

(1) 14 Ed. p. 1420. (2) 2 L. M. & P. 125 note a.
(3) 9 Q. B. D. at p. 498.

1887

THE CITY OF WINNIPEG v. WRIGHT.

Ritchie C.J.

Of this indulgence the appellants neglected to avail themselves, and also neglected to apply for any further extension of time. In fact they took no steps whatever in the case with a view to the prosecution of their appeal.

The respondent, being entirely regular, was entitled, under the statute and rules of the court, to have the appeal dismissed, and applied to Mr. Justice Taschereau for an order dismissing the appeal. When this application came on for hearing, and not until then, the appellants simply asked that further time be granted, but were not, even then, in a position to have the case inscribed, or to file their factum, neither being ready. This was only seven days before the sitting of the court in this present month of May, and not in time to comply with the rules of the court to bring the case on for hearing in the ensuing sittings.

The learned judge, in the exercise of his discretion, refused to grant any further time, but granted the order of dismissal asked for. There was no illegality, irregularity, or impropriety whatever in what the the learned judge did.

I do not think the appellants have shown any sufficient excuse for having neglected to avail themselves of the indulgence granted to them, nor any reason for having neglected to apply within the proper time for an extension of time had they desired it. The appeal having been thus regularly dismissed, in accordance with the statute and rules of the court, and the respondent being legally entitled to the benefit of his judgment, and no miscarriage having been shown, the learned judge not having gone wrong in law, and there having been no mistake of facts shown, nor anything in the circumstances of the case that would justify this court in saying that there had not been a reasonable exercise of discretion which should not be lightly interfered with,

1887

THE CITY OF WINNIPEG v. WRIGHT.

Ritchie C.J.

I can discover no grounds for rescinding an order thus legally and regularly made.

The rights of parties in judgments pronounced in their favor are very clearly set forth in three cases to which I shall call attention. The first I shall read at length, as it has likewise a bearing on the cases of *O'Sullivan* v. *Harty* (1) and *Walmsley* v. *Griffith* (2) lately decided by this court, as to which there appears to have been considerable misunderstanding in the Court of Appeal for Ontario.

In *International Financial Society* v. *City of Moscow Gas Company*, (3) James L. J. says:

"No other appeal"—that is, an appeal from a judgment or order, from a judgment, technically so called, or an order other than an interlocutory order.—"No other appeal shall, except by such leave, be brought after the expiration of one year"—that is a positive direction. Then, of course, the year would be calculated from the time at which the judgment is supposed to take effect; and by the order and by some of the former rules the judgment takes effect from the time when it was actually pronounced. That would be the natural construction if it stopped there. But there is a further provision made as to calculating time. The said respective periods shall be calculated from the time at which the judgment or order is signed, entered, or otherwise perfected (I am paraphrasing it) except in the case of the refusal of an application, and in that case the said respective periods shall be calculated from the date of such refusal. It appears to me impossible to say that it is not the plain grammatical construction of these words. That is to say, where it is necessary for any purpose, in order to enable a man to see what he is appealing from, that the judgment or order should be perfected, so that he may see exactly what is the final form which it takes, and by which he may be aggrieved, then he has a twelvemonth from that time to consider his appeal; but where the application for final judgment or order is simply refused, although refused with costs, he knows exactly the fate of his application, and then he has a twelve month from the time at which he knows that the order with which he is dissatisfied has been made. It appears to me that that is the meaning of the words, and is exactly within the object for which the rule is framed. You take it from the time of refusal—that is all the appellant wants to know—you take it from the time when the order

(1) 13 Can. S. C. R. 431. (2) 13 Can. S. C. R. 434.

(3) 7 Ch. Div. 244.

is perfected when there may be reasonable ground for his saying, I want to see the shape in which the final order is made. In this case there was an application made to the court—as every bill used to be drawn—praying that a certain deed might be set aside, or a certain relief granted, and that application was refused.

Thesiger L. J.:

And lastly, it being admitted that there are some final judgments and orders which do come within the words "in case of the refusal of the application," for that has been practically admitted, it seems to me to reasonably follow that all judgments or orders, whether final or interlocutory, should be included in those words, and consequently an appeal against the refusal of an application of whatever sort should date from the time when the decision is given, and not from the time when an entry of that decision is made, and the same case on application to enlarge the time for appealing.

And in the same case, on application to enlarge the time for appealing, James L. J. said:

I am of opinion that we cannot give any time. The respondents here say they are within the rule, and they have a right (and I think it is as valuable a right as anything which a subject has in this country) to know when they can rely upon the decree or order in their favour. The limitation of the time to appeal is a right given to the person in whose favor a judge has decided. I think we ought not to enlarge that time unless under some very special circumstance indeed, that is to say, if there had been any misleading through any conduct of the other side, as was mentioned in the analagous case of vacating inrolment which came before Lord Cottenham, and afterwards before Lord Chelmsford, in which it was laid down that the right of the suitor was *ex debito justitiæ* to keep his inrolment of the decree if it was made in due time, unless in very special cases. See *Wardle* v. *Carter* (1); *Wildman* v. *Lade* (2). For instance, where there was anything like misleading on the part of the other side, or where some mistake had been made in the office itself, and a party was misled by an officer of the court, or again where some sudden accident which could not have been foreseen—some sudden death, or something of that kind, which accounted for the delay; in such cases leave might be given. But simply where a man says, "I looked at the order, and I *bonâ fide* came to the conclusion that I had up to a particular day, and I determined to take the last day I could," then he has taken upon himself to calculate the last day, and if he has made a mistake in calculating the last day he must

(1) 1 Mylne & C. 283. (2) 4 DeG. & J. 401.

1887

THE CITY OF WINNIPEG v. WRIGHT.

Ritchie C.J.

abide by the consequences of that mistake. Beyond all question, in this case there was abundance of time to have brought the appeal if it was intended really and *bonâ fide* to appeal from the order as pronounced.

Baggallay L. J.:

I am of the same opinion. This court has before expressed an opinion that the mere fact of a misunderstanding by the parties concerned of the provisions of the rules is not such a special circumstance as to induce the court to give that special leave which is required to extend the time.

In *Craig* v. *Phillips* (1), Jessel M. R. said:

This is an an application for leave to appeal from a final order or judgment of Vice Chancellor Bacon pronounced on the fourth of April, 1876, dismissing the plaintiff's bill with costs. Nothing then remained to be done; it was a final judgment entirely disposing of the suit. No fund remained in court; there were no accounts to be taken; the whole litigation was at an end. If the plaintiff meant to appeal, his appeal ought to have been brought within a year, but it was not so brought. Thereupon, subject to the judicial discretion of the Court of Appeal to enlarge the time for appealing, the right of the defendant, under the judgment of the Vice Chancellor, was complete.

Thesiger L. J.:

I am of the same opinion. I think that this court ought not lightly to interfere with the time fixed for bringing appeals, and ought to require very special circumstances to be shewn before exercising its judicial discretion to enlarge the time.

In *Ex parte Hinton, In re Hinton*, marginal note (2):

Notice of an appeal must be given within twenty-one days from the day on which the order appealed from was pronounced, not from the day on which it was drawn up.

Sir James Bacon C.J.:

I have heard all that could be said on this subject, because of the reluctance that one must naturally feel to give effect to a purely technical objection. But the law of the court is very clearly expressed in the rule, and in the decisions which have been referred to. The reason of the policy of the law in this respect is very obvious. It was in the appellant's power to have got the order drawn up on the 3rd of November, or, at any rate, within the period of twenty one days after. The words of rule 143 are clear. The order must be considered as made upon the day on which it was

(1) 7 Ch. Div. 250. (2) L. R. 19 Eq. 266.

pronounced. Indeed, on the face of the order it is stated that the application was heard and disposed of on the 3rd November. I am precluded from hearing this appeal, and it must be dismissed. But I shall give no costs, for the appellant has been misled by the act of the Registrar.

1887

THE CITY OF WINNIPEG v. WRIGHT.

Ritchie C.J.

Under these authorities, and under the peculiar circumstances of the case, I do not think we ought to reverse the decision of the judge in chambers to whom the legislature has given express power to deal with the matter. I think no sufficient circumstances have been shown of such an extraordinary character as would warrant us in doing so, in face of the manifest neglect, and setting at defiance, of the rules of the court by the appellant. If we were to set aside this order I know of no case in which a party, after being guilty of the grossest violation of the rules of the court, could not, with such a precedent, insist on having any regular order rescinded.

STRONG J.—I think the indulgence sought by the appellant was one which might not unreasonably have been granted. The respondent would have been subjected to no delay. The appeal would have been heard as early as if all the steps had been taken with the utmost promptitude.

The English cases decided upon applications to enlarge the time for appealing to the Court of Appeal do not, in my opinion, apply to appeals to this court. The only preliminary proceeding which appeals to the English Court of Appeal require is a notice of motion; the proceedings are already printed and no security is given the appeal being, in fact, a mere re hearing. Here the appellant has to print the proceedings and also to find sureties and perfect his security. To do this thirty days appear to me to be a very short time. The time allowed for an appeal to the House of Lords, which is much more like an appeal to this court than an appeal

1887

THE CITY OF WINNIPEG v. WRIGHT.

Strong J.

to the Court of Appeals, is one year, and in the Privy Council two years are allowed.

I think the respondent here could have had nothing to complain of if the appellant had been ordered to pay all costs and had been put upon terms of bringing the appeal to a hearing at the next term following the application.

FOURNIER J.—I concur in the reasons given by His Lordship the Chief Justice and think the motion should be refused.

HENRY J.—The law provides that an application of this nature may be made either to the court or a judge in chambers, and discretionary power is granted to be fully and equally exercised by either. When a judge in chambers exercises that discretionary power it is doubtful if the court has the power to review his decision, and, in my opinion, it should not be done in any event unless it can be shown that there are circumstances in the case which were not brought to his notice. When the judge gives a decision I am very strongly of opinion that this court has no jurisdiction to interfere with it in any way. The law does not provide, as in other cases, for an appeal from his decision, and although the court assumes certain functions not provided for by law, I think we have no right to interfere with the discretionary powers of a judge.

In this case I can see no reason why the court should interfere. The appellants were to blame all through. They very properly obtained two extensions, but failed to take advantage of the indulgence granted them. No application for further time was made, and they must have known that the appeal was liable to be dismissed. They take no further steps in the matter until the application to dismiss the appeal is made and they then come and say: "Admitting we were all

1887

THE CITY OF WINNIPEG v. WRIGHT.

Henry J.

wrong we ask as a favor to have the time further extended."

Under the circumstances I think the discretionary power exercised by the judge should not be interfered with. To say that a regular judgment by a judge in chambers should be set aside on a mere motion, without showing any usurpation of power on his part, is, I think, totally unauthorized.

I think, therefore, that this application should be dismissed with costs.

GWYNNE J.—I wish to prevent its being supposed that I am of opinion that the case being supposed to be, by the order of the judge in chambers, out of court, deprives us of the right to interfere to grant an indulgence such as that asked; and as the appellants declared themselves ready to proceed with the argument at this court, I think that visiting them with the payment of all costs would have been sufficient to attain the ends of justice. In a matter of practice I do not like differing from a majority of the court, but as I cannot concur in the grounds upon which the refusal of the motion is rested, I think it right to make these observations.

Motion refused with costs.

Solicitor for appellants: *Chester Glass.*

Solicitor for respondent: *W. Redford Mulock.*

1885
*Nov. 3.
1886
*Nov. 8.

FRANÇOIS PINSONNAULT (PLAINTIFF) APPELLANT;

AND

DAVID HEBERT *et al.* (DEFENDANTS)...RESPONDENTS.

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

Possessory action—Equivocal possession—Right of way.

In a possessory action *en réintégrande* brought by P. against H., the latter denied P.'s possession and pleaded, *inter alia*, that he was proprietor and had exercised a right of way over the land in dispute for a number of years. The land in dispute consisted of a roadway situated between the adjoining properties of the plaintiff and defendant.

At the trial P. proved that he had had possession for a year by closing up the road way with a fence and putting his cattle there, and that at times he allowed the defendant H. and others to use the roadway to get to the river, and that when defendant H. took down the fence he immediately restored it, and that defendant H. then asked him to let him use it. That it was after the defendant H. had again taken forcible possession of the land that he instituted against him the present action. H. proved he had used the roadway as a passage for a number of years, and put in his title. The courts below held that both parties had proved only an equivocal possession and dismissed the plaintiff's action, ordering that their rights should be tried by an action *au petitoire*. On appeal to the Supreme Court of Canada:

Held, reversing the judgment of the court below, Fournier J. dissenting, that as P. had proved a possession *animo domini* for a year and a day, he should be re-instated and maintained in peaceable possession of the land, and H. forbidden to trouble him by exercising a right of way over the land in question, reserving to the latter his recourse to revendicate *au petitoire* any right he might have.

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

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

judgment of the Superior Court for Lower Canada of 19th December, 1881, dismissing appellant's action against respondents.

This was a possessory action *en réintégrande*, brought by the owner of a lot of land on the bank of the river Richelieu, complaining of the invasion of his possession of another piece of land forming part of an old road leading from the front road to the river, and being the continuation of a road called the "Grande Ligne."

The plaintiff, (appellant,) alleged in his declaration:

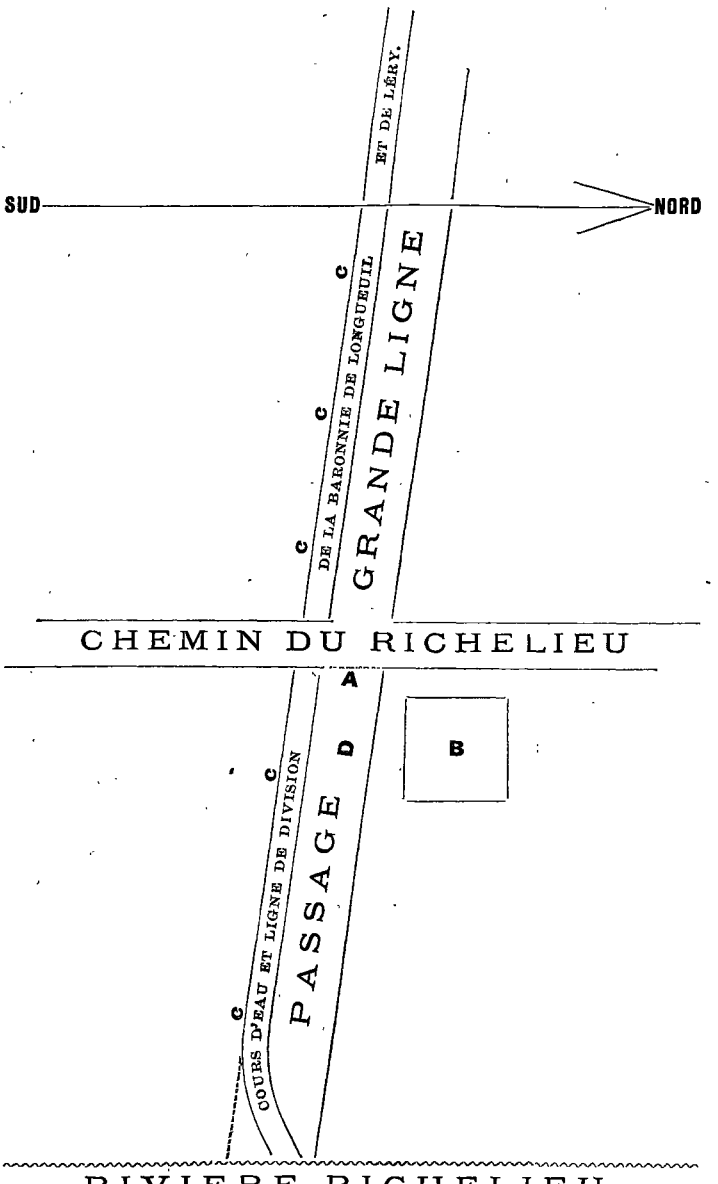
That for more than a year and a day before the month of October, 1879, and for more than ten years before, and up to the beginning of said October, the plaintiff had continuously occupied as owner, *animo domini*, the lot of land in dispute. That he had been troubled by the defendants in the possession of said lot of land; that the latter had taken violent possession of the same and have committed a trespass thereon, and concluded:

That by the judgment to be rendered, he be declared the possessor of the said immovable property; that defendants be forbidden to trouble him in the possession of said immovable, and that plaintiff be, under the authority of the court, reinstated and maintained in peaceable possession of said immovable property; that defendants be condemned jointly and severally to pay plaintiff the sum of $400 with interest and costs.

The following is a sketch of the locality and the spot at which the defendants are alleged to have committed the trespass is marked "Passage."

1885

PINSONNAULT v. HEBERT.



A. Barrière.

B. Maison du Demandeur.

c c c c. Cours d'eau et ligne de division de la Baronnie de Longueuil et de Léry.

D. Passage.

1885

PINSONNAULT v. HEBERT.

The defendants by their pleas admitted having passed in the passage indicated on the above mentioned sketch; they denied that the plaintiff ever possessed the said passage, *animo domini*; they alleged having themselves had the enjoyment and possession of said passage, *animo domini*, for upwards of the last thirty years; and going further, the defendants alleged their titles and that of plaintiff in order to show that the defendants are owners of said passage.

On demurrer being filed by plaintiff to these last allegations of defendants' pleas they were rejected as mixing the petitory with the possessory action.

At the enquête the defendants were allowed to file the titles of the parties in view of showing the nature of their possession. The evidence given at the trial is reviewed in the judgments hereinafter given. The Superior Court found that the parties had concurrent or simultaneous possession of the passage in question, and they were accordingly referred to the petitory action (*renvoyées au pétitoire*) for the determination of their respective claims thereon.

Pagnuelo Q. C., for appellant.

Beique for respondents.

The authorities relied on by counsel as applicable to the facts in evidence are reviewed in the judgments hereinafter given.

FOURNIER J.—Quoique l'appelant ait qualifié sa demande d'action en réintégrande, ce n'est en réalité qu'une action en complainte pour trouble dans la possession d'un petit lot de terrain faisant autrefois partie d'un chemin qui a été aboli par la municipalité de la paroisse où il est situé. Il allègue en avoir eu non seulement la possession annale, mais même une possession qui remonte à au delà de dix ans, et que les intimés l'ont troublé dans cette possession et même dépossé

1886

PINSONNAULT v. HÉBERT.

Fournier J

par violence au commencement d'octobre 1879.

L'un des défendeurs, David Hébert, père de l'autre défendeur, a plaidé par défense au fonds en fait niant spécialement que l'appelant ait eu la possession *animo domini* du terrain en question. Par son exception il prétend que c'est au contraire lui-même qui a eu cette possession qu'il plaide de la manière suivante :

Que, sur et à même le dit lot No. 132 désigné en la déclaration du demandeur, dame Aurélie Gauvin, épouse du défendeur David Hébert et la mère du dit défendeur Henri Hébert, conjointement avec les héritiers de feu Joseph Gauvin, oncle du dit défendeur, possède à titre de propriétaire une largeur de vingt-quatre pieds de terre du côté sud du dit lot, longeant et touchant à la ligne de division de la baronnie de Longueuil sur toute la profondeur du dit lot, depuis le chemin de la grande ligne jusqu'à la rivière Richelieu.

Après avoir allégué que l'appelant ayant fermé l'entrée de ce terrain dont il avait la possession, il invoque ses titres à cette propriété qui consistent en divers actes authentiques dont l'un contient en faveur de sa femme, et d'un des frères de cette dernière une réserve spéciale du terrain en question pour leur servir de passage pour communiquer à la rivière Richelieu. Il ajoute qu'il avait droit de passage sur ce terrain reservé à son épouse et à Joseph Gauvin et qu'il avait droit d'écarter et faire disparaître tout obstacle l'empêchant d'exercer ce droit ; qu'aux époques dont se plaint l'appelant dans sa déclaration, il n'a fait qu'user de son droit de passer sur le terrain ou passage susdit dont il a eu la jouissance et l'usage sans trouble, ouvertement et publiquement au vu et scu de tous, depuis au-delà trente ans, lequel passage a servi au public pendant la même période de temps, et ce à la connaissance personnelle de l'appelant qui connaissait lors de l'institution de son action que le terrain en question appartenait à l'épouse de l' Intimé (D. Hébert).

Henry Hébert, le fils de l'autre intimé, a plaidé les

droits de son père ajoutant que c'était avec la permission de celui-ci qu'il avait passé sur le terrain en question.

1886

PINSONNAULT v. HÉBERT.

Fournier J.

L'appelant a répondu en droit à la partie de ce plaidoyer fondée sur les titres de propriété invoqués par les défendeurs, et la Cour Supérieure a, avec raison, rejeté cette partie du plaidoyer. Mais tout le reste du plaidoyer subsiste et se résume à dire: 1° que l'intimé David Hébert possède à titre de propriétaire le terrain en litige. 2° que depuis au delà de trente ans, il a exercé sur son terrain le droit de passage. 3° que ce n'est que par souffrance qu'il a laissé l'appelant, ainsi que le public se servir du terrain en question.

Après une discussion approfondie de la preuve faite par les parties, la Cour Supérieure, présidée par l'Hon. Juge Chagnon, en est venu à la conclusion que ni l'une ni l'autre des parties n'avait fait une preuve suffisante pour se faire maintenir en possession à l'exclusion de l'autre, et a en conséquence renvoyé l'action de l'appelant avec injonction aux parties de se pourvoir au pétitoire pour faire décider la question de propriété d'après leurs titres respectifs.

Ce jugement porté en appel à la Cour du Banc de la Reine y a été confirmé à l'unanimité des six juges composant la cour (1). C'est de ce jugement de cette confirmation dont l'appelant se plaint.

Il ne s'agit en cette cause que d'une question d'appréciation des témoignages pour déterminer si l'une ou l'autre des parties a eu une possession suffisante du terrain en question pour s'en faire maintenir en possession à l'exclusion de l'autre. Après une lecture attentive de la preuve, j'en suis venu à la même conclusion que l'Hon. Juge Chagnon sur l'appréciation des faits.

Il résulte clairement de la preuve qu'il a été fait de part et d'autre des actes indiquant chez les deux parties

(1.) NOTE.—Il y a 5 juges nommés, le nom du Juge Ramsay est omis, mais il est le seul dont nous avons les notes.

1886

PINSONNAULT v. HEBERT.

Fournier J.

l'idée de faire acte de possession. Ce terrain qui est celui d'un ancien chemin aboli par la municipalité était encore clôturé lorsque le demandeur a demandé à la municipalité la permission de s'en emparer. Cette permission lui fut refusée. Il y fit tout de même des actes de possession, comme des réparations aux clôtures, y mit des animaux et posa des barrières, etc. Mais avant le mois d'octobre 1879, époque du trouble dont il se plaint, l'appelant n'a jamais eu l'idée d'en éloigner l'intimé Hébert, ni les autres personnes qui faisaient usage de ce terrain comme d'un passage. Lorsqu'il fit des réparations aux clôtures il y mit des barrières qui continueraient d'en laisser le libre accès à l'intimé Hébert et à nombre d'autres qui y passaient sans objection de sa part. Il n'a jamais non plus, avant cette époque, fait aucune sommation à l'intimé de se désister, et c'est sans doute pour la raison qu'il a donnée au témoin Brun, qu'il n'y avait que la famille Gauvin dont l'intimé fait partie, qui avait droit de passer sur ce terrain. Il est évident par cette déclaration qu'il n'ignorait pas les droits que Hébert possédait par sa femme, Aurélie Gauvin, admettant par là même que ce n'était pas par pure tolérance de sa part qu'il laissait passer Hébert. Hébert en faisant ces actes de possession voulait sans doute exercer son droit. Ces actes de possesion de la part d'Hébert depuis près de cinquante ans, comme il le dit, étaient un trouble qui empêchait l'appelant de prétendre qu'il a eu une possession paisible, non interrompue et non équivoque du même passage. Le résumé de la preuve fait par l'Hon. Juge Chagnon se termine par la conclusion suivante :—

Il appert par la preuve que les deux parties avaient possession concurrente, c'est-à-dire que si le Demandeur faisait des actes de possession *animo domini* par le fait qu'il faisait pacager dans ce passage ses animaux, et qu'il y faisait des travaux de clôture dans ce but, le défendeur David Hébert a toujours continué lui aussi de

posséder cette voie de passage, comme chemin en y passant et repassant, et que s'il n'y a pas fait de travaux spéciaux, c'était parce que la destination de ce terrain pour lui, était de lui servir de voie de passage ou de chemin, et qu'il l'a toujours utilisé en conformité à cette destination.

1886

PINSONNAULT v. HEBERT.

Fournier J.

L'hon. juge se demande si dans le cas d'une possession concurrente comme celle qui est prouvée en cette cause, il n'aurait pas droit de consulter les titres pour déterminer le véritable caractère de la possession. Il avait incontestablement ce droit qu'on lui reproche d'avoir exercé dans ce cas, parce que les titres avaient été rejetés du dossier. Je n'ai pu constater ce fait, mais il est vrai que la partie du plaidoyer fondé sur ces titres a été rejetée et avec raison ; toutefois, je ne vois pas que les titres aient été sortis du dossier, et s'ils l'eussent été, c'eût été à tort. Car le défendeur dans des actions de ce genre, quoiqu'il ne puisse plaider ses titres comme moyen de défense, a cependant le droit de les produire pour établir le caractère de sa possession. Les titres étant demeurés de record, l'hon. juge a eu raison de les consulter. Voir Bioche vo. Action possessoire (1), et les nombreux arrêts qui y sont cités. Au n° 361 il dit :

2° Par cela seul que le juge, pour éclairer la possession, apprécie les titres respectivement produits, en déclarant quels droits résultent de ces titres pour chaque partie, si d'ailleurs le dispositif se restreint à une simple maintenue en possession. Ce n'est pas un titre qu'applique le juge, c'est une indication qu'il consulte ; ce n'est pas le pétitoire qu'il juge, c'est le possessoire qu'il éclaire.

L'hon. juge a constaté par l'examen des titres que Aurélie Gauvin, épouse de l'intimé Hébert, pouvait avoir des droits réels et véritables dans ce passage, par un titre qui l'avait réservé en propriété au bénéfice des héritiers Gauvin. Mais l'hon. juge n'a rien décidé sur la validité des titres, il s'en est servi seulement pour en conclure que les actes de possession que faisait David Hébert dans ce chemin, tous les ans, depuis au delà de trente ans, étaient faits *animo domini*. Il en conclut

(1) Nos 359, 360, 361.

1886

PINSONNAULT v. HEBERT.

Fournier, J.

aussi que la possession de l'appelant :

Ayant été dans les circonstances, sous l'effet d'un trouble constant apporté par la possession concurrente de David Hébert, l'appelant ne peut rien obtenir sur son action possessoire, mais que les parties doivent vider leur différend au pétitoire.

Cette adjudication est suivie du renvoi de l'action avec dépens.

Ne pouvant attribuer la possession exclusive ni à l'un ni à l'autre des parties, à cause du caractère particulier de leur possession respective, n'y avait-il pas un moyen terme à adopter ? Quoi qu'il soit vrai qu'en principe la possession est exclusive, l'autorité qu'il cite de Troplong admet "que cette vérité doit être temférée par une modification," et Troplong ajoute (1) :

Puisqu'il y a des possessions inégales, rien n'empêche qu'on ne les admette à *concourir* et à s'échelonner les unes sur les autres.....

La règle que deux possessions s'excluent n'est applicable que lorsqu'il s'agit de possessions de même genre, émanées de causes opposées et rivales, travaillant chacune pour un intérêt privé.

Et au numéro 252 il dit (2) :

Lorsque deux personnes concourent sur le même lieu pour le posséder, et se livrent à des actes possessoires également caractéristiques, il n'y a possession d'aucun côté, car les deux possessions s'excluent. C'est par d'autres indices qu'on peut arriver à la connaissance de la propriété.

Les actes de possession dont il s'agit ici n'est pas le même caractère de part et d'autre, l'appelant a réparé les clôtures et a mis ses animaux sur le terrain dont l'intimé se servait, de son côté, comme d'un passage ; ces actes ne sont pas inconciliables et pouvaient être exercés concurremment, comme de fait ils l'ont été pendant un grand nombre d'années. Il eût été plus conforme peut-être au caractère reconnu de ces actes de possession, de maintenir les parties dans leur possession respective ; ce que l'hon. Juge aurait pu faire en se fondant sur l'autorité suivante (3) :

Quid, si les deux parties prétendent réciproquement avoir la possession annale, et que le défendeur se porte reconventionnellement

(1) P. 420. (2) Prescription 1 vol. p. 434.

(3) Bioche Vo. Action possessoire p. 224, n° 324.

demandeur? Le juge peut ordonner le séquestre et renvoyer les parties à procéder au pétitoire; l'art. 1961 qui autorise le séquestre ne fait aucune distinction entre les tribunaux ordinaires et d'exception (nombre d'arrêts cités), ou les maintenir dans la possession respective du terrain contentieux. Cass, 28 Avril 1813, S. 13, 392; 14 Nov. 1832, D. 33, 5. Il y a lieu de réserver les dépens de l'instance au possessoire. Cass, 31 Juillet 1838.

Au lieu de s'appuyer sur cette autorité, l'hon. juge a sans doute préféré, après avoir fait l'examen des titres, comme il en avait le droit, faire application de l'autorité suivante (1):

Jugé aussi que lorsque les deux parties font également preuve d'acte de possession, le juge de paix peut accorder la maintenue à celle qui justifie mieux son droit d'après l'application des titres sous le rapport de la possession. Cass. 19 Juillet 1830, D. 33, 274; 13 Nov. 1839; 9 Dec. 1840, D. 40, 26; 41, 30 Henrion, ch. 51. Il serait plus prudent de maintenir les parties dans leur possession respective de l'immeuble.

L'hon. juge pouvait donc à sa discrétion adopter l'une ou l'autre des conclusions suggérées, sans se mettre en contradiction avec les faits de la cause ni avec la loi qui leur est applicable. Par son renvoi de l'action, il a, en réalité, maintenu les droits de posssession de l'intimé, et il n'a fait en cela que faire application du principe énoncé ci-dessus "que le juge de paix peut accorder la maintenue à celle des parties qui justifie mieux son droit d'après l'application de titre sous le rapport de la possession."

En conséquence je crois avec la cour du Banc de la Reine qui a confirmé à l'unanimité l'opinion de l'hon. juge, qu'il n'y a aucun motif suffisant pour réformer son jugement.

On fait à la possession de l'intimé une objection qui serait grave, si elle était fondée en fait. On le compare à celui qui voudrait se faire maintenir dans la possession d'une servitude de passage, en invoquant ses actes de possession, et on lui objecte avec raison l'art. 549 C.C.

(1) Bioche Vo. Action possessoire, p. 225, n° 325.

1886

PINSONNAULT v. HÉBERT.

Fournier J.

Nulle servitude ne peut être établie sans titre; la possession même immémoriale ne suffit pas à cet effet.

Mais telle n'est pas la position d'Hébert, il ne prétend pas réclamer un droit de passage sur le fond de l'appelant, il réclame le fonds même en prouvant l'avoir possédé à titre de propriétaire. Il ne s'agit aucunement de servitude dans le débat présent—le droit de passage exercé par Hébert n'a été qu'une manière de jouir de sa propriété, il s'agit uniquement de la possession à titre de propriétaire du terrain en litige.

Il est vrai que David Hébert ne s'est servi du terrain en question que comme d'un passage—cette partie de sa propriété ayant été destinée à cet usage comme on le voit par son titre,—il en a joui comme d'un passage mais non à titre de servitude sur la propriété de l'appelant; mais comme d'un passage établi sur un terrain dont il est propriétaire et en possession depuis un grand nombre d'années. C'est dénaturer les faits que de représenter Hébert comme prétendant exercer une servitude sur la propriété de l'appelant. Bien qu'on ne puisse dans cette cause, décider de la validité des titres, on doit cependant les consulter pour qualifier la possession et il en résulte clairement que la position d'Hébert est celle que je viens d'exposer. C'est aussi de cette manière que l'a comprise l'hon. juge Chagnon, ainsi que tous les juges de la cour du Banc de la Reine.

Tout en repoussant l'idée que David Hébert invoque sa possession pour réclamer une servitude sans titre, je veux bien admettre pour un instant, par forme d'argument, qu'il réclame la possession plus que annale d'une servitude, mais il faut ajouter, ce qui saute aux yeux, qu'il fait cette réclamation en se fondant sur un titre authentique. Alors il devait être considéré dans la position d'une personne en possession d'une servitude fondée sur un titre authentique et qui, étant troublé, invoque sa possession annale pour se faire maintenir

dans la possession de son droit de servitude. Une personne dans ce cas a droit au bénéfice de toutes les actions et défenses que la loi accorde pour la protection de la possession. En conséquence Hébert aurait droit dans un tel cas de plaider sa possession annale en produisant son titre. L'autorité suivante est positive à cet égard, Duranton (1) :

Mais lorsque à l'appui de la possession annale actuelle, alléguée en matière de servitude non susceptible de s'acquérir par prescription, celui qui peut l'invoquer en sa faveur, et qui est troublé, produit aussi un titre non précaire, la Cour de Cassation décide que sa complainte est recevable, et que le juge de paix est compétent pour discuter le mérite et l'application du titre, bien qu'il fut contesté (2); qu'appliquer le titre en pareil cas, ce n'est point annuler le pétitoire et le possessoire (3).

Ainsi, en supposant même que David Hébert n'aurait invoqué que la servitude de passage, en se bâsant sur sa possession plus que annale et la production de son titre,—il aurait eu incontestablement d'après ces autorités le droit de plaider comme il l'a fait—et sa possession qualifiée par son titre aurait suffi pour le faire maintenir dans sa possession et rejeter l'action de son adversaire.

Mais je le répète encore une fois ce n'est pas sa position dans cette cause, il se dit possesseur de tout le terrain en litige à titre de propriétaire, et qualifie sa possession par la production d'un titre authentique. Mais comme il a laissé faire à l'appelant certains actes de possession, je crois que le juge en première instance n'a pas eu tort de déclarer que la

(1) Vol. 5 p. 630, No. 638.

(2) Voyez l'arrêt du 17 mai 1820. Sirey, 1820, 1, 324. La cour a dit qu'en tel cas, le juge de paix est tenu d'examiner le titre, et d'accueillir ou rejeter l'action possessoire, selon que le titre contesté fait ou ne fait pas cesser la présomption de précaire. Mais par un autre arrêt, du même jour, elle a décidé que si, dans le cas dont il s'agit, le juge de paix peut renvoyer les parties à se pourvoir au pétitoire, *il n'y est cependant pas obligé*. Nous préférons cette dernière décision. Sirey, ib. 4.

(3) Voy. l'arrêt de la même cour, du 6 juillet 1812. Sirey 1813, 1, 81.

1886

PINSONNAULT v. HEBERT.

Fournier J.

possession quoique concurrente, resterait par l'effet du renvoi de l'action, à l'intimé qui avait qualifié la sienne par des titres authentiques, et son jugement ordonnant, selon l'autorité de Pothier qu'il cite, que les parties se pourvoiront au pétitoire, devait être confirmé, mais il en sera autrement, car je suis seul à soutenir le bien jugé. Si je suis dans l'erreur, je me trouve en nombreuse compagnie, celle du juge de première instance d'abord, et ensuite celle des six juges de la cour du Banc de la Reine, tandis que l'opinion contraire est soutenue pas quatre de mes honorables collègues. Si je mentionne cette particularité, ce n'est pas que je crois que les opinions doivent se compter, au lieu d'être appréciées suivant leur valeur, mais seulement parce que dans cette cour déjà, et aussi dans un tribunal supérieur au nôtre, on a cru trouver dans le nombre un argument pour fortifier une opinion controversée. Suivant moi, l'appel devrait être renvoyé.

The judgment of the majority of the Court was delivered by

TASCHEREAU J.—Action possessoire, avec allégations et conclusions requises pour la complainte et conclusions additionnelles en réintégrande. Le défendeur nie la possession du demandeur ; plaide que sa femme possède le terrain en question à titre de propriétaire ; que le demandeur en ayant fermé l'entrée, lui, le défendeur, écarta la barrière ; qu'il avait droit de passage sur le dit terrain ; qu'il n'a fait qu'user de son droit de passer sur le dit terrain ou passage dont il a eu la jouissance et l'usage depuis plus de trente ans ; que depuis plus de trente ans, il a eu l'usage et la jouissance du dit passage, et qu'il a joui de tel droit tous les ans, surtout durant le cours de chaque été autant de fois qu'il avait occasion d'aller à la rivière Richelieu. Tel est le plaidoyer du défendeur à peu près *verbatim* après le juge-

ment sur une réponse en droit qui en a écarté une partie tel qu'originairement produit. Il n'y apparait certainement pas bien clairement que c'est la possession du terrain que le défendeur prétend avoir eue. Il paraît plutôt se baser sur la possession d'un droit de passage. Mais enfin, il lui a été libre de prouver possession du terrain même sur sa dénégation de cette possession par le demandeur. C'est ce qu'il a tenté de faire sans succès, cependant, dans mon opinion.

Il me semble ressortir clairement de la preuve au dossier que tant qu'au sol, au terrain lui-même, c'est le demandeur qui depuis longtemps en est seul en possession *animo domini*, et que tout ce que le défendeur a possédé et réclamé sur ce terrain jusqu'aux voies de fait en question, c'est un droit de passage. Or cette possession, si elle n'est pas appuyée d'un titre, est considérée en loi avoir été précaire et un simple acte de tolérance. *Cross* v. *Judah* (1); Bioche (2); Boncenne-Bourbeau (3); Pardessus (4); Merlin, Rép. Servitude (5); Demolombe (6).

Le demandeur paraît avoir permis au public de passer là pendant longtemps, et les propres témoins du défendeur Dandurand et Ste. Marie, prouvent que lui défendeur passait là *comme les autres* quand il en avait besoin. Eût-il eu l'*aminus domini* ce ne serait pas suffisant. Il eût fallu que ses actes de possession fussent tellement caractérisés que le demandeur ne pût se méprendre sur ses intentions. Bioche (7). S'il veut prétendre que ces actes de passage étaient des actes de possession du sol, alors la possession qu'il aurait prouvé ne serait dans tous les cas qu'une possession équivoque.

Boncenne-Bourbeau (8) :

(1) 15 L. C. J. 264.
(2) Action possessoire No. 488.
(3) Vol. 7, Nos. 356, 372.
(4) 2 Vol., Servitude No. 325.
(5) No. 325.
(6) Vol. 2 Servitude Nos. 943, 945.
(7) Nos. 160 à 171.
(8) Vol. 2, No. 322.

1886

PINSONNAULT v. HEBERT.

Taschereau J.

La possession équivoque présente avec celle qui s'exerce par tolérance une certaine affinité, lorsqu'il est incertain d'après le caractère des actes, s'ils sont exercés à titre de propriété, de co-propriété et de bon voisinage, comme si, par exemple, une partie prétendant avoir possédé à titre de propriété ou de co-propriété, invoquait des faits de possession qui pourraient être interprétés comme l'exercice d'une servitude discontinue qui ne s'appuirait pas sur un titre Comp. Demolombe. Vol. 2 Servitude, No. 673.

Appleton (1):

Supposons qu'il est démontré que le possesseur a agi *animo domini*, cela suffira-t-il? Non. Il faudra encore que ses actes aient été assez caractérisés pour que le public n'ait pu concevoir aucun doute sur l'existence de cet *animus domini*; point de possession utile si le public n'a pu savoir avec certitude que c'était le droit de propriété qu'on prétendait exercer, et non pas une simple servitude.

D'ailleurs, en ne réclamant pendant de longues années qu'un droit de passage le défendeur n'admettait-il pas par là même la possession du demandeur, son *dominium* du fonds? Est-ce que celui qui n'exerce qu'une servitude peut en même temps avoir l'*animus domini* sur la propriété elle-même? Savigny, (2). Il a produit à l'enquête un titre à la propriété exclusive du terrain pour qualifier sa possession. Mais il n'a tout au plus prouvé, je l'ai dit, qu'une possession d'un droit de passage. Laurent (3). N'y a-t-il pas contradiction entre son titre et sa possession, entre son titre et ses prétentions? Réclame-t-on un droit de passage sur son propre terrain? Il a prouvé un titre à sa propriété, et la possession d'une autre. Le titre supporte-t-il la possession?

Sur un arrêt rapporté dans Dalloz (4): "Cet arsenal du droit français où toutes les erreurs peuvent trouver des arrêts et tous les paradoxes des autorités." L'arrêt cité donnerait à entendre que la Cour de Cassation a là décidé que le propriétaire d'un fonds sur lequel existe un chemin privé prohibé dans la possession de ce

(1) Possession, No. 250.
(2) Possession, p. 97.
(3) Vol. 8, Nos. 215 et seq.
(4) De la poss., n° 220.

1886

PINSONNAULT v. HEBERT.

Taschereau J.

chemin peut poursuivre au possessoire comme troublé dans un simple droit de passage. Mais, en référant au texte du jugement, l'on voit que la cour n'a déterminé qu'une question de compétence.

Re Radepont D. 29, 1, 380. Lorsqu'un défendeur allègue la possession d'un droit de passage, sans titre pour l'appuyer, il doit succomber au possessoire.

Leconte (1) :

Ainsi lorsque la servitude n'est pas du nombre de celles qui peuvent s'acquérir par prescription, parcequ'elle est non apparente, (ou discontinue, apparente ou non, n'importe,) il n'y a point de jouissance qui puisse seule fonder l'action possessoire, au profit de celui qui allègue cette jouissance ; son action serait non recevable : *et dans tous les cas où il serait attaqué par l'autre partie,* comme troublant la jouissance de celle-ci, *il devrait succomber au possessoire,* sauf à se pourvoir au pétitoire s'il croyait avoir acquis le droit de servitude. En effet la possession annale n'aboutirait à rien, lors même qu'elle serait avouée, puisqu'elle ne dispenserait pas de produire un titre constitutif de la servitude. Cass. 23 février 1814.

Bioche (2) :

Si le défendeur prétend avoir eu le droit d'agir comme il l'a fait, c'est une question à examiner au pétitoire. Nous supposons que la contestation du droit invoqué par le défendeur ne puisse résulter que de l'appréciation des prétentions ou allégations contraires des parties, de l'examen des titres invoqués ; le juge de paix ne pouvant faire cette appréciation sans cumuler le possessoire et le pétitoire. Mais provisoirement la maintenue en possession du demandeur doit être prononcée.

Voir aussi Dupont dans la même sens (3) :

Le simple exercise de passage sur le fonds d'un particulier ne peut faire acquérir ni possession du sol ni prescription du sol. S. V. 1844, 2, 168, *re* Coppier. Idem, 404, *re* Communes de la Pèze.

Le défendeur a amené un nommé Brun pour prouver que le demandeur aurait, en une certaine occasion, admis que lui, le défendeur, avait là un droit de passage. Mais ce témoignage est illégal et doit être rejeté. Art. 549-550. On ne peut prouver un droit de servitude par témoins. Et, sur la présente issue d'ailleurs, la possession seule

(1) Actions possessoires, No. 341. (2) Actions poss., No. 898.
(2) Actions poss., No. 288.

1886

PINSONNAULT v. HEBERT.

Taschereau J.

est en cause. Or, le demandeur n'a jamais admis que le défendeur fût en possession de ce terrain ou même en possession d'un droit de passage. Je ne vois nulle part que le demandeur ait jamais admis qu'il n'était pas, lui, en possession du terrain, ou qu'il en était en possession *non animo domini*.

Le défendeur a soutenu que la possession du demandeur n'avait pas été paisible et non interrompue. Le seul fait sur lequel il appuit cette prétention est qu'en mai ou juin 1879, moins d'un an avant l'institution de l'action, lui-même le défendeur, en l'absence du demandeur, qui lui avait défendu de passer sur ce terrain, y serait entré pendant peu de temps, deux ou trois heures peut-être, et y aurait fait quelques petits travaux pour faciliter le passage. Le même jour, le demandeur, de retour chez lui, défit ces travaux, ferma l'entrée du passage avec des madriers, et renouvela au public la défense d'y passer. Le défendeur parut se soumettre, demanda au demandeur la permission d'aller chercher ses matériaux, et cessa de passer, laissant le demandeur en possession du terrain tel qu'il l'était depuis longtemps *titulo domini*. Peut-il argumenter de ces faits que la possession du demandeur n'a pas été paisible et non interrompue ? La proposition me paraît insoutenable. N'a-t-il pas lui-même alors reconnu la possession du demandeur ? Ne devait-il pas alors, s'il avait la possession comme il le prétend aujourd'hui, instituer contre le demandeur une action possessoire ? Au lieu de ce faire, il se retire, reconnaît le demandeur comme roi et maître, et puis, en septembre ou octobre suivant, revient avec force et armes, encore en l'absence du demandeur, abat les barrières et clôtures, et prend possession au nom du droit du plus fort. Et poursuivi par le demandeur au possessoire, il veut invoquer la voie de fait du mois de mai, pour défendre celle du mois d'octobre !

Bioche:

Si j'ai déjà la possession annale au moment où un autre veut rentrer en possession un, seul acte de sa part ne suffirait pas pour causer l'interruption: cet acte serait un simple trouble que je ferais réprimer par la complainte. Pour qu'une possession annale soit interrompue, il faut que l'autre dure elle-même une année (1).

Mais quelques réclamations isolées et réduites au silence, quelques voies de fait repoussées par des voies de fait contraires sont insuffisantes pour faire perdre à la possession le caractère de paisible qu'elle avait auparavant (2).

Et si celui qui était en possession s'en est ressaisi ou a réclamé aussitôt qu'il a eu connaissance de l'occupation, et avant que cette occupation ait duré un an, il n'y a pas eu interruption de sa possession. Marcadé (3); Vazeille (4); Carou (5); Boncenne (6); Merlin (7).

La possession du demandeur a été paisible, publique, continue et non interrompue. Elle a aussi été non équivoque. Ce n'est que comme propriétaire et s'affirmant comme tel, au vu et sçu de tout le monde qu'il était là. Et n'est-on pas toujours censé posséder pour soi et à titre de propriétaire? Qu'il eût un titre ou non, qu'il fût de bonne foi ou non, est parfaitement indifférent. Carou, (8); Aulanier, (9); Garnier, (10); Boncenne-Bourbeau, (11); Laurent, (12); Bioche, (13); Pothier, (14); Pothier, (15).

La prescription acquisitive de la possession par un an s'opère sous les mêmes conditions que la prescription acquisitive de la propriété par trente ans. Ici, d'ailleurs, il appert que le terrain en litige était autrefois un chemin public depuis longtemps aboli, et que le demandeur dès cette abolition, tant par

(1) No. 105.
(2) No. 111; Appleton De la poss., No. 233.
(3) Prescr. 123.
(4) Prescr. No. 67.
(5) Nos. 675, 700.
(6) Vol. 7 No. 328.
(7) Rep. Vo. voies de fait, par. 1, art.
(8) No. 462.
(9) No. 19.
(10) P. 116.
(11) Vol. 7, No. 312.
(12) Vol. 32, No. 294.
(13) Nos. 207, 1027.
(14) Possession, No. 95.
(15) Coutume d'Orléans des cas possessoires, No. 50.

1886

PINSONNAULT v. HEBERT.

Taschereau J.

lui-même que par ses auteurs, étant propriétaire du terrain de chaque côté, s'en est emparé comme formant partie de sa propriété, et en a depuis toujours été en possession.

Je conclus donc que le défendeur n'a pas prouvé sa possession du terrain; que tant qu'au droit de passage, sa possession de ce droit est, en loi, censée avoir été précaire et par tolérance; qu'il ne peut être reçu à invoquer contre l'action du demandeur, l'exercice de ce droit comme preuve de la possession du terrain lui-même, parce que cette possession, sous les circonstances de la cause, a été équivoque.

La Cour Supérieure a débouté le demandeur de sa demande, parce que, dit-elle, le demandeur et le défendeur ont prouvé une possession égale et simultanée. En confirment ce jugement, la Cour du Banc de la Reine s'est servie d'expressions plus correctes il me semble, en disant que ni l'un ni l'autre n'avait prouvé de possession qualifiée

Je concours avec ce dernier jugement tant qu'au défendeur, mais tant qu'au demandeur je suis d'avis qu'il a prouvé une possession suffisante. J'allouerais l'appel.

GWYNNE J.—I entirely concur in the judgment of my brother Taschereau. The plaintiff proved an actual continuous possession extending over many years; the defendant gave no evidence of any possession other than such as consisted in the acts of disturbance of the plaintiff's possession of which he complained, and the question of title asserted by the defendant not being cognizable on the record the plaintiff was, in my opinion, clearly entitled to a judgment in his favor.

Appeal allowed with costs.

Solicitors for appellant: *Beique, McGoun & Emard.*

Solicitors for respondent: *Pagnuelo, Taillon & Lanctot.*

THOMAS HOBART BALL, HERMAN PRENSLAUER and SIMON FLORSHEIM, trading under the style of "CHICAGO CORSET COMPANY," and CLINTON ETHELBERT BRUSH and SEELY EDICT BRUSH, trading under the style of "CLINTON E. BRUSH & BRO. (PLAINTIFFS) ..... APPELLANTS;

AND

THE CROMPTON CORSET COMPANY, ROBERT SIMPSON and G. W. DUNN & CO. (DEFENDANTS) RESPONDENTS.

1886
*June 1, 2.
1887
*Mar. 1.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Patent—Infringement of—Coiled wire springs in groups—Substituted for India-rubber—Mechanical equivalent—Want of invention.

In a suit for the infringement of a patent the alleged invention was the substitution in the manufacture of corsets of coiled wire springs, arranged in groups and in continuous lengths, for India-rubber springs previously so used. The advantage claimed by the substitution was that the metal was more durable, and was free from the inconvenience arising from the use of India-rubber caused by the heat from the wearer's body.

Held, affirming the judgment of the Court of Appeal for Ontario, Fournier and Henry JJ. dissenting, that this was merely the substitution of one well known material, metal, for another equally well-known material, India-rubber, to produce the same result on the same principle in a more agreeable and useful manner, or a mere mechanical equivalent for the use of India-rubber, and it was, consequently, void of invention and not the subject of a patent.

APPEAL from the Court of Appeal for Ontario (1) affirming the judgment of Proudfoot J. in the Chancery Division of the High Court of Justice (2), by which the plaintiffs action was dismissed.

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

(1) 12 Ont. App. R. 738. (2) 9 O. R. 228.

1886

BALL v. CROMPTON CORSET CO.

The action was for infringement by the defendants of a patent granted to the plaintiff Florsheim which had been assigned to the plaintiffs the Chicago Corset Company. The latter had granted to the plaintiffs Brush & Brother a licence for using the said patent in Canada.

The following was the invention as described in the letters patent:—

First. An elastic gore, gusset, or section for wearing apparel composed of a covering material having tubes, spiral metal springs inclosed by such tubes and not extending to the edges of the covering material and stayed at their ends by such covering material, and inelastic margins outside of the springs, substantially as and for the purpose set forth.

Second. In an elastic gore, gusset, or section of the character described, the springs arranged in groups and made of a continuous length of coiled wire, substantially as described and shown.

Third. In an elastic gore, gusset or section of the character described, metal fastenings extending across the ends of the tubes between the thicknesses of the covering material, substantially as described and shown.

The portion of the patent specially claimed as the patentee's invention was the metal springs arranged in groups and made of a continuous length of coiled wire. Previous to the patent metal springs had been used, but not in continuous lengths, and the manner in which they were used caused the covering material to become cut and frayed. There were also in previous use India-rubber springs in continuous lengths, but the India-rubber was an objectionable material, from liability to decay, and to contract when the body became heated, and so injure the health of the wearer.

By the statement of defence it was denied that

Florsheim was the first and true inventor of the improvements described in the letters patent; that the alleged invention was new or useful, or that it was a patentable invention; and it was claimed that such alleged inventions were known and used by others previous to the issue of the patent, and that patents for the improvements were in existence in the United Kingdom and in the United States more than twelve months prior to Florsheim's application for a patent in Canada.

On the hearing before Proudfoot J. judgment was given dismissing the plaintiffs' action, the learned Judge holding that defendants had infringed the patent of the plaintiffs; that Florsheim was the first inventor, and that the invention was useful; but he also held that the coiled wire spring was only a mechanical equivalent for the india-rubber spring, and that it did not possess any element of invention, and therefore could not be the subject of a patent. The Court of Appeal affirmed this judgment. The plaintiffs then appealed to the Supreme Court of Canada.

W. Cassels Q.C. and *Akers* for appellants:

By his judgment the learned judge who tried this case finds all the issues in favor of the plaintiffs but one. He finds as a fact that Florsheim was the inventor as between himself and Schilling. 2ndly. He finds as a fact that the defendants infringed the patent. 3rdly. He finds as a fact that "it was clearly established that the invention was useful." 4thly. He finds that none of the patents set out by the defendants anticipated the invention of the plaintiffs, with the exception of a patent granted to one Miller on the 31st day of December, 1866, but because of this patent the learned judge, for reasons given in his judgment, was of opinion that plaintiffs' action must fail.

The learned judges in the Court of Appeal concurred

1886

BALL v. CROMPTON CORSET CO.

with Mr. Justice Proudfoot in all his findings in favor of the plaintiffs, but agree with him that the Miller patent anticipated the invention of the plaintiffs, and on this ground dismissed the appeal.

The patent sued upon is a patent for, among other claims, "an elastic gore, gusset, or section for wearing apparel "composed of a covering material having tubes, spiral "metal springs enclosed by such tubes and not "extending to the edges of the covering material and "stayed at their ends by such covering material, and "inelastic margins outside of the springs."

The patent relied upon by the learned judges, as anticipating the plaintiffs patent, is a patent for a corset with continuous India-rubber springs. It is proved that the patent was never practically used.

A patent similar to that granted in Canada was granted in the United States of America to Florsheim, on the 22nd of February, 1881. This patent was granted to Florsheim after an interference with Schilling. Before the patent was granted a reference was made by the officials of the Patent office to the Miller patent, relied on as a defence to this action, but after full consideration the American Patent Office were of opinion that the Miller patent did not anticipate Florsheim's invention, and the patent was granted to Florsheim.

We do not contend, of course, that the decision of the American Commissioner of Patents is in any way binding upon our Courts; but we say that where, after a protracted interference, with the full consideration of the Miller patent, the American Patent Office granted a patent it has some weight.

In *Smith* v. *Goldie* (1) Mr. Justice Gwynne is reported to have said: "Now upon the question "whether the combination is or is not the proper sub-"ject of a patent it appears to me, I confess, not to be

(1) 9 Can. S. C. R. 46.

1886

BALL v. CROMPTON CORSET CO.

" altogether immaterial, although not conclusive, that " after a protracted contestation, which must have in- " volved enquiry into the patentable character of the " combination, the plaintiff Smith obtained a patent in " the United States."

In this case it was the same as in the Purifier case. With the full knowledge of the patent in question granted to Miller, and after full consideration of its effect, the United States granted a patent to Florsheim.

As hereinbefore stated, the patentee Florsheim by his specifications expressly states that the object he has in view "is to *produce the means for the successful and "practical substitution of metal springs for India-rubber.*"

As far back as the year 1815 those interested in the corset trade were endeavoring to invent some means for a practical application of spiral metal springs for corsets, the use of rubber being injurious and objectionable on various grounds.

In none of the prior patents relied on was a spiral metal spring made continuous, and it is beyond question that up to the time of Florsheim's invention the fact that spiral metal springs could be used continuously was unknown.

The learned counsel then contended upon the evidence that it was established beyond any reasonable controversy: (1) That for over sixty years those in the trade had been endeavouring to successfully substitute spiral metal springs in corsets in lieu of India-rubber; (2) That this had been attempted in various ways, all of which were found to be impracticable; (3) That the use of rubber in corsets was practically useless for the reasons hereinbefore set out; (4) That the improvement made by the defendants was of great value, and that thereby a vastly better article was introduced, and at a greatly reduced cost.

The following cases were cited and relied on ;—

1886

BALL v. CROMPTON CORSET CO.

Smith v. *Goldie* and cases there cited (1); *Unwin* v. *Heath* (2); *Walton* v. *Potter* (3); *Muntz* v. *Foster* (4); *Dalton* v. *Nelson* (5); *Smith* v. *Goodyear* (6).

MacLennan Q.C. and *Osler* Q.C. for respondents.

The evidence clearly establishes that Florsheim was not the "first and true inventor" of this article, for it was "known or used by others before his invention "thereof in February, 1879," and had been anticipated by prior patents in England and the United States.

The substitution of a device well known and used for another device equally well known to obtain the same result does not possess any element of invention. The learned judge who tried the case so found (following *Thompson* v. *James*) (7), and the Court of Appeal has unanimously affirmed that decision.

In support of their case the respondents relied upon the reasoning of the learned judges of the Court of Appeal (8), and in addition to the cases cited by them, referred also to the following authorities:—

Terhune v. *Phillips* (9); *Pickering* v. *McCullough* (10); *Hailes* v. *Van Wormer* (11); *Smith* v. *Nicholls* (12); *Crouch* v. *Roemer* (13); *Hollister* v. *Benedict Manf. Co.* (14); Walker on Patents (15).

Sir W. J. RITCHIE C.J.—The learned judge who tried this case thought that the patent of the Millers, of the 31st Dec. 1866, No. 3451, embraced the whole of the plaintiffs' invention. The only question then, he says, is "whether the substitution of a coiled wire "spring for India-rubber, and the arrangement of tubes

(1) 9 Can. S. C. R. 46.
(2) 5 H. L. Cas. 505.
(3) 1 Web. Pat. Cas. 597; 3 M. & G. 411.
(4) 2 Web. Pat. Cas. 103.
(5) 13 Blatch. 357.
(6) 93 U. S. R. 496.
(7) 32 Beav. 570.
(8) 12 Ont. App. R. 738.
(9) 99 U. S. R. 592.
(10) 104 U. S. R. 310.
(11) 20 Wall. 353.
(12) 21 Wall. 112.
(13) 103 U. S. R. 797.
(14) 113 U. S. R. 59.
(15) Ss. 23, 25, 28, 32, 36, 349, 362, 376.

"into groups, are sufficiently novel, and display enough "invention, to entitle the plaintiffs to a patent" and the learned judge thought they were not; that the plain result of the evidence was, that the coiled wire spring is only a mechanical equivalent for an india-rubber spring, and that it does not possess any element of invention; or, as the learned chief Justice of Ontario says "it therefore stands as a mere substitution of one very well known material for another equally well known material, to produce the same effect on the same principle in a more agreeable and useful manner." The evidence of Edward Wilhelm is very strong and conclusive upon this point. It is as follows:

(His Lordship here read the evidence).

I have been unable to escape from the conclusion arrived at by the learned judge in the court of first instance and by the Court of Appeal, that the use of the coiled wire was only a mechanical equivalent for the india-rubber spring in the Miller patent, and that the plaintiffs' patent, consequently, does not possess any element of invention; that the substitution in this case is in no sense the creative work of an inventive faculty, which the patent laws are intended to encourage and reward; and that the fact that the plaintiffs' improvement has proved successful and highly useful does not, necessarily, establish that it is an invention entitling the plaintiffs to a patent. Such was the case in *Hinks v. The Safety Lighting Co.* (1).

The employing one known material in place of another to produce the same result, though greater cheapness and durability may thereby be secured, is not invention; it involves no new mode of construction and developes no new uses and properties of the article formed, and does not produce a substantially different manufacture. It is a matter of mere mechan-

(1) 4 Ch. D. 607.

1887

BALL v. CROMPTON CORSET CO.

Ritchie C.J.

ical judgment. The substitution may be new and useful but there must be some real novelty in the substitution, or in the application of an old invention to a new purpose. This cannot be said to be the application of an old thing to a new purpose; the means by which the intended result is obtained are substantially the same; there is no difference in function, mode of operation, or character of construction; there is identity of function and substantial identity of performing that function. The use of the coiled wire produced no new and different result not produced by the old combination. There is no change of action; the change of utility was nothing more than a question of degree, and merely did the same thing with better effect. Comparative utility, that is, comparative superiority or inferiority of utility, is not alone a criterion. In this case I cannot discover that the superiority of the plaintiffs' patent over the Miller patent arises from any other cause than the superiority of one well known elastic substance over another equally well known elastic substance, and is, therefore, simply the superiority of material to insure elasticity. India-rubber accomplished the end sought, coiled wire accomplished the same end; both did the same work in, substantially, the same way, accomplishing, substantially, the same result. What was this, then, but the substitution of a mere mechanical equivalent? In *Thompson* v. *James* (1), which was as to the question of substitution of steel springs in the place where other elastic materials were used before, though the Master of the Rolls found, as a matter of fact, that the substitution was new and useful, he felt bound to determine, as a judge, that the substitution of steel wire for whalebone was not the subject of a patent. I cannot distinguish that case from the present.

(1) 32 Beav. 570.

In the United States, where the subject of patents has undergone so much judicial discussion, we naturally turn to ascertain the reasoning which has led to the decisions in that country, and in doing so we find the reasoning and principles enunciated in *Thompson* v. *James* acted on in the highest tribunal of that country. Thus, in *Smith* v. *Nicholls* (1) we find Mr. Justice Swayne, of the Supreme Court, speaking thus:

A patentable invention is a mental result. It must be new and shown to be of practical utility. Everything within the domain of the conception belongs to him who conceived it. The machine, process or product is but its material reflex and embodiment. A new idea may be engrafted upon an old invention, be distinct from the conception which preceded it, and be an improvement. In such case it is patentable. The prior patentee cannot use it without the consent of the improver, and the latter cannot use the original invention without the consent of the former. But a mere carrying forward, or new or more extended application, of the original thought, a change only in form, proportions or degree, the substitution of equivalents, doing substantially the same thing in the same way by substantially the same means with better results, is not such invention as will sustain a patent. These rules apply alike, whether what preceded was covered by a patent or rested only in public knowledge and use. In neither case can there be an invasion of such domain and an appropriation of anything found there. In one case every thing belongs to the prior patentee, in the other to the public at large.

Chief Justice Waite, in *Crouch* v. *Roemer*, (2) delivers himself thus:

It is conceded in the patent itself that shawl straps with handles attached to a leather cross piece having loops at the ends were old. Eustace, one of the witnesses for the complainant, says he made his goods with a cross-piece of the firmest leather he could get, doubled and stitched, so as to render it firmer still. His object clearly was to keep the weight of the bundle from drawing the ends of the handle together so as to press against the sides of the hand.

The testimony leaves no doubt on our minds that handles fastened on rigid cross-bars and used to carry bundles were known long before the complainant's invention. Possibly in adjusting them to use, though this is by no means certain, the straps to bind the

(1) 21 Wall. 118. (2) 103 U. S. R. 799.

1887

BALL
v.
CROMPTON CORSET CO.

Ritchie C.J.

bundle were not passed through loops across the bar, yet it is clear beyond all question that the handle, rigid cross-bar, loops, or their equivalent, and straps, or equivalents, were used in combination to keep together and carry one or more articles in a package made by piling or rolling the articles together. Under these circumstances it was no invention to stiffen by artificial means the leather cross-piece which had been before made as rigid as it could be by thickness, doubling and stitching. All that was done by the inventor was to add to the degree of rigidity which had been used before. The addition of metal or other substance as a stiffener of the known cross-piece, which had already been made rigid in a degree, was not invention. The substantial elements of a well known structure were thus, in no patentable way, changed.

And in *Blake* v. *San Francisco* (1), Mr. Justice Wood, delivering the opinion of the court, says:

"It is settled," says Mr. Justice Gray, speaking for the court, "by many decisions of this court. . . that the application of an old process, or machine, to a similar or analagous subject, with no change in the manner of application, and no result substantially distinct in its nature, will not sustain a patent, even if the new form of result has not before been contemplated. *Pennsylvania Railroad Co.* v. *Locomotive Truck Co* (2); and cases there cited."

If there is any qualification of this rule, it is that if a new and different result is obtained by a new application of an invention, such new application may be patented as an improvement of the original invention; but if the result claimed as new is the same in character as the original result, it will not be deemed a new result for this purpose.

And the cases of *Thompson* v. *Boisselier* (3) and *Stephenson* v. *Brooklyn R. R. Co.* (4); decided that it must not only be new and useful but must amount to invention.

The Appellants in their factum invoke, and also strongly urged on the argument, the following—

It is not contended, of course, that the decision of the American Commissioner of Patents is in any way binding upon our Courts; but the appellants do say that where, after a protracted interference with the full consideration of the Miller patent, the American Patent Office granted a patent it has some weight.

(1) 113 U. S. R. 682.
(2) 110 U. S. R. 490.
(3) 114 U. S. R. 1.
(4) 114 U. S. R. 149.

1887

BALL
v.
CROMPTON CORSET CO.

Ritchie C.J.

In *Smith* v. *Goldie* (1) Mr. Justice Gwynne is reported to have said: "Now upon the question whether the combination is, or is not, the proper subject of a patent it appears to me, I confess, not to be altogether immaterial, although not conclusive, that after a protracted contestation, which must have involved inquiry into the patentable character of the combination, the plaintiff, Smith, obtained a patent in the United States."

In this case it was the same as in the Purifier case. With the full knowledge of the patent in question granted to Miller, and after full consideration of its effect, the United States granted a patent to Florsheim.

Allowing every weight to the presumption in favor of the validity of the patent, arising from the action of the Patent Office in granting it, any such presumption is surely entirely rebutted by a judicial decision declaring that the patent so granted is void, which has actually taken place with reference to this very patent. The question of the validity of this patent came up for adjudication in the United States Circuit Court from the Northern District of Illinois, and was decided January 11th, 1886, and reported in the official gazette of the United States Patent Office under the heading: "decisions of the Commissioner of Patents and of the United States courts in patent cases." It was decided on the same grounds, and for the same reasons, as was the action before us. After detailing minutely the plaintiffs' patents and the English patents to Mills of March 14th, 1815, to the Millers of December 31st, 1866, and the American patent to M. J. Van Norstrand of February 1st, 1876, the learned judge decided that the latter's patent No. 238,101 as to groups, 2308 as to elastic gussets and gores as to durability, &c, were voidable for want of patentable invention over the English patents to Jane Mills of March 14th 1815, the English patent to the Millers of December 31st, 1866, and the American patent to M. S. Van Nostrand of February 1st, 1876; that the substitution of one

(1) 9 Can. S. C. R. 46.

1887

BALL v. CROMPTON CORSET CO.

Ritchie C.J.

material, metal, for India-rubber springs is not a patentable difference. The learned judge says of the Miller patent:

Letters patent, No. 238,100, corsets, and No. 238,101, elastic gore or gusset for wearing apparel, granted February 22, 1881, to Simon Florsheim, as inventor, and Thomas H. Ball, as assignee, are void for want of patentable novelty over the English patent to John Mills, of March 14th, 1815, the English patent to Miller, of December 31, 1866, and the American patent to Mary J. C. Van Norstrand, of February 1, 1876.

Patent No. 238,100 claimed a corset having elastic side sections comprising two layers of cloth stitched together transversely so as to form tubes, wherein were inserted in groups of spiral metal springs formed of one continuous spring, and such sections having plain margins or edges for uniting the elastic sections to the non-elastic sections of the corset. The prior patents taken together disclosed this construction, except that they did not show an elastic section composed of groups of spiral metal springs. Held, that no invention, but only mechanical skill, was required to group such springs.

Same—Change of material.

The substitution of one material (metal for India-rubber springs) is not a patentable difference, even where a superior article is pro duced by such substitution.

Same—Complete device not shown in single prior patent.

Although the complete devices described in these patents may not be found in any one of the prior patents, yet enough is shown in the Miller (1866) patent to invalidate them.

The English patent of John Mills, of March 14, 1815, shows elastic sections or gores in corsets made of cloth with tubes stitched into the same, into which are inserted metal spiral springs, so as to pucker the cloth over the springs and give the sections the required elasticity. The patentee, in his specifications, says:

Figure I is a representation of a stay composed of the same material as common stays, with the introduction of an elastic or expansive portion or slit down the middle, which will dilate or expand by a more than ordinary pressure or force being exerted, as in the case of breathing or exercising of the arms. This flexible portion is composed of springs either of brass, copper or iron wire, or of any other matter or thing capable of producing sufficient elasticity; but this which I recommend is small brass wire worm springs, which extend by a small degree of force. These I place close together in runners or spaces stitched in between two pieces or layers of silk, satin, or other fit material puckered or quilted loosely to give room

1887

BALL v. CROMPTON CORSET CO.

Ritchie C.J.

for expansion, the ends of the springs and their covering of silk, satin, or other matter on them sewed or otherwise fastened to and between the two half pieces of the stay, previously made of the usual material.

Here we have an elastic section for a corset, the elasticity being secured by spiral springs transversely set into the material of which the section is made, and this section extending from the top to the bottom of the corset either at the back or front or both.

In the American patent, granted February 1, 1876, to Mary J. C. Van Nostrand, a corset is shewn with elastic sections at the sides extending from under the arms to the hips or bottoms of the corsets, this section being made of elastic webbings, the elastic material being presumably India-rubber. The elastic sections in this corset are located in the same place and perform the same functions as those shown in the complainant's corset.

In the English patent to Miller, of December 31, 1866, elastic gussets suitable for use on boots, stays, and for other purposes are described where the elastic material used is India-rubber strips run continuously back and forth in tubes formed in cloth. The patentee says:

According to our invention we secure the vulcanized India-rubber springs between two pieces of woven fabrics, leather or other material by stitching with the sewing machine, the stitches running in parallel lines and passing through the two pieces of fabric or material between the India-rubber springs; and the springs, in place of being each a separate piece, are in one piece, the length of the vulcanized India-rubber cord at the end or each traverse across the gusset being turned around and caused to return parallel to itself; thus the liability of the India-rubber to slip and work out of the gusset is much reduced. When gussets made in this manner are worked into boots or other articles, the stitches by which they are secured are passed through a margin on each side of the gusset, and not through the India-rubber part of the gusset, as heretofore.

We first cut the material, leather, silk, cotton, or any other woven fabric, and the lining to the size required of the gusset when it is finished and for leaving the required margin. We then turn over the top edge and baste or tack it down to the lining. We then commence to stitch with a sewing machine a series of rows in parallel lines transversely across the gusset, the stitching passing through the two materials, commencing at the top, and so on, from row to row, until the whole of the gusset is stitched. The distance between the rows of stitches will depend on the thickness of the India-rubber thread to be inserted."

1887

BALL
v.
CROMPTON CORSET CO.

Ritchie C.J.

They then describe the manner in which they pucker the cloth and a machine for doing puckering, and proceed:

"We then insert with the bodkin or needle the thread or strand of India-rubber, which is in one length. We commence at the top cavity to insert the India-rubber thread or cord, and follow back in the next row or cavity, causing it to return parallel to itself, and so on, the same from row to row until the whole of the cavities are filled with India-rubber. We then pull back the margin that is left as large as required and tack it down with an ordinary needle, and the gusset is ready for use."

There can be no doubt that there is described in this patent a gusset with non-elastic margins, edges or ends, and the only conceivable difference between this device and the elastic sections in the complainant's corset patent is that an India-rubber spring is used instead of a metal spiral spring and the springs in this English patent are not grouped. This patent seems to fully instruct any person how to make a section like the section shewn in the complainant's corset patent with India-rubber springs. It does not seem to me that there is any patentable difference between the gussets described in the English patent of Miller and the sections in the complainant's corset patent. The substitution of one material for another is not a patentable difference, even where a superior article is produced by such substitution. *Hotchkiss* v. *Greenwood* (1), *Hicks* v. *Kelsey* (2), *Terhune* v. *Phillips* (3).

In the corset patent the patentee gives his reasons for grouping the springs. He says:

The Springs are arranged in groups as shown. The number of springs composing the group will vary according to location, so as to give the requisite stiffness and elasticity. Those at the top and bottom of the elastic side sections of the groups of springs should not be made so stiff as at the waist. It is essential also that the springs be arranged in groups since if placed contiguous throughout the elastic sections the corset would be much too heavy and expensive, and such sections would be too stiff at some points and not stiff enough at others.

Here is a mere mechanical reason given for grouping these springs clearly applicable to the change of material and the use to which the gusset or section is applied. Were a good mechanic to attempt to apply the Miller gusset or gore to a corset in the manner shown in the complainants corset patent, where an unequal degree of elasticity is required at different points, there can be no doubt that he would

(1) 11 How. 248. (2) 18 Wall. 670.
(3) 99 U. S. R. 592.

provide for that inequality of elasticity by placing his rubber springs closer together or farther apart, which would not require inventive ability, but mere mechanical skill of adaptation. With the part of corset making so far developed in the direction of complainant's device as is shewn by the elastic sections of Miller and Van Nostrand, and with the Miller section showing continuous springs and non-elastic margins, it would seem that all complainant did, in his corset, was fully entitled in the older art. The substitution of wire for rubber makes the Miller corset in all respects an elastic section such as is shewn in complainant's corset, except that the springs are not grouped, and this is not a patentable difference, as the only advantage of the grouping is to make the sections less rigid at some points than at others.

As to complainant's gusset or gore patent, it seems to me that all the elements of this patent are found in the English patent of Miller, just considered. The only difference is the material of the springs, and that I have already said in the discussion of the first patent is not a patentable difference. Miller's patent shows a gusset with tubes into which the springs are inserted, and upon which the cloth or gusset material is puckered, and margins for attaching the gusset to the garment where it is to be used or applied. The old Mills patent of 1815 showed a gusset with metal springs inserted in tubes, and the cloth puckered over those tubes, so as to provide for the expansion; but the patent did not expressly provide for a plain or a non-elastic margin, and all that Miller did in 1866 over Mills in 1815 was to put a non-elastic margin upon the Mills gusset, and all that Florsheim did was to substitute metal springs in place of the rubber springs shown in the Miller patent. This cannot amount to invention in the then state of the art. Coiled wire springs for a gusset or gore were old, and gussets with non-elastic margins were old and well known long before Florsheim applied for his patent, and the proof shows that he examined the Miller patent before he applied for the patent now under consideration, so that he must have known that the field was already covered before his device was produced.

It is urged on the part of complainant that the complete device as described in each of these patents is not found in any of the older devices; but, as I have already said, I find enough in the Miller patent alone to meet and anticipate both these patents. When Miller had shown how to make an elastic gusset or section for wearing apparel with non-elastic margins, there was no invention in applying such a gusset or section to a corset when corsets had already been made with elastic sections, although these older

1887

BALL v. CROMPTON CORSET CO.

Ritchie C.J.

sections did not have non-elastic margins, as it did not require invention to put Miller's elastic sections into Mills or Van Nostrand stays.

For all these reasons I am constrained to conclude that the use of wire did not lay so much out of the track of the former use of India-rubber as not naturally to suggest itself, and, therefore, that the mere substitution of metal for India-rubber was destitute of patentable invention.

STRONG J.—The principle of the invention claimed by the plaintiff is the same as that of the Miller patent, namely, a continuous spring instead of one cut into lengths. The substitution of a wire spring for one of India-rubber is no novelty, but a mere adaptation of a device already well known and used which attains precisely the same object. Numerous authorities show that there is nothing in this to entitle the plaintiff to a patent. It is sufficient to refer to two cases precisely in point and closely resembling the present in their circumstances, *Thompson* v. *James* (1), cited and relied on in the judgments in both the courts below, and that of *Cave* v. *The Morgan Envelope Co.* (2), decided by Judge Lowell in the Circuit Court of the United States.

The appeal should be dismissed with costs.

FOURNIER J.—For the reasons given by Mr. Justice Henry, whose judgment I have read, I am in favour of allowing the appeal.

HENRY J.—The only question for decision in this case arises upon the issue raised by the 4th statement of defence of the respondents, wherein they allege that the invention claimed by the appellants was not patentable. The statute provides that a party may obtain a patent for

(1) 32 Beav. 570. (2) 4 Bann. & Ard. Pat. Cas. 109.

Any new and useful art, machine, manufacture or composition of matter, or any new and useful improvement on any art, machine, manufacture or composition of matter not known or used by others before his invention.

The claim in this case is for a new and useful improvement on a manufacture, and our inquiry is simply from the evidence to ascertain if the manufacture by the appellants of corsets within the terms of his patent was new and useful.

The learned judge who tried the action decided that it was useful, and on that point his judgment is fully sustained, and, I think, very properly so. In this connection I was struck by the statements of Mr. Justice Burton in his judgment in the court below as follows:

I have not the slightest doubt that the improvement made by the plaintiffs was of great value, and that thereby a vastly better article was introduced, and at a greatly reduced cost, and I regret that the effect of our decision is to enable the defendants to avail themselves of the plaintiffs' ingenuity and skill without compensation. It does not commend itself to one as a very honest proceeding, &c.

With all due deference to the learned judge, I must express the opinion that entertaining such views, in which I fully concur, his judgment, in my opinion, should have been for the appellants. He finds, substantially, that the improvement produced two results—"a vastly better article," and "at a greatly reduced cost." Now, when we consider that the claim in the appellants' patent was for a new combination, which has produced the results just mentioned, it seems to follow as a necessary result that that "combination" must have been new. Otherwise, no such results would have been produced. In *Penn* v. *Bibby* (1) the Chancellor says:

To this it is objected that the alleged invention was merely a new application of the old and well known theory. It is very difficult to extract any principle from the various decisions on this subject which can be applied with certainty to every case nor, indeed, is it easy to reconcile them with each other.

(1) 2 Ch. App. 135.

1887

BALL
v.
CROMPTON CORSET CO.

Henry J.

And Sir A. Cockburn, in *Harwood* v. *Great Northern Railway* said (1);

Although the authorities establish the proposition that the same means, apparatus, or mechanical contrivance, cannot be applied to the same purpose, or to purposes so nearly cognate and similar as that the application of it in the one case naturally leads to application of it when required in some other, still the question in every case is one of degree, whether the amount of affinity or similarity which exists between the two purposes is such that they are substantially the same, and that determines whether the invention is sufficiently meritorious to be deserving of a patent.

Under the ruling in the latter case, as well as the preceding one, the inquiry in a case like that before us must be directed to ascertain in the words of Sir A. Cockburn:

Whether the amount of affinity or similarity which exists between the two purposes is such that they are substantially the same.

If the improvement of the appellants is not substantially the same as that of another opposed to it, and that the results are useful in the production of a better article and at a largely reduced cost, that, in the concluding words of Sir A Cockburn, determines that "the invention is sufficiently meritorious to be deserving of a patent."

Let us now see how the matter stands by comparing the two opposing patents separately.

In the specification of the appellants' patent the applicant says;

The object I have in view is to produce means for the successful and practical substitution of spiral metal springs for India-rubber as an element in elastic gores, gussets and sections of wearing apparel. My invention consists, first, in securing the metal springs to the covering material, and extending such covering material beyond the ends of the springs, to form inelastic margins; second, in arranging the springs in groups, and in making the springs of two or more of such groups continuous; and third, in peculiar cross-fastenings for staying the springs at their ends when not made continuous.

With the exception of the substitution of metal springs for those made of India-rubber it is the same as

(1) 2 B. and S 208.

that in the Miller patent referred to, and it claims nothing more. The ruling decisions as to mechanical equivalents include nothing beyond what is simply and solely mechanical.

There is very much beyond that in this case. An equivalent is to be considered not only in regard to its mechanical powers, but as to its general efficiency to do what is claimed for it. We may suppose the case of an inventor producing a machine in which he claims to use a material substance which on trial from the want, say, of elasticity or otherwise, failed to insure the working of the machine, and the patent lapses. It would have been, if successful, a valuable invention to the public, but its benefits are lost through the failure of the specified material substance. Another inventor substitutes suitable materials and succeeds in producing a machine valuable to the public. It is, therefore, meritorious and deserving of a patent. Here, then, we have an invention for the application of India-rubber. Two substantial objections to its use are shown to exist. First, its offensive smell, and next, that in a short time its elasticity is gone.

It is not shown that Miller's invention was ever practically used, but, on the contrary, there is evidence going to show that from the obnoxious qualities of India-rubber, and its want of durability as an elastic substance, it could not be successfully used. It is an English patent, but has not been shown to have had any practical value.

The public, therefore, derived, as far as we can discover, no benefit from it. On the other hand the appellants' improvement has been shown to have been a public benefit, and therefore well worthy of a patent. We have evidence of the application of spiral springs, but not continuous or at all adapted to the purpose of producing satisfactory results. The trial of them

1887

BALL
v.
CROMPTON
CORSET CO.

Henry J.

resulted in failure, because they were not continuous and were not fastened to elastic margins. Besides, in the plaintiffs' specification arrangements were made for groups of spiral springs in places where a greater amount of strain would naturally be felt, leaving the other parts, although connected, to be more easily affected; and, therefore, making the corset lighter and more easy and comfortable to the wearer. This case resembles very much that of *Smith* v. *Goldie*, decided lately in this court. There was a claim there for a combination only. It was by the simultaneous application by means of fans of a current of air to the revolving bolt of a grist mill and a set of brushes worked by machinery. The fans had been previously used for the same purpose and so had brushes, but no similar simultaneous action had been previously applied by means of machinery, and the result was the manufacture of a superior article of flour. This Court decided in favour of the patent for the combination as a meritorious invention on account of the improved results. I believe an application to the Privy Council to grant an appeal in that case was made and refused.

There was nothing new in that case but the simultaneous application of two well known and used powers both of which had been previously but ineffectually separately tried. On principle are not the two cases similar?

The India-rubber springs of Miller did not accomplish, as far as shewn, any beneficial result. The material is shown to contract with the heat of the wearer's body, and therefore to become to some extent uncomfortable if not injurious. Articles manufactured with India-rubber to give them elasticity very soon lose it, and if kept any time in stock become to that extent injured. It is alleged, therefore, that dealers

1887

BALL v. CROMPTON CORSET CO.

Henry J.

refused to purchase articles so made. From the evidence before us the proper conclusion is that Miller's patent was worthless and that of the appellants most valuable.

To decide, then, that the former should be held to have anticipated the latter would not, in my opinion, be conformable to law, equity, or common justice I think the appellants have fully established their patent rights and are entitled to our judgment with the usual results in such cases, and that the appeal should be allowed with costs in all the courts.

GWYNNE J.—This is an action for alleged infringement by the defendants of a patent for invention granted to one Florsheim by letters patent bearing date the 29th day of April, 1881.

The defendants, among other defences, deny

1st. That the alleged invention is new or useful.

2nd. They deny that the alleged invention is a matter for which letters patent could be granted.

3rd. They say that the alleged inventions were known and used by others before the alleged invention thereof by the patentee.

4th. They say that patents for the said inventions were in existence in other countries, to wit, in the United Kingdom of Great Britain and Ireland and the United States of America, more than twelve months prior to the application in Canada for the said alleged patent.

5th They say that the specification of the alleged patent does not correctly or fully describe the mode or modes of operating contemplated by the alleged inventor. Nor does the same state clearly or distinctly the contrivances or things claimed as new for which the patentee claimed an exclusive property or privilege.

6th. They say that the said alleged patent claims more than the patentee had a right to claim as new.

1887

BALL v. CROMPTON CORSET CO.

Gwynne J.

The letters patent of the 29th April, 1881, purport to grant to the patentee and his assigns, for the period of five years, the exclusive right, privilege and liberty of making, constructing and using, and vending to others to be used, certain new and useful improvements on elastic gores, gussets, &c., for wearing apparel, of which he claimed to be the inventor, such his invention consisting, as stated, in the letters patent as follows:—

It consists, 1st. in an elastic gore, gusset or section for wearing apparel, composed of a covering material having tubes, spiral metal springs inclosed by such tubes and not extending to the edges of the covering material, and stayed at the ends by such covering material, and inelastic margins outside of the springs.

2nd. in an elastic gore gusset or section of the character described, the springs arranged in groups and made of a continuous length of coiled wire.

3rd. in an elastic gore, gusset or section of the character described, the metal fastenings C extending across the ends of the tubes between the thicknesses of the covering material.

In the specifications referred to in, and made part of, the letters patent the patentee says;

The object I have in view is to produce means for the successful and practical substitution of spiral metal springs for India rubber as an element in elastic gores, gussets and sections for wearing apparel.

My invention (he says) consists first in securing the metal springs to the covering material and extending such covering material beyond the ends of the springs to form inelastic margins; second in arranging the springs in groups and in making the springs of two or more of such groups continuous and, third, in peculiar cross fastenings for staying the springs at their ends when not made continuous.

In 1815 Letters patent of invention were granted in England to one Mills for improved elastic stays. The invention for which such Letters Patent were granted was described to consist of the introduction of a flexible or elastic portion in those parts of the stays best calculated to give relief to the wearer and at the same time preserving that stability and support usually given to the body by the common adaptation of whalebone, steel, and other hard or inflexible

materials. Three drawings of stays showing the elastic portions introduced are annexed to the specifications and are referred to therein as figures 1, 2, and 3. The improvement as introduced into the stays shewn in Figure 1 was described as follows:

Figure 1 is a representation of a stay composed of the same materials as common stays with the introduction of an elastic or expansive portion or slit down the middle which will dilate or expand by a more than ordinary pressure or force being exerted as in the case of breathing or exercise of the arms. The flexible portion is composed of springs either of brass, copper, or iron wire, or of any other matter or thing capable of producing sufficient elasticity; but that which I recommend is small brass wire worm springs which extend by a small degree of force. These I place close together in runners or spaces stitched in between two pieces or laying of silk, satin or other fit material puckered or quilted loosely to give room for expansion; the ends of the springs and their covering of silk, satin or other matter on them, sewed or otherwise fastened to, and between, the two half pieces of the stay previously made of the usual materials such as jean, or other cotton, linen, silk woollen or leather, &c.

As to figure 2 the specifications say;

This elastic portion is composed of dilating springs as before expressed, either of copper, brass, iron or other matter, but brass wire worm springs I prefer, covered as before described. In this elastic portion the springs need not be placed so close together as in figure 1, and it will be found necessary to place stronger springs at the top and bottom than in the middle, the latter being intended to yield very readily, the power to help support and brace the body with busks of a slighter kind than usually adopted in common stays placed down the stay in order to distend it as seen in the drawing.

In all these drawings the ends of the coverings of the springs extending beyond and outside of the elastic portion were shewn to be sewn to the two half pieces of the stay between which the elastic portion was introduced.

It thus appears that before ever India-rubber was used as an elastic material in stays, or in gussets gores, &c., for wearing apparel, the use of metal spiral or worm springs was well known; to speak therefore of the

1887

BALL
v.
CROMPTON CORSET CO.

Gwynne J.

substitution of spiral metal springs *for* India-rubber as an invention in 1881 seems rather anachronistic.

In 1866 letters patent of invention were granted to James Miller and James Miller Jr. for the invention of improvements in the manufacture of elastic gussets.

By this time the use of vulcanized India-rubber as an elastic material for gussets, gores &c. had become common and the improvement patented by these letters patent was in the making India-rubber gussets.

The specifications accompanying these letters patent describes the invention patented as follows;—

This invention has for its object improvements in the manufacture of elastic gussets suitable for use in boots and stays and for other purposes. In the manufacture of gussets it is usual to weave the vulcanised India-rubber springs into the fabric in the process of manufacture; the India-rubber forming a portion of the warp of the fabric; or when the gussets are of leather by means of cement, and in either case each spring or line of India-rubber has been a separate piece. Now, according to our invention we secure the vulcanised India-rubber springs between two pieces of woven fabric, leather. or other material by stitching with a sewing machine, the stitches running in parallel lines and passing through the two pieces of fabric or material between the India-rubber springs, which, in place of being each a separate piece are in one piece, the length of vulcanized India rubber cord at the end of each traverse across the gusset being turned round and caused to return parallel to itself; thus the liability of the India-rubber to slip and work out of the gusset is much reduced. When gussets made in this manner are worked into boots or other articles the stitches by which they are secured are passed through a margin on each side of the gusset and not through the India-rubber part of the gusset as heretofore.

Now, from these Letters Patent it is apparent, that if the mode as described in the Letters Patent of April, 1881, for securing metal springs to their covering material, and the extension of such covering material beyond the ends of the springs, to form a margin for the purpose of thereby attaching the covering material of the springs to other parts of the fabric to which the elastic portion was to be applied, had not been known

ever since the granting of the Letters Patent to Mills in 1815, this mode of fastening springs in gussets and of attaching such gussets was known ever since the granting of the Letters Patent in 1866. The mode of securing springs in their covering material, or of attaching the covering material containing the springs to other portions of the fabric to which they were to be attached, were matters wholly independent of all consideration of the nature of the material of which the elastic springs were made. There would be no patentable novelty in the application of a mode of fastening, in a gusset, elastic springs made of one material, or of attaching the gussets containing such springs to another material, to the case of gussets containing elastic springs made of a different material, whatever novelty there might be in the use of a different material for the making of the elastic springs.

In 1872 Letters Patent of invention were granted in England to one Adlam for the invention of "an improvement in stays." In the Letters Patent and in the specifications accompanying the same the invention was described as:

An elastic fabric made of India-rubber webbing, or its elasticity may be derived from small spiral springs inserted in the fabric.

The patentee in the specifications referring to drawings therein, said:

When metallic springs are employed I insert them in the following manner: The inner and outer fabric, *a a*, figure 2, are united together by a series of parallel stitches, *b b*, to form channels to receive springs, and the fabric is then reeved upon wires, which are withdrawn to enable the springs to be inserted. I may here observe that the springs are of brass wire, and are the same as those employed for garters or belts, which are covered in a similar manner to that above described.

And again:

The elastic fabric may consist of India-rubber fabric, but I prefer small spiral springs inserted in the fabric as being more durable.

Now, from these letters patent, it is apparent that

1887

BALL v. CROMPTON CORSET CO.

Gwynne J.

the use of spiral metal springs in preference to India-rubber, for the purpose of making elastic fabrics, had long been well-known, and from the time of the granting of these letters patent we must take to be well known the mode there described of inserting the metal springs in the covering material in "channels," which seems to be but another word for the "tubes" mentioned in the letters patent to Florsheim of the 29th of April, 1881. On the first of February, 1879, one Gustav Schilling applied for letters patent of invention to be granted to him in the United States, for what he claimed to be a new and useful improvement in gloves and for which letters patent were granted to him on the 5th of August, 1879. The invention for which these letters patent were granted was said to consist in a series of springs made of very fine brass wire coiled upon a small mandrel so that their spirals are successively in close contact with each other, such springs being enclosed in finely wrinkled leather tubes and attached with their ends across the wrist portion of the glove. In his specifications the patentee declared that he was aware that elastic woven bands, straps or gores were well known and had long been used in gloves, such bands, straps, or gores being composed of india-rubber strands, upon which when under tension a filling of small threads has been woven. And *he therefore disclaimed* the invention *of an elastic attachment* for the purposes mentioned. He also declared that he was well aware of the shoe fastenings of Fitch and Jones, *composed of a spiral spring* coiled around an elastic core, and permanently secured to the shoe at one end only, and *he therefore disclaimed* the invention *of a spiral spring coil* to be used for gloves. He also declared that he was aware of an English patent of 1866, wherein was described an *elastic gore* for shoes, composed of leather, divided by stitches into

1887

BALL v. CROMPTON CORSET CO.

Gwynne J.

numerous tubes, through which when wrinkled a small India-rubber strand is threaded back and forth, and he *therefore disclaimed* the invention described in such English patent. And all that he claimed as his invention was the *combination with a glove* of a series of spiral metal springs enclosed in separate puckered tubes and permanently attached at both ends to the wrist portion of the glove. We are not called upon now to determine whether this attachment to a glove, or as it is called "combination with a glove at the wrist" of a well known elastic fabric made of spiral metal springs producing the elasticity which spiral metal springs were known to produce, was a patentable invention. For our present purpose it is sufficient to say that the elastic fabric here described, for the combination of which with a glove the Letters Patent were granted in the United States, and its elastic property were things that were well known.

On the 7th of February, 1879, the same Gustave Schilling applied for Letters Patent to be granted to him in the United States for what he claimed to be a new and useful improvement in elastic gores for gaiters, and Letters Patent were granted therefor on the 22nd of April, 1879. The invention for which these Letters Patent were granted was said to consist in the application of a series of small coil springs enclosed in finely wrinkled tubes formed by uniting two flaps of thin leather with parallel seams of stitching and arranged in series with blank spaces between the different series so as to adjust the tension of the various parts of the elastic gore.

In the specifications accompanying these Letters Patent the springs are described as being made of very fine brass wire which are coiled upon a small mandrel so that its spirals are successively in close contact with each other, precisely as in the specifications accom-

1887

BALL v. CROMPTON CORSET CO.

Gwynne J.

panying the application of the same applicant on the 1st of February, 1879, above mentioned. The specifications further say:

The leather tubes, after the springs are inserted therein, are contracted over the same so as to form a multitude of small wrinkles equally distributed over the whole length of the springs, and the ends of the latter are secured in the ends of the tubes in the gore, which again, with its edges, is secured by stitching between the edges of the material and the lining of the gaiter in the usual manner. The springs I arrange in the gore in series of two, three or four, with a blank space between each two series, in accordance with the required elastic resistance for making a tight and yet easy fit of the gaiter round the angle of the foot. Heretofore the gores for gaiters were made of an elastic fabric composed of rubber tiers interwoven with or covered with silk or cotton threads. Such gores, however, were not durable, soon lost their elasticity, and could not be blackened with the rest of the shoe, and therefore soon had a worn out appearance, while a gore of my above described construction will exert a uniform tension which will not relax with its use and will out-last the gaiter, can be shined with blacking, and will be impervious to water as much as the rest of the shoe. The unpleasant feeling of rubber to the skin, particularly in the summer time, is well known, and a substitute of leather gores is therefore something desirable.

What I claim as my invention is the elastic gore for gaiters and boots, composed of wrinkled flaps and coiled metal springs placed in tubes between the flaps and arranged in series, with blank spaces between the series, substantially as described and shewn.

It is to be observed here that the covering material of leather is described as having ends or edges extending beyond the spiral springs and the tubes in which they are placed, by which edges the gore containing the spiral springs is sewn to the gaiter in what is called the usual manner. In the specifications the novelty which is relied upon seems to be the substitution of leather for India-rubber.

That the use of spiral metal springs and their superiority as an elastic material over India-rubber was well known I have already shewn. Whether the insertion of spiral metal springs in leather as a covering

material was a patentable invention, we need not now enquire, for I refer to these Letters Patent for the purpose merely of showing that, neither in the use of spiral metal springs for the purpose of making an elastic fabric, nor in the mode of attaching such elastic fabric to the material in which the elastic fabric was to be inserted, by sewing to such material the ends or edges of the covering material of the metal springs extending beyond the ends of the spring, was there any novelty.

On the 4th of March, 1879, the above named Gustav Schilling, jointly with the plaintiff Florsheim, applied for, and on the 17th February, 1880, obtained, Letters Patent to be granted to them in the United States for what they claimed to be new and useful improvements in pantaloon garments, and they described what they claimed their invention to be as follows:

Our invention consists in Pantaloons, Drawers, or Overalls as a new article of manufacture provided with elastic straps at the sides, such straps composed of a series of spiral springs held in puckered tubes between two layers of materials and arranged lengthwise of the waistband and supported by intermediate loops; and also in Pantaloons, Drawers, or Overalls as a new article of manufacture having a triangular gore at the back of the waistband composed of a series of spiral springs held in puckered tubes and arranged in a close group at the top, followed by puckered spaces separated by two spiral springs, all as more specifically hereinafter described.

Figures are then referred to with letters upon them indicating the several parts as follows:

C is an elastic gore inserted in the rear upper of the garment, and *D D* are elastic straps secured with their ends upon the waistband at the sides of the overalls, whereby the support of the garment is brought upon the hips and the loose portion of the waistband intermediate of the strap ends for the purpose of preventing its sagging down; has two loops, *E E*, attached, which inclose, and by which it is suspended on, the straps.

The gore *C*, as well as the straps, *D D*, are composed each of two flaps, *c c*, of thin leather or of cloth, which may be of a correspond. ing color with the fabric of the pantaloons. These flaps are cut about twice the length the gore or strap is to be when finished, and are united by longitudinal parallel seams of stitching so as to form

1887

BALL v. CROMPTON CORSET CO.

Gwynne, J.

small tubes between two such seams, into each of which is inserted a small coil-spring, *d*. These springs are made up of very fine brass wire, which we coil upon a small mandrel, so that the spirals are successively in close contact with each other. The leather or fabric tubes are contracted over these springs so as to form a multitude of small wrinkles equally distributed over the whole length of the said springs and the ends of the latter we secure in the ends of the tubes to the fabric.

For the gore we arrange the springs in series of two, three, or four with a blank space between each two series and in accordance with the required elastic resistance necessary for insuring a close yet comfortable fit for the pantaloons and with the length of the springs proportioned to the varying width of the gore. For the side straps we arrange about four such springs side by side and we attach the ends of such straps upon the waistband and cover said ends by small patches of leather or fabric, and to the waistband at equal distance between the ends of, and over, the straps we secure two leather or fabric loops which will sustain the otherwise loose portion of the waistband.

Such springs interlaid between leather or cloth which will conceal and protect the same and will prevent their being stretched beyond the length of the covering material, make a much more durable elastic strap or gore than those made of rubber shirrs interwoven with or covered with the threads of the fabric, which are early influenced by the weather and become brittle with age, besides the disagreeableness of rubber where it comes in contact with the human skin.

Although it may be desirable to apply both the gore and the straps to pantaloon garments, yet one or the other alone may be sufficient to bring about the desired good result, and, therefore, we do not wish to be restricted to their combined application.

The straps may be detachably secured by buttons or buckles so as to enable the same to be taken off while the overalls, pants or drawers are sent to the laundry for cleaning or washing, and such elastic straps may be applied with good advantage also to the vest in place of the rear latchets and buckles.

After describing in this manner the mode of construction of the elastic fabrics made of metal springs, the use of which in pantaloons was claimed to be so superior to elastic fabrics made of India-rubber, and the use of which, as applied to vests, was claimed to be so superior to "rear latchets and buckles" theretofore in use as to make the garment in which they should be inserted such "*a new article of manufacture*" as to

entitle the applicants to have letters patent granted to them as for a new invention, the specifications nevertheless proceed to say ;

We do not claim in this application the invention of spirally-coiled wire springs, held in puckered tubes between two layers of material, neither do we claim the application to pantaloons, overalls, or drawers of elastic gore, pieces or straps—but as we have not found described and do not know of such garments provided with straps or with gores constructed, arranged, and applied as described in our specification. We do claim as new and as our invention ;

1. As a new article of manufacture pantaloons, drawers or overalls provided at the sides with elastic straps composed of a series of spiral wire springs held in puckered tubes between two layers of material arranged lengthwise of the waistband and supported by intermediate loops substantially as and for the purposes set forth.

2. As a new article of manufacture pantaloons, drawers or overalls provided with a triangular gore composed of a series of spiral wire springs, held in puckered tubes and arranged in a close group at the top followed by puckered spaces, separated by two spiral wire springs substantially as and for the purposes set forth.

What was claimed to be the new invention was not the spiral metal springs, as described, but, 1st, as a new article of manufacture, pantaloons, drawers and overalls provided at their sides with straps composed of a series of well known spiral springs arranged lengthwise of the waistband and supported by intermediate loops ; and,

2nd, as a new article of manufacture, pantaloons, drawers or overalls provided with a triangular gore composed of a series of the well known spiral metal springs arranged, &c , &c.

For the above, as new inventions, letters patent were granted. Whether such letters patent, if granted in this Dominion, could be held to be valid is not now the question. I refer to the specifications accompanying the application for these letters patent merely to point out the plaintiff Florsheim's disclaimer of elastic gore pieces composed of spirally coiled wire springs held in puckered tubes between two layers of covering material being a new invention.

1887

BALL v. CROMPTON CORSET CO.

Gwynne J.

On the 10th March, 1879, the above named Gustav Schilling and the plaintiff Florsheim jointly applied for, and subsequently, on the 25th November, 1879, obtained, letters patent in the United States, to be granted to them for what they claimed to be a new and useful improvement in corsets.

In the specifications accompanying the application, and forming part of the letters patent, the applicants, describing their invention, say:

The object of our improvement is the production of a corset specially adapted for use in warm weather and in warm rooms and under circumstances of work or exercise which will produce free perspiration, and to that end we have now adopted a construction and an arrangement of parts which will ensure a constant, uniform, accurate fit of the corset to the wearer under all changes of her position, without chafing or annoying in any part, and will be cool, comfortable and exceedingly durable. To that end India-rubber elastic portions are dispensed with, as these soon loose their elasticity and durability in the presence of animal heat and perspiration, and instead of such, metallic spiral springs encased in puckered cloth tubes are used. For this same purpose the corset instead of being made in two parts as usual, is made practically of a single part, the central back portion being made of the elastic material above referred to inserted in the form of a piece with substantially parallel sides so as to give an equal degree of elasticity to all parts of the corset. For the same purpose, also, gores of the elastic material above referred to are inserted at the sides where an annoying pressure is ordinarily given by corsets to the hip bones; and shoulder straps of the same elastic material are provided in order to hold the corset, which should not fit tightly in any part, from a tendency to slip down under some circumstances.

The novelty of our invention consists in the application (to a corset constructed substantially as described) of shoulder straps composed of wire springs in puckered tubes substantially as described, and of the entire corset as a new article of manufacture, having the elastic back, hip gores and shoulder straps, all as more fully hereinafter described.

After referring to certain drawings accompanying the specifications, they say:

We are aware that it is not original with us to use metallic wire coiled springs inclosed in cloth tubes in corsets, or to make a corset practically in one piece by inserting an elastic portion in the back, or to use elastic gores in corsets at the hips, or to provide corsets

with partially elastic shoulder straps, and we disclaim all such inventions broadly.

After this disclaimer I confess that I find a difficulty in seeing what remained to be patented as a new and useful improvement in corsets. The applicants, however, without defining precisely what they claimed to be novel, or claiming that they had obtained any new result by the combination of known materials, add:

But, as we believe that we have certain novelties in our corset for which we are entitled to letters patent, we claim as new and as our invention,

1st. In combination with a corset the elastic shoulder straps composed of wire springs in puckered tubes throughout their entire length substantially as described and shewn; and

2nd. As a new article of manufacture the corset described and shewn having an elastic back piece, elastic hip gores, and elastic shoulder straps, all constructed and arranged substantially as specified.

That is to say, they claim 1st. as a patentable novelty the application, throughout the entire length of the shoulder strap of a corset, of wire springs in puckered tubes, the use of which, partially in shoulder straps, was well known; and, 2ndly., they claim as novel the corset just as it was shewn in the drawing and model accompanying and forming part of, the specifications, having elastic pieces made of well known materials producing well known effects, arranged in the particular manner shewn in such drawings and model. Now, in the model of the corset which accompanied the specifications, a copy or drawing of which, certified by the Commissioner of Patents of the United States, has been produced in evidence, is shewn the elastic back piece or strip used in the corset in the lower end of which (a copy or drawing of which on an enlarged scale is filed) the metallic wire coiled springs are shown to be inserted in one continuous coil. On the part of the plaintiffs it was contended, that, although the continuous coil of wire springs did so appear, yet that it did not form part of what was specifically patented by the

1887

BALL v. CROMPTON CORSET CO.

Gwynne J.

letters patent; and the reason given was, that the continuity of the coil was, as was alleged, the invention of Florsheim, whereas the other matters were the joint invention of Schilling and Florsheim, and that they could not be united in the same letters patent. But whether the continuous coil of wire springs as part of the corset which was the patented article having an elastic back piece in which the continuous coil is shewn, was or not covered by the letters patent, or whether it was intentionally omitted for the reason suggested, appears to me to be of no importance; for the article which was patented, being a corset having the elastic back piece, as shewn in the drawings, which elastic back piece contained the continuous coil, the use of which, whether in itself the subject of a patent or not, plainly appeared, the plaintiffs Florsheim and Schilling by their specifications proclaimed to the world, if not already well known, the use of the continuous coil more than twelve months before the plaintiff Florsheim applied for the letters patent of the 29th April, 1881.

From these extracts from the above several letters patent, I think it very plainly appears, that the defendants have maintained their contention, that the letters patent of the 29th April, 1881, cover more than the patentee Florsheim had a right to claim as new, and that the several matters professed to be patented were known and used by others before the alleged invention thereof by the plaintiff Florsheim, and that letters patent for the several matters covered by the letters patent of April, 1881, or at least some of such matters, were in existence in other countries more than twelve months prior to Florsheim's application for such letters patent. In fact, those letters patent have been, in my opinion, well described as having been granted for divers matters for which, whether patentable novelties or not, letters patent had been granted, some to certain

parties in Great Britain for some of the matters, and others to other parties in the United States, of whom the plaintiff Florsheim himself was one, for other such matters

The letters patent of the 29th of April, 1881, profess to grant to the plaintiff Florsheim the exclusive right, privilege and liberty of making, constructing and using, and vending to others to be used : —

1st An elastic gore, gusset or section, for wearing apparel, composed of a covering material having tubes, spiral metal springs inclosed by such tubes and not extending to the edges of the covering material, and stayed at their ends by such covering material, and inelastic margins outside of the springs.

2nd. An elastic gore, gusset or section of the character described, the springs arranged in groups and made of a continuous length of coiled wire.

3rd. An elastic gore, gusset or section of the character described, the metal fastening, *C*, extending across the ends of the tubes between the thicknesses of the covering material.

The metal springs as used in the elastic gore or gusset, first and thirdly above described, are not continuous. The elastic gore secondly described differs from that first described only in the insertion in the tubes of a continuous coil or continuous coils of wire springs.

And that thirdly above described differs from that first described only in the insertion of a wire fastening extending across the ends of the tubes, which in the elastic gore first described have no such fastening.

Now, the elastic gore or gusset as first above described, the exclusive right or privilege of making and using which, and vending to others to be used, the letters patent purport to grant to the plaintiff Florsheim, is covered by the descriptions taken together as contained in the specifications forming part of the above English letters patent of 1815, 1866, and 1862, and as

1887

BALL v. CROMPTON CORSET CO.

Gwynne J.

also covered by the descriptions as contained in the specifications forming part of the above letters patent to Schilling of the 22nd of April and the 5th of August 1879; and by the description contained in the specifications accompanying the above recited application of the 4th March, 1879. In fact, a great part of what is covered by the *first* of the above paragraphs, taken from the letters patent of the 29th April, 1881, is wholly disclaimed as being novel by the plaintiff Florsheim himself in the specifications accompanying this application.

As to the elastic gore described in the second of the above paragraphs taken from the letters patent of the 29th of April, 1881, the only novelty there suggested is the use of a *continuous* coil of wire springs in lieu of the wire springs mentioned in the first paragraph which were not continuous. As to this I am of opinion that the substitution of continuous wire springs for non-continuous wire springs, there being no new result or special benefit attributed to the *continuity* merely, is not a patentable novelty. The use of continuous springs was known in 1866 as appears by the above recited letters patent granted in that year, and that the use of continuous *wire* springs for the same precise purpose had been known for more than twelve months prior to the plaintiff Florsheim's application for the letters patent of the 29th April, 1881, is apparent from the drawings and model of the corset described in the specifications, forming part of the United States letters patent which were granted to the plaintiffs Florsheim and Schilling on the 25th of November, 1879, upon their application of the 10th March, 1879.

In like manner, as to the insertion of a wire passed through the ends of non-continuous wire springs, as described in the third of the above paragraphs, taken from the Letters Patent of the 29th April, 1881, that does not appear to me to be a fit subject of Letters Patent

1887

BALL v. CROMPTON CORSET CO.

Gwynne J.

as for an invention. No special benefit or novel result is attributed to this insertion of the wire. In fact upon the argument the whole benefits relied upon as supporting the Letters Patent were the superiority which metal springs had over India-rubber as an elastic material, and the manner of attaching the gore or gusset containing the springs, by its edges or margins, to the fabric in which the gore or gusset was to be inserted. Now, as to the superiority of wire springs over India-rubber, that was well known as early as 1815, and the substitution of wire springs for India-rubber was disclaimed by the plaintiff Florsheim as being novel, or as being his invention, in the specifications accompanying and made part of the above recited Letters Patent, granted to him and Schilling on the 25th November, 1879, and the 17th February, 1880, and such substitution of metal springs for India-rubber is not now claimed to be novel, or to be part of the invention for which the plaintiff Florsheim applied for the Letters Patent now under consideration; and as to the method pointed out in the specifications accompanying the Letters Patent of April, 1881, of attaching the gore or gusset containing the wire springs by the edges or margins to the fabric to which it is to be attached, that method sufficiently clearly appears to be substantially shewn in the description contained in the specifications accompanying the above recited English patents of 1815 and 1866 and in those accompanying the United States Letters Patent to Schilling of the 22nd April, 1879.

In fine, for the avoidance of the Letters Patent now under consideration, it is sufficient to say that a part, indeed, as it appears to me, almost the whole, if not the whole of the articles thereby patented as novelties were known and in use for more than twelve months prior to the plaintiff Florsheim's application for the Letters Patent granted to him in April, 1881.

1887

BALL
v.
CROMPTON CORSET CO.

GWYNNE J.

The appeal, therefore, should, in my opinion, be dismissed with costs.

Appeal dismissed with costs.

Solicitor for appellants: *John Akers.*

Solicitors for respondents: *Mowat, MacLennan, Downey & Biggar.*

1886

*Feb. 24.
*May 17.

GEORGE J. TROOP AND WILLIAM J. LEWIS (PLAINTIFFS)..... } APPELLANTS;

AND

THE MERCHANTS MARINE INSURANCE COMPANY (DEFENDANTS)..... } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Mar. Ins.—Ins. on freight—Constructive total loss—Abandonment—Repairs by underwriters.

A vessel proceeding on a voyage from Arecibo to Acquim and thence to New York, encountered heavy weather, was dismasted and was towed into Guantanamo. The underwriters of the freight sent an agent to Guantanamo to look after their interests, and the master of the vessel, under advice from the owners, abandoned her to such agent, and refused to assist in repairing the damage, and complete the voyage. The agent had the vessel repaired and brought her to New York, with the cargo.

On an action to recover the insurance on the freight,

Held, reversing the judgment of the Court below, Strong J. dissenting, that there being a constructive total loss of the ship the action of the underwriters, in making the repairs and earning the freight, would not prevent the assured from recovering.

APPEAL from a Judgment of the Supreme Court of Nova Scotia (1) ordering that judgment be entered for the defendants on a special case stated by the parties. The said special case was as follows:

1st. This is an action brought to recover the sum of eight hundred dollars upon a policy of insurance issued by the defendant company to the plaintiffs, carrying on

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

(1) 6 Russ. & Geld. 323.

business under the name of Black Brothers and Co., upon the freight of the brigantine "Rebecca Neily," of which the plaintiffs were owners, upon a voyage at and from Arecibo to Acquim and thence to New York. The plaintiffs alone were interested in said freight.

2nd. Whilst prosecuting said voyage with her cargo on board, she encountered heavy weather, was dismasted, and towed into Guantanamo on or about the middle of November, A.D. 1881. The defendant company had also a policy on the hull of said vessel to the extent of two thousand five hundred dollars, dated the 10th day of May, A.D. 1881, which is the subject of the first count of the declaration herein.

3rd. It would have cost at least the amount of freight, payable under the charter-party hereinafter referred to from Acquim to New York, to send the cargo on from the said port of Guantanamo to New York by another ship

J. F. Whitney & Co., commission merchants in New York, disbursed the said vessel and collected her freight, which was placed by them to credit of the "Rebecca Neily" and owners for account of disbursements paid by them, and after so crediting the sum received there was a balance left unpaid on disbursement account which was placed by them to the debit of said "Rebecca Neily" and owners. The said disbursement account was rendered by said J F. Whitney & Co. to the defendant company by the authority of the latter, and the defendant company paid to said J. F. Whitney & Co. the said balance due to them. The said J F. Whitney & Co. also had other money transactions with the defendant company relative to said vessel after she was towed into Guantanamo and before her arrival at New York from Guantanamo aforesaid; and the said J. F. Whitney & Co. had made payments for said vessel by the authority of the defendant company, and the latter subsequently re-imbursed said

1886

TROOP v. MERCHANTS MARINE INSURANCE CO.

J. F. Whitney & Co. for all the moneys which they had advanced or paid for said defendants.

4th. The printed case in an action brought by the plaintiffs above named against the Honorable Alfred G. Jones, and which is hereinafter more particularly referred to, together with the pleadings in this action, the policy of insurance granted by defendants upon said freight, the charter-party entered into on behalf of the plaintiffs for the carriage of the cargo on board said "Rebecca Neily" at the time of her loss shall form part of this case. The court shall consider the evidence in the said printed case herewith, and as to all questions of fact not admitted in this case the court shall be at liberty, and power is hereby given to them, to find all questions of fact and to draw all inferences of fact that a jury might.

5th. It is admitted that preliminary proofs were given in due form more than sixty days before this action was commenced.

6th. The said action brought by the said plaintiffs against said Honorable Alfred G. Jones, as will be seen on reference to the said printed case, was an action against said Jones as an underwriter upon a policy on the hull of the said "Rebecca Neily" to recover for a total loss of said vessel. On the trial of plaintiffs' said action against said Jones, the following verdict or finding was rendered by Mr. Justice Thompson, who tried the said cause:—

"I give the verdict for the plaintiffs for the amount "claimed, and interest. While recognizing the im- "portance of the questions involved in this suit, I do "not here state at large the views which I entertain "on these questions, because I conceive it will be only "useful for me to state the points on which my con- "clusions rested. I thought the abandonment justifi- "able, and the constructive total loss theory sustain- "able.

" 1st. By the vessel's condition and situation at
" the time of the abandonment, irrespective of
" subsequent events, confirmatory of this view
" 2nd. By the evidence of value after repaired.
" 3rd. By the actual cost of the repairs

" Having arrived at this conclusion, it seemed to me " that the plaintiffs were entitled to the verdict, not- " withstanding the repairs effected by the under- " writers, and the endeavours of the underwriters to re- " store the vessel to the plaintiffs."

7th. The defendants, upon said verdict of Mr. Justice Thompson being sustained by the court *in banco* upon appeal thereto, paid into court in this action, on or about the 31st day of July, A. D. 1884, under the count upon the said policy on hull, the amount due thereon as for a total loss of said vessel, with interest to the date of such payment.

8th. It is admitted that the foregoing findings of Mr. Justice Thompson were correct, and it is agreed that they shall form part of the case, and shall have the same effect herein as if found in this cause upon sufficient evidence in that behalf.

9th. The question for the consideration of the Court is whether or not the plaintiffs can, under the circumstances, recover the insurance on said freight.

Judgment to be entered for the successful party with the costs upon and incident to the claim upon the freight policy.

The following facts also were presented by the printed case in appeal.

SUPPLEMENTARY PARAGRAPH.

The defendants sent an agent, one Lewis Anderson, from Halifax to Guantanamo to look after their interests.

He left Halifax 7th December, 1881, and arrived at Guantanamo the 22nd of December, 1881. In respect to this matter certain correspondence took place

1886

TROOP v. MERCHANTS MARINE INSURANCE CO.

between the parties thereto in reference to Anderson's mission, the owners claiming that they had abandoned the ship and had no further interest in her.

The plaintiffs had in the meantime sent the following telegrams to J. F. Whitney & Co., which were communicated by letter to Whittier.

December, 1881.

To J. F. Whitney & Co., New York.

Write Whittier Saturday's mail. Abandoned to underwriters seventeenth of November. Pay crew to that date. Underwriters sending Anderson. On arrival give up charge to him. If Anderson wants your services or crew must employ you himself. Keep charge chronometer, have estimates in writing, make no drafts. Let Anderson pay all disbursements.

BLACK BROS. & Co.

HALIFAX, December 9th, 1881.

To J. F. Whitney & Co., New York.

Add to Whitter's letter, if Anderson proposes to outfit vessel from material of "valmes" raise no objection and be careful to express no opinion as to its quality or suitableness. Be careful in every way not to commit owners to anything Anderson does.

BLACK BROS. & Co.

Whittier refused to repair, although requested so to do by Anderson, and informed Anderson he was going to give up charge to him. He and the crew left the vessel, and thenceforth ceased to have any connection with her.

Anderson put a man in charge of the vessel. Materials for repairs were ordered from New York by defendants, and Anderson commenced repairing the ship, and paid off salvage claims and other expenses on the ship. He placed Captain Stevens and another crew on board at Guantanamo, and they took part in repairing. When the vessel was temporarily repaired, the cargo, consisting of 270 tons of logwood, was again

taken on board The vessel in charge of Stevens and his crew left there 11th March, 1882, and arrived in New York the 2nd of April, 1882. Stevens went to J. F. Whitney & Co., and gave them the ship's papers to do the ship's business. Stevens and crew were paid by defendants. The vessel was repaired further in New York and tendered back, but after action brought.

On the argument of the special case the Supreme Court of Nova Scotia, McDonald C. J. dissenting, directed that judgment be entered for the defendants. The plaintiffs appealed from this decision to the Supreme Court of Canada

Graham Q. C. for the appellants.

The freight was not earned before this action was brought. *Providence Washington Ins. Co.* v. *Corbett* (1).

Shepherd v. *Henderson* (2) shows the distinction between actions before freight earned and actions after.

The fact of the underwriters having earned the freight will not prevent us from recovering. The very definition of insurance on freight is against such a contention, for we could not earn the freight ourselves so as to bring it within the cases in the House of Lords. *Scottish American Ins. Co.* v. *Turner* (3), and *Stewart* v. *Greenock Marine Ins. Co* (4).

See also *Sea Ins. Co.* v. *Hadden* (5).

Henry Q. C. for the respondents.

The rights of the underwriter cannot be defeated by the bringing of the action before the proper time. The underwriters undertook to repair, and if the vessel was worth repairing there was no constructive total loss.

There is no distinction between this case and the *Scottish American Ins. Co.* v. *Turner* (6). See *Simpson* v. *Thomson* (7).

The following cases also were cited:

(1) 9 Can. S. C. R. 256.
(2) 7 App. Cas. 49.
(3) 1 Macq. H. L. Cas. 334.
(4) 1 Macq. H. L. Cas. 328.
(5) 13 Q. B. D. 706.
(6) 1 Macq. H. L. Cas. 337.
(7) 3 App. Cas. 279.

1886

TROOP v. MERCHANTS MARINE INSURANCE CO.

Ritchie C.J.

Keith v. *Burrows* (1); *Miller* v. *Woodfall* (2).

Sir W. J. RITCHIE C. J.—If the abandonment was justifiable and accepted, and there was therefore a constructive total loss of the vessel, was there not therefore at that moment a loss of freight to the owners for which they would then and there have had a right of action against the underwriters on freight? If so, how could that right be affected by anything the underwriters on the ship may do with the vessel after she became their property? The moment the total loss of the ship took place was there not necessarily, then and there, a loss of the freight, and does it make any difference as regards the insurance on freight, whether that total loss was actual or constructive? The ship was, in both cases, lost to the owners, and in both cases the freight was equally lost to the owners. To make a good constructive total loss the position of the ship must be such that a prudent owner would not repair; if then he did not repair the voyage would be lost and the freight not earned, and in establishing this state of matters the underwriters on the freight would, I presume, unquestionably be liable for the loss of the freight and this by reason of the ship being incapacitated from earning freight by the perils insured against. Does it not follow, so far as the owner is concerned, that the moment he was justified in abandoning the ship by reason of the perils of the seas, that moment he was entitled to recover for all loss which those perils occasioned, whether of vessel or freight; in other words, was not the freight, against the loss of which the insurers undertook to indemnify the insured, a loss to him by the perils insured against, and therefore should they not make their indemnification good? Before any freight had been earned, as in *Benson* v. *Chapman* (3) there was a damage so serious

(1) 1 C. P. D. 722; 2 App. Cas. 636.

(2) 8 E. & B. 493.

(3) 6 M. & G. 792.

1886

TROOP v. MERCHANTS MARINE INSURANCE CO.

Ritchie C.J.

as to justify the owner in treating it as a total loss and abandoning the ship to the underwriters. By this total loss he lost his ship by the perils insured against, and by the same loss he lost his freight by reason of the same perils. The insurers of the ship indemnified him against the one, and I cannot understand why the insurers of the freight should not indemnify him against the other. The total loss of the ship carried with it the total loss of the freight. The damage, as between the insured and underwriters, amounted to a total loss and the freight was never earned by the ship. The moment this total loss took place the insured was prevented by the perils mentioned in the policy from performing the voyage insured, and when it was so prevented that the underwriter bound himself to indemnify the insured.

I think *Benson* v. *Chapman* (1); *Stewart* v. *Greenock Marine Ins. Co* (2); *Scottish Marine* v. *Turner* (3) and *Rankin* v. *Potter* (4) conclusive of this case.

In *Stewart* v. *The Greenock Marine Insurance Company* (5) The Lord Chancellor says:—

In *Benson* v. *Chapman* (1), the ship, soon after leaving the port of loading, sustained damage sufficient to entitle the owner to recover as for a total loss, but the captain had repairs done at an expense beyond what a prudent owner would have incurred, and he brought the cargo home, and the freight was earned, but the court held that the total loss of the ship carried with it the total loss of the freight. Chief Justice Tindal says: - "The assured has sustained a total loss of his freight, if he abandons the ship to the underwriters on ship, and is justified in so doing, for after such abandonment he has no longer the means of earning the freight, or the possibility of ever receiving it if earned, such freight going to the underwriters on ship." The damage amounting, as between the assured and the underwriters, to a total loss, the abandonment did not alter the relative rights of the parties, and the principle of that decision was that the plaintiff, the owner, was entitled to recover against the underwriters on freight as for a total loss of the freight, because the total loss of the ship carried with it the total loss of the freight, and

(1) 6 M. & G. 792.
(2) 1 Macq. H. L. Cas. 328.
(3) 1 Macq. H. L. Cas. 354.
(4) L. R. 6 H. L. 83.
(5) 1 Macq. H. L. Cas. 332.

1886

TROOP
v.
MERCHANTS MARINE INSURANCE CO.

Ritchie C.J.

though the freight was afterwards earned it did not belong to the owners, but to the underwriters on ship.

In *The Scottish Marine Insurance Company of Glasgow* v. *Turner* (1), we find the following:

The Lord Chancellor:

It was to this state of circumstances that Chief Justice Tindal referred in *Chapman* v. *Benson* (2), where he said:—"The assured has sustained a total loss of the freight if he abandons the ship to the underwriters on ship, and is justified in so doing, for after such abandonment he has no longer the means of earning the freight or the possibility of ever receiving it, if earned, such freight going to the underwriters on ship." But there the very learned Chief Justice had in contemplation what was then treated as a total loss and abandonment before the freight was earned.

Lord Truro (3):

To determine whether there has been a loss of freight within the meaning of the policy on freight, we must consider what are the obligations which the underwriter takes upon himself by that policy. My noble and learned friend has, I think, stated them most correctly. I conceive that the underwriter on freight binds himself to indemnify the insured when prevented from performing the voyage insured by any of the perils mentioned in the policy.

The decision of the Court of Common Pleas in *Benson* v. *Chapman* proceeded upon the distinct ground that the voyage had been lost—that is to say, that the ship had been reduced to such a state of damage by the perils insured against that she could not be put into a condition to perform the voyage without an outlay such as no uninsured prudent owner would incur; for the owner, in order to save the underwriters, would not be bound to do that, greatly to his injury, which he would not do if uninsured.

That judgment was indeed reversed in the Exchequer Chamber, and the reversal of the Exchequer Chamber was sustained by this House; but nobody uttered a word tending to impugn the correctness of the law which had been laid down in the Court of Common Pleas. The judgment was reversed because the Court of Error could not draw that conclusion of fact upon the special verdict which the Court of Common Pleas had drawn upon the special case; the law being perfectly unimpugned both in the Exchequer Chamber and in this House.

I think, therefore, that in this case there was a total loss of freight in consequence of damage by sea perils being so great that the shipowner was not bound to repair the ship and that there was an actual total loss of the

(1) I Macq. H. L. Cas. 337. (2) 6 Man. & Gr. 792.
(3) P. 340.

freight by the constructive total loss of the ship. Therefore I think the appeal in this case should be allowed with costs.

1886

TROOP v. MERCHANTS MARINE INSURANCE CO.

STRONG J.—Dissented.

Ritchie C.J.

FOURNIER J.—I agree with the Chief Justice that the appeal should be allowed.

HENRY J.—I think the plaintiff is entitled to recover. There was a total loss of freight within the meaning of the contract. The vessel was lost by the perils insured against and was placed in the situation that it would require more money to repair her than she was worth.

I think, therefore, the appeal should be allowed with costs.

TASCHEREAU J.—Concurred.

Appeal allowed with costs.

Solicitors for Appellants: *Meagher, Drysdale & Newcombe.*

Solicitors for Respondents: *Henry, Ritchie & Weston.*

THE MERCHANTS' BANK OF CANADA..... } APPELLANTS;

AND

THOMAS C. KEEFER, *et al*..... RESPONDENTS.

1884

*Mar. 20.

1885

*Jan. 12.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Will—Construction of—Contingent interest.

T. McK., a testator, having previously given all his estate, real and personal, to trustees in trust for his wife for life, or during her widowhood, made a devise, as follows:—"In trust, also, that at the death, or second marriage of my said wife, should such happen, my son Thomas, if he be then living, shall have and take lot number 1, etc., which I hereby devise to him, his heirs, and assigns to and for his and their own use forever." The testator

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

1884

MERCHANTS' BANK OF CANADA v. KEEFER.

then gave to his other sons and to his daughters other real estate in fee. He directed that all the said devises "in this section of my will mentioned and devised," should take effect upon and from the death or marriage of his wife, and not sooner. He gave all his other lands in trust for sale, the rents and proceeds to be at his wife's disposal while unmarried, and after her death or marriage all his personal property and estate remaining was to be equally divided among his children; providing always, that in the event of any child dying without issue before coming into possession "of his or her share of the property or money hereby devised or bequeathed," the share of such child should go equally among the survivors and their issue, if any, as shall have died leaving issue. The residuary clause was as follows:— "All other my lands, tenements, houses, hereditaments, and real estate," etc.

Held,—Sir W. J. Ritchie C.J. and Fournier J. dissenting, reversing the judgment of the court below, that the interest devised to Thomas was contingent upon his surviving his mother.

APPEAL from the judgment of the Court of Appeal for Ontario (1) affirming the decree of the Court of Chancery (2).

The clauses of the will bearing upon the points in issue as well as all the facts and circumstances giving rise to the action are fully stated in the judgments hereinafter given, and will be found also in the reports of the case in the courts below.

Robinson Q.C. and *Gormully* for appellants.

S. H. Blake Q.C. for respondents.

Black for respondent T. C. Keefer and *McIntyre* for the infants.

Sir W. J. RITCHIE C.J.—On the 8th of September, 1855, Thomas Mackay made his will whereby, after appointing his wife and his sons, Alexander, John, Charles and Thomas, executrix and executors thereof, with a provision in the event of his wife marrying again that she should cease to be executrix, he devised and bequeathed to his said executrix and executors in these words:—

All and singular the moneys, debts, stocks, bills, bonds, mortgages, debentures and other securities, goods, chattels and effects, lands,

(1) 9 Ont. App. R. 117. (2) 29 Gr. 162.

tenements and hereditaments whatsoever and wheresoever situate, and all interest in the same of which I shall die possessed, and to which I shall be in any way entitled at the time of my death, in trust, for the several uses and purposes hereinafter mentioned and declared, and to be held and applied and disposed of as hereinafter mentioned and appointed; that is to say:

First.—For payment of debts, &c.

Secondly.—For payment of £50 to Bytown Protestant Hospital, &c.

Thirdly.—In the event of his wife surviving him, in trust for her maintenance and support so long as she shall live, and of his children so long as they shall live with their mother, &c., and the testator directed that his wife, so long as she lived and continued his widow, should have the full right to possess and manage the property and the profits, &c., thereof, for such purposes, and in the event of her marrying again then for the payment out of the rents, &c., to her of £500 annually, which annuity he charged on his said property and estate in lieu of dower.

Fourthly.—In trust also that at the death or second marriage of my said wife, should such happen, my son Thomas, if he be then living, shall have and take lot No. 1, in the front concession on the Ottawa, of the township of Gloucester, in the county of Carleton, and Province of Canada, containing two hundred acres, more or less (see deed from Francis Saragues), which I hereby devise to him, his heirs and assigns, to and for his and their own use forever. And that my sons, Alexander, John, Charles and Thomas aforesaid, shall have and take all my other real estate in the township of Gloucester aforesaid, namely, lots Nos. 2, 3, 4 and 5, in the said front concession of said township (see deeds from Henry Munro, Gideon Olmstead and Clements Bradley; also deed from Government of lot No. 2), with all mills, houses and buildings thereon erected. Also ten acres of land in the city of Ottawa, in said county, being a part of lot letter "O" in said city (except the part sold to John McKinnon, Esquire), with all mills, houses and buildings thereon erected. Also Green Island, near the mouth of the Rideau river, in said county, with all mills, houses and buildings thereon erected. All which I hereby devise to my said sons, Alexander, John, Charles and Thomas, and to their heirs and assigns, to and for their own use forever, as tenants in common, subject nevertheless, to the payment of the legacies and annuities in and by this my will, bequeathed and made chargeable thereon.

1885

MERCHANTS' BANK OF CANADA v. KEEFER.

Ritchie C.J.

And that my daughters, Ann, Christina, Jessie and Elizabeth, shall have and take all my houses, lands, tenements and real estate in the city of Montreal, which I hereby devise to my said daughters, their heirs and assigns, to and for their own use forever as tenants in common.

And I hereby will and direct that all the said devises in this section of my will mentioned and devised, shall take effect upon, from and after the said death or marriage of my said wife, and not sooner.

And all his other real estate of every nature and description in trust to be sold, and the rents, &c., to be at the disposal of his wife so long as she should live and remain unmarried for the support of herself and his children, and after her death or marriage to be equally divided among his children with power of conveyance to his widow unmarried, and after her death to his eldest surviving son.

In trust also that at the death or marriage of my said wife, as aforesaid, all my personal property and estate then remaining shall be equally divided among my said children, either in money or in kind as to my said executors shall seem best, allowing one year for the making of such distribution.

Provided always, and I hereby will and bequeath, that in the event of any of my said children dying without legal issue before coming into possession of his or her share or shares of the property or money hereby devised or bequeathed, then the share or shares of such child or children to go to and be equally divided among the survivors, and the legal issue of such, if any, as shall have died leaving issue.

And in the event of any of my said children dying before coming into possession as aforesaid, and leaving legal issue, such issue in every case to take the portion or share which would have belonged to his, her, or their father or mother if then living. And to the husband or wife of each of my said children, who shall after marriage, and before coming into possession as aforesaid, die without issue, leaving such husband or wife, I give and bequeath the sum of fifty pounds annually, as an annuity payable out of, and chargeable upon, the share which would have belonged to such child if living.

The question at issue in this case arises under that part of the fourth devise, viz:—

In trust, also, that at the death or second marriage of my said wife, should such happen, my son Thomas, if he be then living, shall have and take lot No. 1, in the front concession, &c., which I hereby devise to him, his heirs and assigns, to and for his or their own use forever.

The appellants contending that this is a contingent

gift to Thomas, depending on his being alive at the death of his mother, the question then simply is: Did Thomas take a vested or contingent remainder?

The courts unquestionably favor a construction which gives a vested interest in property where there is ambiguity or doubt, and the intention that the interest shall be contingent is not clear, but not to defeat the clear intention of the testator.

Chief Justice Best puts this clearly in *Duffield* v. *Duffield* (1):

> The rights of the different members of families not being ascertained whilst estates remain contingent, such families continue in an unsettled state, which is often productive of inconvenience and sometimes of injury to them. If the parents attaining a certain age be a condition precedent to the vesting estates, by the death of their parents before they are of that age children lose estates which were intended for them, and which their relation to the testators may give them the strongest claim to.
>
> In consideration of these circumstances the judges, from the earliest times, were always inclined to decide that estates devised were vested; and it has long been an established rule for the guidance of the courts at Westminster in construing devises, that all estates are to be holden to be vested, except estates in the devise of which a condition precedent to the vesting is so clearly expressed that the courts cannot treat them as vested without deciding in direct opposition to the terms of the will. If there be the least doubt, advantage is to be taken of the circumstances occasioning the doubt; and what seems to make a condition is holden to have only the effect of postponing the right of possession.

In considering the whole scheme, or rather scope and object of this will, I think it very clear that the testator intended to dispose of the whole of his property, and did not contemplate any contingency whereby there should be an intestacy as to any part of it. I can discover nothing in this will to indicate that the testator intended or contemplated that any of his real estate, specifically devised, should in any event remain to be dealt with as undisposed of, as appellants contend. The testator after providing for his wife, then specifically devises certain portions of his real estate among his

(1) 1 Dow. & C. 309.

1885

MERCHANTS' BANK OF CANADA v. KEEFER.

Ritchie C.J.

children, male and female; these portions subject to the interest of the wife, I think he intended to dispose of absolutely to the objects of his bounty.

Much stress is laid by the appellants on the words in the devise to Thomas, "if he be then living," which are not to be found in the devises to the other sons and the daughters, but I think these words in substance amount to no more than the language of the paragraph which immediately follows the devises, viz.:—

> And I hereby will and direct that all the said devises in this section of my will mentioned and devised (which clearly includes the devise to Thomas) shall take effect upon, from and after the said death or marriage of my said wife and not sooner.

Which completes, in my opinion, the disposition of the will in reference to these specific devises.

I may here notice that it has been strongly urged, and the argument appears to have influenced the minds of the Chancellor and Mr. Justice Patterson, that the clause following the residuary bequest, which I have already quoted, providing that in the event of any one or more of the children dying without legal issue before coming into possession of her or their share, &c., "the share or shares of such child or children should go to and be equally divided among the survivors and the legal issue of such, if any, as should have died, leaving issue," and the other providing for the event of any of the children dying before coming into possession aforesaid and leaving legal issue, show an intent that the interest taken by Thomas in lot No. 1 was contigent, but I entirely agree with Chief Justice Hagarty and Justices Burton and Ferguson, that these paragraphs refer to the personal property and estate to be divided in money or kind, disposed of in the residuary clause and bequest, and have no reference whatever to the specific devises of the real estate to the sons and daughters which are to them respectively and their heirs and assigns, whereas disposition of the personalty refers only to the legal issue of such as shall have died leaving issue.

The last clause relating to these specific devises appears to me to show very conclusively that all these specific devises were intended by the testator to be placed on one and the same footing, though the words "if he be then living" are not used in connection with the other devises. Without these words then and without this paragraph what is the devise to Thomas? It is unquestionably a devise to Thomas, his heirs and assigns to and for his and their own use forever. Now *in re Duke Hannah* v. *Duke* (1) it is said by James L. J. :—

There is a strong, or I may say a stringent, rule, that if we have words clearly making a vested gift, clear words are required to convert it into a contingent one.

Mr. Jarman thus states this general rule (2) :—

Where a testator creates a particular estate, and then goes on to dispose of the ulterior interest expressly in an event which will determine the prior estate, the words descriptive of such event occurring in the latter devise will be construed as referring merely to the period of the determination of the possession or enjoyment under the prior gift, and not as designed to postpone the vesting.

Then have the words of futurity been inserted for the purpose of postponing the vesting or do they refer simply to the deferred possession or enjoyment ?

As to this Mr. Jarman again says (3) :—

The result of authorities is thus summed up by Sir W. P. Wood in *Maddison* v. *Chapman* (4): The true way of testing limitations of that nature is this: Can the words, which in form import contingency, be read as equivalent to "subject to the interests previously limited?"

Vice-Chancellor Wood's language is thus :—

The class of authorities of which *Pearsall* v. *Simpson* (5) may be taken as the leading case, merely establish that where there is a limitation over which, though expressed in the form of a contingent limitation, is in fact dependent upon a condition essential to the determination of the interests previously limited, the court is at liberty to hold, that, notwithstanding the words in form import contingency, they mean no more, in fact, than that the person to take under the limitation over is to take subject to the interests so previously limited.

(1) 16 Ch. D. 114.
(2) 1 vol. p. 800.
(3) Vol. 1 p. 809.
(4) 4 K. & J. 719.
(5) 15 Ves. 29.

1885

MERCHANTS' BANK OF CANADA v. KEEFER.

Ritchie C.J.

I apprehend the true way of testing limitations of that nature is this: Can the words which in form import contingency be read as equivalent to "subject to the interests previously limited?"

Take the simplest case: A limitation to A. for life, remainder to B. for life, and upon the decease of B., "if A. be dead," then to C. in fee. There the limitation to C. is apparently made contingent upon the event of A.'s dying in the life time of B. Nevertheless, inasmuch as the condition of A.'s death is an event essential to the determination of the interest previously limited to him, the court reads the devise as if it were to A. for life, remainder to B. for life, and on B.'s death, subject to A.'s life interest (if any) to C. in fee.

Theobald on Wills (1).

But in the case of successive limitations "where there is a limitation over which, though expressed in the form of a contingent limitation is, in fact, dependent on a condition essential to the determination of the interests previously limited, notwithstanding the words in form import contingency, they mean no more, in fact, than that the person to take under the limitation over is to take subject to the interests previously limited."

Maddison v. *Chapman* (2); *Webb* v. *Hearing* (3); *Pearsall* v. *Simpson* (4); *Franks* v. *Price* (5); *Chellew* v. *Martin* (6); *Edgeworth* v. *Edgeworth* (7).

I think the testator intended this to be an immediate absolute devise or gift to Thomas and his heirs, an absolute disposition of the property subject to the wife's interest, and that the words which accompany this gift, though apparently importing a contingency indicate no more than the determination of the prior estate, no more than certain circumstances on the happening of which the party entitled shall have and take the possession and enjoyment, that is to say, on the termination of the interest previously secured to the wife, and so was a vested estate in fee in Thomas and his heirs subject to the executory trust to be executed for the benefit of the wife during her widowhood or life, and not a condition that the devisee should survive the wife, but was intended only to mark the period at which the devise

(1) 2 Ed. p. 405.
(2) 4 K. & J. 709, 719; 3 DeG. & J. 536.
(3) Cro. Jac. 415.
(4) 15 Ves. 29.
(5) 5 Bing. N. C. 37.
(6) 21 W. R. 671.
(7) L. R. 4 H. L. 35.

should take effect in possession and the devisee should have the full benefit of the devise and be put in complete possession, that possession being necessarily deferred on account of the antecedent benefit given to the wife. The devise to Thomas being in succession to the interest devised for the benefit of the wife, the gift to both were alike immediate, though Thomas and his heirs could not have the benefit until after the death or marriage of the wife, and therefore Thomas took a remainder in fee, which having vested immediately on the testator's death was not defeated by his own death in the life time of his wife.

In *Goodtitle* v. *Whitby* (1) Lord Mansfield :—

He said he would lay down a rule or two of construction, previously to giving his particular opinion on this case. 1st. Wherever the whole property is devised, with a particular interest given out of it, it operates by way of exception out of the absolute property. This rule is laid down in Matthew Manning's case (2).

2nd. Where an absolute property is given, and a particular interest is given, in the mean time, as "until the devisee shall come of age, &c., and when he shall come of age, &c., then to him, &c," the rule is, that that shall not operate as a condition precedent, but as a description of the time when the remainder—man is to take in possession.

* * * * *

Here, upon the reason of the thing, the infant is the object of the testator's bounty; and the testator does not mean to deprive him of it, in any event. Now suppose that this object of the testator's bounty marries and dies before his age of twenty-one, leaving children; could the testator intend in such an event to disinherit him? Certainly he could not. And as to the testator's heir-at-law, his heir-at-law is only to take what the testator has not devised away from him.

In the leading case of *Hanson* v. *Graham* (3), Sir Wm. Grant says :—

The only cases alluded to in *May* v. *Wood* (4) are cases of real estate, beginning with Boraston's case (5), and ending with *Doe Wheedon* v. *Lea* (6). The principle of them all is stated by Lord Mansfield in *Goodlittle* v. *Whitty* (1), &c.

(1) 1 Burr. 228.
(2) 8 Co. 951 b.
(3) 6 Ves. 246.
(4) 3 Bro. C. C. 471.
(5) 3 Co. 16.
(6) 3 T. R. 41.

1885

MERCHANTS' BANK OF CANADA v. KEEFER.

Ritchie C.J.

He then quotes the rules laid down—the first and second—as above, and after making observations on that case and Boraston's case, he says :—

So in *Manfield* v. *Dugard* (1) it was clear, the testator meant to postpone the enjoyment of the son for the sake of the antecedent benefit of the wife; but he clearly meant a vested remainder, not contingent, whether the son should take any benefit at all in the estate. But that makes a very different question from this, whether where there is no precedent estate, no purpose whatsoever, for which the enjoyment was to be postponed, you shall say the enjoyment only is to be postponed.

So in the case before us there was a reason for postponing the possession, and, in my opinion, it is very clear that nothing but the enjoyment was intended to be postponed.

Mr. Washburn (2) says :—

An estate is vested in interest when there is a present fixed right of future enjoyment.

And he quotes from Fearne (3) as follows :—

The present capacity of taking effect in possession, if the possession were now to become vacant, and not the certainty that the possession will become vacant before the estate limited in remainder determines, universally distinguishes a vested remainder from one that is contingent.

So that when the testator died leaving Thomas him surviving, Thomas had the then present absolute right and capacity to have and take the estate the instant the prior estate should determine, and though he should die and not have the enjoyment, as he did in fact, it would descend to his heirs who would take in his place.

I cannot bring my mind to the conclusion that when the testator used these words, "which I hereby devise to him, his heirs and assigns, to and for his and their own use forever" he ever intended or contemplated that if his son died before his mother, leaving children his heirs, that such children should not enjoy the property, because their father happened to die before the death or second marriage of his mother, and that under

(1) 1 Eq. Ca. Abr. 195. (2) Vol. 2 p. 548, Real Property.
(3) Contingent Remainders 216.

such circumstances the testator as to his property would have died intestate.

Nor does the limitation in this case contain any incident but what is essential to the determination of the estate previously limited.

Lush J. in *Leadbeater* v. *Cross* (1) delivering the judgment of the court says:—

No doubt the life estate in question is limited in terms of contingency, terms which, literally construed, make the happening of the event, namely, the survivorship of the tenants for life, a condition precedent to the gift. But we are to look not at the form but the substance of the devise.

One of the rules of construction laid down in Powell on Devises (2) is:—

Where an estate in remainder is limited in terms of contingency on the happening of certain events, and the events described are precisely those on which (the preceding estates having determined) it will fall into possession, it is construed to be, not a contingent gift conditioned to take effect on these events, but a devise immediately vested, the possession of which is necessarily dependent on the events in question.

And I think we may apply to the case before us the words of the learned judge:—

This rule, which is deduced by the learned author from the cases which he quotes, could not have been more accurately framed to meet this case if it had been framed for the purpose, and it is one which commends itself to common sense.

Here then is an absolute gift to a person and his heirs "which I hereby devise to him and his heirs and assigns, to and for his and their own use forever," with words accompanying the gift apparently importing a contingency or contingencies, but in reality only indicating certain circumstances, viz: "the death or the marriage of the widow," on the happening of either of which the estate vested by the gift should take effect in possession and enjoyment by the devisee or his heirs or assigns, and though the death of the devisee before the happening of either of such events prevented his personal enjoyment of the property, that enjoyment and

(1) 2 Q. B. D. 21. (2) 3 Ed. by Jarman, vol. 2 p. 217.

1885

MERCHANTS' BANK OF CANADA v. KERFER.

Ritchie C.J.

possession on the happening of the event passed to the heirs or assigns of the devisee, who were as much the object of the testator's bounty as the devisee himself—a result in accordance with the express intention of the testator—rather than to the heirs of the testator himself,—a result I can find no indication in the will that the testator contemplated.

Therefore I construe this devise as if the testator had said, "I hereby devise lot No. 1 to Thomas and his heirs and assigns, to and for his and their own use forever, which he shall have and take (that is the possession and occupation) at the death or second marriage of my wife, if he be then living," and is no more or less than is contained in the paragraph which says, "the devises shall take effect after and upon the death or marriage of my said wife, but not sooner." That is, in my opinion, shall take effect in possession, inasmuch as having devised for the benefit of the wife they could not take effect sooner. In other words, the intention of the testator was that the devise to Thomas and his heirs should confer a vested remainder, to take effect absolutely in possession on the marriage or decease of the widow—either of which events removing the prior estate out of the way—in effect, a devise of the whole estate *instanter* to Thomas and his heirs, with the exception of a partial interest carved out for the benefit of the widow. With respect to words of apparent contingency they are referable to the possession merely though the disposition of the ulterior interest should be, as Mr. Jarman expresses it, "in terms which literally "construed would seem to make such ulterior interest "depend on the fact of the prior interest taking effect; "in such cases it is considered that the testator merely "uses the expressions of apparent contingency as "descriptive of the state of events under which he "conceives the ulterior gift will fall into possession"; the object of the testator, apparently, being to make

1885

MERCHANTS' BANK OF CANADA v. KEEFER.

Ritchie C.J.

it clear beyond all doubt that though devised absolutely the interest in the wife was not to be interfered with —that the devises shall be clearly understood to be subject to the life interest or until marriage of the wife.

Having given the estate to Thomas and his heirs, it never could have been the intention of the testator to die intestate as to such estate, if Thomas happened to die before the marriage or death of the wife. Had the testator intended in the event of Thomas so dying to take the estate away from his children or heirs, I think we should have found such intention clearly expressed to give it away from such children or heirs, or a devise or limitation over in case he so died. In this case there is, in my opinion, no residuary devise as to this property, and the reason seems to me obvious, because the testator intended to, and I think must have supposed he had, disposed of the fee simple. I cannot think the testator intended to create an intestacy, but on the contrary he intended that the property should go to his son Thomas and his heirs, and he or they should enter into the possession and enjoyment thereof on the decease or marriage of his wife.

And therefore I think it may be said in this case as Lord Westbury in *Edgeworth* v. *Edgeworth* (1) says :—

* * * * *

Upon the whole, therefore, we should unquestionably disturb that conclusion which is to be collected from the words of the will. We should depart from the settle l canons of construction—that you are not to construe words as importing a condition if they are fairly capable of another interpretation—and we should entirely defeat the intention of this testator, which plainly was to make a complete disposition of the property, if we adopted a conclusion which would leave that intention baffled, and end in having it declared that there was an intestacy.

I am, therefore, of opinion that the appeal should be dismissed.

STRONG J.—The only question argued on this appeal was as to the construction of a particular devise

(1) L. R. 4 H. L. 41.

1885

MERCHANTS' BANK OF CANADA v. KEEFER.

Strong J.

contained in the will of the Hon. Thos. Mackay, whereby the testator gave a certain parcel of land to one of his sons, Thomas Mackay the younger. The devise in question is in the words following :—

In trust also that at the death or second marriage of my said wife, should such happen, my son Thomas, if he be then living, shall have and take lot No. 1 on the first concession of the Ottawa, of the Township of Gloucester, in the County of Carleton, and Province of Canada, containing two hundred acres more or less, which I hereby devise to him, his heirs and assigns, to and for his and their own use forever.

The testator had previously given all his real and personal estate to trustees in trust for his wife for life or during her widowhood. The question of construction which has been raised as to this devise to the testator's son, Thomas Mackay the younger, is as to whether it was vested or contingent. I have arrived at a conclusion differing altogether from that of the Court of Chancery, and of two of the four judges who heard the cause in the Court of Appeal, and whose opinions were that Thomas Mackay, the devisee, took a vested estate in remainder subject to the life estate of his mother, for I am of opinion that the proper construction was that adopted by the late Chief Justice of Ontario and Mr. Justice Patterson, viz. : That this devise was contingent on Thomas Mackay, the son, surviving his mother. It appears to me to be perfectly plain that the words, "if he be then living shall have and take," have reference to the vesting of the estate and not merely to enjoyment or possession. If the words at the end of the paragraph, "which I hereby devise to him, his heirs and assigns to and for his and their own use forever" had been omitted, there would have been no doubt or question of this. In that case the only words of gift would have been, "shall have and take" and the vesting must necessarily have depended on them alone. The added words of limitation are, however, supposed to make a difference. The answer to this is, I think, that which Mr. Justice Patterson has pointed out

namely, that the proper office of these words is to describe the quantity of the estate to be taken by the devisee, and that they can have no influence whatever on the question of the time of vesting. Again, as was forcibly argued by Mr. Gormully, if the words "if he be then living" are not construed as making the devise contingent they are redundant and useless, for the possession was already deferred until the death or second marriage of the testator's widow by the preceding provisions of the will. The authorities which go to show that, when the devise in remainder is to take effect upon the contingent determination of a prior estate, the estate in remainder vests notwithstanding the words of contingency, are not applicable, since the contingency here has no connection whatever with the life estate of the widow, which is only subject to a contingent determination in the event of her second marriage. Thomas Mackay surviving his mother is an event wholly independent of and collateral to the duration of the estate given to her. I do not think any reference to authorities in a case like the present, not depending on any general rule of construction, but merely on the interpretation of the language in which the testator has expressed himself in this particular instance, is called for or would be useful. Then, it does not appear to me to be a legitimate mode of arriving at the testator's intention to contrast this devise with those in favor of his other sons in which no reference is made to that now in question, and to speculate upon the testator's omission to give any reasons for making any distinctions between his son Thomas and his three other sons as regards the vesting of the estates which he gave to them in the properties respectively devised to them. Therefore, construing the words as they stand, I have no hesitation in determining that the proper conclusion is to hold the devise to Thomas Mackay a contingent

1885

MERCHANTS' BANK OF CANADA v. KEEFER.

Strong J.

remainder. If, however, in any subsequent part of his will the testator had so referred to this devise as to explain his intention to be to give a vested estate to Thomas, that of course would have the effect of changing the *primâ facie* construction already indicated. I have, however, searched the will in vain for any such explanation. Nothing can be found in the slightest degree to alter or affect the terms of this gift. The words contained in the same numbered section of the will "and I hereby will and direct that all the said devises in this section of my will mentioned and devised shall take effect from and after the death of my said wife, and not sooner" are no more than an emphatic reiteration of the previous provisions that all the estates previously devised to the testator's sons, including Thomas, were to be subject to the life estate of his wife. Whether they related only to the possession or had reference to the vesting itself, and so cut down vested estates previously given to the three sons, other than Thomas, to contingent remainders, is a question we have not now to determine. If I had to determine it, however, I should have very little hesitation in holding, that they had not any such effect, and that the estates conferred upon the three sons, Alexander, John and Charles, by a previous clause of the will, and which I think were vested, remained unaffected by this provision. I may say in passing, though it is of no importance as regards the present decision, that the apparent uselessness of a construction which would attribute vested estates in remainder to the sons other than Thomas, liable to be divested if these sons should pre-decease their mother, and the effect of which would therefore be that during their mother's life these three sons took estates which they could not enjoy and which were not marketable, is no objection to the construction I adopt. If the language of the testator calls for it, as I think it does, all we have to do is to

1885

MERCHANTS' BANK OF CANADA v. KEEFER.

Strong J.

interpret his words according to settled rules, and we are not to permit ourselves to violate his directions because they appear to us to lead to a disposition of his property which would be wanting in practical utility. But it is sufficient for the present purpose to say, that whether the passage I have extracted relates to possession or vesting, it in neither case contains anything inconsistent with the construction which holds the devise of lot No. 1 to Thomas Mackay to be a contingent remainder.

Then, the devise to Thomas being held to have been contingent, the subsequent disposition of this lot No. 1 in the event which happened of his death before his mother must depend upon the residuary clause beginning with the words "all other my lands, tenements, houses and hereditaments and real estate." Nothing can be better established than that a devise of other lands includes undisposed of interests in lands in which partial interests in contingent estates which have failed have been previously given, as upon a like principle a gift of "unsettled lands" includes unsettled interests in lands in which particular estates have been by the same will previously settled. Then it seems a totally inadmissible construction to say that the provisions containing the gift over in case of the death of any of the testator's children without issue, and the clause substituting the issue of children, who may die before the testator's widow, for their parent, does not apply to every devise and bequest, as well specific as residuary, contained in the will. The words of this clause, "in the event of any of my children "dying without legal issue before coming into possession "of his or her share or shares of the property or money "hereby devised or bequeathed them, the share or shares "of such child or children to go to and be equally divi-"ded among the survivors, and the legal issue of such, if "any, as shall have died leaving issue," are surely

1885

MERCHANTS' BANK OF CANADA v. KEEFER.

Strong J.

sufficiently comprehensive to include all previous gifts, as well residuary as specific, contained in the will, unless we are to attribute to the word "hereby," which primarily must mean "by this will," some secondary meaning, which would be purely arbitrary since no context calls for it. I cannot conceive how the testator, desiring to make this clause applicable to every one of his dispositions, could have expressed himself more aptly and generally, and I am unable to follow the argument which seeks to confine this provision to the personal property mentioned in the next preceding clause. I am unable to accede to the proposition that the description of the property and the limitations show it to have been the testator's intention so to restrict it; the word "property" is comprehensive of lands and real estate, and is even more appropriate to describe such subjects than personalty, and there is nothing in the gift over to survivors, or the substitution of issue by the clause following it, inconsistent with a disposition of realty. Then, holding that this clause of survivorship applies to all the preceeding devises contained in the will, it requires no demonstration to show that the following clause,—that substituting issue for parents—also applies to the same subjects of disposition. It follows from this, that, even if we were to construe the devise to Thomas as vested instead of contingent, our judgment in the event, which has happened, of his death before his mother must be the same. I should add that I do not see anything in the substitutional clause inconsistent with holding that Thomas did not take a vested estate, whilst the other sons did take such an estate but one liable to be divested in the event of their deaths before their mother. This substitution of issue is consistent with both constructions.

Then, if this lot No. 1 formed part of the residuary lands, and these residuary lands were included in these

provisions as to survivorship and substitution, as I hold they were, the consequence, in the events which have happened, will be, that on the death of Elizabeth Keefer, although that occurred in the life time of her mother, her children who survived her took an absolute vested estate in remainder, not liable to failure on the death of any of the children before the tenant for life, but subject only to Mrs. Mackay's life estate, in one-fourth of this lot No. 4. I say they took it absolutely and not subject to failure in the event of death in Mrs. Mackay's life time; for, according to the most modern authorities, a substitutional gift to children of a parent's share is not subject by implication to a contingency to which the vesting or determination of the original share of the parent may have been subject (1). I have already said, that I do not regard the passage in the will, by which the testator directs that all the devises in the fourth section of his will shall take effect from and after the death or marriage of his wife, as importing contingency, but merely postponement of enjoyment; but even if they were to be held as referring to the vesting, I should still be of opinion that they had no reference to the substitutional gifts to the children, although these, also, are comprised in the fourth section of the will though in a subsequent part of it.

The words used by the testator are that "issue" are to take the portion or share which would have belonged to his, her or their father or mother if then living. It is clear upon authority as indeed would almost necessarily be implied without it, that the word "issue," thus used correlatively with "father or mother," means children (2).

(1) *Lanphier* v. *Buck*, 2 Dr. & Sm. 484; *Re Turner*, 34 L. J. Ch. 660; *Masters* v. *Scales*, 13 Beav. 60; *Merrick's Trusts*, L. R. 1 Eq. 551.

(2) *Sibley* v. *Perry*, 7 Ves. 522; *Pruen* v. *Osborne*, 11 Simons 132; *Smith* v. *Horsfall*, 25 Bea. 628; *Stevenson* v. *Abingdon*, 31 Bea. 305; *McGregor* v. *McGregor*, 1 DeG. F. & J. 63; *Martin* v. *Holgate*, L. R. I. H. L. 175; *Bryden* v. *Willett*, L. R. 7 Eq. 472; *Heasman* v. *Pearse*, 7 Ch. App. 275.

1885

MERCHANTS' BANK OF CANADA v. KEEFER.

Strong J.

The substitution is, however, to be restricted to those children who survived their mother; children who predeceased her, if any, are to be excluded. This also depends on a well settled rule applicable to substitutional gifts of a class of children for parents who die before the happening of a particular event, and appears to proceed upon the principle that the testator is to be presumed not to have intended to substitute for a dead person one previously deceased (1).

The children of Mrs. Keefer of course take as amongst themselves as tenants in common and not as joint tenants by force of the statute law of Ontario, R.S.O. ch. 105, sec. 11.

I have not considered that portion of the decree which relates to the lands devised by the testator other than lot No. 1, as I understood at the argument, and gathered from the way in which the appeal was presented by the appellant's factum, that the decree of the Court of Chancery in this respect was not objected to. For the same reason I say nothing about the partition or an account against the trustee. If any directions are required on these heads I suppose the parties will speak to the minutes.

The costs of all parties as well in this court as in both of the courts below, should, I think, be paid out of the estate of the Hon. Thos. Mackay, the testator.

The following minutes will sufficiently indicate the proper variations to be made in the decree:—

Vary the decree of the Court of Chancery as follows: For the first paragraph substitute the following declaration.

1. This court doth declare that lot No. 1 in the 1st Concession, on the Ottawa, in the Township of Gloucester, in the County of Carleton, in the

(1) *Lanphier* v. *Buck*, 2 Dr. & Sm. 484; *Re Turner*, 34 L. J. Ch. 660; *Merrick's Trusts*, L. R. I. Eq. 551; *Thompson* v. *Clive*, 23 Beav. 282; *Crause* v. *Cooper*, 1 J. & H. 207; *Bennett's Trusts*, 3 K. & J. 280; *Hurry* v. *Hurry*, L. R. 10 Eq. 346; *Hobgen* v. *Neale*, L. R. 11 Eq. 48; *Heasman* v. *Pearse*, 7 Ch. App. 275; *Haskett Smith's Trusts*, 26 W. R. 418.

will of the Hon. Thos. Mackay mentioned, was by the said will devised to the plaintiff in trust for the testator's son, Thomas Mackay the younger, for an estate in fee simple in remainder, subject to the life estate of the testator's widow, but that such estate in remainder was subject to the contingency of the said Thomas Mackay the younger surviving the said testator's widow, and that upon the death of the said Thomas Mackay the younger before his mother the said remainder failed.

And that for the second paragraph of the said decree there be substituted the following declaration :—

2. And this court doth further declare that at and upon the death of Elizabeth Keefer in the pleadings mentioned, the plaintiff became and was seized of one undivided fourth part of the said lot No. 1 in trust for the surviving children of the said Elizabeth Keefer in remainder as hereinafter mentioned, and that the said children of the said Elizabeth Keefer, who survived her, thereupon became absolutely entitled to an equitable estate in fee simple in remainder expectant on the death or second marriage of the said testator's widow in one undivided fourth part of the said lot No. 1, as tenants in common. And that upon the death of the said Anne Crichton Mackay, the widow of the said testator, the said plaintiff became seized of the remaining undivided three-fourth parts of the said lot No. 1 in trust for Annie Keefer, Christine Mackay and Jessie Clark, in the pleadings named, and the said Annie Keefer, Christine Mackay and Jessie Clark became absolutely entitled to an equitable estate in the said remaining three undivided fourth parts of lot No. 1 as tenants in common in fee simple.

1885

MERCHANTS' BANK OF CANADA v. KEEFER.

Strong J.

3. And this court doth in all other respects affirm the said decree and the order of the Court of Appeal.

4. Order that the costs of all parties to this appeal be paid out of the estate of the Hon. Thos. Mackay.

FOURNIER J. concurred with RITCHIE C.J.

HENRY J.—Thomas Mackay, through whom both parties in this case claim on the 1st September, 1885, executed his last will and testament by which he appointed his wife and his sons, Alexander, John, Charles and Thomas, executrix and executors thereof, and by it devised and bequeathed to his executrix and executors all his estate, real and personal, as follows:—

All and singular, the moneys, debts, stocks, bills, bonds, mortgages, debentures and other securities; goods, chattels and effects, lands, tenements and hereditaments whatsoever and wheresoever situate, and all interest in the same, of which I shall die possessed and to which I shall be in any way entitled at the time of my death, in trust for the several uses and purposes hereinafter mentioned and declared, and to be held and applied and disposed of as hereinafter mentioned and appointed, that is to say: First, for the payment of debts; and secondly, for payment of £50 to the Bytown Protestant Hospital.

Thirdly.—In the event of his wife surviving him in trust for her maintenance and support during her life time and for the maintenance and support of his children so long as they should live with their mother, &c, with directions that his wife, so long as she lived and continued his widow, should have the full right to possess and manage the property devised and bequeathed and the profits, &c, thereof, for such purposes, but in the event of her marrying again then for the payment out of the rents and profits, &c., to her of £500 annually, which annuity he charged on his said property and estate in lieu of dower.

The controversy which has arisen between the parties to this action is as to the construction of that part of

the fourth devise, which is as follows :—

In trust, also, that at the death or second marriage of my said wife, should such happen, my son Thomas, if he be then living, shall have and take lot No. 1, in the front concession, &c., which I hereby devise to him, his heirs and assigns to and for his or their own use forever.

What then was the legal interest of Thomas at his father's death? Did he take a vested or contingent remainder? What did the testator intend? We must gather his intention from the words of the devise and from the whole of the will. He devised and bequeathed all his estate, real and personal, to his executrix and executors in trust for the support of his widow and children during her life and widowhood, and while the children lived with her; and in trust, also, that at the death or second marriage of his wife, should such happen, his son Thomas, if he should be then living, should have and take lot No. 1. He then directs that his four sons, including Thomas, should have and take all his other real estate in the township of Gloucester, namely, lots two, three, four and five, in the same concession as lot No. 1, with all mills, houses and buildings thereon erected. Also, ten acres of land in the city of Ottawa (except a part sold to John McKinnon, Esq.) Also, Green Island near the mouth of Rideau river, with all mills, houses and buildings thereon erected—all these properties he devised to his four sons (including Thomas), their heirs and assigns as tenants in common.

The testator devised his houses, lands, tenements and real estate, in the city of Montreal, to his four daughters Ann, Christina, Jessie and Elizabeth. All the devises and bequests in the will, except those to his wife, are appointed to take effect on the death of his wife or on her second marriage, if such should happen, and they included all his estate, real and personal, his wife in the meantime to have the use of all for her support and that of his children. And all his property then remaining undisposed of specially by his will to be divided equally

1885

MERCHANTS' BANK OF CANADA v. KEEFER.

Henry J.

amongst his then surviving children or their legal representatives.

It will thus be seen that the testator appointed for his son, Thomas, independently of the devise to him of lot No. 1, an equal share with his three other sons of all his estate, real and personal. Independently of lot No. 1 Thomas got the same share of his father's estate as his brothers, but the will provided for his getting lot No. 1 in addition, but, as the will provides, in case he should be alive at the death or second marriage of his mother. Lot No. 1, devised with all his other property to his executrix and executors, of whom Thomas was one, in trust for the benefit of his wife during her life or widowhood, was in trust, also, that at the death or second marriage of his wife, his son Thomas, if he should be then living, was to take it, which he thereby devised to him, his heirs and assigns. Taking the disposition of his estate by his will, why should the testator only in this one of the many devises contained in his will limit the devise of lot No. 1 by the use of the words "if he be then living," if he did not intend them to have the natural construction such words should bear? I can readily conceive why something special or extra should be provided and appointed for one of a number of sons, if alive, to take it personally on the happening of some future event, when the same reason would call for leaving the same property to become only the property of the son's heirs or assigns. I can readily understand that a father might fairly decide to devise to each of his sons an equal share of certain real estate to go to them, their heirs and assigns as vested remainders, which I take to be the result of the devise to the four sons, and in case one of them named by him should be alive on the happening of a certain event, and on that condition that he should also receive something further. I am of the opinion that such was the intention of the testa-

tor in regard to lot No. 1, and that he did not intend to devise that to the heirs or assigns of Thomas in case of his death before the death, or widowhood of his mother. The devise to Thomas, his heirs and assigns, was, therefore, in my opinion, contingent on Thomas being alive at the happening of the event named.

A construction which gives a vested interest is, no doubt, favored by the courts where there is ambiguity or doubt, but where the intention to create a contingent estate or interest is reasonably evident or clear that intention must be respected and carried out. In this case the condition precedent to the vesting, that is, that Thomas shall be then living, is, I think, clearly expressed, and we cannot treat it as a devise creating a vested interest without going in opposition to the terms of the will.

I think we must assume that the testator advisedly used the words "if he be then living," as a condition precedent; or, amongst other reasons, why were they inserted at all? The testator has used words sufficiently strong and explicit to create a condition precedent, and what right have we to say they were not intended to have any effect, and that without any evidence intrinsic or otherwise to sustain such a declaration? I gather from a study of the whole will that the testator had his own reasons for imposing the condition precedent in question.

I think the appeal should be allowed and judgment given for the appellants with costs to be paid out of the estate of the testator.

GWYNNE J.—The only question raised before us upon this appeal is: Was the estate devised to Thomas Mackay the younger, by the will of his father, in lot No. 1, in the front concession, on the Ottawa, in the township of Gloucester, an estate in fee vested in him upon the death of his father, subject to the estate of his mother

1885

MERCHANTS' BANK OF CANADA v. KEEFER.

Gwynne J.

therein during her life or widowhood, or was it an estate in fee contingent upon his being alive at the death or second marriage of his mother, which ever should first happen? The testator by his will devised and bequeathed all his real and personal estate of every description to his executrix and executors therein named, in trust for the several purposes particularly stated in sections numbered from one to five. In the third section he declared the trust to be as to the whole of his said property for his wife so long as she should live and continue his widow and unmarried, and by the fourth section, which is the one with which we have to deal, he declared the trust to be that at the death or second marriage of his said wife, should such happen, his son Thomas, if then living, should have and take the said lot No. 1 which he hereby devised to him, his heirs and assigns, to and for his and their own use forever, and that his sons, Alexander, John, Charles and Thomas, aforesaid, should have and take certain other real estate therein particularly mentioned, all which he thereby devised to his said sons, Alexander, John, Charles and Thomas, and to their heirs and assigns, to and for their own use forever, as tenants in common; subject, nevertheless, to the payment of the legacies and annuities by his said will bequeathed and made chargeable thereon; and that his daughters, Ann, Christine, Jessie and Elizabeth, should have and take all his houses, lands, tenements and real estate in the city of Montreal, which he thereby devised to his said daughters, their heirs and assigns, to and for their own use forever, as tenants in common. The section then proceeds:—

And I hereby will and direct that all the said devises in this section of my will mentioned and devised shall take effect upon from and after the said death or marriage of my said wife and not sooner.

And all other my lands, tenements, houses and real estate of what nature and kind soever, and wheresoever situate, and as well in Great

Britain as in Canada in trust to be sold, &c., &c., &c., and the rents, issues, profits, price, and proceeds thereof to be at the disposal of my said wife so long as she shall live and remain unmarried for the support of herself and my said children, and after her death or marriage to be equally divided among my said children. * * * * * In trust, also, that at the death or marriage of my said wife as aforesaid all my personal property and estate then remaining shall be equally divided among my said children either in money or in kind as to my said executors shall seem best, allowing one year for the making of such distribution.

Provided always, and I hereby will and bequeath, that in the event of any of my said children dying without legal issue before coming into possession of his or her share or shares of the property or money hereby devised or bequeathed, then the share or shares of such child or children to go to and be equally divided among the survivors and the legal issue of such, if any, as shall have died leaving issue.

And in the event of any of my said children dying before coming into possession as aforesaid and leaving legal issue, such issue in every case to take the portion or share which would have belonged to his, her or their father or mother if then living, and to the husband or wife of each of my said children who shall after marriage and before coming into possession as aforesaid, die without issue, leaving such husband or wife, I give and bequeath the sum of fifty pounds annually as an annuity payable out of and chargeable upon the share which would have belonged to such child if living.

The testator then bequeathed a silver cup presented, to him by Col. By, to his said wife during her life or widowhood, and at her death or second marriage he gave and bequeathed the same to his youngest son then living, and all his books he gave and bequeathed to his sons, Alexander, John, Charles and Thomas, to be taken possession of and equally divided among them at the death or second marriage of his said wife.

In the fifth and last section the testator made provision for the event of his wife dying before him.

Now the testator by the third section of his will declared the trust purposes for which the devisees in trust should hold the whole of his property, real and personal, during the life or widowhood of his wife. In the fourth he declared the trust purposes as to the

1885

MERCHANTS' BANK OF CANADA v. KEEFER.

Gwynne J.

whole of his real estate and as to such of his personal estate as should remain at the death or second marriage of his wife, with a direction for the sale during the life of his wife and the conversion into personalty, subject to the control of his wife so long as she should live and remain unmarried for the support of herself and her said children, of the whole of his real estate not specifically devised to any one after the death or second marriage of his wife. In the first paragraph of this fourth section, which contains the declaration of trust as to the particular parcels of real estate devised to his sons, it is declared that at the death or second marriage of the testator's wife, his son Thomas, if then living, shall have and take the lot No. 1 now in question, which the testator thereby devised to him in fee simple, but these words "if then living" are not used in the sentence declaring the trust in respect of the lots devised to the testator's four sons, of whom Thomas is one as tenant in common. We cannot hold, as it appears to me, from the language used in this paragraph that the testator's intention was to give to his son Thomas an estate in fee in lot No. 1, contingent upon his being alive at the death or second marriage of his mother, and an estate in fee in the lands of which he was made devisee in common with his brothers, vested upon the testator's death, but subject to the estate during life or widowhood devised to the testator's wife. On the contrary, the estate of Thomas in the subject of both devises must, I think, be of the like nature—vested or contingent—and that it is the latter appears to me to be sufficiently clear from the context, for at the close of the next following paragraph of the same section which contains the declaration of trust as to the lands devised to the testator's daughters, in which paragraph the words "if then living" do not appear either, is added a sentence which applies to all

1885

MERCHANTS' BANK OF CANADA v. KEEFER.

Gwynne J.

the previous declarations of trust as well in respect of the lands devised to sons as in respect of those devised to daughters, namely :—

I will and declare that all said devises in this section of my will mentioned shall take effect upon, from and after the said death or marriage of my said wife and not sooner.

This sentence, as it appears to me, was inserted for the express purpose of supplying the want of the repetition of the words "if then living" in the sentences containing the declaration of trust in respect of the lands devised to the testator's four sons as tenants in common, and to his daughters also as tenants in common, and to remove all doubts which the absence of those words from those sentences might raise ; and the effect of this sentence is, in my opinion, to put all the devises to the testator's sons and daughters alike upon the same footing ; that is to say, devises in fee contingent upon their respectively being alive at the death or second marriage of the testator's wife. To construe this sentence as merely postponing the enjoyment in possession of lands vested by the will in the devisees in fee subject to the estate therein of the testator's wife during her life or widowhood, would be to make it wholly nugatory and to hold it to have been introduced for a purpose quite unnecessary ; for the previous devise to the widow during her life or widowhood had already, without more, effectually postponed during her life and widowhood the enjoyment in possession by the sons and daughters respectively of the lands mentioned.

Treating then all of these specific devises to sons and daughters to be alike contingent upon their respectively being alive at the death or second marriage of the testor's wife, the proviso in the section becomes naturally applicable to all the estate, real and personal, devised in the section, and makes the will perfect in providing for the disposition of the testator's estate in the event of the contingency, upon which the devises to the sons and

1885

MERCHANTS' BANK OF CANADA v. KEEFER.

Gwynne J.

daughters should take effect, not happening. I cannot see anything in the proviso to justify us in construing it as applying to personalty alone. The words are sufficient to comprehend realty as well as personalty, and if the previous devises of realty to sons and daughters be contingent, the application of the proviso to those lands is essentially necessary to make the will complete and perfect in its structure. The proper way to construe the will, as it appears to me, is to ascertain, if possible, and I think it is, from that portion of the section which contains the devises to sons and daughters what is the nature and extent of the estate so devised, for the purpose of determining whether the proviso can affect the lands comprehended in such devises, instead of reading the proviso by itself and limiting it to personalty, when the language is comprehensive enough to include realty, and so limiting it to deduce therefrom what is the extent and nature of the estate in realty devised by a previous sentence in the section. Moreover the construction of the proviso as applying to personalty alone is, as it appears to me, open to the objection that it might, so construed, defeat a purpose sufficiently clearly appearing in the proviso itself, by which it is provided that the husband or wife of each of the testator's children who should, after marriage and before coming into possession, die without issue leaving such husband or wife, should receive an annuity of fifty pounds, payable out of and chargeable upon the share which would have belonged to such child, if living. Now, as the personalty is left to the disposal of the testator's wife for the support of herself and the testator's children during the life or widowhood of his wife, and as it is only so much of such personalty as shall be remaining at her death or second marriage that is bequeathed to the children, it might be that nothing should remain to meet that bequest or not sufficient to

secure out of it the payment of the annuities bequeathed to the husbands and wives of such of the testator's children as should die without issue during the life of testator's wife. These annuities in such case would fail unless they are made payable out of, and chargeable upon, the share in realty as well as in the personalty that would have belonged to such child if living. Consistent, too, with this, is the devise in the first paragraph of the section by which the devise to the four sons as tenants in common is expressly made "subject to the payment of the legacies and annuities in and by the will bequeathed and made chargeable thereon." Construing therefore the devises of realty to all of the testator's sons and daughters as contingent upon the event of their respectively being alive at the death or second marriage of the testator's wife, the whole will becomes consistent and complete in its structure, and for the above reasons I am of opinion that Thomas, the testator's son, did not take an estate in the lot No. 1 vested in him on the testator's death, but that the estate devised to him was contingent upon his being alive at the death of his mother, and as that contingency never happened the lot became subject to the limitations of the proviso.

Appeal allowed with costs to be paid out of estate of Hon T. McKay.

Solicitors for appellants: *Stewart, Chrysler & Gormully.*

Solicitors for respondents: *Delamere, Black, Riesor & English, John Hoskin.*

1886

*Mar. 24, 26 & 27.

*June 8.

ALEXANDER FRASER (DEFENDANT).....APPELLANT;

AND

ANDREW W. BELL (PLAINTIFF).....RESPONDENT.

CROSS-APPEAL.

ANDREW W. BELL (PLAINTIFF).....APPELLANT;

AND

ALEXANDER FRASER (DEFENDANT)....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Pleading—Payment into court—Conditional plea—Plaintiff's right to withdraw money.

In an action for an account the defendant after setting up a discharge by the plaintiff of his cause of action against the defendant pleaded as follows:—"In case this honorable Court should be of opinion that the defendant is still liable .... the defendant now brings into court, &c., the sum of, &c., and states that the same is sufficient, &c." The plaintiff took the money out of court.

Held, Strong J. dissenting, that this was a payment into court in satisfaction which the plaintiff had a right to retain, notwithstanding his action was dismissed at the hearing.

Held, per Strong J., that this plea only recognized the plaintiff's right to the money in the event of the court deciding that the defendant was not discharged from his liability, but that on the facts presented the plaintiff was entitled to judgment for the same amount as the sum paid into court.

APPEAL from a decision of the Court of Appeal for Ontario (1) affirming the judgment of Ferguson J. in the Chancery Division by which an order for repayment of money paid into court and taken out by the plaintiff was refused, and cross appeal from the same decision by which the judgment of Ferguson J. dismissing the plaintiff's action was affirmed.

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

(1) 12 Ont App. R. 1.

1886

FRASER v. BELL.

The plaintiff Bell was assignee in insolvency of the firm of McDougal & Bro., who, prior to their insolvency, had assigned a quantity of timber to the defendant Fraser in trust to sell the same and, after paying all expenses, and retaining the amount of a claim he had against the insolvent, to pay over the proceeds to them. This timber, with other timber of Fraser's, was placed in the hands of one Knight, a broker, for sale, and it was sold and part of the proceeds paid over. Knight became insolvent and Bell brought an action for the balance due on the sale of the timber, claiming that Fraser was a trustee and was liable to account for money received by his agent.

The defendant, by his statement of defence, had pleaded, *inter alia*, that the plaintiff had discharged him from liability for the claim sued upon, and also this plea:—

"In case this honorable Court shall be of opinion that the defendant is still liable for the payment of the balance of the money mentioned in the next preceding paragraph, the defendant now brings into court ready to be given to the plaintiff the sum of $4,300, and states that the same is sufficient to pay in full all claims of the plaintiff in respect of the balance of the moneys received, &c."

The plaintiff took the money out of court and the case went to trial on the issues raised by the pleadings.

At the hearing the plaintiff's action was dismissed, but the learned judge refused to make an order for repayment to the defendant of the money taken out of court. The defendant appealed from this decision and the plaintiff appealed from the judgment dismissing his action. Both appeals were dismissed by the Court of Appeals and both parties appealed to the Supreme Court of Canada.

McCarthy Q.C. for the appellant. The rule relating

1886

FRASER v. BELL.

to payment into court in equity cases is very different from the same rule at common law. This case is analogous to a suit in equity where the fund is placed in court *in medio* to abide the event of the suit. See *Lafone* v. *Smith* (1); *Jones* v. *Mackie* (2).

Gormully for the respondent. This is an action under the Judicature Act and the facts of its being in the Chancery Division does not make it a suit in equity. As a matter of fact, it is an action for breach of agreement and sounds in damages.

As to the plaintiff's right to retain this money the authorities are very clear. See *Berdan* v. *Greenwood* (3); *Goutard* v. *Carr* (4); *Hawkesley* v. *Bradshaw* (5); and *Wheeler* v. *The United Telephone Co.* (6).

McCarthy Q.C. in reply contended that none of the cases decided that a plea of payment into court could not be conditional.

Gormully for the appellant in the cross-appeal cited *Speight* v. *Gaunt* (7); *Massey* v. *Banner* (8); *Wren* v. *Kirton* (9); *Lewin* on Trusts (10).

McCarthy Q.C. for the respondent referred to *Re Brier* (11); *Warner* v *Jacob* (12).

Sir W. J. RITCHIE C.J.—An examination of the pleadings shows that the plaintiff by his statement of claim sets forth five distinct clauses or causes of action, the second of which is the only one necessary, in the view I take of the case, to be considered.

That claim is in respect of the proceeds of a quantity of timber mentioned in one of the clauses of the agreement on which the first alleged claim is founded, which timber had been placed by the defendant in the

(1) 4 H. & N. 158.
(2) L. R. 3 Ex. 1.
(3) 3 Ex. D. 251.
(4) 13 Q. B. D. 598 n.
(5) 5 Q. B. D. 302.
(6) 13 Q. B. D. 597.
(7) 22 Ch. D. 727; 9 App. Cas. 1.
(8) 1 J. & W. 241.
(9) 11 Ves. 377.
(10) 8 Ed. p. 435.
(11) 26 Ch. D. 238.
(12) 20 Ch. D. 220.

hands of one Knight for sale. By the statement of defence different answers are pleaded to all the claims. As to the second, it is alleged that the defendant gave the plaintiff an order which he accepted upon Knight for the money due by him, that he received part of it from Knight, and agreed to look to him alone for the whole of it, and discharged the defendant from all liability for it.

The statement of defence as to this claim is as follows:—

In case this honorable court should be of opinion that the defendant is still liable for the payment of the balance of the money mentioned in the next preceding paragraph, the defendant now brings into court ready to be given to the plaintiff the sum of $4,300, and states that the same is sufficient to pay in full all claims of the plaintiff in respect of the balance of the moneys received by the said A. F. A. Knight, mentioned in the seventh paragraph of this statement of defence, and of all interest thereon, and of all damages for non-payment thereof, or for omission to credit the same on the defendant's claim, pursuant to the deed set out in the seventh paragraph of the plaintiff's statement of claim.

Under this statement of defence the $4,300 was paid into court. The amount appears to have been made up by calculating the interest up to the time of payment into court. The plaintiff took it out after joining issue generally on the statement of defence. The action was taken down for trial, and the defendant having succeeded in disproving his liability as to all the causes of action, now asks that the money thus paid into court and paid over to the plaintiff may be ordered to be repaid to him.

It is not necessary, in my opinion, to determine whether the plaintiff's bill should have been dismissed or not, as I think the plaintiff had a right to take the amount paid in out of court, which, on the argument, appeared to be really the only question in controversy. The authorities, viz: *Berdan* v. *Greenwood* (1),

(1) 3 Ex. D. 251.

1886

FRASER v. BELL.

Ritchie C.J.

Goutard v. *Carr* (1), in which *Berdan* v. *Greenwood* was followed and approved; *Hawkesley* v. *Bradshaw* (2), in which Lord Bramwell took the same view of the law, and *Wheeler* v. *The United Telephone Co.* (3), which were relied on by the learned Chief Justice and Mr. Justice Osler in the court below, are too clear and too much in point to be got over.

I cannot think this money was paid in without any object to be attained and by which operation defendant would gain no advantage if defendants present contention is to be upheld (under the rules as they were then). As Mr. Justice Osler says:—

Different forms of expression are to be found in the cases such as "without admitting any liability," *Wheeler* v. *the United Telephone Company* (3). "Lest contrary to what the defendant believes and contends," *Berdan* v. *Greenwood* (4), *Coghlan* v. *Morris* (5), "if by reason of any wrongful act the plaintiff has sustained damage," *Goutard* v. *Carr* (1); but the prevailing fact is that money is paid into court under the pleading, and that the defendant is thereby enabled to avail himself of it as a defence in the action.

I am, as he was, unable to see any substantial distinction between the expression here used, "In case the court should be of opinion that the defendant is still liable," and those found in the pleadings in the cases cited.

STRONG J.—I am of opinion that the money paid into court in this case is not to be considered as having been paid in under order 26. The action is one for an account and to such an action order 26 does not apply. *Nicholls* v. *Evens* (6).

The fund in court was, I consider, paid in, as accord-

(1) 13 Q. B. D. 598 n.
(2) 5 Q. B. D. 302.
(3) 13 Q. B. D. 597.
(4) 3 Ex. D. 951.
(5) 6 L. R. Ir. 405.
(6) 22 Ch. D. 611.

ing to the old chancery practice money was constantly paid in, by a trustee as the balance of a trust fund in his hands to be held *in medio* until the right to it was formally disposed of by the judgment. This practice has never been abolished, but is still in force. Here the defendant recognised the plaintiff's right to the fund, not absolutely but conditionally on the court determining that he had not been discharged from all liability in respect of moneys received by Knight by the effect of an order on Knight given to the respondent by the appellant, but in the event of this point being determined against the defendant, it appears to me very clear that the answer recognizes the plaintiff's title to the money in question The 7th, 8th and 9th paragraphs of the statement of defence, upon a fair and reasonable construction, appear to me to be conclusive against the appellant's contention. By paragraphs 7 and 8 the appellant raises the defence that he was discharged from all liability by reason of the order given by him in favor of the respondent on Knight. It is clear, however, upon the evidence that that order had not the effect of discharging the appellant from any liability he was under as trustee for the respondent in respect to the timber in question, or in respect of the proceeds derived from its sale. Such an exoneration of the appellant was expressly and carefully guarded against by the respondent's solicitor in taking the order; Mr. *Gormully's* letter of the 29th of November, addressed to the appellant, most distinctly stipulates that no waiver of liability such as that which the appellant pleads in the 7th paragraph of his statement of defence shall be implied from the acceptance of this order. Whether there was such a liability apart from any discharge appears to me a question which does not arise, inasmuch as upon a fair construction of paragraphs 8 and 9 there

1886

FRASER v. BELL.

Strong J.

is an implied admission of liability for the money in Knights hands in the contingency of the order being held not to operate as a discharge. The word "discharge" there used implies a pre-existing liability, as does also the expression "still liable." The manifest object of the pleader was, by paying this money into court, to induce the respondent to accept it in satisfaction and so avoid an account which might result in a much larger measure of liability than that which the appellant thus conceded. The evidence, however, shows conclusively that the appellant might, with due diligence, have obtained payment of this money from Knight, and I am not prepared to admit that *Speight* v. *Gaunt* has anything to do with this case. It recognizes a general rule as to the duties of trustees, but the application of that rule to the facts of the present case in no way relieves the appellant from his responsibility for the money which came into Knight's hands.

Taken in conjunction with the circumstances actually existing, which, as I have said, show that the appellant was liable for money received by Knight, I read the 9th paragraph as an admission of this liability, and a submission that the money in court should be paid to the respondent in the event of the order on Knight not being held to be a discharge.

I am of opinion that the judgments of the courts below should be varied in conformity with the foregoing opinion, by declaring the respondent entitled to the money paid into court, and by ordering the appellant to pay all the costs below as well those of the action in the Chancery Division as of the appeal and cross appeal.

FOURNIER J.—I am of the opinion that the appeals should be dismissed.

HENRY J.—I concur in the decision arrived at. I

1886

FRASER v. BELL.

Henry J.

think the party here paid the money into court under a rule whereby plaintiff was entitled to take it out and keep it as a result of the proceedings in court. Under the old system of paying money into court a party could not deny liability, but here the party pays money in and, at the same time, denies his liability to pay it. So if the plaintiff has taken the money out of court I think that he has not done so wrongfully.

I think, under all the circumstances, the respondent is entitled to the costs of all the courts because he could not say that he accepted this money in full satisfaction. He could not do so where a party pays in money and at the same time contests his right to pay it.

I concur in the decision as to the main point of the case arrived at by the learned Chief Justice, and think the whole costs of the appeal should be allowed to the respondent.

GWYNNE J.—The difficulty existing in this case appears to me to have arisen from sufficient attention not having been paid to the matters put in issue between the parties by their pleadings on the record. The plaintiff is assignee in insolvency of a firm of lumber merchants named J. L. McDougal & Bro., who became insolvent on or about the 18th day of October, 1877.

The plaintiff, as assignee of the said insolvents and by virtue of the proceedings in their insolvency, became the owner of an undivided half of certain timber berths or limits, subject to a certain charge thereon in favor of the defendant, and the defendant at the date of the said insolvency and thenceforward until the sale thereof continued to be absolute owner of the other undivided half of the said limits. In the month of March, 1882, the plaintiff, as such assignee, instituted this action against the defendant.

In his statement of claim he alleges several distinct causes of action, the first of which is stated in the 7th

1886

FRASER v. BELL.

Gwynne J.

and 8th paragraphs which are in substance as follows:

7th Paragraph. On the 29th July, 1881, the plaintiff and defendant entered into an agreement in writing signed by them whereby, among other things, they agreed as follows:—

1. That the said limits should be offered for sale by public auction on or before the 1st day of November, 1881, in such parcels as the plaintiffs should deem best for the realization of the highest price, subject, however, to the proviso that if the said limits should be offered for sale in more parcels than one each parcel should be sold subject to a condition making void the sale of such parcels, unless the price realized by the sale of the whole of the said limits should reach in the aggregate the amount of one hundred thousand dollars.

That the defendant should receive the purchase money upon the trusts following, that is to say:

a. To pay himself one half of the total price received for the limits.

b. Out of the other half to deduct the sum of $58,603.\frac{08}{100}$ dollars, being the amounts of the claim properly provable by him against the estate of the said insolvents, after subtracting therefrom the amount received from the sale of the raft of timber mentioned in his claims filed against said estate with interest thereon from the 20th day of September, 1881.

c. To pay the balance to the plaintiff as assignee of the said estate, and it was thereby further agreed that the account of the sales of the timber by A. F. A. Knight & Co. should be verified at the expense of the estate if required. That the balance of the timber in the hands of A. F. A. Knight & Co. belonging to the estate, as shown in the said account sales, is 48,030 feet 84-12 inches, and that on this the defendant had a lien for his claim aforesaid, and if this should be sold before the sale of the limits it was agreed that the amount realised therefrom should be deducted from the amount of the defendant's claim as aforesaid Mr. Knight's and other proper charges to be first deducted. That if the limits should not be sold at the sale thereof the creditors should have the option, to be exercised within twenty-one days thereafter, of paying the defendant the amount of his said claim, and should thereupon be entitled to a transfer of one undivided half of the said limits on payment of the usual transfer fees, and in default thereof that the defendant should be entitled to the security held by him as the amount of his claim. The above to be a complete settlement between the said defendant and the said estate, and the said defendant to have no further claim against the said estate or the said undivided half of said limits or timber belonging to said estate.

1886

FRASER v. BELL.

Gwynne J.

8th Paragraph alleges that

The said limits were sold in the manner provided by the said agreement and the defendant received the purchase money arising from such sale, but that although all conditions had been performed and fulfilled and all things had happened and all times elapsed necessary to entitle the plaintiff to be paid the balance due to him under the said agreement, yet that the defendant did not pay the whole of the said balance to the plaintiff, but paid only a part thereof contrary to the said agreement.

The above contained the first item or cause of action set out in the plaintiff's statement of claim, and the amount, if any, which the plaintiff should recover in respect thereof would be the difference between the amount of the balance remaining of one half of the amount realised from the sale of the limits, after deducting therefrom the amount of the defendant's claim remaining unpaid, and the amount, which, as the statement of claim admits, had been paid by the defendant to the plaintiff arising from the sale of the limits.

The second item of plaintiff's cause of action is stated in the 9th paragraph of his statement of claim, as follows :—

9th paragraph—The plaintiff also says that although the balance of the timber mentioned in the additional clauses of the said agreement was sold before the sale of the said limits, the defendant did not deduct the amount realized thereupon from the amount of the defendant's claim against the said insolvent estate, as provided in the said agreement, but deducted the whole amount of his claim, namely, the sum of $58,003.08 mentioned in the said agreement, from the proceeds of the sale of the said limits, and did not account to, or credit the plaintiff for, the proceeds of the said timber.

The amount claimed by the plaintiff under this second item of his claim is the amount realized from the sale of the 48,030 feet of timber mentioned in the agreement as the balance remaining unsold when the said agreement was entered into.

The third item of the plaintiff's claim is set out in the tenth paragraph of his statement of claim, in which

10th paragraph the plaintiff sets out in full an indenture under

1886

FRASER
v.
BELL.

Gwynne J.

seal, bearing date the 29th day of May, 1887, between the firm of J. L. McDougal & Brother of the first part and the defendant of the second part whereby the said firm did transfer to the defendant a quantity of timber upon trust to sell the same and out of the proceeds to pay: 1st. All costs, charges, expenses and customary dues; 2nd. All men's wages and expenses at the port of Quebec; 3. To pay certain drafts and bills of exchange accepted by the defendant for the accommodation of the said firm, and every renewal thereof; 4th. To retain and pay to himself, the defendant, divers other sums therein mentioned, $2\frac{1}{2}$ cents per cubic foot of the timber, commission, &c., &c.; 5th. To pay the balance, if any, to the said firm. And the plaintiff alleged that although the timber mentioned in the said agreement had been sold by the defendant, and that all conditions had been fulfilled, and that all things had happened and all times had elapsed to entitle the plaintiff to an account of the proceeds of the said timber, and to be paid the balance due to him on such account, yet, that the defendant has not accounted for nor paid to the plaintiff the proceeds of the said timber, and the defendant has improperly charged the plaintiff with large sums for expenses and has improperly made large deductions from the quantity of timber admitted to have been received by him for alleged loss in culling and waste in shipping and otherwise, and upon taking the accounts of the sales of the said timber between the plaintiff and the defendant the plaintiff is entitled to credit for divers large sums of money which he has not received and which have not been paid to him by the defendant.

The fourth item of the plaintiff's claim is stated as follows in the 11th paragraph of his statement of claim:—

11th paragraph - The plaintiff as assignee of the said insolvent estate, and under and by and with the advice and consent of the creditors of the said insolvents, made an agreement with the defendant in the month of November, 1877, by which it was agreed that for and in consideration of certain commission then agreed to be paid and allowed to the defendant the defendant should take the timber then made and the timber and supplies then being on the limits of the insolvents, and should make all necessary advances and employ and pay workmen to make timber on the said limits for the remainder of the said season and for the benefit of and on account of the said estate and should raft and take the said timber to market, and should out of the proceeds of the sale of the said timber repay himself his said advances and commission agreed

upon and should pay the balance to the plaintiff, and the plaintiff says that the defendant did make and take out the timber under the said agreement and has received the proceeds thereof, but although all conditions have been fulfilled and things happened and all times elapsed to entitle the plaintiff to be paid the balance due to him on account of the said raft, the defendant has not paid or accounted to him for the proceeds of the said raft.

The fifth and last item of the plaintiff's claim is set out as follows in the

12th paragraph—The defendant, in or about the month of November, 1877, took possession, and has ever since been in possession of a farm upon the limits of the said insolvents and has received and taken hay, oats and other produce of the said farm, and has sold the same and received large sums of money therefor for which he has not accounted to the plaintiff and which the plaintiff claims to be paid, and the plaintiff claimed: 1. Payment of the amount which should be found due by the defendant; 2. That all proper directions might be given and accounts taken and 3. Such further and other relief as the nature of the case might require.

From the above statement of claim it is apparent that the first of the above causes of action is for a simple money demand for a balance claimed to be due from the defendant to the plaintiff upon the agreement of the former and in respect of moneys which had been received by the former to the use of the latter.

The defendant's statement of defence to this cause of action alleges that the whole balance of the moneys arising from the sale of the timber limits, after deducting the amount of defendant's claim by way of lien thereon, was $42,233.73 and that the defendant paid to the plaintiff $42,000.00 of that sum and retained the balance of $233.73 to pay a counter claim which he asserted that he had against the plaintiff for the conversion by the plaintiff, as assignee of the insolvent estate, to the use of that estate of certain property of the defendant, and he claimed by way of counter claim the right to retain the said sum in payment and satisfaction of the property so converted. To this defence the plaintiff simply joined issue and the matter there-

1886

FRASER v. BELL.

Gwynne J.

by put in contestation was the truth of the matter alleged by way of defence. As to the sum of $12,233.73 being the balance in which alone the plaintiff was interested, that was admitted to be correct as was also the statement that the defendant had paid $42,000.00 thereof, so that the issue was in fact limited to the correctness of the defendant's counter claim which the learned judge who tried the case found for the defendant. Upon this issue, therefore, it is clear that the plaintiff's action should not have been dismissed, but that a verdict should have been found and judgment given for the defendant in terms affirming the establishment of his defence and his counter claim, for the defence admitted the plaintiff's cause of action to the amount of $233.73 unless he should establish his counter claim, and displaced the cause of action so admitted only by establishing his counter claim. He was, therefore, clearly entitled to judgment on that issue.

Now, the second of the above causes of action which is set out in the 9th paragraph of the plaintiff's statement of claim is also a simple money demand for a balance claimed to be due from the defendant to the plaintiff upon the agreement of the former and in respect of monies alleged to have been received by the former to the use of the latter.

The defendant's statement of defence to this cause of action, in short substance, alleges that $8,470.02 was the amount of the proceeds of the sale of the 48,030 feet of timber in the agreement, set out in plaintiff's statement of claim, stated to be the balance remaining in A. F. A. Knight's hands for sale, and that upon demand made by the plaintiff on the defendant for that sum the defendant gave the plaintiff an order upon the said Knight for that sum, and that the plaintiff accepted the order and applied to Knight for the same and

received from him $4,500.00 on account of such sum of $8,470.02 and the plaintiff thereby agreed to look to said Knight for the payment of the balance of the said sum of $8,470.02 *and discharged the defendant from the payment of the same* but

In case this honorable court should be of opinion that the defendant is still liable for the payment of the said balance the defendant now brings into court, ready to be given to the plaintiff, the sum of $4,300 and states that the same is sufficient to pay in full all claims of the plaintiff in respect of the balance of the monies received by the said A. F. A. Knight and all interest thereon and of all damages for non-payment thereof or for omission to credit the same on the defendant's claim pursuant to the deed set out in the 7th paragraph of the plaintiff's statement of claim.

The only replication which the plaintiff makes to this statement of defence is joinder in issue.

Now, it is to be observed that the defendant does not set up any defence of the nature that he never had been liable to the plaintiff, but that Knight alone was, in respect of the proceeds of the sale of the 48,030 feet of timber; on the contrary, the defendant admits his original liability and his omission, as alleged in plaintiff's statement of claim, to credit the amount on the defendant's claim pursuant to the deed in the statement of claim mentioned, and he professes to avoid this original liability and such his omission to credit the amount by alleging that the plaintiff had taken the draft on Knight for $8,470.02 and had taken part from him, and had agreed to look to him for the balance, and had discharged the defendant therefrom; but in case the defendant should fail to establish this discharge and the court should hold that the defendant's original liability still remains then he pays the $4,300.00 into court as sufficient *to satisfy* him for the balance of the proceeds of the sale of the timber, for *all damages occasioned by defendant's omission to credit the same on his claim* as he had agreed to do by the deed set out in the plaintiff's statement of claim. Upon this defence

1886

FRASER v. BELL.

Gwynne J.

I am of opinion that the plaintiff was, upon the authority of *Goutard* v. *Carr* (1) and of *Wheeler* v. *United Telephone Co.* (2), entitled to withdraw, as he did, the amount so paid into court, but whether he was or not, was in truth unimportant in the present case, for upon the issue raised by the plaintiff's joinder in issue to the defendant's defence to the cause of action all that was in issue was, in substance, whether or not the plaintiff had discharged the defendant, as alleged, from the original liability which, by his statement of defence, he admitted, and if not whether the amount paid into court was or not sufficient to pay everything demanded by the plaintiff in respect of the matters to satisfy which it had been paid in; and as the defendant had to abandon as incapable of proof his defence as to his having been discharged by the plaintiff as asserted in his statement of defence, he, by the express terms of that statement, admitted the plaintiff's absolute right to the $4,300.00 so paid into court. But as the plaintiff offered no evidence in support of the issue that the amount so paid into court was insufficient to pay for all damages and demands in respect of which it was paid in, the defendant was entitled to a verdict and judgment in his favor upon this part of this issue joined in respect of the cause of action to which this defence is pleaded.

In answer to the third cause of action, which is set out in the 10th paragraph of plaintiff's statement of claim, the defendant, in short substance, pleads by way of defence that the instrument sued upon in the 1st and 2nd causes of action, above set out, was executed to secure all claims and demands of every nature and kind whatsoever arising in respect of the deed in the 10th paragraph of plaintiff's statement which upon a full and complete account between the plaintiff and defendant were stated and settled and

(1) 13 Q. B. D. 598 n.

(2) 13 Q. B. D. 597.

secured by the deed of the 29th July, 1881, set out in the 7th paragraph of the plaintiff's statement of claim. To this statement of defence the plaintiff having simply joined issue the sole question was as to its truth, and the learned judge having found in favor of the defendant, upon this issue also defendant was entitled to judgment being entered in his favor thereon.

In answer to the 4th cause of action which is set out in the 11th paragraph of the plaintiff's statement of claim, the defendant pleads by way of defence an account stated and settled between the plaintiff and defendant in respect of this cause of action, at which statement of account the defendant was found indebted to the plaintiff in the sum of $1,912.00 which sum the defendant paid to the plaintiff and the plaintiff accepted in full satisfaction of all claims and demands whatsoever in respect of this part of his claim and as set out in the 11th paragraph of his statement of claim. On joinder in issue to this defence the defendant appears to have been entitled to judgment also in his favor. To the 5th and last cause of action as set out in the 12th paragraph of the plaintiff's statement of claim, the defendant pleads that all the matters comprised in this cause of action were taken into consideration and included in the account stated and settled between plaintiff and defendant prior to the execution of the deed of the 29th July, 1881, and that the amount by that deed secured to be paid to the plaintiff was the balance found due to him upon the stating and settling of such account. Upon issue joined by the plaintiff to this plea also the learned judge has found the issue in favor of the defendant so that the defendant was entitled to judgment upon this issue also and upon the whole record, while the plaintiff was entitled to retain the money paid into court the defendant was entitled to judgment upon all of the above issues. The defen-

1886

FRASER v. BELL.

Gwynne J.

dant, however, does not appeal against the judgment of the court below which, instead of giving judgment for the defendant on the above issues, has dismissed the plaintiff's action; on the contrary he rests his appeal which is against so much of the judgment as refuses to order repayment to him of the money paid into court by him, upon the judgment dismissing the plaintiff's action. On the other hand, the plaintiff's cross appeal seems to have been taken for the sole purpose of insisting upon his right to have recovered upon the issue joined on the second of the above causes of action in the plaintiff's statement of claim mentioned -the sum which was paid into court, if it had not been paid in, and taken out by the plaintiff, but if he should succeed in resisting the defendant's appeal in respect of his claim to have the money so taken out of court repaid to him, the plaintiff admits that he can establish no further claim against the defendant. Substantial justice will therefore be obtained by dismissing both appeals with costs and leaving the judgment to remain as pronounced in the court below although it is not in the precise form which, upon the issues joined, that judgment should have assumed.

Appeal dismissed with costs.

Solicitors for appellant: *Pinhey, Christie & Christie.*

Solicitors for respondent: *Gormully & Sinclair.*

AUGUSTE F. COLLETTE, *et al.* (DEFENDANTS) ..... } APPELLANTS;

AND

JEAN BAPTISTE LASNIER (PLAINTIFF) RESPONDENT.

1885
*Nov. 4.

1886
*Mar. 8.

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

Patents—Validity of prior patent—Infringement—Damages—What proper measures.

In 1877 L., a candle manufacturer, obtained a patent for new and useful improvements in candle making apparatus. In 1879 C., who was also engaged in the same trade, obtained a patent for a machine to make candles. L. claimed that C's. patent was a fraudulent imitation of his patent and prayed that C. be condemned to pay him $13,200 as being the amount of profits alleged to have been realised by C. in making and selling candles with his patented machine, and also $10,000 exemplary damages.

C. contended his patent was valid as a combination patent of old elements; that there could be no action for infringement of L's. patent until C's. patent was repealed by *scire facias*; and also that L's. patent was not a new invention. The Superior Court, on the evidence found that C's. patent was a fraudulent imitation of L's. patent, and granted an injunction and condemned C. to pay L. $600 damages for the profits he had made on selling candles made by the patented machine. This judgment was affirmed by the Court of Queen's Bench (appeal side). At the trial there was evidence that there were other machines known and in use for making candles, but there was no evidence as to the cost of making candles with such machines, or what would have been a fair royalty to pay L. for the use of his patent. And it was proved also that L's. trade had been increasing. On appeal to the Supreme Court of Canada it was—

Held, (affirming the judgment of the courts below), Henry J. dissenting, that C's. machine was a mere colorable imitation of L's., based upon the same principles, composed of the same elements and producing no results materially different; therefore L's. patent had been infringed, and there was no necessity in order to

---

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

1885

COLLETTE v. LASNIER.

recover damages for infringement that C's. patent should first be set aside by *scire facias*.

Also (reversing the judgment of the court below) that in this case the profits made by the defendants were not a proper measure of damages; that the evidence furnished no means of accurately measuring the damages, but substantial justice would be done by awarding $100.

APPEAL from a judgment of the Court of Queen's Bench for Lower Canada (appeal side) confirming the judgment of the Superior Court in favor of the respondent.

The respondent (plaintiff below) obtained a patent for a machine which he styled "Machine à fabriquer les cierges de Jean Baptiste Lasnier." The said patent was said, by the specificatioon, to consist:

1o. "In the combination of a basin or tub C, in which the wax is placed, suspended by its curved edge D, resting on the edge of the outside basin, so as to leave a space E, which being filled with water, melts the wax by steam and boiling water, said wax by such process preserves its fine color and is prevented from burning;"

2o. "In the combination of a dipping plunger or frame H, with its bars or cross-pieces II, and the hooks JJ, to which the wicks D are attached, and the strap or chain P, so as to dip the wicks K in the wax and withdraw them. Also, the combination of the weight A and the teeth B to counterbalance the weight, as well as the regulating pin *d*;"

That after obtaining such patent the plaintiff put it in operation and manufactured candles with it which he sold.

The plaintiff's patent was obtained in 1877 and in 1879 the defendants also obtained a patent for new and useful improvements in candle manufacturing apparatus under the name of "Collette & Ulric's Candle Apparatus." This patent was said to consist:

"1st, in a candle making apparatus the combination of a boiler A, and pipes D and K, with tank C, melting vat E and frame L; 2nd in a candle manufacturing apparatus the combination of the dipping plunger Q having slides R, with the candle holder S, having dovetailed or $\sqrt{}$ shaped strips *b*, and hooks C, with the frame L having slide rods OO and cross beam P, with pulley A; 3rd in the combination with a candle making apparatus having the dipping plunger Q. fitted with candle holder S of the rope or chain T, pulley A, and winch *d*."

The plaintiff alleged this last to be an infringement of the patent, and brought an action for damages and for an injunction. They claimed as damages the profit made by defendants in the manufacture and sale of the candles made by the last-mentioned patent process. The Superior Court allowed both the injunction and the damages, the latter on the basis claimed by the plaintiff, and the Court of Appeal confirmed the judgment.

Lacoste Q.C. for appellants:

Until appellant's patent has been set aside by *scire facias* the respondent cannot sue for an infringement of his patent. See 32 Vic ch. 26 sec. 46; art. 1035 C. P. C. (Foran's edition).

[The Chief Justice—Under sec. 23 of the Patent Act, if the respondent has a valid patent, he has a right against all the world.]

On the merits the counsel contended, first, that the Lasnier patent was a mere combination of old elements with no new results, and therefore he could not complain of an infringement; citing Nougier Brevêts d'Invention (1); *Crompton* v. *Belknap Mills* (2); Curtis' Law of Patents (3); and secondly, admitting that the Lasnier

(1) Nos. 411, 412, 414, 421. (2) 3 Fisher's patent cases 536.
(3) Sec. 111.

1885

COLLETTE v. LASNIER.

patent is valid, the measure of damages should be according to the difference in cost between the best known machine in use which could be got for manufacturing the tapers, and the cost of the new patented machine with a fair remuneration for the improvement.

Geoffrion Q.C. for respondent contended, that as the appellants had not contested the validity of the respondent's patent the only question for the court to decide, was whether there had been an infringement. Commenting on the evidence he contended that the manufacture of tapers by appellant was an infringement of the Lasnier patent, and relied on the following authorities :—

Bump on Patents (1) ; Higgin's Digest of patent cases citing *Hill* v. *Thompson* (2) ; *Morgan* v. *Seaward* (3) ; *Heath* v. *Unwin* (4) ; *Russell* v. *Ledsam* (5) ; *Bateman* v. *Gray* (6). Goodeve's patent cases citing *Clark* v. *Adie* (7). The same doctrine prevails in the United States. Curtis's Law of Patents (8).

As to amount of damages the learned counsel argued that respondent was entitled to all the profits he could have realized, or such an amount as might have been charged for a royalty equivalent to a reasonable profit on every pound manufactured by him.

Sir W. J. RITCHIE C.J.—I think the defendant has infringed plaintiff's patent ; that the defendant's machine is substantially the same as plaintiff's ; the alterations he has made are, in my opinion, only in reference to the construction of the machine, not a new machine or new combination.

(1) P. 204.
(2) No. 931 p. 385.
(3) No. 938 p. 386.
(4) No. 944 p. 389.
(5) No. 945 p. 389.
(6) No. 962 p. 392.
(7) P. 117.
(8) P. 287 No. 289.

1886

COLLETTE v. LASNIER.

Henry J.

FOURNIER J. concurred.

HENRY J.—This is an action for an alleged infringement of a patent obtained by the respondent Lasnier, brought by him against the appellants.

The declaration recites the patent and charges the appellants with a breach of it. They pleaded thereto a number of pleas: one denying the infringement and others raising other issues, to which, in the view I take of the case, it is not necessary to refer; but there are two which raise issues important to be considered.

By the law which determines rights under patents of invention, the specification is deemed a part of the patent, and the two instruments are to be construed together as one, and if it appears by the patent or specification that anything is claimed by the patentee as a part of his invention which is not new the grant of the privilege will be wholly void. This doctrine is so fully established that I consider it quite unnecessary to cite authorities for the proposition. The consideration given for a patent is a warranty that all is new which the applicant seeks to protect; otherwise a party by getting a patent would obtain protection at the public expense for an alleged invention which already was in public use. The consideration is entire and covers everything in the patent and specification, and if it fails as to one or more parts of the alleged invention, it fails for all, and the patent is therefore void. It is not voidable merely but *ab initio* void. If void, no action can be maintained for any infringement of it, even if the part of the invention to which the alleged infringement refers was new. My reason for stating this proposition will be apparent hereafter.

Before, however, referring to the issues which are affected by the terms of the proposition just stated, I think it proper to refer to one of the defences set up by the appellants, that is to say, that whereas they

1886

COLLETTE v. LASNIER.

Henry J.

obtained, subsequently to the respondent's, a patent by which they were lawfully authorized to manufacture the same article as mentioned in the patent of the respondent, although by the same means as it describes, the subsequent patent authorized such to be done, so long as the same remained unrepealed. I cannot give effect to that contention. When the patent was issued to the respondent, he, if it were good in law, got by the operation of the statute the exclusive right, and a second patent for the same object would be wholly unauthorized and contrary to the terms of the statute, and therefore void. It would be void also because the invention sought to be protected by the second patent could not be deemed new. The respondent sets out the subsequent patent of the appellants, in his declaration, and having done so his counsel raised the objection that I have just dealt with.

We have, therefore, to decide solely as to the patent of the respondent, and the question of the alleged infringement. In the specification of the respondent he describes his invention, and after setting out and describing the mode of manufacture and the means of using the patented machine, he concludes in these words:—

Je ne réclame pas comme invention le fourneau, ni les bassins, et levier, courroi, ni les poulies ni les poteaux, non plus les poteaux à mortoise, ni le poids de contre balance ni les coulisses, etc., etc., car je sais qu'ils ne sont pas nouveaux, mais je réclame comme invention: —

1o. La combinaison du bassin ou cuve intérieur C. dans laquelle est placée la cire, pendue par son bord recourbé D. reposant sur le bord du bassin extérieur B. de manière à laisser un espace E. qui rempli d'eau, fait fondre ma cire par la vapeur et chaleur de l'eau en ébullition, qui par ce moyen conserve ma cire dans sa belle couleur, et l'empêche de brûler tel que décrits, et pour les fins indiquées.

2o. La combinaison du mouton ou chasse H. avec ces barres ou traverses I.I. et les crochets J.J. à laquelle on attache les mèches K. et le courroi ou chaines P. par laquelle il est suspendu et le levier S.

qui le fait descendre et monter dans et de la cuve ou bassin intérieur C. par l'action de la courroi ou chaine P. de manière à plonger les mèches K. dans la cire et de les retier.

Aussi la combinaison du poid A. et des dents à dégré *b.* pour contrebalanncer la pésenteur, ainsi que la chevilles régulatrice, *d.* etc. etc. tel que décrit et pour les fins indiquées.

The patent refers to the specification and protects the combination as claimed.

To the charge of infringement of the combination so protected, the appellants, with other defences, pleaded as follows:—

Que chacun des organes qne composent cette machine étaient depuis longtemps connus et acquis au public et que chaque combinaison séparée et le mode de fonctionnement de chacun de ces organes étaient depuis longtemps dans le domaine public et en usage.

Que notamment la combinaison "d'un bassin suspendu par son "bord recourbé sur un autre bassin de manière à laisser un espace "rempli d'eau afin de faire fondre la cire par la vapeur et la chaleur "de l'eau en ébullition" était, lorsque le demandeur a pr s son brevet et longtemps auparavant, dans le domaine public et en usage.

Que la combinaison d'un mouton ou plongeur ou châsse auquel sont attachées les mèches se soulevant et se baissant par des moyens mécaniques semblables et équivalents à ceux de la machine du demandeur, de maniére à plonger le plongeur dans la cire et le retirer, était depuis longtemps connu, et dans le domaine public et en usage.

Que le demandeur ne peut réclamer comme son invention aucune des combinaisons prises séparément, ni aucuns des moyens qui sont mentionnés dans son brevet d'invention pour la fabrication des cierges et de la chandelle.

Que ce procédé de fabriquer des cierges et de la chandelle en faisant fondre le suif ou la cire à l'aide d'un bain-marie et par immersion, à l'aide d'un p'ongeur méchanique, était depuis longtemps connu et dans le domaine public lorsque le demandeur a pris son brevet.

The first combination claimed by the respondent is that of the two boilers—the one intended to hold the wax used in the manufacture of wax tapers or candles, and the other to hold water, with a space between

1886

COLLETTE v. LASNIER.

Henry J.

them to heat the wax by the steam and heat of the water in a boiling state, and the object for which is stated to be to preserve the good colour of the wax and to hinder it from burning "telque decrits et pour les fins indiqués."

This combination claimed to be new by the specification is alleged in the defence to have been at the time of the issue of the patent, and long before, publicly known and in use. An important issue is, therefore, raised, and if the defence is proved and the patent nevertheless sustained, what would the result be? Clearly that the public could not use a combination which was public property, because the patent interposed to prevent the continued use of such public right. Such a conclusion could not, however, be reached. No person by obtaining a patent can interfere with public rights previously acquired. What was in the public domain could not be called new, and was therefore unpatentable? As I before stated the consideration for the patent in this case was entire and indivisible—founded on the warranty that everything claimed as new was really so, and as there was but one consideration for the whole, a failure in part makes the whole patent void. The issue is squarely raised and must be decided according to the facts in evidence on the trial. Looking at the evidence as to that issue, it appears all one way, and that is to sustain the defence. The evidence is sufficient to establish the position that every part of the machine with its several combinations was well known and used before the date of the patent, except the application of the lever to the pullies for raising and lowering the plunger. The combination of a furnace with the two boilers as before mentioned had been well known and used, but the respondent in his specification claims it as new. He admits that the basins were not new, but claims their combination.

He claims the combination of the lever with the chains or bands by which the plunger is raised and lowered to be added to and form part of the whole combination with the boilers, furnace, and other parts mentioned. His claim, however, is not confined to the mere combination of the lever with the other part of the combined machine, but if it had been so confined and the question properly raised by the defence as to its validity, it might be at least very doubtful if the mere addition of such a piece of well known and used mechanical agency would entitle the applicant for a patent to obtain protection for it. Levers have been universally known and used for all sorts of purposes and all kinds of machinery for centuries, and the mere addition of it to other parts of the combined machine in question is such that it would be obvious as a mechanical means to an end to any person knowing the operation of the other parts of the machine and the use of the lever, that there would be in regard to it little that could be properly termed *invention.* It would be, in my opinion, but the application of a well known and used mechanical power to a combined machine, the right to use which by the public could not be questioned. That issue is, however, not raised as the appellants have admitted the validity of the patent to that extent. Although making that admission they have pleaded a defence otherwise and have shown by evidence that is not only not contradicted but sustained, that, for the reasons I have before given, the patent is void. If so, no action can be maintained for any infringement of it. The appellants are, therefore, in my opinion, entitled to have their appeal allowed and a judgment in their favor decreed with costs.

TASCHEREAU J.—Lasnier, the respondent, in 1877 obtained a patent for new and useful improvements in candle making apparatus. In 1879 the appellants

1886

COLLETTE v. LASNIER.

Taschereau J.

obtained a patent for the same object—new and useful improvements in candle making apparatus.

The respondent now sues the appellants to annul their patent, and for damages resulting from the infringement by them of his own patent. He alleges by his declaration: 1. That he manufactured tapers with his machine after having obtained his patent, and that he sold those tapers. 2. That, after having taken cognizance of his patent of invention, the appellants constructed their machine, which is an infringement of his patent. 3. That on the 20th February, 1879, the appellants obtained a patent. 4. That since the month of August, 1878, the appellants have manufactured by means of their machine, 600 lbs. of tapers a day, and that they have sold them. 5. That the appellants have realized with the aid of the machine, by economy in manufacturing and superiority of the article manufactured, a saving of five cents per pound, representing so much profit. 6. That the profit so realized by the appellants by means of their machine, amounts to $13,200 which the respondent has a right to claim as having been realized by the infringement of his own patent. 7. That the respondent, moreover, has a right to exemplary damages to the amount of $10,000.

Conclusions—That the appellants be declared to have copied the Lasnier machine. That the appellants' patent be declared null as having been obtained in violation of the rights of the respondent. That the appellants be forbidden to make use of the Lasnier machine, and that they be condemned jointly and severally to pay respondent $23,000 for damages.

The appellants admitted the legality of the respondent's patent, but denied that they had infringed it in any way, or that their own patent was a copy or imitation of it, but that, on the contrary, their patent is a good and valid one.

1886

COLLETTE v. LASNIER.

Taschereau J.

Such is the issue between the parties. We have, therefore, not to inquire into the validity of the respondent's patent. The only question submitted is as to the legality of the one issued to the appellants.

The two courts below have found against the appellants, and declared that their patent was a copy and a fraudulent imitation of the one owned by the respondent, prohibiting the appellants from further making use of their machine.

These judgments, in my opinion, are unassailable, and the appeal should, except as to the damages, of which I shall speak just now, be dismissed. I will not enter into a detailed comparison of the two machines. This would be hardly intelligible without the model, which we had before us at the argument. The judgment appealed from finds that the appellants' machine is substantially the same as the respondent's, and entirely based on the same principles, and that the few changes or improvements it may contain are entirely unimportant and constitute mere mechanical equivalents, used for the same purpose and producing the same result. In this finding of fact I entirely concur. It being so, in fact, the appellants' case has no standing in law. That is so clear that authority is hardly required for it. They are collected in Bump's Law of Patents, Nos. 197, 202, 205 and 207. In France the principle is the same.

Now, as to the question of damages. It is settled law that though a Court of Appeal will not, as a general rule, entertain an appeal from an order of the court below assessing damages, yet, it will do so, when it is shown that the court below has acted on a wrong principle in assessing the quantum of damages. *Ball* v. *Ray* (1); *Bank of Upper Canada* v. *Bradshaw* (2).

It is under this rule that the appellants here ask us

(1) 30 L. T. N. S., 1. (2) L. R. I. P. C., 479.

1886

COLLETTE v. LASNIER.

Taschereau J.

to reverse that part of the judgment of the Court below condemning them to pay $600 damages for having infringed the respondent's patent. They allege that these damages were assessed upon a wrong principle. In my opinion, it is so, and the appeal as to these damages should be allowed. By the declaration itself the respondent alleges no actual loss, or that he suffered any damage, but simply alleges that the appellants, by using the respondent's patent or their fraudulent imitation of it, have realized a profit of $13,200 over and above the profits they would have or that might have been realized in making candles without resorting to this machine, and he claims that he is entitled to this as the amount of damages that he has suffered; there is even no allegation that had the appellants not used this machine, he would have made all the candles they made. And he could not have contended this, because it is in evidence that there are various other modes of making candles, and that if the appellants had not in the past made, and cannot in the future make, candles with their machine, there was and there is nothing to prevent them from so doing by the other various modes in existence, or even with the respondent's own machine, for he could not refuse to sell them one. Now, all the respondent claims, is the profits that the appellants made. And the judgment of the court below grants them nothing else. After enunciating that the respondent is entitled only to the damages he actually sustained, the court evidently taking it for granted that the damages he sustained consist in the profits made by the appellants, says:—

Considérant que le demandeur a prouvé que par suite de la contrefaçon illégale de son invention, les défendeurs ont du réaliser dans la fabrication des cierges par eux vendus pendant la période écoulée, du mois de septembre, 1878, au mois de novembre, 1879, une économie leur assurant un bénéfice de 5 centins par chaque livre de

ciérges, en outre des profits ordinaires, et qu'il est prouvé que pendant cette période de 14 mois, les défendeurs ont fabriqué et vendu au moins 12,000 livres de cierges donnant un profit net de six cents piastres, réalisé au moyen de l'invention du demandeur, et que celui-ci est en droit de réclamer, à titre de dommages par lui éprouvés, à raison des faits susdits, &c.

Now, these same profits, as I have remarked, the appellants would have made if they had bought and worked one of the respondent's machines. It is in evidence that the appellants were engaged, long before the respondent obtained his patent, in the candle making business, and he made 5,000 or 6,000 pounds a year. It is also in evidence that the respondent's business ever since the appellants made use of their machine, increased and keeps increasing. Milleur who estimates respondent's damages at $25,000, and Esinhart who estimates them at $15,000, base their estimation on the supposition that the respondent should be, with his patent, the only one to make candles in the country; they say so unequivocally. Arrêt de Bourges, 28 Dec. 1869 in Dalloz (1).

There is no evidence in the record of the cost or value of the respondent's machine, or of what would be a fair royalty on it, so that it is impossible to assess the damages; my brother judges are disposed to grant $100 damages, I would not have given so much, but will agree, however, to this amount.

Appeal dismissed with costs as to the infringement. Appeal allowed as to amount of damages with costs against appellants.

GWYNNE J.—Assuming the respondent's patent to be a good one, as upon the record it is admitted to be, the machine for which the appellants have procured a patent also is a mere colorable imitation of the respondent's machine, based upon precisely the same prin-

(1) 1870, 2153.

1886

COLLETTE v. LASNIER.

Gwynne J.

ciples, composed of the same elements, and differing from it only in the arrangement of those elements and producing no results materially different, the judgment, therefore, of the court below should be maintained, except as to the amount of damages, which should be reduced, as the evidence fails to furnish to us any means of accurately measuring the plaintiff's damages. How he himself contemplated making his profit does not appear. It is only when, from the peculiar circumstances of the case, no other rule can be found that the defendants' profits become the criterion of the plaintiff's loss, and we have no evidence before us to enable us to determine what rule should govern in the present case. Whether the profit should consist in the value of a license to make and sell the patented improvement; or if it shewed what is a fair estimate of the value of such license, the plaintiff has not, so far as appears in evidence, set any value himself on such a license. Moreover, the estimate of the defendants' profits, if that had been shewn to be the proper rule applicable to the case, does not appear to have been made by a comparison of the profit obtainable by use of the plaintiff's improved machine in making tapers, with the latest precedent and best known mode of making them, but by a comparison between the use of the plaintiff's improvement and of a very old mode of making tapers, which had, as is said, been improved upon by other modes before the plaintiff obtained a patent for his improvement. I think that substantial justice will be done by reducing the damages to $100.00 and maintaining in other respects the judgment of the Superior Court and dismissing this appeal with costs.

Appeal dismissed with costs. Judgment of Court of Queen's Bench (appeal side) varied.

Solicitors for appellants: *Lacoste, Globensky & Brousseau.*

Solicitors for respondent: *Robidoux & Fortin.*

THE ST. CATHARINES MILLING AND LUMBER COMPANY, (DEFENDANTS) ..... APPELLANTS;

AND

THE QUEEN, ON THE INFORMATION OF THE ATTORNEY GENERAL FOR THE PROVINCE OF ONTARIO, (PLAINTIFF) ..... RESPONDENT.

1886
Nov. 19, 20 & 22.
1887
June 20.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Indian Lands—Title to—Right of Occupancy—Lands reserved for Indians—B. N. A. Act sec. 91, subsec. 24—Sec. 92, subsec. 5—Secs. 109, 117.

The lands within the boundary of Ontario in which the claims or rights of occupancy of the Indians were surrendered or became extinguished by the Dominion Treaty of 1873, known as the North West Angle Treaty, No. 3, form part of the public domain of Ontario and are public lands belonging to Ontario by virtue of the provisions of the British North America Act (1).

Only lands specifically set apart and reserved for the use of the Indians are "lands reserved for Indians" within the meaning of

(1) The following sections of the act bear upon the point in question:—

"Sec. 92. In each Province the Legislature may exclusively make laws in relation to matters coming within the classes of subjects next hereinafter enumerated, that is to say—

"5. The management and sale of the public lands belonging to the Province and of the timber and wood thereon.

"Sec. 109. All lands, mines, minerals and royalties belonging to the several Provinces of Canada, Nova Scotia and New Brunswick at the Union, and all sums then due or payable for such lands, mines, minerals and royalties, shall belong to the several Provinces of Ontario, Quebec, Nova Scotia and New Brunswick, in which the same are situate or arise, subject to any trusts existing in respect thereof, and to any interest other than that of the Province in the same.

"Sec. 117. The several Provinces shall retain all their respective public property not otherwise disposed of in this act, subject to the right of Canada to assume any lands or public property required for fortifications or for the defence of the country."

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

1886

ST. CATHARINES MILLING AND LUMBER CO. v. THE QUEEN.

sec. 91, item 24 of the British North America Act (1).

The judgment of Boyd C. in the Chancery Division of the High Court of Justice for Ontario (2) and of the Court of Appeal for Ontario (3) affirmed. Strong and Gwynne JJ. dissenting.

APPEAL from a decision of the Court of Appeal for Ontario (3), affirming the judgment of the Chancery Division (2), which restrained the defendants from cutting timber on lands in Ontario claimed to be public lands of the Province.

This was an action by Her Majesty on the information of the Attorney General for the Province of Ontario against the St. Catharines Milling and Lumber Co. to prevent them from cutting and carrying away timber on lands in Ontario, lying south of Wabigoon Lake in the District of Algoma. It was claimed by the Attorney General that the lands in question were public lands of the Province, and that the defendants were trespassers and wrongdoers in cutting such timber.

The defendants justified under a license from the Dominion Government and pleaded the following special defence:

7. "The defendants say that the tract of land in "question, together with the growing timber thereon, "was, with other lands in the said district or territory, "until recently claimed by the tribes of Indians who "inhabited that part of the Dominion of Canada, and "that the claims of such tribes of Indians have always

(1) "Sec. 91. 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 to restrict the generality of the foregoing terms of this section, 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:—

"24. Indians and lands reserved for the Indians."

(2) 10 O. R. 196.

(3) 13 Ont. App. R. 148.

1886

ST. CATHARINES MILLING AND LUMBER CO. v. THE QUEEN.

"been recognized, acknowledged, admitted and acqui-
"esced in by the various Governments of Canada and
"Ontario, and by the crown, and that such Indian
"claims are, as to the lands in question herein, para-
"mount to the claim of the Province of Ontario, or of the
"crown as represented by the Government of Ontario,
"and that the Government of the Dominion of Canada,
"in consideration of a large expenditure of money made
"for the benefit of the said Indian tribes, and of pay-
"ments made to them from time to time, and for divers
"other considerations, have acquired the said Indian
"title to large tracts of lands in the said territory, inclu-
"ding the lands in question in this action, and the
"timber thereon, and by reason of the acquisition of the
"said Indian title, as well as by reason of the inherent
"right of the crown, as represented by the Government
"of Canada, the Dominion of Canada, and not the Pro-
"vince of Ontario, has the right to deal with the said
"timber lands, and at the time of granting the said leave
"and license had and still have full power and author-
"ity to confer upon the defendants the rights, powers
"and privileges claimed by them, as aforesaid, under
"which the said pine timber was cut."

The lands in question formed a portion of the territory declared, by what is known as the "Boundary Award," to be geographically within the limits of the Province of Ontario, and in the year 1873 they were surrendered by the Indians to the Government of Canada by virtue of a treaty known as the North West Angle Treaty No. 3.

The question to be decided was whether under the provisions of the B. N. A. Act these lands belonged to the Province of Ontario or the Dominion.

The action was tried in the Chancery Division before Boyd C. who decided in favor of the Province, and his decision was affirmed by the Court of Appeal. The

1886

ST. CATHARINES MILLING AND LUMBER CO. v. THE QUEEN.

defendants appealed to the Supreme Court of Canada from the decision of the Court of Appeal.

McCarthy Q C. and *Creelman* for the appellants.

Before discussing this case on the basis of the B. N. A. Act it is proposed to show, historically, that the Indians had a title to this land which never passed to the Province.

All this country was once occupied by Indian tribes. On its discovery by Europeans the discoverers acquired a right of property in the soil provided that discovery was followed by possession. See Sir Travers Twiss Law of Nations ch. headed "Right of Acquisition," (1), as to the contest between England and the United States with reference to the mouth of the Columbia.

In case of conquest the only test as to the title of the conqueror is found in the course of dealing which he himself has prescribed. When he adopts a system that will ripen into law he settles the principle on which the conquered are to be treated.

In Canada, from the earliest times, it has been recognized that the title to the soil was in the Indians, and the title from them has been acquired, not by conquest, but by purchase.

In 1763 a royal proclamation was issued dividing the British possessions in America into separate governments and defining the powers of each. The rights of the Indians are conserved therein as the following extract will show :—

"And whereas it is Just and Reasonable and Essential "to Our Interests and the Security of Our Colonies that "the several Nations or Tribes of Indians with whom "we are connected and who live under Our protection "should not be molested or disturbed in the possession "of such parts of Our Dominions and Territories as, not

(1) Pp. 196 and 203, secs. 123 *et seq.*

"having been ceded to or purchased by Us are reserved "to them or any of them as their hunting grounds, We "do therefore with the Advice of Our Privy Council "declare it to be Our Royal Will and Pleasure that no "Governor or Commander-in-Chief in any of Our "Colonies of Quebec, East Florida or West Florida, do "presume upon any pretence whatever to grant warrants "of Survey or pass any Patents for Lands beyond the "bounds of their respective Governments as described in "their Commissions; as also that no Governor or Com-"mander-in-Chief of any of Our other Colonies or "Plantations in America do presume for the present, and "until Our further pleasure be known, to grant warrants "of Survey, or pass Patents for any Lands beyond the "head or sources of any of the Rivers which fall into "the Atlantic Ocean from the West and North-west, or "upon any lands whatever, which not having been "ceded to or purchased by Us as aforesaid, and reserved "to the said Indians or any of them.

"And we do further declare it to be our royal will and "pleasure, for the present, as aforesaid, to reserve under "our Sovereignty, protection and dominion, for the use "of the said Indians, all the land and territories not in-"cluded within the limits of our said three new Govern-"ments, or within the limits of the territory granted to "the Hudson's Bay Company; as also all the land and "territories lying to the westward of the sources of the "rivers which fall into the sea from the west and north-"west as aforesaid; and we do hereby strictly forbid, on "pain of our displeasure, all our loving subjects from "making any purchases or settlements whatsoever, or "taking possession of any of the lands above reserved, "without our especial leave or license for that purpose "first obtained.

"And we do further strictly enjoin and require all "persons whatsoever, who have either wilfully or in-

1886

ST. CATHARINES MILLING AND LUMBER CO. v. THE QUEEN.

"advertently seated themselves upon any lands within "the countries above described, or upon any other lands "which, not having been ceded to or purchased by us, "are still reserved to the said Indians as aforesaid, forth-"with to remove themselves from such settlements.

"And whereas great frauds and abuses have been "committed in the purchasing lands of the Indians, to "the great prejudice of our interests, and to the great "dissatisfaction of the said Indians, in order therefore to "prevent such irregularities for the future, and to the "end that the Indians may be convinced of our Justice "and determined resolution to remove all reasonable "cause of discontent, we do, with the advice of our "Privy Council, strictly enjoin and require, that no "private person do presume to make any purchase from "the said Indians of any lands reserved to the said In-"dians within those parts of our colonies where we have "thought proper to allow settlement; but if at any time "any of the said Indians should be inclined to dispose "of the said lands, the same shall be purchased only for "us, in our name, in some public meeting or assembly "of the said Indians to be held for that purpose by the "Governor or Commander-in-Chief of our colony respec-"tively within which they shall lie; and in case they "shall lie within the limits of any proprietaries con-"formable to such directions and instructions as we or "they think proper to give for that purpose. And we "do, by the advice of our Privy Council, declare and "enjoin, that the trade with the said Indians shall be "free and open to all our subjects whatever, provided "that every person who may incline to trade with the "said Indians do take out a license for carrying on such "trade from the Governor or Commander-in-Chief of any "of our colonies respectively where such person shall "reside, and also give security to observe such regula-"tions as we shall at any time think fit, by ourselves or

"commissaries to be appointed for this purpose, to direct "and appoint for the benefit of the said trade; and we "do hereby authorize, enjoin and require the Governors "and Commanders-in-Chief of all our Colonies respec- "tively, as well as those under our immediate govern- "ment, as those under the government and direction of "proprietaries, to grant such licenses without fee or "reward, taking especial care to insert therein a condi- "tion that such license shall be void, and the security "forfeited. in case the person to whom the same is "granted shall refuse or neglect to observe such regula- "tions as we shall think proper to prescribe as afore- "said."

William Penn was not the first to acquire Indian lands by purchase. He came to America in 1682 and made his treaty in 1683. Long before that settlements had been made in New York, first by the Dutch, next by the English, and then by the Swedes in 1674, and during all that period the right to the land was held to be determined by the earlier acquisition of the Indian title. See Hazard's Annals of Penn. (1).

Penn made his great treaty with the Indians in 1683. There is no written record of it in existence and no evidence as to its exact nature. But there is no doubt that Penn always recognized the Indians as owners of the soil and purchased lands from them.

To give two instances out of many. Penn in his own person made a purchase from the Indians of a considerable quantity of land lying between the Neshaminy and Pennepact Creek. The deed of sale is dated the 23rd June, 1683, and is of record; as is also another deed dated the 14th July following, for lands lying between the Schuylkill and Chester river. And see Hazard (2).

The following extracts and references will show that

(1) Vol. I p. 395. (2) Pp. 581-3.

1886

ST. CATHARINES MILLING AND LUMBER CO. v. THE QUEEN.

the same system was pursued in different States of the Union.

Pennsylvania—Graham's history of the United States (1). After relating the various circumstances connected with the celebrated treaty made between William Penn and the Indians in 1682, the author goes on to say:—

"The example of that equitable consideration of the "rights of the native owners of the soil, which has "been supposed to have originated with him, was first "exhibited by the planters of New England, whose "deeds of conveyance from the Indians were earlier by "half a century than his, and was successively re-"peated by the planters of Maryland, Carolina, New "York and New Jersey, before the province of Pennsyl-"vania had a name."

And see Hepworth Dixon's life of William Penn (2); Memoirs of the Hist. Soc. of Penn. (3); Broadhead's Hist. State N. Y. (4).

In Hazard's An. (5) will be found the documents connected with Penn's dealings with the Indians.

New England—Neal's History of New England, London, 1720 (6):—"The planters, notwithstanding the "patent which they had for the country from the crown "of England, fairly purchased of the natives the several "tracts of land which they afterwards possessed. See "also Barber's History of New England (7). And see "Palfrey's Hist. New England (8)."

Connecticut—Broadhead's History of the State of New York (9):—"It was therefore thought expedient that to "their existing rights by discovery, and exclusive visi-"tation, should be added the more definite title by pur-

(1) Vol. 2 p. 346.
(2) Pp. 185, 199, 200, 214-6 and 312.
(3) Vol. 1 part 1 pp. 164-6; vol. 3 part 2 pp. 146, 164.
(4) P. 232.
(5) Pp. 488-500.
(6) P. 134.
(7) P. 24.
(8) Vol. 3 p. 137.
(9) P. 234-5.

"chase from the aborigines." And see Conn. Hist. Collection.

New York—Broadhead's History of the State of New York (1):—Speaking of Peter Minuit's administration of New Netherland as Director General, the work goes on to say, "up to this period (1626) the Dutch had pos- "sessed Manhatten Island only by right of first dis- "covery and occupation. It was now determined to "superadd a higher title by purchase from the abori- "gines." Smith's Hist. N. Y. (2).

New Jersey—Broadhead (3); Hepworth Dixon's Life of Penn (4).

Delaware—Broadhead (5); Hazard An. Penn. (6); Martin Hist. North Carolina (7).

New Haven—Story on the Constitution (8).

Rhode Island—Story (9); Barber Hist. New England (10).

Maryland—Graham Hist. U. S. (11); McSherry Hist. Maryland (12); Bozman Hist. Maryland (13).

Virginia—Notes of Virginia, London, 1782 (14); English in America by Judge Haliburton (15).

Carolina—Martin Hist. N. C. (16); Ramsay Hist. S. C. (17).

Then, coming to the Dominion, we start with the Articles of Capitulation signed at Montreal in 1760, one of which is:

Article 40.—"The savages or Indian Allies of His Most Christian Majesty shall be maintained in the lands they inhabit, if they choose to reside there; they

(1) P. 164.
(2) Pp. 266-7.
(3) Pp. 202-3.
(4) Pp. 143, 149.
(5) Pp. 200-1.
(6) P. 47.
(7) P. 93.
(8) 4 Ed. vol. 1 p. 56.
(9) 4 Ed. p. 6.
(10) P. 39.
(11) Pp. 11, 12.
(12) Pp. 24, 30.
(13) Vol. 2 pp. 28-32.
(14) P. 170.
(15) P. 99.
(16) P. 143.
(17) Pp. 12, 13.

1886

ST. CATHARINES MILLING AND LUMBER CO. v. THE QUEEN.

shall not be molested on any pretence whatsoever, for having carried arms and served His Most Christian Majesty; they shall have, as well as the French, liberty of religion, and shall keep their missionaries."

Next is the Treaty of Paris, 1763, in which Canada was ceded to Great Britain, and in the same year the Royal Proclamation to which reference has already been made was issued.

The Six Nation Indians came to this country shortly after the War of Independence. For their loyal conduct the crown granted to them certain lands purchased from the Ojibeways. We have not the precise words of this grant but we have all the conditions attached to it (1). After providing against alienation by the Indians, except among themselves, it concludes as follows:

"Provided always, that if at any time the said Chiefs, Warriors, Women and people of the said Six Nations, should be inclined to dispose of and surrender their use and interest in the said district or territory, or any part thereof, the same shall be purchased for us, our heirs and successors, at some public meeting or sasembly of the Chiefs, Warriors, and People of the said Six Nations, to be holden for that purpose by the Governor, Lieutenant-Governor or person administering our Government in our Province of Upper Canada."

In 1796 the Six Nation Indians, then resident in Canada, by treaty with the Government of the United States ceded their lands in New York for valuable consideration. On 1798 the Mohawks and in 1802 the Seneca Nation did the same. In 1838 the Seneca Nation by Indenture conveyed their reserved lands in New York to the Assignees of Massachusetts. The Treaty will be found in the United States Statutes at large (2). Mention may be made in this connection of

(1) App. (E E E) to Journals Ho. Ass., Can. 1844-5, page 24.

(2) Vol. 7 p. 557.

the Lake Superior and Lake Huron Treaties, in 1850, by which Canada purchased from the Ojibbeways for valuable consideration nearly all their lands.

In the Province of Quebec the French appear to have dealt with the Indians as a conquered people, and while they made them large grants their lands do not seem to have been acquired by purchase. The same principle prevailed in the Maritime Provinces. We are not obliged, however, to account for Ontario occupying a position different, in this respect, from that of the other Provinces. The B. N. A. Act simply dealt with the condition of affairs as it found them at the time it was passed.

In Nova Scotia and New Brunswick all questions with regard to Indians were well defined and nothing was supposed to be disturbed by the act of confederation.

The other Provinces not being concerned in the original formation of the Dominion this question cannot, so far as they are concerned, be discussed on the basis of the British North America Act.

The following statutes may be referred to as dealing with the matters in question here: 2 Vic. ch. 15, (U. C.); 12 Vic. ch. 9 (Can.): 13–14 Vic. ch. 74 (Can.); C. S. C. ch. 9; C. S. L. C. ch. 14; 27–28 Vic. ch. 68 (Can.) And the following cases are cited as decisions on the statutes. *The Queen* v. *Strong* (1); *Regina* v. *Baby* (2); *Totten* v. *Watson* (3); *Vanvleck* v. *Stewart* (4); and *Bown* v. *West* (5); and as American authorities on the question of the Indian title see Kent's Com. Title by Discovery (6); *Cherokee Nation* v *State of Georgia* (7); *Worcester* v. *State of Georgia* (8); *Ogden*

(1) 1 Gr. 392.
(2) 12 U. C. Q. B. 346.
(3) 15 U. C. Q. B. 392.
(4) 19 U. C. Q. B. 489.
(5) 1 E. & A. 117.
(6) 13 Ed. p. 259.
(7) 5 Peters 1.
(8) 6 Peters 515.

1886

ST. CATHARINES MILLING AND LUMBER CO. v. THE QUEEN.

v. *Lee* (1); *Godfrey* v. *Beardsley* (2); and *Gaines* v. *Nicholson* (3).

In all the treaties mentioned the word "cede" is used; this is a term usually employed in cases of transfers of land between different States The Indians are dealt with as quasi-independent nations. The reason for this is pointed out in the case of the *Cherokee Nation* v *Georgia*; see also *Turner* v. *American Baptist Union* (4).

It is not contended that item 24, section 91, of the British North America Act vests these lands in the Dominion, any more than that item 5 of section 92 vests them in the Province. What is contended is that section 92 must be read in conjunction with section 108 as to public works, section 109 as to lands, &c., in the Provinces, and section 117 as to mines and minerals, in order to get at the meaning of the act with respect to the question in this case.

By the North-West Angle Treaty, in 1873, the Dominion Government granted to the Indians certain hunting and fishing privileges, which would be inoperative if the contention of Ontario in this case is correct

It is claimed that the land always belonged to the Province, but until this treaty was made they could exercise no control over it. Only the Dominion could deal with it and the Governor-General alone could make a treaty for its surrender. And the land was in a peculiar position in other respects. No white man conld go upon it and deal with the Indians. This was made a criminal offence in 1841, and the Dominion Parliament was the only authority by which that law could be repealed. Can it be supposed then, that this territory passed to the Province under the word

(1) 6 Hill (N. Y.) 546; 5 Den. N.Y. 628.
(2) 2 McLean 412.
(3) 9 How. 356.
(4) 5 McLean 344.

1886

ST. CATHARINES MILLING AND LUMBER CO. v. THE QUEEN.

"lands" in the British North America Act?

The lands intended to be under the control of the local authorities are lands which are valuable assets. It might be admitted that if the crown had any estate in these lands it would be in the right of the Province under the authority of *Mercer* v. *Attorney-General for Ontario* (1); but there was no estate. The Indians had a right to occupy the land, to cut the timber and to claim the mines and minerals found on the land, and the land descended to their children; the only restriction upon their title was as to alienation; that might be called a limited or base fee. And was there any thing more vested in the crown than a mere right to the land when the Indian title was extinguished?

As to escheat see Stephens Black. (2); *Burgess* v. *Wheate* (3); 2 Greenleaf's Cruise Digest (4); *Mercer* v. *Attorney General for Ontario* (1).

W. Cassels Q C. and *Mills* for the respondents.

In considering the argument of the appellants it must be clearly kept in mind that the authorities in the United States relied upon by the appellants are authorities dealing with the rights of the Indians in regard to lands specially reserved to them by treaties ratified and sanctioned by the United States. These authorities deal with the rights of the Indians as vested in them under and by virtue of these treaties.

The various treaties will be found in vol. 7 United States Statutes at Large. I more particularly refer to page 44.

The learned counsel for the appellants lay stress upon the negotiations by the Six Nation Indians with the United States after they came to Canada. These negotiations related to lands set apart to those Indians on

(1) 5 Can. S. C. R. 538; 8 App. Cas. 767.
(2) 9 Ed. p. 178.
(3) 1 Wm. Bl. at p. 162.
(4) P. 192.

1886

ST. CATHARINES MILLING AND LUMBER CO. v. THE QUEEN.

the 11th November, 1794. See *Ogden* v. *Lee* (1). The treaty in question is there set out, and so in regard to the other cases relied upon by the appellants.

There are four cases decided by the Supreme Court of the United States which have a direct bearing upon the question in controversy. Nearly all, if not all other cases, are determined upon the particular terms of the various treaties. These four cases decided by the Supreme Court are very applicable to the case in question, and are directly opposed to the contention of the appellant.

The first case, *Fletcher* v. *Peck* (2), is strongly in point. In that case prior to any surrender by the Indians the State had granted a patent. A surrender was obtained from the Indians in favor of the United States. It was contended that at the time of the patent the title was in the Indians, and that no title passed by the patent granted by the State. The court, however, held that the title to the soil was in the State, the right existing in the Indians being one merely of occupancy—that the surrender merely operated as an extinguishment and for the benefit of the legal estate. This case was decided in 1810.

In 1815 the case of *Meigs* v. *McClung* (3) was decided. The facts in this case were a grant by the State prior to surrender and a subsequent grant from the United States, claiming title by virtue of a surrender from the Indians. The court held that the right in the Indians was merely one of occupancy, and that the surrender merely operated as an extinguishment of this right enuring to the benefit of the fee.

Johnson v. *McIntosh* (4) is a leading case in the United States. In this case all the various treaties and statutes are referred to and the question exhaustively dealt with.

(1) 6 Hill (N. Y.) 546.
(2) 6 Cranch 87.
(3) 9 Cranch 11.
(4) 8 Wheaton 574.

[The learned counsel read extracts from this case showing that the Indian title, so-called, was merely one of occupancy.]

In *Clarke* v. *Smith* (1), the same views are affirmed.

[The learned counsel then referred to the various cases cited by the appellant's counsel pointing out and contending that each case was decided upon the particular treaty and could have no application to the case in question.]

The cases in our own courts are also against the contention of the appellants. In *Doe d Jackson* v. *Wilkes* (2) it was held that a patent by the crown of an Indian reserve passed to the plaintiff.

In *Bown* v. *West* (3) and *Doe d Sheldon* v. *Ramsay* (4) the court held that the Indians had no title.

Reg. v. *Baby* (5) has been cited in support of the appellants' argument. That case when looked at will be found to be very different from what is contended for. So in *Totten* v. *Watson* (6).

Vanvleck v. *Stewart* (7) had reference to a special reservation set apart for the benefit of the Indians. In this case it was held that the Indians had a beneficial right in the lands reserved, and a right to the timber cut from these lands.

Church v. *Fenton* (8) related to the lands specially reserved for the benefit of the Indians. In November, 1786, a surrender had been obtained and by the terms of the surrender a special reserve was set apart for the benefit of the Indians. By this treaty it was stipulated that in the event of the Indians subsequently desiring to surrender the reserved lands so specially set apart the crown would sell them for the benefit of the Indians. The special reserve was

(1) 13 Peters 195.
(2) 4 O. S. 142.
(3) 1 E. & A. 117.
(4) 9 U. C. Q. B. 105.
(5) 12 U. C. Q. B. 346.
(6) 15 U. C. Q. B. 392.
(7) 19 U. C. Q. B. 489.
(8) 28 U. C. C. P. 384.

1886

ST. CATHARINES MILLING AND LUMBER CO. v. THE QUEEN.

surrendered in 1854, and the contest in *Church* v. *Fenton* arose in regard to these particular lands.

There are no other authorities bearing on the point. Reference to the mode of dealing with the Indians in the United States does not warrant the contention of the appellants. For instance, in 1635 one Roger Williams was banished from Massachusetts for maintaining that the title to Indian lands was not in the King but in the natives. In 1632 the Dutch complained that their lands in New York, which they held by purchase from the Indians, had been taken from them. Counsel's opinion was that the Indians could pass no title to the lands.

The learned counsel for the appellants refers to the Articles of Capitulation and to the Proclamation of 1763. It is said that this proclamation is the charter of the Indians.

Assuming this charter to be the foundation of their title what then becomes of their original title to the lands? If the Indian title is based upon a right acquired from the crown by virtue of this proclamation, then it must be the starting point of their title, and they can have no higher rights than those given to them by the proclamation in question.

The proclamation assumes the title to be in the crown and not in the Indians. By this proclamation the crown gives power to the Governors to grant lands east of a certain line. If the Indian title existed, how could they exercise this right? What becomes of the titles granted east of the line in question? The crown reserves for the present the lands west of the line. If the Indians accept title under this proclamation, then they accept a reservation during the pleasure of the crown. Subsequently by the statute, passed in 1774, the boundaries of the Province of Quebec are extended so as to embrace the lands in controversy, and the pro-

clamation is annulled by the very terms of the act. If, therefore, this proclamation is the foundation of the Indian title, they accept it merely as an act of bounty from the crown, with the right to the crown to alter or annul it.

The effect of this proclamation is fully referred to in the case of *Fletcher* v. *Peck* (1) hereinbefore referred to, and in that particular case it was held that the extension of the territory forming the State of Georgia withdrew it from the operation of the proclamation of 1763.

If the Supreme Court of the United States is correct in holding that the effect of extending the jurisdiction of the Governor of Georgia to grant patents for lands reserved by the proclamation of 1763 was an annulling of that proclamation, so far as the extended area is concerned, surely an express statute has a similar effect. It is, therefore, submitted that the contention of the appellants is erroneous.

There is no instance on record where the courts have recognized the Indian title, or gone behind a grant from the crown to inquire whether or not an Indian title was well founded.

We next come to the effect of the confederation act. The learned counsel for the appellants have striven to argue that under the statute the lands in question are vested in the Dominion.

In order to arrive at the true meaning of the British North America Act the constitution of each of the provinces at the time of confederation must be considered. In the Province of Quebec no surrenders have ever been obtained from the Indians. If the contention of the appellants is correct, then the grants for nearly the whole of that province are of no effect. Such contention, however, has never been put forward.

Section 91 item 24 of the British North America Act

(1) 6 Cranch 87.

1886

ST. CATHARINES MILLING AND LUMBER CO. v. THE QUEEN.

clearly refers to lands which have been specially reserved. Take the case of surrender of lands in Upper and Lower Canada prior to confederation. At the time of confederation would not the title to these lands be vested in the old provinces of Upper and Lower Canada? What becomes of these lands after confederation? Surely under the British North America Act they would be vested in the provinces of Ontario and Quebec respectively.

Section 108 of the B. N. A. Act refers to the 3rd schedule; that schedule says nothing about the Indian reserves.

[The learned counsel here referred to the various statutes of the different Provinces prior to confederation, contending that the confederation act plainly referred to reserves specially set apart under the various statutes.]

Then, since confederation the Dominion Parliament has clearly recognized such to be the case. For instance, in the statute of 1868, again in the statute of 1869, and so in the statute relating to British Columbia.

[Here counsel refer to various statutes since confederation relating to the admittance of British Columbia into the Union, and the various statutes of the Dominion relating to Indians.]

It is submittted that the extent of the Indian title is a mere right of occupancy, a mere right of hunting, &c., which can only be dealt with for the purpose of extinction. The utmost that can be contended is, that the fee is vested in the Province subject to the right of occupancy in the Indians.

[Counsel read extracts from the judgments of the Chancellor and the judges in the Court of Appeal in support of their contention.]

There are lands in Ontario which have never been

1886

ST. CATHARINES MILLING AND LUMBER CO. v. THE QUEEN.

surrendered and which are dealt with by the Crown Lands Department.

A further point relied upon by the respondents is, that the contention now put forward by the appellants could not be put forward on the part of the Dominion without operating as a fraud on the rights of the Province of Ontario.

In the year 1871 the Dominion approached the Province of Ontario with the view to arranging for a provisional boundary pending the assignment of the true boundary. Negotiations between the Dominion and the Province of Ontario lay in abeyance until the Dominion obtained a surrender of the Indian title. Subsequently the Dominion renewed negotiations, pointing out that by virtue of this surrender the Indian title had become extinguished. An agreement was then entered into whereby the Dominion were to have a full right to grant patents to the lands west of the Provincial boundary, and the Province to have the right to grant patents to the lands east of this boundary, and by the agreement the Dominion and the Province respectively agreed to ratify each others acts and to confirm the patents in the event of the true boundary being determined to be east or west of the provisional line.

Proceedings were taken to have the true boundary ascertained and after eight years the contention was determined in favor of the Province.

Notwithstanding this agreement, and the fact that for eight years the Province and the Dominion have been endeavouring to have the boundary settled, it is contended by the present appellants that all the time, no matter what the courts might hold in regard to the true boundary, the lands were vested in the Dominion.

It is said that by the treaty in question of 1873 the Dominion obtained a title to the lands in dispute.

1886

ST. CATHARINES MILLING AND LUMBER CO. v. THE QUEEN.

The Dominion, however, treated this as operating as na extinguishment of the Indian title for the benefit of the Province in the event of its appearing the boundary of the Province was west of the lands in question, and it is submitted the Dominion could not now successfully contend that this surrender had other or further effect after the agreement entered into by the Province of Ontario.

Another point to be considered is, supposing the Indians had said to Governor Morris "We will not make a treaty with you," if the appellants' contentions are correct for all time to come these vast territories would have been withdrawn from settlement.

To maintain their position the appellants must assume that the Indians have a regular form of government, whereas nothing is more clear than that they have no government and no organization, and cannot be regarded as a nation capable of holding lands (1).

Washburn on Real Property (2), and Story on The Constitution (3) were also referred to.

It is also contended that the crown had never recognized the aboriginal inhabitants of a country who were without any settled government as the proprietors of the soil. This was not only the rule uniformly acted upon by the Sovereigns of England, but it was a part of the common law of Europe. Answers of James I. and his Lords of Trade to the States' General (4); Chalmer's Annals of the Colonies (5); Vattel's Law of Nations (6); see also various charters of Government and grants of land made by the Sovereign of England from 1585 to 1758 without reference to Indian occupation.

At the time of the discovery of America, and long after, it was an accepted rule that heathen and infidel

(1) Wheaton's International Law. Note 24.
(2) 5 Ed. Bk. 3 ch. 3 ss. 4, 5 & 6.
(3) Ss. 152-8.
(4) N. Y. Hist. Doc. Vol. 1. pp. 56 58.
(5) P. 623.
(6) Bk. 1 Ch. 7 Sec. 81—Ch. 18 ss. 205-209.

nations were perpetual enemies, and that the Christian prince or people first discovering and taking possession of the country became its absolute proprietor, and could deal with the lands as such.

Calvin's Case (1); *Butts* v. *Penny* (2); *Gelly* v. *Cleve* cited in *Chamberlain* v. *Harvey* (3); *East India Co.* v. *Sandy's* (4); *The Slave Grace* (5).

It is a rule of the common law that property is the creature of the law and only continues to exist while the law that creates and regulates it subsists. The Indians had no rules or regulations which could be considered laws.

St. John's argument on this subject and the authorities cited in *The King* v. *John Hampden* (6).

Parkman's War of Pontiac vol. 1; Paley's Moral Philosophy (7); Bentham's Theory of Legislation (8); Locke on Government (9).

No title beyond that of occupancy was ever recognized by the crown as being in the Indians, and this recognition was based upon public policy and not upon any legal right in the aboriginal inhabitants.

Opinion of John Holt and others. N. Y. Hist. Doc. (10); N. Y. Hist. Doc. (11); New Haven Col Records 1639 (12); Connecticut Col. Rec. 1680 (13); Ibid 1717 (14); Ibid 1722 (15); Douglas' Hist. Summary (16); *Arnold* v. *Mundy* (17).

The King had no power to prevent the sale of lands by any proprietor. The reservation by the proclamation of 1763, for the present, of the lands west of a

(1) 4 Coke's Rep. 1.
(2) 2 Lev. 201.
(3) 1 Ld. Raymond, p. 147.
(4) 7 Har. St. Tr. 493.
(5) 2 Hagg. Ad. R. 104.
(6) 1 Har. St. Tr. 535
(7) Bk. 3 ch. 4.
(8) Part 1 ch. 8.
(9) Bk. 2 ch. 5 secs. 28, 32, 42.
(10) Vol. 13 p. 463.
(11) Vol. 8 pp. 373–374. pp. 441, 442.
(12) P. 57.
(13) Pp. 56–57.
(14) P. 13.
(15) Pp. 355, 356.
(16) Vol. 2. pp. 275–280.
(17) 1 Hals. 1.

1886

ST. CATHARINES MILLING AND LUMBER CO. v. THE QUEEN.

certain line, rests upon the King's ownership of the lands. It was an act arising out of his proprietary rights. And in no case did he undertake to deal with the Indians when he had parted with the fee. Penn dealt with the Indians of Pennsylvania, and so did the proprietors and corporators in other proprietary and charter governments.

Entick's Hist. of Late War (1).

Young's Chronicles of New England (2); Proud's History of Pennsylvania; Murdock's History of Nova Scotia.

McCarthy Q.C. in reply.

The decision of the Privy Council in the boundary case has never been adopted by act of Parliament and has not the force of law. It is claimed that it estops us from claiming this land, but even if it is binding it only decided that the land was, territorially, a part of Ontario. The question of title was not raised in that case.

The question to be decided in this case is: Had the Indians any title, and if they had was it of so limited a character that the crown had an estate in the land consistent therewith.

[The learned counsel took up the American cases referred to by the counsel for the respondent, showing how in his opinion they failed to support the argument founded on them.]

The case of *Mitchell* v. *The United States* (3) brings up the questions involved in this appeal more nearly than any I have found. In that case it was said that purchases from the Indians have universally been held good. Before Mitchell died the Indians had ceded to the crown of Great Britain, and the land was afterwards transferred to the crown of Spain, and finally to the United States. The court said if these facts were true

(1) Vol 1. pp. 109–111. (2) P. 176.
(3) 9 Peters 711.

1886

ST. CATHARINES MILLING AND LUMBER CO. v. THE QUEEN.

the prior title must prevail.

It cannot be said that the Quebec Act of 1784 annulled the proclamation of 1763. The object of that act was to do away with the British, and restore the French, law, but it did not attempt to change the mode of dealing with the Indians.

The following cases may be referred to as dealing with this proclamation. *Campbell* v. *Hall* (1) referred to in *Mitchell* v. *The United States*; *Sims* v. *Irvine* (2); *Johnson* v. *McIntosh* (3); and *Worcester* v. *State of Georgia* (4).

Now, the question remains whether, the Indians having had the enjoyment of the lands without a right of interference in any body, there was any right or title in the crown. If so, what is the estate of the crown? Does it depend on the Indians becoming extinct? It is laid down by the Privy Council that an escheat is not an estate, and if not, how could it pass under the British North America Act?

If this property is under the control of the Dominion they alone can deal with it. But what duty rests on the Dominion to buy the land for the benefit of Ontario?

Sir W. J. RITCHIE C.J.—I am of opinion, that all ungranted lands in the province of Ontario belong to the crown as part of the public domain, subject to the Indian right of occupancy in cases in which the same has not been lawfully extinguished, and when such right of occupancy has been lawfully extinguished absolutely to the crown, and as a consequence to the province of Ontario. I think the crown owns the soil of all the unpatented lands, the Indians possessing only the right of occupancy, and the crown possessing the legal title subject to that occupancy, with the absolute exclusive right to extinguish the Indian title

(1) Cowp. 204.
(2) 3 Dallas 425.
(3) 8 Wheaton at p. 596.
(4) 6 Peters 515.

1887

ST. CATHARINES MILLING AND LUMBER CO. v. THE QUEEN.

Ritchie C.J.

either by conquest or by purchase; that, as was said by Mr. Justice Story (1),

> It is to be deemed a right exclusively belonging to the Government in its sovereign capacity to extinguish the Indian title and to perfect its own dominion over the soil and dispose of it according to its own good pleasure. * * The crown has the right to grant the soil while yet in possession of the Indians, subject, however, to their right of occupancy.

That the title to lands where the Indian title has not been extinguished is in the crown, would seem to be clearly indicated by Dominion legislation since confederation. See 31 Vic. ch. 42; 33 Vic. ch. 3; 43 Vic. ch. 36.

I agree that the whole course of legislation in all the provinces before, and in the Dominion since, confederation attaches a well understood and distinct meaning to the words "Indian reserves or lands reserved for the Indians," and which cover only lands specifically appropriated or reserved in the Indian territories, or out of the public lands, and I entirely agree with the learned Chancellor that the words "lands reserved for Indians," were used in the B. N. A. Act in the same sense with reference to lands specifically set apart and reserved for the exclusive use of the Indians. In no sense that I can understand can it be said that lands in which the Indian title has been wholly extinguished are lands reserved for the Indians.

The boundary of the territory in the north west angle being established, and the lands in question found to be within the Province of Ontario, they are necessarily, territorially, a part of Ontario, and the ungranted portion of such lands not specifically reserved for the Indians, though unsurrendered and therefore subject to the Indian title, forms part of the public domain of Ontario, and they are consequently public lands belonging to Ontario, and as such pass under

(1) Story on the Constitution 4th Ed. ss. 687.

1887

ST. CATHARINES MILLING AND LUMBER CO. v. THE QUEEN.

Ritchie C.J.

the British North America Act to Ontario, under and by virtue of sub-sec. 5 of sec. 92 and sec. 109 as to lands, mines, minerals and royalties, and sec. 117, by which the Provinces are to retain all their property not otherwise disposed of by that act, subject to the right of the Dominion to assume any lands or public property for fortifications, etc, and therefore, under the British North America Act, the Province of Ontario has a clear title to all unpatented lands within its boundaries as part of the Provincial public property, subject only to the Indian right of occupancy, and absolute when the Indian right of occupancy is extinguished.

I am therefore of opinion, that when the Dominion Government, in 1873 extinguished the Indian claim or title, its effect was, so far as the question now before us is concerned, simply to relieve the legal ownership of the land belonging to the Province from the burden, incumbrance, or however it may be designated, of the Indian title It therefore follows that the claim of the Dominion to authorize the cutting of timber on these lands cannot be supported, and the Province has a right to interfere and prevent their spoliation.

This case has been so fully and ably dealt with by the learned Chancellor, and I so entirely agree with the conclusions at which he has arrived, that I feel I can add nothing to what has been said by him. Many questions have been suggested during the argument of this case, and in some of the judgments of the court below, but I have, purposely, carefully avoided discussing, or expressing any opinion, on questions not immediately necessary for the decision of this case, leaving all such matters to be disposed of when they legitimately arise and become necessary for the determination of a pending controversy.

1887

ST. CATHARINES MILLING AND LUMBER CO. v. THE QUEEN.

Strong J.

STRONG J.—By the report of the Judicial Committee of the Privy Council of the 23rd July, 1884, made upon a reference to it of the question of disputed boundaries between the Provinces of Ontario and Manitoba, and which report was adopted by Her Majesty and embodied in the Order in Council of the 11th August, 1884, the territory in which the lands now in question are included was determined to be comprised within the limits of the Province of Ontario. This decision of the Judicial Committee, whilst defining the political boundaries according to the contention of the last named province, does not, however, in any way bear upon the question here in controversy between the Dominion of Canada and the Province of Ontario regarding the proprietorship of the lands now in dispute. The decision of the present appeal depends altogether upon the construction to be placed upon certain provisions of the British North America Act. By the 24th enumeration of section 91 of that act the power of legislation in respect of "Indians and lands reserved for the Indians" is conferred exclusively upon the parliament of Canada By section 109 of the same act,

All lands, mines, minerals and royalties belonging to the several provinces of Canada, Nova Scotia and New Brunswick at the union, and all sums then due or payable for such lands, mines, minerals and royalties, shall belong to the several provinces of Ontario, Quebec, Nova Scotia and New Brunswick in which the same are situate or arise, subject to any trust existing in respect thereof, and to any interest other than that of the province in the same.

By sec. 92, enumeration 5, exclusive power of legislation is given to the provinces regarding

the management and sale of the public lands belonging to the province, and of the timber and wood thereon.

The contention of the appellants is, that the lands now in question, and which are embraced in the territory formerly in dispute between the Provinces of Ontario and Manitoba, and which have been decided by the Judicial Committee to be within the boundaries

1887

ST. CATHARINES MILLING AND LUMBER CO. v. THE QUEEN.

Strong J.

of Ontario, were, at the time of confederation, lands which had not been surrendered by the Indians, and consequently come within the definition of "lands reserved for the Indians" contained in sub section 24 of section 91, and are therefore not public lands vested in the province by the operation of section 109. The province, on the other hand, insists that these are not "lands reserved for the Indians" within sub-section 24, and claims title to them under the provision of section 109 as public lands which at the date of confederation "belonged" to the Province of Ontario.

It is obvious that these lands cannot be both public lands coming within the operation of section 109 and "lands reserved for the Indians," and so subject to the exclusive legislative power of the parliament of Canada by force of the 24 sub-section of section 91. The "public lands" mentioned in section 109 are manifestly those respecting which the province has the right of exclusive legislation by section 92 sub-section 5. Then, these public lands referred to in sub-section 5, and which include all the lands "belonging" to the province, are clearly distinct from "lands reserved for the Indians," since lands so reserved are by section 91 sub-section 24 made exclusively subject to the legislative power of the Dominion. To hold that lands might be both public lands within section 109 and sub-section 5 of section 92, and "lands reserved for the Indians" within sub-section 24 of section 91, would be to determine that the same lands were subject to the exclusive powers of two separate and distinct legislatures, which would be absurd (1). This consideration alone is sufficient to dispose of any argument derived from the latter clause of section 109, saving trusts existing in respect of public lands within its operation. Moreover, the trusts thus

(1) See. as to conjoint effect of s. 109 and s. 92, subs. 5, *Attorney General* v. *Mercer*, 8 App. Cas. at p. 776.

1887

ST. CATHARINES MILLING AND LUMBER CO. v. THE QUEEN.

Strong J.

preserved are manifestly of a different order from anything connected with lands reserved for Indians, for instance, those trusts subsisting in favour of persons who had contracted for the purchase of Crown Lands, but whose titles had not been perfected by grants. The word "trusts" would not be an appropriate expression to apply to the relation between the crown and the Indians respecting the unceded lands of the latter. As will appear hereafter very clearly, such relationship is not in any sense that of trustee and *cestui que trust*, but rather one analogous to the feudal relationship of lord and tenant, or, in some aspects, to that one, so familiar in the Roman law, where the right of property is dismembered and divided between the proprietor and a usufructuary.

It will be convenient here to notice a point to which some importance has been attached in the courts below. It is said, that the British North America Act contains no clause vesting in the Dominion the ultimate property in lands reserved for the Indians over which an exclusive power of legislation is by section 91 conferred on the Dominion Parliament, and that consequently, even though the lands now in question should be held to come within the 24th enumeration of the last mentioned section, yet as they are not vested in the crown in right of the Dominion nothing passed by the lease or license under which the appellants claim title. The answer to this objection is, first, that as this is an information on behalf of the Province complaining of an intrusion upon Provincial lands, the question to be decided in the first instance is that as to the title of the Province. To support the information the respondent must establish that these lands were vested in the Province by the British North America Act, failing which the information must be dismissed, whether the lease or license granted by the Dominion to the appellants conferred a legal title or not.

1887

ST. CATHARINES MILLING AND LUMBER CO. v. THE QUEEN.

Strong J.

If, therefore, the respondent fails in making out the title of the Province, it is not essential that the appellants should be able to show that under some particular clause of the British North America Act, the lands of which the *locus in quo* forms part were vested in the Dominion. I am of opinion, however, that the ultimate crown title in the lands described in sub-section 24 of section 91, whatever may be the true meaning of the terms employed (an inquiry yet to be entered upon), became, subject to the Indian title in the same, vested in the crown in right of the Dominion. The title and interest of the crown in the lands specified in sub-section 24 at the date of confederation belonged to it in the rights of the respective Provinces in which the lands were situated; for the reasons already given these lands were not vested in the new Provinces created by the confederation act; they must therefore have remained in the crown in some other right, which other right could only have been, and plainly was, that of the Dominion. For, having regard to the scheme by which the British North America Act carried out confederation, by first consolidating the four original Provinces into one body politic—the Dominion—and then re-distributing this Dominion into Provinces and appropriating certain specified property to these several Provinces, it follows that the residue of the property belonging to the crown in right of the Provinces before confederation not specifically appropriated by the appropriation clauses of the act, sections 109 and 117, to the newly created Provinces, must of necessity have remained in the crown, and it is reasonable to presume for the use and purposes of the Dominion. Next, inasmuch as all revenues, casual or otherwise, arising from the title and interest of the crown in "lands reserved for the Indians" (whatever may upon subsequent consideration appear to be the proper meaning of that expression) are

1887

ST. CATHARINES MILLING AND LUMBER CO. v. THE QUEEN.

Strong J.

by the effect of section 102 allotted to the Dominion, this assignment of revenue to the Dominion, according to a well understood rule of construction, implies a vesting of the land and property from which the revenue is to arise. This last mentioned construction, which is analogous to that so familiar in construing wills by which a gift of rents and profits is held to be equivalent to a gift of the land itself, was referred to with approbation in *Attorney General* v. *Mercer* (1), though its application was excluded in that case for the reason that the right of escheat there was held to be expressly vested in the Provinces under section 109, which cannot be the case as regards "lands reserved for the Indians," over which an exclusive power of legislation is conferred on the Dominion, whatever may appear as the result of further consideration to be the proper meaning attributable to that expression.

The questions to be determined are therefore now restricted entirely to the construction to be placed on the words, "lands reserved for the Indians," in subsection 24 of section 91, and we are to bear in mind that whatever are the lands subjected by this description to the exclusive legislative power of the Dominion they cannot be lands belonging to the Province, since all these last mentioned lands are expressly subjected to the exclusive legislative powers of the Provinces. In construing this enactment we are not only entitled but bound to apply that well established rule which requires us, in placing a meaning upon descriptive terms and definitions contained in statutes, to have recourse to external aids derived from the surrounding circumstances and the history of the subject-matter dealt with, and to construe the enactment by the light derived from such sources, and so to put ourselves as far as possible in the position of the legislature whose

(1) 8 App. Cas. at p. 774.

1887

ST. CATHARINES MILLING AND LUMBER CO. v. THE QUEEN.

Strong J.

language we have to expound. If this rule were rejected and the language of the statute were considered without such assistance from extrinsic facts, it is manifest that the task of interpretation would degenerate into mere speculation and guess work.

It is argued here for the appellants, that these words "lands reserved for the Indians" are to have attributed to them a meaning sufficiently comprehensive to include all lands in which the Indian title, always recognized by the crown of Great Britain, has not been extinguished or surrendered according to the well understood and established practice invariably observed by the Government from a comparatively remote period. The respondent, on the contrary, seeks to place a much narrower construction on these words and asks us to confine them to lands, first, which having been absolutely acquired by the crown had been re-appropriated for the use and residence of Indian tribes, and secondly, to lands which, on a surrender by Indian nations or tribes of their territories to the crown, had been excepted or reserved and retained by the Indians for their own residence and use as hunting grounds or otherwise. In order to ascertain whether it was the intention of Parliament by the use of these words "lands reserved for the Indians" to describe comprehensively all lands in which the Indians retained any interest, and so to include unsurrendered lands generally, or whether it was intended to use the term in its restricted sense, as the respondent contends, as indicating only lands which had been expressly granted and appropriated by the crown to the use of Indians, or excepted or reserved by them for their own use out of some large tract surrendered by them to the crown, we must refer to historical accounts of the policy already adverted to as having been always followed by the crown in dealings with the Indians in respect of their

1887

ST. CATHARINES MILLING AND LUMBER CO. v. THE QUEEN.

Strong J.

lands.

In the Commentaries of Chancellor Kent and in some decisions of the Supreme Court of the United States we have very full and clear accounts of the policy in question. It may be summarily stated as consisting in the recognition by the crown of a usufructuary title in the Indians to all unsurrendered lands. This title, though not perhaps susceptible of any accurate legal definition in exact legal terms, was one which nevertheless sufficed to protect the Indians in the absolute use and enjoyment of their lands, whilst at the same time they were incapacitated from making any valid alienation otherwise than to the crown itself, in whom the ultimate title was, in accordance with the English law of real property, considered as vested. This short statement will, I think, on comparison with the authorities to which I will presently refer, be found to be an accurate description of the principles upon which the crown invariably acted with reference to Indian lands, at least from the year 1756, when Sir William Johnston was appointed by the Imperial Government superintendent of Indian affairs in North America, being as such responsible directly to the crown through one of the Secretaries of State, or the Lords of Trade and Plantation, and thus superseding the Provincial Governments, down to the year 1867, when the confederation act constituting the Dominion of Canada was passed. So faithfully was this system carried out, that I venture to say that there is no settled part of the territory of the Province of Ontario, except perhaps some isolated spots upon which the French Government had, previous to the conquest, erected forts, such as Fort Frontenac and Fort Toronto, which is not included in and covered by a surrender contained in some Indian treaty still to be found in the Dominion Archives. These rules of policy

1887

ST. CATHARINES MILLING AND LUMBER CO. v. THE QUEEN.

Strong J.

being shown to have been well established and acted upon, and the title of the Indians to their unsurrendered lands to have been recognized by the crown to the extent already mentioned, it may seem of little importance to enquire into the reasons on which it was based. But as these reasons are not without some bearing on the present question, as I shall hereafter shew, I will shortly refer to what appears to have led to the adoption of the system of dealing with the territorial rights of the Indians. To ascribe it to moral grounds, to motives of humane consideration for the aborigines, would be to attribute it to feelings which perhaps had little weight in the age in which it took its rise. Its true origin was, I take it, experience of the great impolicy of the opposite mode of dealing with the Indians which had been practised by some of the Provincial Governments of the older colonies and which had led to frequent frontier wars, involving great sacrifices of life and property and requiring an expenditure of money which had proved most burdensome to the colonies. That the more liberal treatment accorded to the Indians by this system of protecting them in the enjoyment of their hunting grounds and prohibiting settlement on lands which they had not surrendered, which it is now contended the British North America Act has put an end to, was successful in its results, is attested by the historical fact that from the memorable year 1763, when Detroit was besieged and all the Indian tribes were in revolt, down to the date of confederation, Indian wars and massacres entirely ceased in the British possessions in North America, although powerful Indian nations still continued for some time after the former date to inhabit those territories. That this peaceful conduct of the Indians is in a great degree to be attributed to the recognition of their rights to lands unsurrendered by them, and to the

1887

ST. CATHARINES MILLING AND LUMBER CO. v. THE QUEEN.

Strong J.

guarantee of their protection in the possession and enjoyment of such lands given by the crown in the proclamation of October, 1763, hereafter to be more fully noticed, is a well known fact of Canadian history which cannot be controverted. The Indian nations from that time became and have since continued to be the firm and faithful allies of the crown and rendered it important military services in two wars—the war of the Revolution and that of 1812.

The American authorities, to which reference has already been made, consist (amongst others) of passages in the commentaries of Chancellor Kent (1), in which the whole doctrine of Indian titles is fully and elaborately considered, and of several decisions of the Supreme Court of the United States, from which three, *Johnston* v. *McIntosh* (2), *Worcester* v. *State of Georgia* (3), and *Mitchell* v. *United States* (4), may be selected as leading cases. The value and importance of these authorities is not merely that they show that the same doctrine as that already propounded regarding the title of the Indians to unsurrendered lands prevails in the United States, but, what is of vastly greater importance, they without exception refer its origin to a date anterior to the revolution and recognise it as a continuance of the principles of law or policy as to Indian titles then established by the British government, and therefore identical with those which have also continued to be recognized and applied in British North America. Chancellor Kent, referring to the decision of the Supreme Court of the United States, in *Cherokee Nation* v. *State of Georgia* (5), says:—

> The court there held that the Indians were domestic, dependent nations, and their relations to us resembled that of a ward to his guardian; and they had an unquestionable right to the lands they occupied until that right should be extinguished by a voluntary

(1) Kent's Commentaries 12 ed. by Holmes, vol. 3 p. 379 *et seq.* and in editor's notes.
(2) 8 Wheaton 543.
(3) 6 Peters 515.
(4) 9 Peters 711.
(5) 5 Peters 1.

cession to our government (1).

On the same page the learned commentator proceeds thus :—

The Supreme Court in the case of Worcester reviewed the whole ground of controversy relative to the character and validity of Indian rights within the territorial dominions of the United States, and especially with reference to the Cherokee nation within the limits of Georgia. They declared that the right given by European discovery was the exclusive right to purchase, but this right was not founded on a denial of the Indian possessor to sell. Though the right of the soil was claimed to be in the European governments as a necessary consequence of the right of discovery and assumption of territorial jurisdiction, yet that right was only deemed such in reference to the whites; and in respect to the Indians it was always understood to amount only to the exclusive right of purchasing such lands as the natives were willing to sell. The royal grants and charters asserted a title to the country against Europeans only, and they were considered as blank paper so far as the rights of the natives were concerned. The English, the French and the Spaniards were equal competitors for the friendship and aid of the Indian nations. The Crown of England never attempted to interfere with the national affairs of the Indians further than to keep out the agents of foreign powers who might seduce them into foreign alliances. The English Government purchased the alliance and dependence of the Indian Nations by subsidies, and purchased their lands when they were willing to sell at a price they were willing to take, but they never coerced a surrender of them. The English Government considered them as nations competent to maintain the relations of peace and war and of governing themselves under her protection. The United States, who succeeded to the rights of the British Crown in respect of the Indians, did the same and no more; and the protection stipulated to be afforded to the Indians and claimed by them was understood by all parties as only binding the Indians to the United States as dependent allies.

Again the same learned writer says (2);

The original Indian Nations were regarded and dealt with as proprietors of the soil which they claimed and occupied, but without the power of alienation, except to the Governments which protected them and had thrown over them and beyond them their assumed patented domains. These Governments asserted and enforced the exclusive right to extinguish Indian titles to lands, enclosed within the exterior lines of their jurisdictions, by fair purchase, under the sanction of treaties; and they held all individual purchases from the Indians, whether made with them individually or collectively as

(1) 3 Kent Comms. 383. (2) P. 385.

1887

ST. CATHARINES MILLING AND LUMBER CO. v. THE QUEEN.

Strong J.

tribes, to be absolutely null and void. The only power that could lawfully acquire the Indian title was the State, and a government grant was the only lawful source of title admitted in the Courts of Justice. The Colonial and State Governments and the government of the United States uniformly dealt upon these principles with the Indian Nations dwelling within their territorial limits.

Further, Chancellor Kent, in summarising the decision of the Supreme Court in *Mitchell* v. *United States*, states the whole doctrine in a form still more applicable to the present case. He says (1):

> The Supreme Court once more declared the same general doctrine, that lands in possession of friendly Indians were always, under the colonial governments, considered as being owned by the tribe or nation as their common property by a perpetual right of possession; but that the ultimate fee was in the crown or its grantees, subject to this right of possession, and could be granted by the crown upon that condition; that individuals could not purchase Indian lands without license, or under rules prescribed by law; that possession was considered with reference to Indian habits and modes of life, and the hunting grounds of the tribes were as much in their actual occupation as the cleared fields of the whites, and this was the tenure of Indian lands by the laws of all the colonies.

It thus appears, that in the United States a traditional policy, derived from colonial times, relative to the Indians and their lands has ripened into well established rules of law, and that the result is that the lands in the possession of the Indians are, until surrendered, treated as their rightful though inalienable property, so far as the possession and enjoyment are concerned; in other words, that the *dominium utile* is recognized as belonging to or reserved for the Indians, though the *dominium directum* is considered to be in the United States. Then, if this is so as regards Indian lands in the United States, which have been preserved to the Indians by the constant observance of a particular rule of policy acknowledged by the United States courts to have been originally enforced by the crown of Great Britain, how is it possible to suppose that the law can, or rather could have been, at the date of confederation, in a state any less favorable to the Indians whose lands

(1) P. 386, note (*a*).

were situated within the dominion of the British crown, the original author of this beneficent doctrine so carefully adhered to in the United States from the days of the colonial governments? Therefore, when we consider that with reference to Canada the uniform practice has always been to recognize the Indian title as one which could only be dealt with by surrender to the crown, I maintain that if there had been an entire absence of any written legislative act ordaining this rule as an express positive law, we ought, just as the United States courts have done, to hold that it nevertheless existed as a rule of the unwritten common law, which the courts were bound to enforce as such, and consequently, that the 24th sub-section of section 91, as well as the 109th section and the 5th sub-section of section 92 of the British North America Act, must all be read and construed upon the assumption that these territorial rights of the Indians were strictly legal rights which had to be taken into account and dealt with in that distribution of property and proprietary rights made upon confederation between the federal and provincial governments.

The voluminous documentary evidence printed in the case contains numerous instances of official recognition of the doctrine of Indian title to unceded lands as applied to Canada. Without referring at length to this evidence I may just call attention to one document which, as it contains an expression of opinion with reference to the title to the same lands part of which are now in dispute in this cause by a high judicial authority, a former Chief Justice of Upper Canada, is of peculiar value. In the appendix to the case for Ontario laid before the Judicial Committee in the Boundary Case (1) we find a letter dated 1st of May 1819 from Chief Justice Powell to the Lieutenant Governor, Sir Peregrine Maitland, upon the subject of the conflict then going on between the North West and Hudson's

(1) At p. 134.

1887

ST. CATHARINES MILLING AND LUMBER CO. v. THE QUEEN.

Strong J.

Bay Companies, and of which the territory now in question was the scene. The Chief Justice, writing upon the jurisdiction of the Upper Canada Courts in this territory and of an act of Parliament relating thereto, says:

> The territory which it affects is in the crown and part of a district, but the soil is in the aborigines and inhabited only by Indians and their lawless followers.

There cannot be a more distinct statement of the rights claimed by the appellants to have existed in the Indians than this, and if the soil, *i.e.* the title to the soil, was in the Indians in 1819 it must have so remained down to the date of the North West Angle Treaty No. 3 made in 1873.

Then it is to be borne in mind that the control of the Indians and of the lands occupied by the Indians had, until a comparatively recent period, been retained in the hands of the Imperial Government; for some fifteen years after local self government had been accorded to the Province of Canada the management of Indian affairs remained in the hands of an Imperial officer, subject only to the personal direction of the Governor General, and entirely independent of the local government, and it was only about the year 1855, during the administration of Sir Edmund Head and after the new system of Government had been successfully established, that the direction of Indian affairs was handed over to the Executive authorities of the late Province of Canada. Further, it is to be observed, that by the terms of the 24th sub-section the power to legislate concerning Indians, as distinct from lands reserved, is expressly assigned to the Dominion Government, and this legislative power appears, by the tacit acquiescence of all the new Governments called into existence by confederation, to include the burden of providing for the necessities of the Indians, which has since been borne exclusively by the Government of the Dominion. At all events, the exclusive right of legislating

1887

ST. CATHARINES MILLING AND LUMBER CO. v. THE QUEEN.

Strong J.

respecting Indian affairs is thus attributed by this clause to the Parliament of Canada. This must include the right to control the exercise by the Indians of the power of making treaties of surrender, and since, as already shown, it is only by means of formal treaties that the Indian title can be properly surrendered or extinguished, Parliament must necessarily have the power, as incident to the general management of the Indians, of so legislating as to restrain or regulate the making of treaties of surrender which might be deemed improvident dispositions of Indian lands. If this were not so, and Parliament did not possess this power of absolute control over the Indians in respect of their dealings with their lands, the provisions of the 24th sub-section would be most incongruous and unreasonable, for in that case, whilst on the one hand Parliament would have to provide for the necessities of the Indians, on the other hand it would not have the means of restraining these wards of the Dominion Government from wasting the means of self support which their hunting grounds afforded. Then, taking into consideration this wide power of legislation respecting the Indian tribes, and seeing that it must necessarily include a power of control over all Indian treaties dealing with proprietary rights, it is surely a legitimate application of the maxim *noscitur a sociis* to construe the words "Lands reserved for the Indians" as embracing all territorial rights of Indians, as well those in lands actually appropriated for reserves as those in lands which had never been the subject of surrender at all.

To summarize these arguments, which appear to me to possess great force, we find, that at the date of confederation the Indians, by the constant usage and practice of the crown, were considered to possess a certain proprietary interest in the unsurrendered lands which they occupied as hunting grounds; that this

1887

ST. CATHARINES MILLING AND LUMBER CO. v. THE QUEEN.

Strong J.

usage had either ripened into a rule of the common law as applicable to the American Colonies, or that such a rule had been derived from the law of nations and had in this way been imported into the Colonial law as applied to Indian Nations; that such property of the Indians was usufructuary only and could not be alienated, except by surrender to the crown as the ultimate owner of the soil; and that these rights of property were not inaptly described by the words "lands reserved for the Indians," whilst they could not, without doing violence to the meaning of language, be comprised in the description of public lands which the Provinces could sell and dispose of at their will. Further, we find from the conjunction of the word "Indians" with the expression "lands reserved for the Indians" in the 24 sub-section of section 91 of the British North America Act, that a construction which would place unsurrendered lands in the category of "public lands" appropriated to the Provinces would be one which would bring different provisions of the act into direct conflict, since such lands would be subject to the disposition of the local legislature under sub-sec. 5, and at the same time it would be within the powers of the Dominion Parliament, in the exercise of its general right of legislation regarding the Indians, to restrain surrenders or extinguishments of the Indian title to such lands, and thus to render nugatory the only means open to the Provinces of making the lands available for sale and settlement. Then, there being but two alternative modes of avoiding this conflict, one by treating the British North America Act as by implication abolishing all right and property of the Indians in unsurrendered lands, thus at one stroke doing away with the traditional policy above noticed, and treating such lands as ordinary crown lands in which the Indian title has been extinguished, the other by holding that such unsurrendered lands are to be considered as embraced in

the description of "lands reserved for the Indians," it appears to me that the first alternative, which would attribute to the Imperial Parliament the intention of taking away proprietary rights, without express words and without any adequate reason, and of doing away at a most inopportune time with the long cherished and most successful policy originally inaugurated by the British Government for the treatment of the Indian tribes, is totally inadmissible and must be rejected. The inevitable conclusion is, that the mode of interpretation secondly presented is the correct one, and that all lands in possession of Indian tribes not surrendered at the date of confederation are to be deemed "lands reserved for the Indians," the ultimate title to which must be in the crown, not as representing the Province, but in right of the Dominion, the Indians having the right of enjoyment and an inalienable possessory title, until such title is extinguished by a treaty of surrender which the Dominion is alone competent to enter into. To these considerations must be added the further and weighty reason, that the construction just indicated is most fair and reasonable, inasmuch as the Dominion, being burdened with the support and maintenance of the Indians, ought also to have the benefit of any advantage which may be derived from a surrender of their lands.

To these arguments the respondent opposes others of varying weight and importance, which may, as far as I can see, be all classed under two heads. First, it is attempted to show by reference to a variety of documents consisting of legislative and administrative acts, public correspondence and official reports, all of which I concede are quite admissible for the purpose, that the words "lands reserved for the Indians" had, at the time of confederation, acquired a well recognised secondary meaning, and that they were

1887

ST. CATHARINES MILLING AND LUMBER CO. v. THE QUEEN.

Strong J.

synonymous with Indian reserves and were confined to lands appropriated to the Indians by grant from the crown, or lands which the Indians had themselves reserved by excepting them from treaty surrenders. The answer to this is, in my opinion, very plain. It is true that these documents do show that lands so specifically appropriated to the Indians have always been treated and are to be considered as lands "reserved" for the Indians, and therefore lands comprised in the description given in the 24th subsection of section 91, but it does not follow from this that the clear and undoubted title of the Indians to their peculiar interest in unsurrendered lands is not also included in the same description. The inference would rather be against a construction which would attribute to the Imperial Parliament the intention of making a purely arbitrary distinction between the two classes of Indian property, for if it is once admitted or established that the Indians have a proprietary interest in lands not surrendered by them, a point on which there can really be no serious doubt, the same reasons which induced Parliament to throw around the minor territorial interests of the Indians in the smaller classes of reserves the powerful protection of the Dominion Government, or rather stronger reasons than these, must also have applied to their more valuable and important territorial rights in unsurrendered lands.

The other principal argument relied upon for the respondent is one derived from the supposed inconvenience which would result from the proprietary interest in this large tract of territory becoming vested in the Dominion Government. I can see no force in this. I am unable to see that any such result must necessarily, or is even likely, to follow because the proprietorship of the soil in a large tract of land situate within the confines of a particular province is vested

1887

ST. CATHARINES MILLING AND LUMBER CO. v. THE QUEEN.

Strong J.

in the Dominion, whilst the political rights, legislative and administrative, over the same territory are vested in the provincial government. Instances of such ownership by a federal government within the limits and subject to the jurisdiction of local governments, provinces, or states, are easily to be found, and it has never been suggested that any political inconvenience, or clashing of jurisdiction, has resulted from them. In all the States of the American Union, except the original thirteen and seven others formed out of cessions of territory by original States, viz.: Maine, Vermont, Tennessee, Kentucky, West Virginia, Alabama and Misissipi, and Texas, (which was admitted to the Union as a state already formed out of foreign territory,) the federal government was the original proprietor of the soil, and still remains so as regards ungranted lands. We may, therefore, presume that a system which has prevailed and still prevails in seventeen states of the Union, and which also exists in our own Province of Manitoba, and must likewise apply to all future provinces formed out of the North-West Territory, cannot be so incompatible with the political rights of local governments, or with the material interests of the people, as to require us to depart from the ordinary and well understood rule of statutory construction, and to ascribe to the Imperial Parliament the intention of abolishing by implication Indian titles which the crown had uniformly recognized for a long course of time, and protection to which had been expressly ordained and guaranteed by a proclamation of the king more than a century old.

The objection that the interests of the public would be prejudiced by attributing the ultimate crown title in Indian lands to the Dominion instead of to the province, seems to imply that this dispute is to be considered as a continuance of the contest respecting the provincial boundaries of Ontario and Manitoba. I cannot assent

1887

ST. CATHARINES MILLING AND LUMBER CO. v. THE QUEEN.

Strong J.

to this. The question between the two provinces was one in which the rights of two distinct political communities, each representing separate and distinct portions of the general public of the Dominion, came into conflict. In the present case we are entitled, indeed bound, to assume that in the disposal of these lands for the purposes of settlement the interests of the public, as well the public of Ontario as of Canada at large, will be as well served by the Dominion as by the province. I have already shown that the ownership by the Dominion of territory included within the limits of the province, is in no way inconsistent with the political rights of the latter as regards government and legislation The only real question, therefore, can be and is, that as to which government has the better title to the fund to be produced by the sale of these lands, and if, in construing the statute, we are to take into consideration arguments based on the fairness and equity of giving to one government rather than to the other the title to this fund, I have no hesitation in assigning the better right to the Dominion. I see nothing inequitable or inconvenient, but much the reverse, in a construction of the statute which has the effect of attributing the profits arising from the surrender and sale of Indian lands to the Dominion, upon which is cast the burthen of providing for the government and support of the Indian tribes and the management of their property, not only in the Provinces, but throughout the wide domain of the North-West Territories, rather than upon the Provinces, who are not only free from all liabilities respecting the Indians, but are not even empowered to undertake them and cannot legally do so.

So far as arguments derived from expediency, public policy, and convenience are to have weight in removing any ambiguity which may be fairly raised with reference to the meaning of the terms "lands reserved for the

Indians," there were some invoked by the learned counsel for the appellants which, in my opinion, far exceed in weight any of the same class put forward on behalf of the respondent. Is it to be presumed that by the 109th and 117th sections of the British North America Act it was intended to abrogate entirely the well understood doctrine, according to which the Indians were recognized as having a title to the lands not surrendered by them, which had been acted upon for at least one hundred years, and which had received the express sanction of the crown in a royal proclamation, wherein the Indians are assured that, to the end that they might be convinced of the King's justice and determined resolution to remove all reasonable cause of discontent, their lands not ceded to or purchased by the crown should be reserved to them for their hunting grounds? And is it to be supposed that this was done of the mere motion of the Imperial Parliament, without any suggestion or request from the body of delegates assembled in the conference by which the terms and plan of confederation were settled, or otherwise from this side of the Atlantic? And can that be considered a reasonable construction which would attribute to Parliament the intention to make this great change, and thus to break faith with the Indian tribes by abrogating the privileges conferred by a proclamation which they had always regarded as the charter of their rights, just as Canada was on the eve of acquiring from the Hudson's Bay Company a large territory which would place in subjection to the new Dominion an Indian population far in excess of the aggregate of that contained in all the old Provinces together, a population which it would be of the utmost importance to conciliate, and which would be sure to be affected by any want of good faith practised towards the Indians of the Provinces? Before we can say that the language of the 24th sub-section of section 91

1887

ST. CATHARINES MILLING AND LUMBER CO. v. THE QUEEN.

Strong J.

is to receive the interpretation contended for by the respondent, we must be prepared to answer these questions in the affirmative. This I cannot bring myself to do, but I am compelled to prefer the plain primary meaning of the words in question contended for by the appellants, according to which lands reserved for the Indians include unsurrendered lands, or, in other words, *all* lands reserved for the Indians, and not merely a particular class of such lands.

To the objections just mentioned it is, however, answered, that all the obligations of the crown towards the Indians incidental to their unsurrendered lands, and the right to acquire such lands and to make compensation therefor by providing subsidies and annuities for the Indians, attach to and may be performed by the Provinces as well as by the Dominion. The proper rejoinders to this have been already indicated, but may be more fully stated as follows: First, a construction which, without any adequate reason, would apportion the management of the Indians and their lands between two Governments and two sets of officers, whilst it is obvious that an administration of Indian affairs as a whole by one Government and one set of officers could alone be practicable and beneficial, would be so eccentric and arbitrary that nothing but express words could authorise it. Secondly, the Provinces are Governments of limited capacities, executive as well as legislative, and amongst the powers attributed to the Provincial Governments and Legislatures by the B. N. A. Act none can be found which would authorise such a dealing with Indians in respect of their lands. It cannot be pretended that any such power is conferred in express terms, and none can be implied, since such an implication would be in direct conflict with the only meaning which can be sensibly attached to the word "Indians" as used in the 24th sub-section of section

91, considered apart altogether from the subsequent words "and lands reserved for Indians," by which word "Indians," standing alone, it must have been intended to assign to the Dominion the tutelage or guardianship of the Indians and the right to regulate their relations with the crown generally, a duty which could not be properly performed by the Dominion if the tribes were liable to be beset by the Provinces seeking surrenders of their lands. On the whole, therefore, the result is that the construction contended for by the respondent, that unsurrendered Indian lands vested in the Provinces under the 109th and 117th sections, would practically annul the well recognized doctrine of an Indian title in these lands, and for that reason alone is therefore inadmissible.

It appears to me, therefore, that the contentions of the respondent entirely fail, and that were there nothing more to be said the appellants would be entitled to judgment on this appeal.

So far I have considered and dealt with the case upon the assumption that there were no extrinsic circumstances, documents, or course of conduct, from which we could derive assistance in placing a meaning upon the words of the 24th sub-section, beyond the established usage of the crown, according to which the Indians were considered as possessing the proprietary interest already referred to in their unsurrendered lands. It appears, however, that a much stronger case than this is made in favour of the construction contended for by the appellants, for we find that in the proclamation of King George the 3rd, already incidentally alluded to, which had the force of a statute and was in the strictest sense a legislative act, and which had never, so far as I can see, been repealed, but remained, as regards so much of it as is now material, in force at the date of confederation, Indian lands not ceded to or purchased by the king, *i.e.*, lands not surrendered, are expressly des-

1887

ST. CATHARINES MILLING AND LUMBER CO. v. THE QUEEN.

Strong J.

cribed in terms as lands "reserved to the Indians;" the two expressions, "lands not ceded to or purchased "by the king," and "lands reserved to the Indians," being expressly treated as convertible terms. This proclamation was that of the 7th October, 1763, by which provision was made for the government of certain territories acquired by Great Britain by conquest during the seven years' war, and which had been ceded by the treaty of peace concluded at Paris between France, England, and Spain on the 10th February, 1763. By this proclamation four separate governments were established, viz., those of Grenada, East and West Florida, and Quebec, and the limits of each province were defined, those of Quebec not comprising the whole territory of Canada ceded by France and being of much smaller extent than those afterwards ascribed to the second province of the same name by the Quebec Act passed in 1774 (1). The description of the territory included in the government of Quebec erected by the proclamation is as follows :—

First, the government of Quebec, bounded on the Labrador coast by the river St. John, and from thence by a line drawn from the head of that river through the lake St. John to the south end of Lake Nipissim, from whence the said line crossing the river St. Lawrence, and the Lake Champlain, in 45 degrees of north latitude, passes along the high lands which divide the rivers that empty themselves into the said river St. Lawrence from those which fall into the sea; and also along the north coast of the Bay of Chaleurs and the coast of the gulf of St. Lawrence to Cape Rosieres, and from thence crossing the mouth of the river St. Lawrence by the west end of the island of Anticosti, terminates at the aforesaid river of St. John.

This description, manifestly, does not include the lands now in question.

The proclamation, after declaring that the King had issued Letters Patent to the Governors of these several colonies directing the calling of general assemblies for purposes of legislation and some other provisions immaterial here, proceeds to ordain certain

(1) 14 G. 3 c. 83.

regulations respecting Indians and Indian lands as follows :—

And whereas it is just and reasonable and essential to our interest and the security of our colonies that the several nations or tribes of Indians with whom we are connected and who live under our protection should not be molested or disturbed in the possession of such parts of our dominions and territories as, not having been ceded to or purchased by us, are reserved to them or any of them as their hunting grounds, We do therefore, with the advice of our Privy council, declare it to be our royal will and pleasure that no Governor or Commander in chief in any of our colonies of Quebec, East Florida or West Florida, do presume, upon any pretence whatever, to grant warrants of survey, or pass any patents for lands, beyond the bounds of their respective Governments as described in their Commissions ; as also, that no Governor or commander in Chief in any of our other colonies or plantations in America do presume for the present, and until our further pleasure be known, to grant warrants of survey, or pass patents for any lands, beyond the heads or sources of any of the rivers which fall into the Atlantic ocean from the west and north-west, or upon any lands whatever which, not having been ceded to or purchased by us as aforesaid, are reserved to the said Indians or any of them.

And we do further declare it to be our royal will and pleasure, for the present, as aforesaid, to reserve under our sovereignty protection and dominion, for the use of the said Indians, all the land and territories not included within the limits of our said three new Governments, or within the limit of the territory granted to the Hudson's Bay Company ; as also all the lands and territories lying to the westward of the sources of the rivers which fall into the sea from the west and north-west as aforesaid ; and we do hereby strictly forbid, on pain of our displeasure, all our loving subjects from making any purchases or settlements whatsoever, or taking possession of any of the lands above reserved, without our especial leave or licence for that purpose first obtained.

And we do further strictly enjoin and require all persons whatsoever, who have either wilfully or inadvertently seated themselves upon any lands which, not having been ceded to or purchased by us, are still reserved to the said Indians as aforesaid, forthwith to remove themselves from such settlements.

And whereas great frauds and abuses have been committed in the purchasing lands of the Indians, to the great prejudice of our interests, and to the great dissatisfaction of the said Indians, in order therefore to prevent such irregularities for the future, and to the end that the Indians may be convinced of our justice and determined resolution to remove all reasonable cause of discontent, we

1887

ST. CATHARINES MILLING AND LUMBER CO. v. THE QUEEN.

Strong J.

do, with the advice of our Privy Council, strictly enjoin and require, that no private person do presume to make any purchase from the said Indians of any lands reserved to the said Indians within those parts of our colonies where we have thought proper to allow settlement; but if at any time any of the said Indians should be inclined to dispose of the said lands the same shall be purchased only for us, in our name, in some public meeting or assembly of the said Indians, to be held for that purpose by the Governor or Commander-in-Chief of our colony respectively within which they shall lie.

This same proclamation was the subject of judicial consideration in the celebrated case of *Campbell* v. *Hall* (1), and its effect and operation was fully considered by Lord Mansfield in his judgment in that case.

As is well known, it was determined in the case of *Campbell* v. *Hall* (1), that the king had power to legislate as regards ceded and conquered colonies, and that this identical proclamation now under consideration had the force of law in the colonies to which it applied, though it was also determined that the king, having by it ordained the calling of legislative assemblies in the several colonies mentioned, his power of legislation was thereby exhausted, and that a subsequent proclamation with reference to Grenada was of no legislative force. In the present case the importance of this proclamation is paramount, and appears to me to be by itself decisive of the present appeal. In the first place, it gives legislative expression and force to what I have heretofore treated as depending on a regulation of policy, or at most on rules of unwritten law and official practice, namely, the right of the Indians to enjoy, by virtue of a recognized title, their lands not surrendered or ceded to the crown; it prohibits all interference with such lands by private persons by way of purchase or settlement, and limits the right of purchasing or obtaining cessions of Indian lands to the king exclusively. Next, by the words "to lands which not having been ceded to or "purchased by us are still reserved to the said Indians "as aforesaid," it indicates that "lands reserved for the

(1) 1 Cowp. 204.

1887

ST CATHARINES MILLING AND LUMBER CO. v. THE QUEEN.

Strong J.

"Indians" was a description and definition applicable to, and indeed convertible with, unsurrendered or non-ceded lands. It thus furnishes us with a key to the meaning of the words "lands reserved for the Indians," an expression which appears to have originated in this proclamation, and it entitles us, whenever we find the same words used in a statute or public document without a context indicating that it is used in some restricted sense, to infer that it includes those rights of the Indians in their unsurrendered lands which it was one of the principal purposes of the proclamation to assure to them. If the effect of this proclamation as applicable to the present case stopped here it would, as it seems to me, be conclusive, for being a legislative act having the force of a statute it has never, in my opinion, been repealed, but has, so far as it regulates the rights of the Indians in their unsurrendered lands, remained in force to the present day. It was, therefore, in force at the date of the passage of the British North America Act, and, if I am correct in this, I am warranted in saying that in the face of its express provisions that Indian lands not surrendered or ceded to the crown shall be considered "lands reserved to the "Indians," it is impossible to reject the equivalent interpretation that lands reserved for the Indians mean lands not ceded by the Indians, which is all the appellants contend for. But this proclamation has, as it appears to me, an application far beyond that already mentioned. It not only gives us a clue to the meaning of the term "lands reserved for or to the Indians," but it applies directly and in terms to the present lands. By the first clause of the extract from the proclamation which I have read the King declares it to be his will and pleasure to reserve under his sovereignty, protection and dominion, for the use of the said Indians, all land and territory not included (1) within the limits of "our said three Governments," (2) or within the limits

1887

ST. CATHARINES MILLING AND LUMBER CO. v. THE QUEEN.

Strong J.

of the territory granted to the Hudson's Bay Company, (3) also all lands westward of the sources of the rivers which fall into the Atlantic ocean from the west and north west. Now this territory, of which the lands in question form part, and one controversy as to which was determined by the Order-in-Council of August, 1884, was clearly not comprised within the limits of the first Province of Quebec, as those limits were defined by this proclamation of October, 1763, nor was it included within the territory granted to the Hudson's Bay Company, nor did it lie to the west or north-west of the sources of the rivers falling into the Atlantic ocean. Then, what were the lands not included within the three Governments, nor within the Hudson's Bay territory, to which the proclamation refers as being thereby reserved for the Indians? Clearly it has reference to the residue of the territories mentioned at the outset of the proclamation, viz., the "countries and islands ceded and confirmed to us by the said treaty." And if this is correct, and I fail to see how it can be otherwise, this identical tract of territory now in question was, by this proclamation, which in *Campbell* v. *Hall* was adjudged to have legislative force, reserved to and set apart for the use of the Indians, and this provision of the proclamation, never having been repealed, nor in any way derogated from by any subsequent legislation, remained in full force as a subsisting enactment up to the passing of the confederation act. In other words, it is a legislative act, applying directly to the lands now in question, assuring to the Indians the right and title to possess and enjoy these lands until they thought fit of their own free will to cede or surrender them to the crown, and declaring that, until surrender, the lands should be reserved to them as their hunting grounds, and being still in full force and vigor when the British North America Act was passed, it operated at that time as an express

legislative appropriation of the land now in dispute for the use and benefit of the Indians by the designation of "lands reserved to the Indians." Therefore the effect of the 24th sub-section of section 91 of the British North America Act upon these lands, as lands "reserved to the Indians" by the proclamation, must be precisely the same as if, by an act of Parliament passed the day before the British North America Act, it had been declared that these same lands, designated by some appropriate description, should be "reserved to the Indians," in which case it could hardly be pretended that they were not lands "reserved for the Indians" within sub-section 24 of section 91, but public lands belonging to the Province under sections 109 and 117 and subject to the exclusive legislation of the Province under sub-section 5 of section 92.

I now proceed to consider the objections which have been made on behalf of the respondent to the arguments based on the Proclamation of 1763. First, it is said that the proclamation was wholly repealed by the Quebec Act passed in 1774 (1). To this proposition I cannot assent. The proclamation had made provision for the civil government of the Province of Quebec, which was created by it, and it had defined the boundaries of that Province; and it was these provisions, and these only, which were repealed, altered, or in any way affected by the act of 1774. The repealing section, which is the fourth, is as follows;

And whereas the provisions made by the said proclamation in respect of the civil government of the said Province of Quebec and the powers and authority given to the Governor and other civil officers of the said Province, by the grants and commissions issued in consequence thereof, have been found by experience to be inapplicable to the state and circumstances of the said Province, the inhabitants whereof amounted at the conquest to above 65,000 persons professing the religion of the Church of Rome and enjoying an established form of constitution and system of laws by which their persons and property had been protected, governed and ordered for

(1) 14 G. 3 c. 83.

1887

ST. CATHARINES MILLING AND LUMBER CO. v. THE QUEEN.

Strong J.

a long series of years, from the first establishment of the said Province of Canada. Be it therefore further enacted: That the said proclamation, so far as the same relates to the said Province of Quebec and the commission under the authority whereof the Government of the said Province is at present administered, and all and every the ordinance and ordinances made by the Governor and Council of Quebec for the time being relative to the civil government and administration of justice in the said Province, and all commissions to judges and other officers thereof, be and the same are hereby revoked, annulled and made void from and after the 1st day of May, 1775.

From the wording of this section, as well that portion of it which consists of preamble as the enacting clause itself, it is plain that the intention was only to revoke so much of the proclamation as had relation to the civil government, the powers given to the governor, and other civil officers, and to the administration of justice in the Province. By the proclamation the law of England had been introduced into the new Province erected by the King out of the territory ceded by France. This had proved a cause of great dissatisfaction to the French Canadian population, and had, as the fourth section recites, "been "found upon experience to be inapplicable to the "state and circumstances of the Province." One principal object of the act was to remedy this grievance by providing (as it did) that in controversies as to property and civil rights the laws of Canada should be the rule of decision. The proclamation had also provided for the calling of legislative assemblies; such assemblies being considered unsuited to the state of the Province, this provision was also superseded by enacting that the legislative power should be vested in a council composed of members appointed by the crown.

Further, the act greatly enlarged the boundaries of the Province, extending them westward to the Mississippi (as I may now venture to say) and southward to the junction of the Ohio and Mississippi. It was this

1887

ST. CATHARINES MILLING AND LUMBER CO. v. THE QUEEN.

Strong J.

last provision which principally attracted attention to the measure in England, and led to great debates in Parliament, and particularly to the vigorous opposition of Mr. Burke, then the agent of the Province of New York (1). This extension of the limits of the Province was, as is well known, induced by considerations of policy connected with the discontent then prevailing in the adjoining English Provinces, whose people greatly objected to the act and considered themselves much aggrieved by its passage.

It is nowhere suggested that anything connected with the questions of Indians or Indian rights led to this enactment. None of the changes in the terms of the proclamation which were introduced by the act have the most remote bearing on Indian land rights or Indian affairs. Neither the establishment of French instead of English law, nor the substitution of a council for an assembly, nor the enlargement of the Provincial boundaries, can by implication have any such effect, and the act does not contain a word expressly referring to the Indians. Further, the third section of the act contains an express saving of titles to land, in words sufficiently comprehensive to include the Indian title recognized by the proclamation. Its words are:

> Nothing in this act contained shall extend, or be construed to extend, to make void, or to vary, or alter, any right, title or possession derived under any grant, conveyance or otherwise howsoever, of or to any lands within the said province or the provinces thereto adjoining; but that the same shall remain and be in force and have effect as if this act had never been made.

The words "right," "title" and "possession" are all applicable to the rights which the crown had conceded to the Indians by the proclamation, and, without absolutely disregarding this 3rd section, it would be impossible to hold that these vested rights of property or possession had all been abolished and swept away

(1) See printed papers in arbitration case 371-373 and Ontario appendix to same 137.

1887

ST. CATHARINES MILLING AND LUMBER CO. v. THE QUEEN.

Strong J.

by the statute. I must therefore hold, that the Quebec act had no more effect in revoking the five concluding paragraphs of the proclamation of 1763 which relate to the Indians and their rights to possess and enjoy their lands until they voluntarily surrendered or ceded them to the crown, than it had in repealing it as a royal ordinance for the government of the Floridas and Granada.

Then it is said that the proclamation was, as regards the Indians, merely a temporary measure, and that its character as such is evidenced by the introductory words to the clauses now material: "and we do "further declare it to be our Royal will and pleasure *for the present.*" There is no force in this point unless it can be shown that the proclamation was revoked in a regular and constitutional manner. A statute which makes provision "for the present," without any express limit in point of time, or other indication by which its duration can be ascertained, remains in force until it is repealed. As I have already said, we are bound to regard this proclamation as having all the force of a statute, and as such it must be subject to the established rules of statutory construction. No act of Parliament, Order in Council, or Colonial statute or ordinance can be produced repealing, or assuming to repeal, so much of its terms as are applicable to the present question. We are therefore bound to conclude that, to the extent just indicated, it remained in full force and operation, and had all the effect of an act of Parliament, up to the passing of the British North America Act in 1867.

That the proclamation was not considered by the government and its officers to have been superseded by the Quebec Act, or otherwise, is shown by the strict observance of its terms in all dealings with the Indians respecting their lands. The Indians themselves have been allowed to consider it as still of binding force, and

1887

ST. CATHARINES MILLING AND LUMBER CO. v. THE QUEEN.

Strong J.

to look upon it as the charter of their rights. In the report of the Indian commissioners appointed by the government of Canada, dated the 22nd January, 1844, and therefore made whilst the Indians were still under the protection of the Imperial Government, it is said:

The subsequent proclamation of His Majesty George Third, issued in 1763, furnished them with a fresh guarantee for the possession of their hunting grounds and the protection of the crown. This document the Indians look upon as their charter. They have preserved a copy of it to the present time, and have referred to it on several occasions in their representations to the government.

Since 1763 the government, adhering to the royal proclamation of that year, have not considered themselves entitled to dispossess the Indians of their lands without entering into an agreement with them and rendering them some compensation. For a considerable time after the conquest of Canada the whole of the western part of the upper province, with the exception of a few military posts on the frontier and a great extent of the eastern part, was in their occupation. As the settlement of the country advanced and the land was required for new occupants, or the predatory and revengeful habits of the Indians rendered their removal desirable, the British government made successive agreements with them for the surrender of portions of their lands.

It is not suggested that between 1844 and the passage of the British North America Act anything occurred to detract from Indian rights. This constant usage for upwards of a century by itself raises a strong presumption in favour of the construction of the Quebec Act which I maintain, namely, that it had not the repealing effect contended for by the respondent. Further, in the case of *Johnson* v. *McIntosh* (1), decided in 1823, the Supreme Court of the United States had to deal directly with this identical point of the binding effect, as a legislative ordinance, of the proclamation of 1763, and with its operation at a date subsequent to the Act of 1774 upon Indian lands included within the boundaries of the second province of Quebec created by that act. The lands there in question were within the territory, which, by the Treaty of Versailles (1783) settling the boundaries between Canada and the United States, became

(1) 8 Wheaton 545.

1887

ST. CATHARINES MILLING AND LUMBER CO. v. THE QUEEN.

Strong J.

part of the United States and was known as the Territory of Illinois, and these lands had been purchased from the Indians in 1775 and 1778 in contravention of the terms of the proclamation. It was objected that the title so acquired was thereby rendered void. Chief Justice Marshall, in giving the judgment of the court, says:

> The proclamation issued by the King of Great Britain in 1763 has been considered, and we think with reason, as constituting an additional objection to the title of the plaintiff.

The Chief Justice then proceeds to consider the constitutional validity of the proclamation, which he recognises to have been well established by *Campbell* v. *Hall* (1), and upon that, as well as upon other grounds, he gives judgment against the title. Now, if the Quebec Act, which, as it was a statute preceding in date the Declaration of Independence (1776), would have been considered in this respect binding by the American Courts, had repealed the proclamation, the Supreme Court would have been wrong in its conclusion that it applied to the case before them. It is out of the question to suppose that the judges of the Supreme Court of the United States, several of whom were contemporaries of the revolution and actors in it (notably the Chief Justice himself), were not perfectly familiar with a statute so notorious throughout the old colonies as the Quebec act, which had been one of the pretended grievances set forth in the Declaration of Independence by way of justifying the revolution. We must therefore conclude that it was considered by the court not to repeal or in any way affect the provisions of the proclamation relating to the Indians. Lastly, the learned Chancellor himself, in his judgment in this case, concedes that "the proclamation has frequently been referred to by the Indians themselves as the charter of their rights;" and, speaking of the clause "relating to the manner of dealing with them in respect of lands they occupy at large or as a reserve," he says it "has

(1) 1 Cowp. 204.

always been scrupulously observed in such transactions," but still he adds that it had been repealed by the Quebec act and had become obsolete. That so much of it as is now material was not repealed by the Quebec act, according to the proper construction of that statute, I have, I think, sufficiently established; and that it could otherwise have become legally obsolete was impossible, since, if *Campbell* v. *Hall* is to be considered sound law, it was a legislative ordinance of equivalent force with a statute, and consequently could only have been repealed by an act emanating from some competent legislative authority; but no such act can be referred to. That the proclamation ever in fact became practically obsolete from desuetude, is so far from having been the case that it is admitted to have remained since the act of 1774 "operative as a declaration of sound principles which then and thereafter guided the executive in disposing of Indian claims"

But even if I am wrong in my view that the statute of 1774 had not the effect contended for, but that the proclamation was in point of law wholly revoked by it, there still remains the argument that its terms furnish a key to the meaning of the words used in the 24th subsection of section 91 of the British North America Act, upon the construction of which the decision to this appeal must wholly depend. Thus, using the text of the proclamation as a glossary, we find that in 1763 lands reserved for the Indians meant lands not ceded or surrendered by them to the crown. Then, as we find it generally admitted, that this proclamation, even if superseded, has down to the present time been regarded by the Indians as the charter of their rights, that it has remained operative as a declaration of sound principles, and that its terms have always been scrupulously observed in dealings with the Indians in respect of their lands (all of which are very nearly the learned Chancellor's own words), the result is inevitable, that

1887

ST. CATHARINES MILLING AND LUMBER CO. v. THE QUEEN.

Strong J.

the expression "lands reserved for the Indians" employed in the proclamation retained its original significance as an equivalent for lands not ceded to or purchased by the crown down to 1867 when the British North America Act was passed, and that, consequently, when the same words were made use of in the 91st section of that act, it was with the intention that they should receive the same definite and well understood meaning as had always been thus attached to them.

Some stress has been laid on the legislation of the Dominion since confederation, as indicating that the Parliament of Canada has adopted the construction of the British North America Act contended for by the respondent. Even if this had been so, I am not aware of any principle upon which what may be considered an erroneous view adopted by Parliament of this question of the meaning of sub-section 24 of section 91 could bind this court to adopt the same construction in a judicial decision, although, if there was room for doubt and there had in fact been any legislation, it would, as embodying the opinion of Parliament as to the proper interpretation of the Imperial act, be entitled to some, though not conclusive, weight and influence. It does not appear, however, that any such construction as is contended for by the respondent has, in fact, been placed by Parliament on the 24th sub-section of section 91. Three acts relating to the Indians and Indian lands have been passed by the Parliament of Canada since confederation, in 1868, 1876, and 1880 respectively. In the first of these statutes (31 Vic. ch. 42), an act organizing the Department of the Secretary of State, by section 6 all lands reserved for Indians, or for any tribe, band, or body of Indians, are declared "to be deemed reserved for the "same purposes as before the act," and by section 8 it was provided, that lands reserved for the use of the Indians should only be ceded to the crown by a

1887

ST. CATHARINES MILLING AND LUMBER CO. v. THE QUEEN.

Strong J.

formal treaty of surrender made in the manner prescribed by the act, and that until surrender no sale or lease of Indian lands should be valid. In the subsequent acts of 1876 and 1880 (1), the same provisions were repeated, except that the word "reserves" was used instead of "lands reserved for the Indians," and by an interpretation clause, it was declared that the term "reserve" meant "any tract of land set apart by treaty or otherwise for the use or benefit, or granted to a particular band of Indians, of which the legal title is in the crown but which is unsurrendered." With regard to these acts it is to be observed that in the first act the identical expression calling for interpretation, "lands reserved for the Indians," is used. In the second and third, the word "reserves" has been substituted, and what I understand to be contended is, that this word "reserves," with the meaning affixed to it by the interpretation clause, has a narrower signification than one which includes all unsurrendered lands. I am not prepared so to understand the word "reserves" as defined by the interpretation clause, for I cannot admit that it has a less comprehensive signification than the words "lands reserved for the Indians" in the Act of 1868, and these latter words must receive the same construction as is to be attributed to precisely the same words as used in the British North America Act. But, conceding that the word "reserves" did apply to Indian lands of a different class from those referred to as "lands reserved for the Indians," what possible effect could that have on the present question, which is confined to the construction of an Imperial statute—the confederation act? That Parliament has no power to divest the Dominion in favour of the Provinces of a legislative power conferred on it by the British North America Act is, I think, clear. But, assuming that it had, it has neither assumed to put

(1) 39 Vic. ch. 18; 43 Vic. ch. 28.

1887

ST. CATHARINES MILLING AND LUMBER CO. v. THE QUEEN.

Strong J

forth any authoritative declaration of the proper construction of the clause in question in the British North America Act, or to relinquish in favour of the provinces any right of property or power of legislation vested in the Dominion by its provisions. At most, if my construction of the word "reserves" is erroneous, it could be said, that, having the power to legislate for all lands occupied by and not surrendered by Indians, Parliament had only seen fit to exercise this power in relation to the class of lands comprised in the description of "reserves" as defined by the interpretation clause, but on no principle that I ever heard or read of could this be said either to imply an authoritative declaration of the construction of the British North America Act binding on the courts, or a relinquishment in favour of the provinces of the exclusive right of legislation regarding lands reserved for the Indians, or a cession to the provinces of the rights of the crown in such lands. These statutes have, therefore, no application to the question the court is called upon to decide on this appeal.

On the whole my conclusion must be, that the lands included in the description of "lands reserved for the Indians," in subsection 24 of section 91 were not vested in the provinces as public lands or property by sections 109 and 117, and that all lands occupied by Indians and not ceded by them to the crown are comprehended in the exclusive powers of legislation conferred on the Dominion, and that the ultimate property in such lands, subject to the Indian title, is vested in the crown for the use of the Dominion; that consequently the North-West Angle Treaty No. 3 conferred an absolute title to the lands in question in this case on Her Majesty in right of the Dominion of Canada; and that this appeal must be allowed and the information dismissed in the court below with costs in all the courts.

FOURNIER J. concurred with RITCHIE C. J.

1887

ST. CATHARINES MILLING AND LUMBER CO. v. THE QUEEN.

Henry J.

HENRY J.—I have not considered it necessary, in the view I entertain of this case, to prepare a written judgment, but may say, in starting, that I entirely approve of the judgment of the learned chancellor, which, I think, embraces all the important points in the case.

I think that after the conquest of this country all wild lands, including those held by nomadic tribes of Indians, were the property of the crown and were transferred to those who applied for them only by the crown. It was never asserted that any title to them could be given by the Indians. In 1763, after the conquest, the crown issued a proclamation by which all persons were prohibited from trading with the Indians in regard to purchase of lands, and it was declared that all such transactions should be void. The Indians were not permitted to transfer any of their rights as to the land to any individual, and no such transfers were valid unless made by the crown. These were restrictions on the rights of the Indians following the conquest of the country, and I refer to them with reference to the question whether or not the Indians could convey a title in fee simple of the lands in question to the Dominion Government, as contended for, or to any one else.

If the Province of Ontario owned these lands, subject to such rights, then arises another question, whether the purchase from the Indians by the treaty spoken of operated to give a title in them to the Dominion Government, or as an extinguishment of the rights of the Indians in favour of the Province of Ontario.

In the first place, I suppose nobody will assert that if a private individual entered upon any of the lands at any time the Indians could legally object, as the law does not permit them by any legal means to recover possession of the land, or recover damages for any trespass committed thereon. I mention this to show that the Indians were never regarded as having a title.

1887

ST. CATHARINES MILLING AND LUMBER CO. v. THE QUEEN.

Henry J.

In 1873 the crown, in its wisdom, decided to hold these lands as a hunting ground for the Indians. In the first settlement of the country to assert sovereignty and to put that assertion into operation would have caused war, and it was necessary to treat with the Indians from time to time in order to facilitate settlement. They were, therefore, dealt with in such a manner that they were not asked to give up their lands without some compensation. The treaty in question was made when the Dominion Government claimed that the lands in question were not a part of Ontario, and many years before the Privy Council decided that they were. The Dominion Government, asserting that it was a portion of the territory of Manitoba over which they had jurisdiction (for, by arrangement, all the crown lands and timber in Manitoba were reserved to the Dominion), entered into negotiations with the Indians for the extinguishment of their title. That being done we have to inquire what was the operation, in law, of that extinguishment.

Now, suppose an individual had purchased from the Indians a part of this territory the crown would have the right to ignore the transfer. The Indians might have no further claim, but the extinguishment of the Indian rights would enure to the benefit of the crown. If the Indian claim had been extinguished by private persons it would, without doubt, have operated in favor of the crown. Apply that principle to this case and we will see that the extinguishment, if Ontario was the owner at the time, would in the same way operate in favor of the Province of Ontario.

This document signed by certain Indians is not evidence of a purchase. The conveyance itself shows that the title was in the crown, and the treaty is simply a cession of all the Indian rights, titles, and privileges whatever they were, and the consideration is stated to have emanated from Her Majesty's bounty,

&c, The consideration was, therefore, on the face of the treaty, an act of bounty on the part of Her Majesty. It is not an acknowledgment of any title in fee simple in the Indians. The Indians were not in possession of any particular portion of the land; for years and years they might never be on certain portions of it; they could not be said to have yielded possession, for that they cannot be assumed to have had, but virtually only relinquished their claim to the lands as hunting grounds.

A question of importance arises under the confederation act. By one of the sections of that act all lands *reserved for the Indians* were placed under the control of the Dominion Parliament. We must then inquire what was reserved for them. There are many ways of reserving real estate. It may be reserved by will, by deed, by proclamation, and so on, but it requires an act of some description. As regards the wild lands inhabited by nomadic tribes of Indians, by what process is it shown that they were ever *reserved* by anybody? They are in the same state as they were at the conquest. We find that several large tracts of land were at different times specially reserved for the use of Indian tribes, and have been held in trust for them by the Government. When the Indians did not require them they were sold and the money held for their use. There was another class. In many of the treaties by which the Indians gave up their right to portions of the country certain portions of the territory they were about to transfer were reserved for them in the treaties themselves. When, therefore, the Imperial act was passed there was sufficient material for the operation of the clauses relating to lands "reserved for the Indians."

But, I would ask, how can it be said that the lands in question in this suit were ever reserved? They were always the property of the crown. The Indians

1887

ST. CATHARINES MILLING AND LUMBER CO. v. THE QUEEN.

Henry J.

had the right to use them for hunting purposes, but not as property the title of which was in them. Thus, then, we have these words in the statute explained by the knowledge we have of certain lands being expressly reserved for the Indians.

Reservation cannot be effected by implication; there must be some act.

The words in the Imperial statute refer only to lands expressly reserved, and the other wild lands in the country are not affected by the provision referred to.

These very lands belonged to the Province before confederation, but the right to them was contested by the Dominion Government. A mere dispute does not alter the question of title. And when the matter came before the Privy Council it was decided that the lands were part of the Province of Ontario. The result of that decision reverted back to the time of the passing of the Imperial act. It was just as much the property of the Province all along as it would have been had no dispute arisen.

We have the Imperial Act which settles the whole question. All the lands, except those reserved in the act itself, shall belong to the several Provinces. How, then, could the Dominion get a title to these lands? If the transfer from the Indians had never taken place no such question could or would have arisen, and the right of Ontario to the lands now contested would no doubt have been admitted. The mere transfer by the Indians to the Dominion Government of their rights cannot affect the title of Ontario.

I think, therefore, the right to grant licenses to cut timber on these lands was in no way given to the Dominion Government. If the lands are situate in Ontario they belong to Ontario, under the British North America Act. So that all we have to enquire is: Was the land a part of Ontario at the time of con-

1887

ST. CATHARINES MILLING AND LUMBER CO. v. THE QUEEN.

Henry J.

federation? If it was, it is in the same position as any other wild lands in Quebec, Nova Scotia, or New Brunswick. The Dominion does not claim the lands in those other Provinces, and the mere surrender by the Indians could not give a title to those lands in Ontario.

As I stated before, I fully concur in the judgment of the learned Chancellor. If the lands in question belong to Ontario, and the Indian claims had not been extinguished, I maintain that it would be highly unconstitutional for the Dominion to interfere with them, as suggested, by the passage of an act to prohibit the Indians from dealing with the Government of Ontario therefor.

For the reasons given, I am of opinion that the appeal herein should be dismissed with costs.

TASCHEREAU J.—I am also of opinion that the appeal should be dismissed.

The question involved has been so thoroughly reviewed by the learned Chancellor in the court of first instance, and by the learned judges of the Ontario Court of Appeal, that I feel unable to add to their observations almost anything but useless repetition.

There is no doubt of the correctness of the proposition laid down by the Supreme Court of Louisiana, in *Breaux* v. *Johns* (1), citing *Fletcher* v. *Pecks*, and *Johnson* v. *McIntosh*, "that on the discovery of the American continent the principle was asserted or acknowledged by all European nations, that discovery followed by actual possession gave title to the soil to the Government by whose subjects, or by whose authority, it was made, not only against other European Governments but against the natives themselves. While the different nations of Europe respected the rights (I would say the claims) of the natives as

(1) 4 La. An. 141.

1887

ST. CATHARINES MILLING AND LUMBER CO. v. THE QUEEN.

Taschereau J.

occupants, they all asserted the ultimate dominion and title to the soil to be in themselves." I refer also to *Brooks* v. *Norris* (1), *Martin* v *Johnson* (2), and *De Armas* v. *New Orleans* (3), in the same court.

That such was the case with the French Government in Canada, during its occupancy thereof, is an incontrovertible fact. The King was vested with the ownership of all the ungranted lands in the colony as part of the crown domain, and a royal grant conveyed the full estate and entitled the grantee to possession. The contention, that the royal grants and charters merely asserted a title in the grantees against Europeans or white men, but that they were nothing but blank papers so far as the rights of the natives were concerned, was certainly not then thought of, either in France or in Canada. Neither in the commission or letters patent to the Marquis de la Roche in 1578 and 1598, nor in the charter to the Cent Associés in 1627, nor in the retrocession of the same in 1663, nor in the charter to the West Indies Company in 1664, nor in the retrocession of the same in 1674, by which proprietary Government in Canada came to an end, nor in the six hundred concessions of seigniories extending from the Atlantic to Lake Superior, made by these companies, or by the Kings themselves, nor in any grant of land whatever during the 225 years of the French domination, can be found even an allusion to, or a mention of, the Indian title.

On the contrary, in express terms, de la Roche was authorized to take possession of, and hold as his own property, all lands whatsoever that he might conquer from any one but the allies and confederates of the crown, and, likewise, the charter of the West Indies Company granted them the full ownership of all lands

(1) 6 Rob. La. 175. (2) 5 Mart. La. (O. S.) 655.
(3) 3 La. (O. S.) 86.

1887

ST. CATHARINES MILLING AND LUMBER CO. v. THE QUEEN.

Taschereau J.

whatsoever, in Canada, which they would conquer, or from which they would drive away the Indians by force of arms. Such was the spirit of all the royal grants of the period. The King granted lands, seigniories, territories, with the understanding that if any of these lands, seigniories, or territories proved to be occupied by aborigines, on the grantees rested the onus to get rid of them, either by chasing them away by force, or by a more conciliatory policy, as they would think proper. In many instances, no doubt, the grantees, or the King himself, deemed it cheaper or wiser to buy them than to fight them, but that was never construed as a recognition of their right to any legal title whatsoever. The fee and the legal possession were in the King or his grantees.

Now when by the treaty of 1763, France ceded to Great Britain all her rights of sovereignty, property and possession over Canada, and its islands, lands, places and coasts, including, as admitted at the argument, the lands now in controversy, it is unquestionable that the full title to the territory ceded became vested in the new sovereign, and that he thereafter owned it in allodium as part of the crown domain, in as full and ample a manner as the King of France had previously owned it. That it should be otherwise for the lands now in dispute, I cannot see on what principle. To exclude from the full operation of the cession by France all the lands then occupied by the Indians, would be to declare that not an inch of land thereby passed to the King of England, as, at that time, the whole of the unpatented lands of Canada were in their possession in as full and ample a manner as the 57,000 square miles of the territory in dispute can be said to be in possession of the 26,000 Indians who roam over it.

Now, when did the Sovereign of Great Britain ever

1887

ST. CATHARINES MILLING AND LUMBER CO. v. THE QUEEN.

Taschereau J.

divest himself of the ownership of these lands to vest it in the Indians? When did the title pass from the Sovereign to the Indians? Not by any letters patent. The appellants do not contend that any exist, but they contend that such was the effect of the royal proclamation of the 7th October, 1763. They failed, however, to establish that proposition. I cannot find in that document a single word that can be construed as a grant or to have the operation of a grant. The general provisions of this proclamation, it must not be lost sight of, did not apply to the territory now in controversy, for the Province of Quebec, thereby constituted, was bounded west at Lake Nipissing. But it is argued by the appellant that the following clauses support their contention:

> And whereas it is just and reasonable and essential to our interests and the security of our colonies that the several nations or tribes of Indians with whom we are connected, and who live under our protection, should not be molested or disturbed in the possession of such parts of our Dominion and Territories, as not having been ceded to or purchased by us, are reserved to them or any of them as their hunting grounds, we do therefore, with the advice of our Privy Council, declare it to be our royal will and pleasure that no governor or commander-in-chief in any of our colonies of Quebec, East Florida or West Florida, do presume, upon any pretence whatever, to grant warrants of survey or pass any patents for lands beyond the bounds of their respective governments as described in their commissions; as also that no governor or commander-in-chief in any of our other colonies or plantations in America do presume, for the present, and until our further pleasure be known, to grant warrants of survey or pass patents for any lands beyond the head or sources of any of the rivers which fall into the Atlantic ocean from the west and north-west, or upon any lands whatever which, not having been ceded to or purchased by us as aforesaid, are reserved to the said Indians or any of them.
>
> And we do further declare it to be our royal will and pleasure, for the present, as aforesaid, to reserve under our sovereignty, protection and dominion, for the use of the said Indians, all the lands and territories not included within the limits of our said three new governments, or within the limits of the territory granted to the Hudson's Bay Company; as also all the lands and territories lying to the westward of the sources of the rivers which fall into the sea from the

west and north-west as aforesaid; and we do hereby strictly forbid, on pain of our displeasure, all our loving subjects from making any purchases or settlement whatsoever, or taking possession of any of the lands above reserved, without special leave or license for that purpose first obtained.

1887

ST. CATHARINES MILLING AND LUMBER CO. v. THE QUEEN.

Taschereau J.

Now, as I read these clauses, they, it seems to me, far from supporting the appellants' case, are entirely adverse to them. First, rather superfluously and unnecessarily, the governors are forbidden to issue any patents for lands beyond the bounds of their respective governments. This applies to crown lands of course. Then the governors are prohibited, for the present, from granting patents for any lands in the territory of the North-West, or for any lands whatever which, not having been ceded to, or purchased by, the crown, are reserved to the Indians or any of them. Now, all this clause necessarily refers to is crown lands not previously conceded or granted; the governors never have been presumed to even grant patents for lands that had previously passed from the crown. It is to crown lands, to lands owned by the crown but occupied by the Indians, that the proclamation refers. The words "for the present," in this and the next clause, are equivalent to a reservation by the king of his right, thereafter or at any time, to grant these lands when he would think it proper to do so. He reserves for the present for the use of the Indians all the lands in Canada outside of the limits of the Province of Quebec as then constituted. Is that, in law, granting to these Indians a full title to the soil, a title to these lands? Did the sovereign thereby divest himself of the ownership of this territory? I cannot adopt that conclusion, nor can I see anything in that proclamation that gives to the Indians forever the right in law to the possession of any lands as against the crown. Their occupancy under that document has been one by suffer ance only. Their possession has been, in law, the

1887

ST. CATHARINES MILLING AND LUMBER CO. v. THE QUEEN.

Taschereau J.

possession of the crown. At any time before confederation the crown could have granted these lands, or any of them, by letters patent, and the grant would have transferred to the grantee the *plenum et utile dominium*, with the right to maintain trespass, without entry, against the Indians. A grant of land by the crown is tantamount to conveyance with livery of seisin (1). This proclamation of 1763 has not, consequently, in my opinion, created a legal Indian title.

From this result of my interpretation of it it is unnecessary, for my determination of this case, to consider how far the sections of the proclamation to which I have alluded, have been affected by the act of 1774 (2). I may, nevertheless, remark, that any right the Indians might have previously had could not, it seems, have been affected by this act, as by its 3rd section it is specially provided and enacted that "nothing in this act contained shall extend, or be construed to extend, to make void, or to vary, or alter, any right, title, or possession derived under any grant, conveyance, or otherwise howsoever, of or to any lands within the said Province, or the Provinces thereto adjoining."

It was further argued for the appellants that the principles which have always guided the crown since the cession in its dealing with the Indians amount to a recognition of their title to a beneficiary interest in the soil. There is, in my opinion, no foundation for this contention. For obvious political reasons, and motives of humanity and benevolence, it has, no doubt, been the general policy of the crown, as it had been at the times of the French authorities, to respect the claims of the Indians. But this, though it unquestionably gives them a title to

(1) *Doe Fitzgerald* v. *Finn*, 1 U. 24 U. C. C. P. 230; *Rex* v. *Lelievre*, C. Q. B. 70; *Greenlaw* v. *Fraser*, 1 Rev. de Jurisp. 506.

(2) 14 Geo. 3 ch. 83 sec. 4.

1887

ST. CATHARINES MILLING AND LUMBER CO. v. THE QUEEN.

Taschereau J.

the favorable consideration of the Government, does not give them any title in law, any title that a court of justice can recognize as against the crown. If the numerous quotations on the subject furnished to us by appellants from philosophers, publicists, economists and historians, and from official reports and despatches, must be interpreted as recognizing a legal Indian title as against the crown, all I can say of these opinions is, that a careful consideration of the question has led me to a different conclusion.

The necessary deduction from such a doctrine would be, that all progress of civilization and development in this country is and always has been at the mercy of the Indian race. Some of the writers cited by the appellants, influenced by sentimental and philanthrophic considerations, do not hesitate to go as far. But legal and constitutional principles are in direct antagonism with their theories. The Indians must in the future, every one concedes it, be treated with the same consideration for their just claims and demands that they have received in the past, but, as in the past, it will not be because of any legal obligation to do so, but as a sacred political obligation, in the execution of which the state must be free from judicial control.

The appellants' contentions, I may here remark, would appear to be supported by some extracts from the judgment of the Supreme Court of New Zealand, in a case of the *Queen* v. *Symonds* (June 1847), which are to be found in the Imperial Parliamentary papers, 1860, vol. XLVII, p. 17, (Colonies New Zealand). But the nature of the Indian title in New Zealand is a peculiar one. Art. 2 of a treaty with the Indians, known as the treaty of Waitangi, guaranteed to them the full exclusive possession of all the lands occupied by them so long as they would desire to retain these lands, and by the interpretation put

1887

ST. CATHARINES MILLING AND LUMBER CO. v. THE QUEEN.

Taschereau J.

upon that treaty by the Home Government, it was considered that the Indians had a right of proprietorship over their lands.

On the interpretation of the words "lands reserved for the Indians," in section 91 par. 24 of the B. N. A. Act, I adopt the reasoning of the Chancellor and of Chief Justice Hagarty. Even if such lands be specially reserved for the Indians, the title is in the Crown (1).

The Territory in dispute is not "reserved for the Indians" in the sense of these words as contained in that section. And even if the Indians had any interest in it, that would not affect the Province of Ontario's claim to it, as then the Province would, under the very words of section 109 of the B. N. A. Act, hold it subject to that interest.

As regards the question considered by Mr Justice Burton, whether or not the Lieutenant Governor in each Province is, as Her Majesty's representative under the B. N. A Act, the only party who could extinguish the so called Indian title, if any there be, I refrain from expressing any opinion, for the reason that the point does not come up for our determination, and consequently that anything I might say about it would be entirely *obiter*

Were these lands at confederation crown lands, or the private property of the Indians, is the abstract question to be determined. I am of opinion that they were crown lands, and consequently that under sections 109 and 117 of the B. N. A. Act they belong, as before confederation, to the Province of Ontario and form part of its public domain by title paramount.

GWYNNE J. - In 1763 the Board of Trade made a report to His then Majesty King George the 3rd,

(1) *Boulton* v. *Jeffreys*, 1 E. & A. (Ont) 111; *Jackson* v. *Wilkes*, 4 Q. B. (O. S.) 142; *Bown* v. *West*, 1 E. & A. 117; *Totten* v. *Watson*, 15 U. C. Q. B. 392; *Bastien* v. *Hoffman*, 17 L. C. R. 238; *The Commissioner of Indian Lands* v. *Payzant*, 3 L. C. J. 313.

wherein they suggested a plan for the future management of Indian Affairs in His Majesty's possessions in North America.

The plan suggested in this report was approved by His Majesty, and to give effect to it the proclamation of the 7th October, 1763, was issued, wherein is contained a declaration of His Majesty's Royal intentions towards the tribes of Indians in His Majesty's North American possessions. In that proclamation are contained the following passages (1):

It has been argued that the above passages extracted from the proclamation, had no effect within the limits of the then Province of Quebec, although that Province is specially mentioned in the proclamation. This argument was founded upon the contention, that the Indians were never recognised by the French Kings as having any estate, right, or title in the lands situate within the limits of the French possessions in North America, and that the English title to those lands being derived from the treaty of Paris of 1763, the title of the Crown of England to the lands ceded by the French King by that treaty is the same as the title which the Kings of France formerly had.

It may be admitted that the Kings of France recognised no title in the Indians in any part of the territory in the possession of the Kings of France, whose mode of dealing with the Indians was to make, *ex gratiâ*, crown grants of land for their conversion, instruction, and subsistence, but the fact that the Kings of France so dealt with the Indians presented no obstacle to the Sovereign of Great Britain, upon acquiring the French title, placing the Indians upon a more just and equitable footing, and recognizing their having a certain title, estate and interest in the lands so acquired by the Crown of Great Britain; and in

(1) See p. 625.

1887

ST. CATHARINES MILLING AND LUMBER CO. v. THE QUEEN.

Gwynne J.

point of fact this proclamation, ever since its issue, has been faithfully observed in its integrity, as well within the limits of the then Province of Quebec as in all other the British possessions in North America. At the time of the cession by the French the greater part of that portion of French Canada which now constitutes the Province of Quebec had been already granted by the French Kings To lands so granted the proclamation, of course, had no application, but outside of those granted lands, if there were any Indians claiming title their rights, as declared in the proclamation, were respected.

By the Haldimand papers in the Canadian Archives it appears that in December, 1766, one Philibot, having an order of his Majesty in Council, dated the 18th June 1766, directed to the Governor and Commander-in-Chief of the Province of Quebec, for a grant of 20,000 acres in that Province, petitioned the Governor, praying that the grant might be assigned to him on the Restigouche at a place indicated by him, and the Committee of Council at Quebec having taken the matter of the petition into consideration reported that the lands so prayed to be granted to the petitioner "were or were claimed to be the property of the "Indians, and as such, by His Majesty's express com- "mand as set forth in his proclamation of 1763, not "within their power to grant." It is with that part of French Canada which now constitutes the Province of Ontario that we are at present concerned, and so inviolably has the proclamation been observed therein that it, together with the Royal instructions given to the Governors as to its strict enforcement, may, not inaptly, be termed the Indian Bill of Rights. By an order of His Majesty and Council, dated at St James', May 4th, 1768, transmitted to the Honorable Thomas Gage, Major-General and Commander-in-Chief of all

His Majesty's Forces in North America, he was ordered to

Put Lieut. George McDougal, late of the 60th Regt., in possession of Hogg Island situate in Detroit River, three miles above the Fort of Detroit "provided that it can be done without umbrage to the Indians," and upon consideration that the Improvements projected by McDougal be directed to the more easy and effectual supply of His Majesty's Fort and Garrison maintained at Detroit.

The mode adopted on this occasion to extinguish the Indian title was, that General Gage forwarded the order to Capt. Turnbull, commanding at Detroit, with the following instructions as to the execution of it :—

As Mr. McDougal's occupying these lands depends on the sufferance of the Indians who have claims thereto, it will be necessary that those Indians should be collected by the friends of Mr. McDougal and publicly signify to you, or rather give a written acknowledgment of, their consenting to the cession of these lands in favor of Mr. McDougal.

This must be a solemn act, performed in your presence by Indians concerned in the property of these lands, to which they must sign the mark of their tribes, and you will certify the same to be done by you, under my authority and in your presence; their permission at the same time must be had to people the Islands for cultivation, for every necessary particular should be mentioned in the writing for the cession of these lands, and the whole fully and distinctly explained to the Indians to prevent future claims or disputes.

In pursuance of the above instructions an indenture *inter partes* was made and executed by and between those chiefs of the Ottawa and Chippewa nations of Indians, of the one part, and George McDougal, of the other part, whereby it was witnessed that the said chiefs, for themselves and by the consent of the whole of the said nations of Indians, for and in consideration of property to the value of £194. 10s., thereby acknowledged to have been received, did grant, bargain, sell, alien and confirm unto the said George McDougal, his heirs and assigns for ever, the said island in the Detroit river, about three miles above the fort, that he might settle, cultivate and otherwise employ it to his and his Majesty's advantage, together with the houses, out-

1887

ST. CATHARINES MILLING AND LUMBER CO. v. THE QUEEN.

Gwynne J.

houses and appurtenances whatsoever to the said island, messuage or tenement and premises belonging or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents and services of the said premises and every part thereof, and all the estate, right, title, claim and demand whatsoever of them the said Indians of, in and to the said messuage, tenement and premises and every part thereof, to have and to hold the said messuage, and all and singular the said premises above mentioned, and every part and parcel thereof, with the appurtenances, unto the said George McDougal, his heirs and assigns for ever, and the said chiefs did thereby engage themselves, their heirs, their nations, &c., forever to warrant and defend the property of the said island unto the said George McDougal, his heirs, executors, administrators and assigns for ever. In 1784 Governor Haldimand purchased from the Mississagas what is known as the Grand River tract and settled thereon the Six Nations Indians who, shortly after the close of the revolutionary war, removed from their settlements in the State of New York into Canada.

In a letter dated at Quebec, the 26th April, 1784, addressed by Governor Haldimand to Lieut.-Governor Hay on his departure from Quebec to enter upon his government, is the following paragraph defining his duty in relation to the Indians and their lands:

> The mode of acquiring lands by what is called Deeds of Gift is to be entirely discontinued, *for, by the King's instructions,* no Private Person, Society, Corporation or Colony is capable of acquiring any property in lands belonging to the Indians, either by purchase, or grant or conveyance from the Indians, excepting only where the lands lie within the limits of any colony the soil of which has been vested in Proprietaries or Corporations by grants from the Crown; in which cases such Proprietaries or Corporations only shall be capable of acquiring such property by purchase or grants from the Indians. It is also necessary to observe to you that, *by the King's instructions,* no purchase of lands belonging to the Indians, whether in the

name of or for the use of the Crown, be made, but at some general meeting, at which the Principal Chiefs of each Tribe claiming a property in such lands shall be present.

In 1781 the form adopted for the surrender of the Island of Michilimakinak was a deed poll whereby four chiefs of the Chippawa nation, on behalf of themselves and all others of their nation the Chippewas "who have or can lay claim to the said Island," surrendered and yielded up the said Island into the hands of Lieutenant Governor Sinclair for the behalf and use of His Majesty George the third, &c., &c., and his heirs for ever, and they did thereby make for themselves and posterity a renunciation of all claims in future to said Island. The deed contains the following clause :

> And we have signed two deeds of this tenor and date in the presence of (naming seven persons), one of which deeds is to remain with the Government of Canada and the other to remain at this post to certify the same, and we promise to preserve in our village a Belt of Wampum of seven feet in length to perpetuate, secure, and be a lasting memorial of the said transaction to our nation forever hereafter, and that no defect in this deed for want of law forms, or any other, shall invalidate the same.

This deed is signed by the Chiefs with their totems, according to Indian custom, and by the Lieutenant Governor and a Captain, Lieutenant and Ensign of the 8th regiment. The last clause in the deed seems to have been inserted with the design of shewing on the face of the deed that the transaction had been authorised in a council of the nation. The obtaining such authority in the first place was the invariable custom, and then a deed was executed for the purpose of evidencing the transaction which the nation had authorised in council.

By the deed of surrender of about two million (2,000,000) acres along the shore of Lake Erie, executed on the 19th May, 1790, it appears to have been executed in a full Council of the Ottawa, Chippewa, Pottowatani and Huron Nations, which was attended by

1887

ST. CATHARINES MILLING AND LUMBER CO. v. THE QUEEN.

Gwynne J.

the Commanding Officer at Detroit, with a large staff of his officers as representing the crown, and in their presence as subscribing witnesses the deed is executed in the Indian manner by eight Chiefs of the Ottawa, eight of the Chippewa, six of the Pottowatani and thirteen of the Huron Nations.

The deed is in the form of a deed-poll, commencing:

Know all men by these presents that we, the principal Village and War Chiefs of the Ottawa, Chippewa, Pottowatani and Huron Nations, for and in consideration, &c. Have, by and with the consent of the whole of our said Nations, Given, granted, enfeoffed, alienated and confirmed, And by these presents do give, grant, enfeoff, alien and confirm unto His Majesty George III, King, &c., &c., a certain tract of land (describing it) To Have and to hold to the only proper use and behoof of His said Majesty, his Heirs and Successors for ever.

The deed contained a covenant for quiet enjoyment as follows:—

And we the said Chiefs for ourselves and the whole of our said Nations, and their Heirs, do covenant, promise and agree to and with his said Majesty (for quiet enjoyment by his Majesty, his heirs and Successors).

And then concludes:

And by these presents do make this our act and deed irrevocable under any pretence whatever, and have put his said Majesty in full possession and seizin by allowing houses to be built upon the premises.

The deed appears to have been recorded in the office of the clerk of the crown, in the district of Hesse, on the 22nd day of June, 1790.

On the 7th of December, 1792, a deed was executed which purports to be an indenture made between Five Chiefs of the Mississaga Indian Nation, of the one part, and our Sovereign Lord George the 3rd, King, &c., &c, of the other part, which recites an indenture, bearing date the 22nd of May, 1784, made between the ten persons (naming them and describing them as Sachems, War Chiefs and principal Women of the Mississaga Indian Nation), of the one part, and our said

1887

ST. CATHARINES MILLING AND LUMBER CO. v. THE QUEEN.

Gwynne J.

Sovereign Lord George the third, King, &c., &c., of the other part, whereby the said Sachems, principal Chiefs and Women, in consideration of £1180, 7s. 4d., lawful money of Great Britain, did grant, bargain, sell, alien, release and confirm unto his said Majesty, his Heirs and Successors (certain lands therein particularly described); it then recites that there was found to be a certain error in that description, and that it was necessary and expedient that the boundary lines of the said parcel of land should be accurately laid down and described, the said chiefs, therefore, parties to the said deed of December, 1792, did thereby acknowledge and declare

That the true and real description of the said tract or parcel of land so bargained, sold, aliened and transferred by and to the parties aforesaid is all that tract or parcel of land lying and being, &c. (describing it by a corrected description), and therefore the said five chiefs (naming them) in consideration of the aforesaid sum of £1180 7s. 4d., so paid as therein aforesaid, and of the further sum of five shillings to them in hand paid and for the better ratifying and confirming the thereinbefore recited indenture, did grant, bargain, sell and confirm unto his Majesty, his heirs and successors, all that tract of land (describing it by the corrected description), to have and to hold to His Majesty, his heirs and successors for ever.

The deed then contains the clause following:

And whereas at a conference held by John Collins and William R. Crawford, Esquires, with the principal chiefs of the Mississaga nation (Mr. John Rousseau as interpreter) it was unanimously agreed that the king shall have a right to make roads through the Mississaga country; that the navigation of the said rivers and lakes shall be open and free for his vessels and those of his subjects; that the king's subjects should carry on a free trade, unmolested, in and through the country; now this indenture doth hereby ratify and confirm the said conference and agreement so had between the parties aforesaid, giving and granting to his said Majesty power and right to make roads through the said Mississaga country, together with the navigation of the said rivers and lakes for his vessels and those of his subjects trading thereon free and unmolested. In witness whereof the chiefs, on the part of the Mississaga nation, and His Excellency John Graves Simcoe, Lieutenant Governor of the said province, &c., on the part of His Britannic Majesty, have hereunto set their hands and seals, &c., &c.

1887

ST. CATHARINES MILLING AND LUMBER CO. v. THE QUEEN.

Gwynne J.

The deed is executed by the four chiefs and the Lieutenant Governor.

In the interval between the years 1792 and 1836 many instruments similar in character, some in the form of deeds poll by way of grant and surrender, and others in form of deeds of bargain and sale, were from time to time executed by the Indians in the customary Indian manner, whereby divers large tracts of country situate within the Province of Upper Canada were granted, and surrendered, and sold, and transferred to the reigning sovereign for the time being in pursuance of resolutions passed in solemn councils of the respective nations of Indians occupying and claiming title to the lands so granted and surrendered. One of those deeds, which was executed by the Mississagas of the Bay of Quinté in 1835, when we reflect that the form of those surrenders has been in every case devised by officials acting on behalf of the crown, and not by the Indians themselves is very instructive as to the light in which the Indian title has always been regarded by the crown. It is as follows:

Know all men by these presents that we (here follows the names of five Indians), sachems and chief warriors of the Mississaga tribe of Indians of the Bay of Quinté, in the Province of Upper Canada, *in consideration of the trust and confidence by us reposed in His Most Gracious Majesty King William the Fourth*, and in order that His said Most Gracious Majesty, his Heirs and Successors, may grant and dispose of the lands and tenements hereinafter comprised and described for the benefit of the said Indians, in such manner and form, and at such price or prices, as to His Majesty His Heirs and Successors shall seem best, do remise, release, surrender, quit claim and yield up unto His Majesty King William the Fourth, his Heirs and Successors, all and singular those certain parcels of land (&c. &c., &c., describing them) to the end, intent, and purpose that the said lands and premises shall and may be granted and disposed of by His said Majesty, his Heirs and Successors, in trust, for the benefit of the said Indians and upon and for no other use, trust and intent or purpose whatsoever. In witness whereof we the said Sachems and Chief Warriors of the said Indians have hereunto set our hands and seals at Grape Island, in the Province aforesaid, the

15th December, 1835.

The deed is executed by the five Chiefs in the presence of J. B. Clench, then Superintendent of Indian Affairs, and two others.

In the month of August, 1836, Sir Francis Head, then Lieutenant Governor of Upper Canada, deeming the resolution of the Indians in council assembled to be the material element in effectuating the extinction of the Indian title, dispensed with the subsequent execution of any deed, and obtained the surrender to the crown of several large tracts of country by submitting certain propositions in writing (containing terms of surrender) to the Indians, to be considered by them in council, which, upon being approved and signed by the Chiefs in council assembled, constituted the surrenders. In his reports communicating the surrenders to Lord Glenelg, then Colonial Secretary, the Lieutenant Governor, after enumerating the tracts of land so acquired, says:—

> I have thus obtained for his Majesty's Government from the Indians an immense portion of most valuable land.

Although the opinion entertained by Sir Francis Head that the act of the Indians in Council was all that was necessary to effectuate the surrenders may be admitted to be correct, still in point of fact this would seem to have been the only occasion upon which deeds were dispensed with—unless the surrender by the Saugeen and Owen Sound Indians in 1854 can be considered another. The resolution in council in that case seems to have been prepared with the view of serving both as the resolution in council and a deed of surrender, for it is framed in the form of a deed—and, indeed, all the resolutions of the Indians in their councils, being signed by the Chiefs with their totems according to Indian custom, may be regarded as deeds. The surrender of 1854 above referred is in the following form:—

1887

ST. CATHARINES MILLING AND LUMBER CO. v. THE QUEEN.

Gwynne J.

We the Chiefs, Sachems and Principal men of the Indian tribes resident at Saugeen and Owen Sound confiding in the wisdom and protecting care of our Great Mother across the Big Lake, and believing that our good Father, His Excellency the Earl of Elgin and Kincardine, Governor General of Canada, is anxiously desirous to promote those interests which will most largely conduce to the welfare of his Red children, have now, being in full Council assembled, in presence of the Superintendent General of Indian affairs and of the young men of both tribes, agreed that it will be highly desirable for us to make a full and complete surrender to the Crown of that Peninsula known as the Saugeen and Owen Sound Indian Reserve, subject to certain restrictions and Reservations to be hereinafter set forth.

We have therefore set our marks to this document, after having heard the same read to us, and do hereby surrender the whole of the above named tract of country, bounded &c., with the following reservations, to wit—

then followed those paragraphs describing three several blocks of land out of the tract, one for the occupation of the Saugeen Indians, another for the occupation of the Owen Sound Indians, and the third for the occupation of the Colpoy's Bay Indians.

The instrument then proceeded:

All which reserves we hereby retain to ourselves and our children in perpetuity. And it is agreed that the interest of the principal sum arising out of the sale of our lands shall be regularly paid, so long as there are Indians left to represent our tribe, without diminution, at half yearly periods. And we hereby request the sanction of our Great Father, the Governor General, to this surrender, which we consider highly conducive to our general interests. It is understood that no islands are included in this surrender.

This instrument was executed under the respective hands and seals of the Chief Superintendent of Indian Affairs and of the several chiefs, sachems, and principal men of the tribe.

In the interval between 1836 and the passing of the British North America Act several surrenders of large tracts of land were made by the Indians to the crown by deeds executed by the chiefs and principal men of the tribes of Indians occupying and claiming title to such lands. In some of the instruments so executed

1887

ST. CATHARINES MILLING AND LUMBER CO. v. THE QUEEN.

Gwynne J.

the Indians specially reserved to their own use and occupation, from the operation of the deeds of surrender, certain specified tracts within the limits of the tracts as described in the instruments. In some cases the surrenders were made, as in that of 1854 above set out, upon the express condition and trust that the monies to be realized from sale of the lands surrendered should be applied by the crown for the benefit of the Indians.

Now, in 1837, an act, 7 Wm. 4 ch. 118, was passed by the Legislature of the Province of Upper Canada, entituled "An Act to provide for the disposal of the "*Public lands* in this Province and other purposes "therein mentioned."

The act was passed for regulating the issue of Letters Patent granting lands known as and designated "crown lands," "clergy reserves" and "school lands," all of which lands were placed under the control of an officer styled the commissioner of crown lands, and the proceeds arising from the sale thereof were to be accounted for by him to the Receiver General, as forming part of the public revenue of the Province. The act did not affect any lands for the cession of which to His Majesty no agreement had been made with the Indian Tribes occupying and claiming title to the same, nor any lands which, although surrendered by the Indians to the crown, were so surrendered for the purpose of being sold and the proceeds applied for the maintenance of and benefit of the Indians themselves. These lands were all designated Indian lands, and the sale of those surrendered to be sold for the benefit of the Indians themselves, and the management and investment of the proceeds arising from their sale, were placed by the crown under the management of a special officer called the Chief Superintendent of Indian Affairs, who was under the direct super-

1887

ST. CATHARINES MILLING AND LUMBER CO. v. THE QUEEN.

Gwynne J.

vision of the Lieutenant Governor for the time being as representing Her Majesty, and who was accountable to the Imperial Treasury Department. The term "public lands," as used in the act in relation to lands known as "crown lands," "clergy reserves" and "school lands," as distinguished from those known as "Indian lands," has been maintained in several acts of the legislature of the Province of Upper Canada, viz,, 4 and 5 Vic. ch. 100, 16 Vic ch. 159, Consolidated Statutes of Canada ch. 22, 23 Vic. ch. 2, and 23 Vic. ch. 151. By this last act it was enacted, that from and after the 1st day of July, 1861, the Commissioner of Crown lands for the time being should be Chief Superintendent of Indian Affairs, and that all lands reserved for the Indians, or for any tribe or band of Indians, or held in trust for their benefit, should be deemed to be reserved and held for the same purposes as before the passing of the act, but subject to its provisions, and that no release or surrender of lands reserved for the use of the Indians, or of any tribe or band of Indians, should be valid except upon condition that such release or surrender should be assented to by the chief or, if more than one chief, by a majority of the chiefs of the tribe or band of Indians assembled at a meeting or council of the tribe or band summoned for that purpose according to their rules and entitled to vote thereat, and held in the presence of an officer duly authorised to attend such council by the Commissioner of Crown Lands, and that nothing in the act contained should render valid any release or surrender other than to the crown; and it was further enacted that—

The Governor in Council may, from time to time, declare the provisions of the act respecting the sale and management of "the "public lands," passed in the present session, or of the twenty-third chapter of the Consolidated Statutes of Canada, intituled "*An "Act respecting the sale and management of the timber on public*

"*lands*," or any of such provisions, to apply to Indian lands or to the timber on Indian lands, and the same shall thereupon apply and have effect as if they were expressly recited or embodied in this act.

The inviolable manner in which the Indian title as declared by the Proclamation of 1763 has been recognised amply justifies the language of the commissioners appointed by the crown to report upon Indian affairs in the Province of Upper Canada in 1842 and 1856. The former commissioners in their report say :—

The Proclamation of His Majesty George the third issued in 1763 furnished the Indians with a fresh guarantee for the possession of their hunting grounds and the protection of the crown. This document the Indians look upon as their charter. They have preserved a copy of it to the present time, and have referred to it on several occasions in their representations to the Government.

And again : --

Since 1763 the Government, adhering to the Royal Proclamation of that year, have not considered themselves entitled to dispossess the Indians of their lands without entering into an agreement with them and rendering them some compensation.

The commissioners of 1856 in their report say ;—

By the Proclamation of 1763 territorial rights, akin to those asserted by Sovereign Princes, are recognised as belonging to the Indians, that is to say, that none of their land can be alienated save by treaty made publicly between the crown and them. Later, however, as this was found insufficient to check the whites from entering into bargains with the Indians for portions of their lands or for the timber growing thereon, it has been found necessary to pass stringent enactments for the protection of the Indian Reserves.

After the most explicit recognition by the crown of the Indian title for upwards of a century in the most solemn manner—by treaties entered into between the crown and the Indian nations in council assembled according to their national custom, and by deeds of cession to the crown and of purchase by the crown, prepared by officers of the crown for execution by the Indians—it cannot, in my opinion, admit of a doubt that at the time of the passing of the British North America Act the Indians in Upper Canada were acknowledged by the crown to have, and that they

1887

ST. CATHARINES MILLING AND LUMBER CO. v. THE QUEEN.

Gwynne J.

had, an estate, title and interest in all lands in that part of the Province of Canada formerly constituting Upper Canada for the cession of which to the crown no agreement had been made with the nations or tribes occupying the same as their hunting grounds, or claiming title thereto, which estate, title and interest could be divested or extinguished in no other manner than by cession made in the most solemn manner to the crown. These cessions were made sometimes upon purchases made by the crown for the use of the public, in which case the lands so acquired became "*Public lands*," because the revenue to be derived from their sale was appropriated for the benefit of the public and was paid into the Provincial Treasury. Sometimes the cessions were made to the crown upon trust for sale and investment of the proceeds for the benefit of the Indians themselves, and sometimes upon trust to grant to some person upon whom the Indians desired to confer a benefit for special services rendered to them; but all such lands, until the cession thereof should be made by the Indians to the crown, constituted what were known as and designated "Indian Reserves," "Lands reserved for the Indians," or "Indian lands." It is the lands *not ceded to* or *purchased by* the crown which are spoken of in the proclamation of 1763 as *the lands reserved to* the Indians for their hunting ground—and the unceded lands have ever since been known by the designation "Lands reserved for the Indians" or "Indian Reserves."

When the Indians in the deeds or treaties by way of cession of land to the crown reserved from out of the general description of the lands given in the instruments of cession, as they often did, certain particularly described portions of the lands so generally described, for the special uses, occupation or residence of particu-

lar bands, the parts so reserved did not come under the operation of the deed or treaty of cession, but were reserved and excepted out of it and so continued to be just as they were before, lands not ceded to, or purchased by, the crown, and therefore remained still within the designation of "Lands reserved for the Indians," or "Indian Reserves."

It was not the exception of the particular parcels from the operation of the instrument of cession which made such parts come within designation of "Lands reserved for Indians" or "Indian Reserves," but because, being so excepted, they remained in the position they were before, namely, lands not yet ceded to or purchased by the crown.

Now the lands upon which the timber which is the subject of this suit was cut, although admitted to have been within the limits of the old Province of Upper Canada, were, at the time of the passing of the B. N. A. Act, lands for the cession of which to Her Majesty no agreement had been made with the Indian Nations or Tribes occupying the same as their hunting ground and claiming title thereto; the lands had not been ceded to or purchased by the crown; they were not therefore "*Public lands*" within the meaning of the statutes above referred to, viz;—4 and 5 Vic. ch. 100, 16 Vic. ch. 159, C. S. C. ch. 22, or 23 Vic. ch. 2. It was not competent for the Provincial Government to have sold the lands or any part thereof, for the lands, not having been yet ceded to or purchased by the crown, did not come under the designation of "*Crown Lands*" within the meaning of the above acts. No revenue could have been derived from the land which could have passed to the Province of Canada under the statute of 1846—9 Vic. ch. 114—by which the crown surrendered to the Provincial Legislature in exchange for a civil list all the casual and territorial

1887

ST. CATHARINES MILLING AND LUMBER CO. v. THE QUEEN.

Gwynne J.

revenue of the crown. The Indians, whenever they should cede those lands to the crown might cede them only upon trust for sale and investment of the proceeds for the benefit of the Indians themselves, so that the public might never acquire any interest whatever in the monies arising from the sale of the lands.

From these considerations it follows, in my opinion, as an incontrovertible proposition, that in lands situate as those lands were at the time of the passing of the B. N. A. Act, namely, lands which had not been ceded by the Indians to the crown, the province or government of Ontario did not acquire by that act any vested interest. The lands did not come within item No. 5 of section 92, nor within section 109 of the act, but did, in my opinion, come within item 24 of section 91, which placed "Indians" and "lands reserved for "the Indians" under the legislative control of the Dominion Parliament. The B. N. A. Act did not contemplate making, and has not made, any alteration in the relations existing of old between the Indians and his Majesty, either in respect of the estate, title, and interest of the former in their lands not yet ceded to the crown, or indeed in respect of any other matter, further than to place all matters affecting the Indians under the control and administration of her Majesty's government of the Dominion of Canada and the parliament of the Dominion. The provincial government or legislature having been given no control whatever over Indian affairs, the power of entering into a treaty or agreement with the Indians for obtaining from them a cession of the lands in question became vested in her Majesty, freed from the operation of the Canada statute, 23 Vic. ch. 151, which became null and of no further validity. The B. N. A. Act having removed the Indians and their affairs wholly from under the management of a provincial Commissioner of Crown

1887

ST. CATHARINES MILLING AND LUMBER CO. v. THE QUEEN.

GWYNNE J.

Lands, such an officer could no longer be Chief Superintendent of Affairs. The authorities of the Province of Ontario are invested by the B.N.A. Act with no jurisdiction whatever over the Indians, their lands or their affairs. All these matters are by the act placed under the exclusive jurisdiction of the Dominion authorities. The power, therefore, of entering into a treaty between her Majesty and the Indians for the cession to her Majesty of their acknowledged title to any territory within the limits of the province not yet ceded to the crown can, since the passing of the B. N. A. Act, be exercised only either under the authority of an act of the Dominion Parliament or, in the absence of such an act, by her Majesty acting through the instrumentality of the Governor General of the Dominion as her representative and the Dominion Government, in whom and in the Indians claiming title to the land to be ceded must be vested the right of arranging the terms of the treaty of cession. It was in this manner that her Majesty did enter into the treaty with the Indians for the cession of the lands upon which the timber grew the right to which is in question now.

In the year 1873 a commission was issued by the Dominion Government to the Honorable Alexander Morris, then Lieutenant-Governor of Manitoba, Lieut.-Colonel Provencher, then Commissioner of Indian Affairs, and S. J. Dawson, Esq, then a member of the Dominion House of Commons, appointing them commissioners upon behalf of her Majesty to treat with the Indians for the surrender to the crown of the lands now under consideration, and at a council of the Indians held in the month of October, 1873, after three days' spent in negotiating the terms of the cession, a treaty was concluded in the following terms:

Articles of treaty made and concluded this third day of October, 1873, between Her Most Gracious Majesty the Queen of Great

1887

ST. CATHARINES MILLING AND LUMBER CO. v. THE QUEEN.

Gwynne J.

Britain and Ireland by her commissioners, the Honorable Alexander Morris, Lieutenant-Governor of the Province of Manitoba and the North-West Territories, Joseph Albert Herbert Provencher and Simon James Dawson, of the one part, and the Saulteaux tribe of Ojibbeway Indians, inhabitants of the country hereinafter defined and described by their chiefs chosen and named as hereinafter mentioned, of the other part.

The treaty then recites the assembling in council of the Indians inhabiting the territory, and the appointment by them in council of twenty-four chiefs and head men (naming them) to conduct on their behalf negotiations for a treaty with her Majesty's commissioners, and to sign any treaty to be founded upon such negotiations, and that the said commissioners and the said Indians had finally agreed upon and concluded a treaty as follows :—

The Saulteaux tribe of the Ojibbeway Indians and all other the Indians inhabiting the district hereinafter described and defined do hereby cede, release, surrender, and yield up to the government of the Dominion of Canada, for Her Majesty the Queen and her successors forever, all their rights, title and privileges whatsoever to the lands included within the following limits, that is to say:

(Here follows a description of the lands).

To have and to hold the same to Her Majesty the Queen and her successors for ever. And Her Majesty the Queen hereby agrees and undertakes to lay aside reserves for farming lands, due respect being had to lands at present cultivated by the said Indians, and also to lay aside and reserve for the benefit of the said Indians, to be administered and dealt with for them by Her Majesty's Government of the Dominion of Canada, in such manner as shall seem best, other reserves of land in the said territory hereby ceded, which said reserves shall be selected and set aside where it shall be deemed most convenient and advantageous for each band of Indians by the officers of the said government appointed for that purpose, and such selection shall be so made after conference with the Indians. Provided, however, that such reserve, whether for farming or other purposes, shall in nowise exceed one square mile for each family of five, or in that proportion for larger or smaller families, and such selection shall be made if possible during the course of next summer, or as soon thereafter as may be found practicable, it being understood, however, that if, at

the time of any such selection of any reserves as aforesaid, there are any settlers within the bounds of the lands reserved by any Band, Her Majesty reserves the right to deal with such settlers as she shall deem just, so as not to diminish the extent of land allotted to the Indians, and provided also, that the aforesaid reserves of lands, or any interest or right therein or appurtenant thereto, may be sold leased or otherwise disposed of by the said Government for the use and benefit of the said Indians with the consent of the Indians entitled thereto first had and obtained.

And with a view to shew the satisfaction of Her Majesty with the behaviour and good conduct of her Indians she hereby, through her Commissioners, makes them a present of twelve dollars for each man, woman and child belonging to the bands here represented, in extinguishment of all claims heretofore preferred.

And further Her Majesty agrees to maintain Schools for instruction in such reserves hereby made as to her government of her Dominion of Canada may seem advisable, whenever the Indians of the reserve shall desire it.

Her Majesty further agrees with her said Indians, that within the boundary of Indian Reserves, until otherwise determined by the Government of the Dominion of Canada, no intoxicating liquor shall be allowed to be introduced or sold, and all laws now in force, or hereafter to be enacted, to preserve her Indian subjects inhabiting the reserves, or living elsewhere within her North-West territories, from the evil use of intoxicating liquors, shall be strictly enforced.

Her Majesty further agrees with her said Indians that they the said Indians shall have the right to pursue their avocations of hunting and fishing throughout the tract surrendered as hereinbefore described, subject to such regulations as may from time to time be made by her Government of the Dominion of Canada, and saving and excepting such tracts as may from time to time be required or taken up for settlement, mining, lumbering or other purposes by her said Government of the Dominion of Canada, or by any of the subjects thereof duly authorised therefor by the said Government.

It is further agreed between Her Majesty and her said Indians that such sections of the reserves above indicated as may at any time be required for public works or building of what nature soever, may be appropriated for that purpose by Her Majesty's Government of the Dominion of Canada, due compensation being made for the value of any improvements thereon.

And further, that Her Majesty's Commissioners shall, as soon as possible after the execution of this treaty, cause to be taken an accurate census of all the Indians inhabiting the tracts above

1887

ST. CATHARINES MILLING AND LUMBER CO. v. THE QUEEN.

Gwynne J.

described, distributing them in families, and shall in every year ensuing the date hereof, at some period in each year to be duly notified to theIndians, and at a place or places to be appointed for that purpose within the territory ceded, pay to each Indian person the sum of Five Dollars per head yearly.

It is further agreed between Her Majesty and the said Indians that the sum of fifteen hundred dollars per annum shall be yearly and every year expended by Her Majesty in the purchase of amunition and twine for nets for the use of the said Indians.

It is further agreed between Her Majesty and the said Indians that the following articles shall be supplied to any Band of the said Indians who are now actually cultivating the soil, or who shall hereafter commence to cultivate the land, that is to say (here follows the enumeration of several agricultural implements).

All the aforesaid articles to be given once for all for the encouragement of the practice of agriculture among the Indians.

It is further agreed between Her Majesty and the said Indians that each Chief duly recognized as such shall receive an annual salary of twenty-five dollars per annum, and each subordinate officer not exceeding three for each Band shall receive fifteen dollars per annum; and each such Chief and subordinate officer as aforesaid shall also receive once in every three years a suitable suit of clothing; and each Chief shall receive, in recognition of the closing of this treaty, a suitable flag and medal.

And the undersigned chiefs, on their own behalf and on behalf of all other Indians inhabiting the tract within ceded, do hereby solemnly promise and engage to strictly observe this treaty, and also to conduct and behave themselves as good and loyal subjects of Her Majesty the Queen. They promise and engage that they will in all respects obey and abide by the law; that they will maintain peace and good order between each other, and also between themselves and other tribes of Indians, and between themselves and other subjects of Her Majesty, whether Indians or Whites, now inhabiting or hereafter to inhabit any part of the said ceded tract; and that they will not molest the person or property of any inhabitant of such ceded tract, or the property of Her Majesty the Queen, or interfere with or trouble any person passing or travelling through the said tract or any part thereof; and that they will aid and assist the officers of Her Majesty in bringing to justice and punishment any Indian offending against the stipulations of this treaty, or infringing the laws in force in the country so ceded.

In witness whereof Her Majesty's said Commissioners and the said Indian Chiefs have hereunto subscribed and set their hands at the

North-west angle of the Lake of the Woods the day and year first herein above mentioned.

1887

ST. CATHARINES MILLING AND LUMBER CO. v. THE QUEEN.

Gwynne J.

The treaty is thus co-executed by the three Commissioners and the twenty-four Indian chiefs, in the presence of seventeen persons who subscribe their names as witnesses to the signatures of the several parties, and to the fact of the treaty having been first read over and explained by the Honorable James McKay. Now it is to be observed, that the faith of Her Majesty is solemnly pledged to the faithful observance of this treaty, and the government of the Dominion of Canada is made the instrument by which the obligations contained in it, which are incurred by and on behalf of Her Majesty, are to be fulfilled. The land ceded supplies the primary and indeed the only source from which the funds required to maintain the schools contemplated by the treaty, and to meet all the other pecuniary payments and obligations incurred, can be raised. The benefits received and to be received by the Indians under the treaty are in effect so many fruits issuing from their own acknowledged estate and interest in the lands ceded. The administration and management of the estate constituting the source from which the funds required to meet the obligations incurred by the treaty must remain under the control of the Dominion of Canada, which alone, by the B. N. A. Act, has jurisdiction in relation to the Indians and their affairs, at least until a sum shall be realized which, in the judgment of Her Majesty's government of the Dominion having the obligations of the treaty imposed upon them, shall be deemed sufficient to supply for all time to come the necessary funds. That portion of the ceded territory which shall be composed of the contemplated reserves, equal in extent to one square mile for every family of five, if sold, being to be sold for the benefit of the Indians themselves, must be sold by the

1887

ST. CATHARINES MILLING AND LUMBER CO. v. THE QUEEN.

Gwynne J.

Dominion Government, upon whom is imposed the duty of investing and administering the proceeds for the benefit of the Indians interested in each particular parcel; but if the contention of the Province of Ontario is to prevail the whole ceded tract, which constitutes the source from which alone the obligations incurred by the Dominion Government by the treaty can be fulfilled, becomes upon the passing of the B. N. A. Act and by force of that act absolutely and exclusively the property of the Province of Ontario, and therefore the Dominion of Canada have not and cannot have any control over these lands either for the purposes of the treaty or any other purpose. The Dominion, therefore, can have no control over, nor can the Indians have any interest in, the reserves contemplated in the treaty of one square mile for every family of five. If any part of the ceded tract became by the B. N. A. Act the property of the Province of Ontario, as is contended, these reserves did equally with all other parts, for all of it was then in the same condition, and the contention of the Province in substance and effect is, that by force of the B. N. A. Act the whole territory, upon the passing of that act, became the property of the Province of Ontario, and that therefore no part of it, not even the contemplated reserves, can be affected by the terms of the treaty, which cannot affect the rights acquired by the Province under the B. N. A. Act. To obtain a judicial decision to the above effect, by what appears to me a strange procedure, Her Majesty's name is used by the Province for the purpose of having the treaty which has been solemnly entered into by Her Majesty with the Indians, and for the faithful observance of which Her Majesty is solemnly pledged to the Indians, declared to be void and of none effect.

The learned Chancellor of Ontario, in his judgment

1887

ST. CATHARINES MILLING AND LUMBER CO. v. THE QUEEN.

Gwynne J.

pronounced in this case, draws from certain language of mine in *Church* v. *Fenton* (1) the conclusion that the lands now under consideration cannot come within item 24 of sec. 91 of the British North America Act as "*lands reserved for the Indians*," but that language, read in the sense which was intended by me, leads to the contrary conclusion. The contention of the plaintiff in that case was, that the land in question there, which was part of the tract ceded by the Saugeen and Owen Sound Indians by the above recited treaty of 1854, did come within that item, and that therefore it was not liable to be sold for mere payment of taxes. The point adjudged was, that from the time that a contract of sale of the lot in question to a purchaser was entered into by the chief superintendent of Indian affairs, after the cession by the Indians of the land for sale for their benefit, the interest of the purchaser became liable to taxation precisely as the interest of a purchaser of crown lands would be, and that the patent for the lands in question having been issued to the purchaser before the sale for taxes under which the defendant claimed took place, the title of the defendant under that sale must prevail. In the course of my judgment I expressed the opinion that lands surrendered by the Indians, as the tract under consideration there was, for the purpose of being sold, although when sold the proceeds arising from the sale were to be applied for the benefit of the Indians, did not come within the designation of "lands reserved for the Indians" within item 24 of sec. 91 of the British North America Act, that expression being, as I thought, more appropriate in relation to "*unsurrendered lands*" than to lands in which the Indian title had been extinguished.

Lands for the cession of which to Her Majesty

(1) 28 U. C. C. P. 399.

1887

ST. CATHARINES MILLING AND LUMBER CO. v. THE QUEEN.

Gwynne J.

no agreement had been made with the tribes occupying and claiming title to the same, and which were situate within the limits of the old Province of Upper Canada, have always been, in my opinion, considered to come within the designation of "lands reserved for the Indians," or "Indian reserves," or "Indian lands." These lands have always been regarded as Indian hunting grounds. My object was to draw a distinction between lands not ceded by the Indians to the crown and those which had been ceded by them; lands coming within the latter class not being, in my opinion, within the item 24 of section 91, while those of the former class, to which the lands now under consideration did belong at the time of the passing of the British North America Act, do come within that item.

The proclamation of 1763, which may be called the Indians' Bill of Rights, treats these unceded lands as being "lands reserved for the Indians as their hunting "grounds," and as such they have always been regarded in that part of Her Majesty's dominions which formerly constituted the Province of Upper Canada, within the limits of which old province it is admitted that at the time of the passing of the British North America Act the tract under consideration was situate.

Upon the whole, therefore, I am of opinion that the tract in question did not become "public lands belong-"ing to the Province of Ontario" by force of the British North America Act; that the right to sell the said tract, or any part thereof, and to issue letters patent therefor, or the right to sell the timber growing thereon, did not pass to the Province of Ontario by force of the act; that the Indian title in the tract remained the same after the passing of the act as it had been before; that the Indians had an estate, title, and interest in the tract as

1887

ST. CATHARINES MILLING AND LUMBER CO. v. THE QUEEN.

Gwynne J.

their hunting ground, declared and acknowledged in the most solemn manner by all the sovereigns of Great Britain since the proclamation of 1763, which precluded the Provincial Government from interfering therewith in any manner, and which title, estate, and interest could only be divested and extinguished by a cession made in solemn manner by the Indians to Her Majesty; that the British North America Act did not invest the provincial authorities of Ontario with power or right to enter into any treaty with the Indians for the cession of such their estate, title and interest to Her Majesty; that such power and right remained in Her Majesty to be exercised by her through the instrumentality of her Government of the Dominion of Canada and her representative the Governor General; that the treaty of October, 1873, entered into with Indians for the cession of the tract in question is obligatory upon the Dominion Government, who are bound to fulfil the obligations therein contained upon the part of Her Majesty to be fulfilled, and for such purpose are entitled to deal with the lands and the timber growing thereon, unless and until some contract be entered into between the Government of the Province of Ontario and the Dominion Government for the acquisition by the Province of a beneficial interest in any revenue to be derived from the sale of the said lands or of the timber growing thereon.

The Province of Ontario not having acquired such beneficial interest by the British North America Act nor by the terms of the treaty, such beneficial interest can, in my opinion, be acquired only by contract with the Government of the Dominion.

The latter part of sec. 109 of the British North America Act, viz: "Subject to any trusts existing in respect thereof "and to any interest other than that of the Province there- "in," applies, in my opinion, only to lands beneficially

1887

ST. CATHARINES MILLING AND LUMBER CO. v. THE QUEEN.

Gwynne J.

belonging to the Province at the time of the Union, that is to say "public lands," the revenues arising from the sale of which (the lands having been already ceded by the Indians to the crown) formed part of the public revenue of the Province, and has no application to lands which at the time of the passing of the British North America Act had not been ceded by the Indians to the crown. But, assuming that part of section 109 to have any application in the present case, then, as it appears to me, the "trusts" and "interest" in the sentence referred to must be held to be the "purposes" mentioned in the treaty, in consideration of which the cession was made, and the interest which the Indians have in the due fulfilment of the terms of the treaty, of which the Dominion Government are the trustees, and are, therefore, entitled to hold the property ceded in the terms of the treaty of cession as their security and means of executing the trusts imposed on them, unless and until some agreement shall be entered into between the Provincial government and them. In fine, I am of opinion, that at the time of the commencement of this suit the Provincial Government had not, and that they have not now, any vested interest in the timber which is the subject of this suit, and that, therefore, their suit or claim must be dismissed with costs, and that this appeal be allowed with costs.

Appeal dismissed with costs.

Solicitors for appellant: *McCarthy, Osler, Hoskin & Creelman.*

Solicitor for respondent: *The Attorney General for Ontario.*

COLIN H. ROSE, DUNCAN McKENZIE, THOMAS BURKE AND JOHN BURKE (DEFENDANTS)..... } APPELLANTS;

AND

CATHERINE PETERKIN (PLAINTIFF)...RESPONDENT.

1884
*May 19.
1885
*Jan. 12.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Equitable interest in land—Registered instrument executed by same party—Effect of notice to holder—R S. O. ch. 111 *sec.* 81.

R. S. O. ch. 111 sec. 81 declares that "no equitable lien, charge or interest affecting land shall be deemed valid in any court in this Province after this act shall come into operation as against a registered instrument executed by the same party, his heirs or assigns."

Held, that this section does not apply to a case in which the party registering such instrument has notice of the equitable lien, charge or interest, even though the same has been created by parol.

Gwynne J. dissented from the judgment of the court, taking a different view on the facts presented by the evidence.

APPEAL from a decision of the Court of Appeal for Ontario (1) affirming the Chancellor's decree for redemption by the plaintiff of land purchased by defendants from her vendee.

The facts and pleadings are fully stated in the judgments hereinafter given (2).

Moss Q.C. and *Scane* for appellants.

Atkinson for respondent.

The points relied on and cases cited are fully reviewed in the judgments of the court below and in the judgments hereinafter given.

Sir W. J RITCHIE C.J.—In this case a bill was filed by the plaintiff, Catherine Peterkin, for the redemption of a lot of land in the township of Dover conveyed by

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

(1) See 9 Ont. App. R. 429 and 4 Ont. App. R. 25 where the case is reported under the title of *McFarlane* v. *Peterkin*.

1885

ROSE v. PETERKIN.

Ritchie C.J.

her and her husband to one James McFarlane in 1866. The allegations in the bill are as follows:—

"1. That on and prior to the 31st day of August, A.D. "1866, the plaintiff was the owner of and seized in fee "simple of the N. W. half of Lot No. 14, in the 13th "Con. of the Township of Dover E., in the said County.

"2. Shortly before the date above mentioned, the "plaintiff being in want of money, by her agent, one "James Peterkin, applied to the defendant James Mc- "Farlane, (who has died *pendente lite*), to advance to her "the sum of $500, on the security of the said land, and "it was agreed by and between the plaintiff and the "said deceased defendant, James McFarlane, that the "said deceased defendant James McFarlane should "advance to the plaintiff the said sum of $500, and that "your complainant and her husband, in manner then "required by law as to married women, should convey "the said land as security for the repayment of the same.

"3. Accordingly on the said 31st day of August, 1866, "in pursuance of such agreement, the said deceased "defendant James McFarlane paid to the plaintiff the "said sum of $500, and the plaintiff and her said husband "thereupon by indenture dated and executed on the said "last mentioned date, and made between the plaintiff and "her husband of the one part, and the deceased defendant "James McFarlane of the other part, conveyed the said "land to the said deceased defendant James McFarlane, "absolutely in fee simple.

"4. The said indenture though absolute in form was "intended by the plaintiff, and it was expressly under- "stood between her, the plaintiff, and the said defendant "James McFarlane, since deceased, that it should stand "only as a security for the re-payment of the said money "from the date of payment of same to her, and that upon "such re-payment the said deceased defendant James Mc- "Farlane should re-convey the said land to the plaintiff

"free from all incumbrances.

"6. No money, except about ten dollars has been re-
"paid to the said deceased defendant, James McFarlane,
"on account of the said sum so advanced, and the whole
"thereof is due with interest except the said ten dollars.

"7. That some time prior to the 13th day of June,
"A.D. 1871, the plaintiff had arranged a sale of one-half
"the said land in order to redeem the same and obtain a
"reconveyance from the said deceased defendant James
"McFarlane, and proposed to the said deceased defendant
"James McFarlane to do so, or to borrow money if he
"required it on the land and redeem it from him, but he
"then informed the plaintiff that he would not allow her
"to either sell the half of it or mortgage it, but that when
"she got the money for him otherwise than by selling or
"borrowing on the said land he would reconvey it to her.

"8. That subsequently the plaintiff made an applica-
"tion to and offered to pay the said deceased defendant
"James McFarlane the said $500 and interest thereon and
"any costs he might be entitled to; but he refused to
"take the same, and he, the defendant, James McFarlane,
"since deceased, then professed and pretended that the
"said indenture being absolute in form he was not bound
"to receive the said money or to treat said indenture as
"a security, and claimed that having an absolute title
"thereunder, he was not bound to reconvey to the plain-
"tiff on payment of said money and interest, that other
"parties took advantage of him when they could, and
"that he was bound to do the same with the plaintiff.

"9. That for some time prior to about and since the
"said last mentioned date the timber growing and being
"on said land became of great value, and the said defen-
"dant, James McFarlane, deceased, about the time of the
"last mentioned date in pursuance of his threat to the
"plaintiff to treat the said conveyance as absolute and
"thereby to cheat and defraud her, did absolutely sell

1885

ROSE v. PETERKIN.

Ritchie C.J.

"and convey the said land by indenture of bargain and "sale to the defendants, Colin H. Rose and Duncan "McKenzie, who were co-partners at the time in obtain- "ing, manufacturing and selling timber, sawlogs, cord- "wood, and staves, said indenture bearing date the said "13th June, A.D. 1871, for the consideration of to wit '$1,200.

"10. That prior to the sale and conveyance of the said "land by the said deceased defendant, James McFarlane, "to the said defendants, Colin H. Rose and Duncan Mc- "Kenzie, the said last named defendants, had full know- "ledge and actual notice of the plaintiff's claim to said "land and of her right to redeem the same on re-payment "of the said money to the said deceased defendant, James "McFarlane, and took the same from the deceased defen- "dant, James McFarlane, with full notice and knowledge "of the plaintiff's claim and right thereto.

"11. That by indenture of bargain and sale bearing "date 21st June, 1872, the said defendants, Colin H. Rose "and Duncan McKenzie, having previously cut and "removed trees, timber and wood from the said land, of "very great value, to wit over $2,000, conveyed the said "land to the defendant, Thomas Burke, who, prior to the "purchase, sale and conveyance of the said land by the "said deceased defendant, James McFarlane, to the defen- "dants Colin H. Rose and Duncan McKenzie, and by "them to him, had full knowledge of the plaintiff's claim "and right of redemption, and became a purchaser "thereof with notice of the premises.

"11*a*. The said defendants, Colin H. Rose, Duncan "McKenzie and Thomas Burke, on their part, however, "now contend that they are purchasers for value of the "said land, without notice or knowledge of the plain- "tiff's rights.

"12. That by an indenture by way of Mortgage bear- "ing date the 29th day of June, A.D. 1872, the said

"defendant Thomas Burke, conveyed the said land to the "defendants Colin H. Rose and Duncan McKenzie, to "secure the payment of the sum of $1,050 and interest, "which appears by the records of the Registry Office of "the county of Kent to have been assigned by them to "one Zenos W. Watson, by deed of assignment bearing "date the 12th July, A.D. 1872."

The defendants Colin H. Rose and Thomas Burke by their answers admit, for the purposes of this suit, the truth of the allegations contained in the 1st, 2nd, 3rd, 4th, 6th, 7th, 8th, 9th and 12th paragraphs of the plaintiff's bill herein.

But Rose says he was not aware that the land after conveyance to J. McFarlane and prior to purchase by him and Duncan McKenzie was ever claimed to be plaintiffs, and was first informed of such claim 30th December, '73, when served with bill. That the purchase by him and McKenzie from McFarlane was in good faith and upon good and valuable consideration, viz., $1,200 and without notice of plaintiff's claim; that his and McKenzie's conveyance to Burke was with no knowledge of plaintiffs claim, nor does he believe Burke had any knowledge thereof.

Burke says he was not aware that Rose and McKenzie had any notice of plaintiffs claim prior to the purchase or during time they owned land, and is informed and believes they had no notice prior to sale to him; that purchase by Rose and McKenzie from McFarlane was *bonâ fide* and upon good and valuable consideration; that he is not aware that plaintiff ever claimed to have any claim after sale to McFarlane and prior to sale by C. H. Rose and McKenzie to himself; is informed, and believes plaintiff never claimed any right thereto during time same was owned by Rose and McKenzie; that he purchased but not with notice of any claim or right of redemption, but *bonâ fide* and for good and

1885

ROSE v. PETERKIN.

valuable consideration, viz, $1,550 and without any notice of any claim of plaintiff thereto.

Duncan McKenzie answers—admitting and answering in the same way as Rose—so that plaintiffs case is admitted with the exception of the allegations that Rose and McKenzie had prior to sale by McFarlane to them full knowledge and actual notice of plaintiffs claim, and that Burke prior to sale by McFarlane to Rose and McKenzie, and by them to him had full knowledge of plaintiffs claim and right of redemption, and became a purchaser thereof with such notice.

The case was heard on this state of the pleadings and the court declared the conveyance from plaintiff to McFarlane was intended to be and was only a security for the re-payment to McFarlane of $500 advanced by him to plaintiff on 31st August, 1866, with interest at 6 per cent.

"2. And the court doth 'further declare that the de-
"fendants Colin H. Rose and Duncan McKenzie, pur-
"chased the said lands from the said James McFarlane,
"deceased, with full knowledge and actual notice of the
"plaintiff's claim to said lands, and her right to redeem
"the same, and doth order and decree the same accord-
"ingly.'

"3. And the court doth further declare that the de-
"dfenant Thomas Burke purchased the said lands from
"the said defendants Colin H. Rose and Duncan Mc-
"Kenzie, with full knowledge and actual notice of the
"plaintiff's claim to said lands, and of her right to re-
"deem the same, and doth order and decree the same
"accordingly.

"4. And the court doth further order and decree that
"an injunction do issue out of and under the seal of this
"court, perpetually restraining the said defendant
"Thomas Burke, his servants, workmen and agents, from
"committing any wastes, spoil or destruction on the

"said lands.

"5. And the court doth further order and decree that "it be referred to the master of this court at Chatham, "to take an account of the amount still due by the plain- "tiff in respect of the advance of five hundred dollars "to her by the said James McFarlane, deceased, in the "first paragrap hhereof mentioned, and also an account "of the value of the timber, trees, and wood cut down "and removed from the said lands by the detendants, or "any of them, or by the said James McFarlane in his "lifetime, and an account of all other waste committed "by them or any of them.

"6. And in the event of the said master finding that "the amount found due by the defendants or any of them "exceeds the amount found due by the plaintiff, or in the "event of the said master finding that the amount found "due by the defendants, or any of them is less than the "amount found due by the plaintiffs, then upon pay- "ment by the plaintiff to the defendant Thomas Burke "of the balance found due by her within six months after "the said master shall have made his report, and at such "time and place as the said master shall appoint, this "court doth further order and decree that the defend- "ants do assign and convey the said lands to the plain- "tiff free and clear of all incumbrances done by them or "any of them; such conveyance to be settled by the said "master in case the parties differ, and to deliver up to "the plaintiff, upon oath, all deeds and writings in their "or any of their custody or power, relating to the said "lands.

"7. And this court doth further order and decree that "the defendants do pay to the plaintiff what, if any- "thing, shall be found due by them, or any of them, in "excess of the amount found due by the plaintiff, and "her costs of this suit up to and inclusive of this decree, "forthwith after taxation thereof by the said master.

1885

ROSE v. PETERKIN.

Ritchie C.J.

"8. And the said master is to enquire and state what "sum, if any, was due by the plaintiff to the said James "McFarlane, at the time of the tender to him by the "plaintiff, to pay the amount then due, in the eighth "paragraph of the plaintiff's amended bill mentioned, "and whether the sum so tendered was equal to, greater "or less, than the amount then due, and in the event of "the said master finding that the sum so tendered was "equal to or greater than the amount then due, he is to "tax to the plaintiff her costs of this suit subsequent to "this decree, which are to be deducted from the amount, "if anything, found due by her as aforesaid, but in the "event of the said master finding that the amount so "tendered was less than the amount then, due he is to "tax to the defendant John P. Alma, his costs sub-"sequent to this decree, which are to be added to the "amount, if any, found due by the plaintiff as aforesaid.

"9. And this court doth further order that the de-"fendant Thomas Burke do forthwith pay to the plaintiff "ten dollars, her costs of the motion to vary the minutes "of this decree, and to the defendant John P. Alma, five "dollars, his costs of said motion."

Burke appealed and the court of Appeal allowed the appeal and allowed the appellant to file a supplemental answer setting up the defence of the registry laws and such other defence as he may be advised, plaintiff to be at liberty to proceed to a second hearing in the court below.

The plaintiff appealed to the Supreme Court where his appeal was dismissed. Burke filed his supplemental answer, in which he says he gave Rose and McKenzie a mortgage to secure a balance of the purchase money which Rose and McKenzie since assigned to Watson; that he had no notice of plaintiff's claim and purchased and paid the money and gave the mortgage in good faith in reliance on the title as shown by the records

of the registry office, and claims he is a *bonâ fide* purchaser and claims the benefit and protection of the registry laws thereupon.

Thereupon the following replication was filed on the 14th day of March, 1881:—

"The plaintiff joins issue on the supplemental answer of the defendant, Thomas Burke, filed herein.

"The defendant C. E. Pegley, by petition dated 26th August, 1880, sought to re-open the suit under the first decree as to the defendants, other than the appellant Thomas Burke, by praying for leave to file a supplemental answer.

"On the 21st day of September, A.D. 1880, an order was made by the referee allowing the said petitioner to file a supplemental answer. From this order the plaintiffs appealed to a judge of the Court of Chancery, and upon hearing of such appeal the Hon. V. C. Proudfoot allowed such appeal with costs. The said Pegley appealed from said last mentioned order to the Court of Appeal, and his appeal by the decision of said court was dismissed with costs."

Notice of setting down for examination of witnesses and hearing on the issue raised by the supplementary answer of Thomas Burke was served, and the cause duly came on on the 31st March, 1881. Before the evidence was gone into a question was raised as to what issues were before the court, and it was contended by the defendants' counsel that the whole matter was re-opened, and that the plaintiff was obliged to prove not only notice to the different purchasers, but also the right of redemption. The learned Chancellor decided that the case was re-opened as to the question of notice under the supplemental answer of Thomas Burke, and that that was the only issue before the court, as it affected Thomas Burke.

Mr. Justice Patterson, in his judgment on the appeal

1885

ROSE v. PETERKIN.

Ritchie C.J.

of Thomas Burke on the refusal of the Chancellor to allow Burke to amend and plead the registry act, says :—

We have no report of the judgment delivered by the learned Chancellor, nor any information as to the views taken by him of the evidence, or of the opinion he may have formed of the witnesses examined before him.

In the judgment delivered on this second hearing we are not left in doubt as to what those views are. The learned Chancellor says :—

The defendant Burke having appealed from my decree giving to the plaintiff a right to redeem the land sold by McFarlane to McKenzie and Rose, and sold by them to Burke, and having been allowed by the Court of Appeal to set up the registration of his title, by supplemental answer, an indulgence which I had refused to him, the cause was again carried down to a hearing before me at the last sitting of the court at Chatham; when further evidence was given on both sides.

Before dealing with the further evidence I desire to say that I refused the indulgences asked for by Burke, because I was satisfied by the evidence which was taken *vivâ voce* before me, that the defence set up was not a righteous one. There was much in the evidence of Burke and McKenzie, especially in that of Burke, which I discredited. I thought him untruthful, and that the weight of evidence upon the question of notice greatly preponderated in favor of the plaintiff. I formed my judgment, of course, not only from the words uttered by the respective witnesses, but from their demeanor, and the many circumstances which aid a judge of fact before whom evidence is given, to form correct judgment as to its truthfulness, and the weight properly due to it.

At the recent hearing I did not, any more than at the former hearing, consider it to be an open question whether or not the dealing between the plaintiff (by her agent James Peterkin), and McFarlane, was a security for the repayment of an advance of money. This fact is so distinctly admitted by the answer of Rose and Burke who answered together, and by the separate answer of McKenzie, that no other evidence of it could be required. Evidence of the fact was indeed given, but I think upon all but one occasion it was given incidentally in the giving of evidence of notice to McKenzie and Burke. I have no reason to suppose that the admissions contained in the answers were made by mistake.

The answers are sworn, and I see no reason to doubt that the admissions were made because the fact admitted had been ascertained

to be true. At the recent hearing, besides the evidence then given, the evidence given at the previous hearing was before me. My Brother Proudfoot, in his judgment in the Court of Appeal, has commented upon the answer and the evidence of McKenzie. His comment is so accurate and just that I cannot do better than adopt it.

At the recent hearing the plaintiff and James and Alexander Peterkin reiterated the evidence given by them at the previous hearing.

At this hearing the learned Chancellor says material further evidence of notice to Burke was given at the last hearing, the substance of which he gives, and then observes: "Burke was present in court while this evidence was given, but was not called as a witness," his counsel saying that they relied upon the evidence given by him at the former hearing He was called as to one point by the plaintiff, but said nothing as to the evidence which had just been given in his presence. The Chancellor concludes:—

Notice to McKenzie is proved direct from the plaintiff herself, with a good deal of corroborative evidence from other witnesses. Actual notice to Burke is proved to my mind quite as satisfactorily. He learned what claim was made by the plaintiff from herself and from James Peterkin. And the evidence given at the recent hearing in addition to that at the former hearing, proves that he had knowledge, not from one quarter only, but from several, of the plaintiff's claim, and of its nature. His own admissions to Kime and Hardy are corroborative of the same fact. To put it at the lowest, the evidence given at the recent hearing makes it impossible to believe the assertion of Burke that he had not, before he purchased, notice of the plaintiff's claim. It has been said in this case as it has been said in other cases, that it is almost incredible that a man should purchase when he knows of a claim in another, to or upon the same land. But it is not every man that knows of the equitable doctrine that where a man has such notice of title in another as would make his purchase inequitable, an exception is created thereby, to the effect given generally by the Act of Registration. Burke is not the first man who has thought that (to use his own words) if a man has a clear deed he can give a clear deed; and who, to his cost, has acted upon that belief. That belief, and reliance upon advice which he understood (perhaps mistakenly) to have been given to him, that he could purchase, are, I can scarcely doubt, the key to his conduct.

1885

ROSE v. PETERKIN.

Ritchie C.J.

In my judgment, the evidence has brought home both to McKenzie and to himself notice of the plaintiff's claim, and I think his abstaining from giving evidence at the recent hearing may properly be attributed to a consciousness that he could not deny the evidence given upon that occasion.

The redeemable character of the transaction is admitted on the pleadings and is not now, in my opinion, open to discussion. I think, therefore, the only point we have to consider in this case is: Was the learned Chancellor wrong in finding, as a matter of fact, that McKenzie and Burke had actual notice? If the parties had actual notice, I have no doubt this would defeat the registered title.

After carefully considering the evidence and reading the judgments delivered in this case by the learned Chancellor and the learned Judges in the Court of Appeal, I am unable to say that the Chancellor was wrong in the conclusion at which he arrived on this point, and therefore, I think, the appeal should be dismissed.

STRONG J.—I am of opinion that we ought to dismiss this appeal. I agree with the late Chancellor and Mr. Justice Proudfoot that the only question open on the second hearing, was the defence of the registry act set up by the supplemental answer of Thomas Burke. By the original decree pronounced on the 18th of October, 1876, all questions in the cause which were open at the original hearing were concluded. By the order of the Court of Appeal of the 10th March, 1879, (subsequently affirmed on an appeal to this court) the defendant, Thomas Burke, was allowed to file a supplemental answer "setting up the defence of the registry laws or such other defence as he might be advised." And it was also ordered "that for that purpose the replication filed in the court below be withdrawn if necessary, and that the plaintiff be at liberty to proceed to a

second hearing of the cause in the court below." This order does not, however, disturb the decree which stands undischarged and unaltered, except in so far as it might, in the event, be affected by the determination of the questions to be raised by the supplemental answer of Thomas Burke, and even to that extent only by implication, for the order does not in terms provide for any variation of the decree either presently or prospectively. The only additional defence set up by the supplemental answer of Thomas Burke was that of the registry laws. It appears to me, therefore, that the second hearing was properly restricted to a trial of the questions arising on that defence, namely; whether the defendant, Thomas Burke, had duly registered his conveyance; whether he had, at the time he acquired his title, actual notice of the plaintiff's equity; and whether, if he had such notice, that disentitled him, in equity, to the protection of the registry laws. It is impossible to see how the Chancellor could have admitted further evidence of defences raised upon the original record, concluded, as all such questions were, by a decree which had never been vacated, and which he, at the hearing, had no power to discharge. It would, no doubt, have been better if the original decree had been altogether discharged by the order of the Court of Appeal, with leave to the parties to make use, for the purposes of the second hearing, of the depositions already taken, and to give such further and additional evidence as they might be able to bring forward.

I am able to say that when the practice was first introduced in the Court of Chancery of permitting retrials on the ground of the discovery of new evidence, this was the form of order adopted in such cases by some of the judges, and it has the merit of saving expense without occasioning any inconvenience provided the second hearing is before the same judge as

1885

ROSE v. PETERKIN.

Strong J.

the first. This, however, was not the course adopted by the Court of Appeal; the directions of the first decree which determined the issues raised by the defendants other than Thomas Burke, as well as those arising upon the original answer of Thomas Burke, were not displaced, and so the cause was necessarily heard piece meal, and therefore we find no one completed decree containing the decision of the court which has to be sought for partly in the decree of October, 1876, and partly in that of June, 1881. The result of this was that when this cause came before the Court of Appeal the original decree was *res judicata*, and unappealable by lapse of time, no leave to appeal against it having been given, and so the present appeal must be regarded, as it was properly treated by Mr. Justice Proudfoot, as an appeal from the decision of the Chancellor on the single question of the registry laws which was alone open on the second hearing. If this is a correct conclusion it sufficiently accounts for the omission of the counsel for the appellant to raise the question, which has so fully been considered in the judgments of the learned judges of the Court of Appeal, as to the nature and effect of the transaction between Mrs. Peterkin and McFarlane, of which it was incumbent to prove notice, whether it was a conditional sale or a mortgage—a point which appears not to have been taken at the argument, inasmuch as Mr. Justice Patterson says his attention was first called to it by other members of the court after the appeal had been heard. This fact confirms the view I take as to the effect of the order on the first appeal, for the counsel for the appellant would scarcely have passed over such a point had he supposed it to have been open. It appears to me, however, that upon the evidence and the admissions in the answers the Chancellor's conclusions that the transaction was a mortgage and not a

conditional sale were entirely correct. Whether or not the witnesses who gave such evidence were entitled to credit, and whether their testimony was entitled to prevail against that of the witnesses which conflicted with it, was a question for the judge who heard and saw the witnesses and upon which his finding should be held final. Assuming the evidence of James Peterkin to be entitled to credit, as the Chancellor must from his finding have held it to have been, I should have thought it very difficult to say, upon the statement of the facts which we find in his deposition, that a conditional sale and not a mortgage was the true character of the transaction which took place with McFarlane.

James Peterkin's own account is as follows:—

I am brother-in-law of plaintiff's. I saw McFarlane about land in question when Mrs. Peterkin owned it. She sent me to Thompson, son-in-law of McFarlane, asking him to advance money on a mortgage on the property. I saw McFarlane about the land. He came with me out of the house to the shop, and said he would give $500 on the lot and his lifetime to redeem it. I stayed at McFarlane's house all night, and he next morning made me the offer of advancing $500 on the place in the morning, with his lifetime to redeem it. I then went out to Mrs. Peterkin with a deed which was signed the next day. I told her of the arrangement, and she was agreeable. This land was then worth about $1,000. I had conversation with McFarlane about the land before his death, as it was reported that he was going to sell the place. Mrs. Peterkin sent me to ask him whether the half might not be sold so that the other half might be redeemed. I went to him and spoke to him and he seemed to be agreeable; all he wanted he said was his money.

It therefore appears that Peterkin went to McFarlane for the purpose of borrowing money on the security of the land; that he was only authorized by the plaintiff to raise a loan or mortgage not to negotiate a sale; that (as it must be implied) the application actually made was for an advance by way of loan, and that that application was acceded to by McFarlane. The case is not to be looked at solely from the point of view of the

1885

ROSE v. PETERKIN.

Strong J.

party who advanced the money, but we are to consider what was said and done by both parties to the transaction. There is nothing, so far as I can see, in this statement (which for the purposes of appeal we are compelled to take as a correct narrative of what actually occurred) showing any intention on the part of the Peterkins to make an absolute sale subject to a right of re-purchase. I take it to be clear that if a man goes to another and asks for a loan on the security of land and receives for answer, "yes, provided you give me an absolute deed of the land," that that would beyond all doubt be a mortgage and not a sale. Then, if he adds, "and you shall have my lifetime to redeem it," can that make any difference? For this is the precise question here. I cannot see that it would. It is no answer to say that there was no loan because McFarlane had no right to recover the money. That is clearly false reasoning, for if there was a loan there was a right to sue for the money as soon as the term of credit expired, and the very question involved in that of mortgage or no mortgage is: Was there or not a loan and a right to sue for recovery of the money? Where the party asking for the money clearly intends a mortgage and nothing else, and the terms of the transaction or the conduct of the other parties do not positively exclude the character of loan, I take it that it must be so considered.

It has often occurred to me that where an absolute deed is given as a security, and where there has been no professional intervention originally in arranging the terms of the transaction, that misunderstanding frequently arises from the mistaken views which the party who advances the money takes of the legal effect of the transaction, in erroneously assuming that an absolute deed gives him an irredeemable right, and that I think is an admissible hypothesis here.

But what I found my opinion upon is this:—Here

there was an application for a loan and for nothing but a loan; it was acceded to, nothing being said between the parties as to a sale, and no intention of selling on the part of the grantor being directly proved or to be inferred; but the party to whom the proposition is made carries it out upon terms as to re-payment not inconsistent with a loan, and in a form which a Court of Equity says shall not affect the right of redemption, and which is therefore also consistent with the assumption that it was a loan. In such a case I should unhesitatingly hold that the true character of the transaction was a mortgage, and not a sale subject to a right of re-purchase, and I should feel that if I did not so hold I should be overturning principles of decision which, having been recognized by the Court of Chancery for nearly forty years (at least since the year 1849), have become part of the established law of property. But when we consider that this point of a conditional sale was never pleaded in the answers, nor raised either in appeal or in the court of first instance, but that on the contrary the defendants in their sworn answers admit that the transaction was a mortgage, I should have thought it impossible to reverse a decree proceeding as much upon the implied admissions of the parties as upon anything else. With what justice could this decree now be reversed when, for all that appears, the plaintiff might, if the point of the conditional sale had been raised by the answer and she had thus been put to proof respecting it, have brought forward overwhelming evidence of her case by proving admissions made by McFarlane or otherwise, and if the decree could not for this reason be reversed, would it be just or reasonable now, some seven years after the original decree was made, to discharge that decree and permit a supplemental answer to be filed, and send the parties down to a third hearing, when no application is made

1885

ROSE v. PETERKIN.

Strong J.

by the defendants themselves for any such indulgence? On the whole, looking at the state of the pleadings and the state of the proceedings, this question now raised here in the appellant's factum and in argument, although not argued in the Court of Appeal, seems to me to be wholly untenable.

The question upon which this appeal must therefore depend is that raised by the supplemental answer of Thomas Burke, namely, his claim to priority under the registry laws. For the purpose of postponing a registered instrument Courts of Equity, except in the instance of a single decision which I will presently refer to, have always required actual and direct, as distinguished from merely constructive, notice. What such actual and direct notice is may well be ascertained very shortly by defining constructive notice, and then taking actual notice to be knowledge, not presumed as in the case of constructive notice, but shown to be actually brought home to the party to be charged with it, either by proof of his own admission or by the evidence of witnesses who are able to establish that the very fact, of which notice is to be established, not something which would have led to the discovery of the fact if an enquiry had been pursued, was brought to his knowledge. In *Jones* v. *Smith* (1) Sir James Wigram, V.C., there says that constructive notice occurs in the following cases:

> First, cases in which the party charged has had actual notice that the property in dispute was in fact charged, incumbered or in some way affected and the court has thereupon bound him with constructive notice of facts and instruments, to a knowledge of which he could have been led by an inquiry after the charge, incumbrance or other circumstance affecting the property, of which he had actual notice; and secondly, cases in which the court had been satisfied from the evidence before it that the party charged had designedly abstained from enquiry for the very purpose of avoiding notice.

Notice of the kind first described, which merely puts

(1) 1 Hare 55.

the party on enquiry as to the facts of which it is material he should have knowledge, is clearly insufficient to postpone a registered instrument. But it is not to be assumed from this that actual notice to an agent will not bind the principal for the purpose in question. Notice of this latter kind, to which Lord Chelmsford has given the name of imputed notice, being treated as actual notice to the principal and that whatever the character of the agency may be, whether in the case of principal or agent strictly so called, or in that of one partner acting for the partnership, or a trustee for his *cestui que trust*, in all these cases actual notice to the agent is held to be as effectual to postpone a registered instrument as if given to the principal directly (1).

In a case of *Wormald* v. *Maitland* (2), Stuart V. C. held that constructive notice was sufficient to postpone a registered deed. But this case has been distinctly overruled in Ireland by *Russell* v. *Cashell* (3), by Brewster Lord Chancellor, and in England in *Chadwick* v. *Turner* (4), where Turner L. J. says that notice for this purpose "must be clear and distinct and amounting in fact to fraud."

Applying the law as thus stated to the circumstances of the present case the fact of which it was incumbent on the plaintiff to prove actual notice was not that Mrs. Peterkin had some undefined interest in the land, but that she had a right to redeem or recover the land or, in other words, that Macfarlane acquired the land as a security for money lent, and held it as a mortgagee.

What the learned judges who dissented in the Court of Appeal say however is this—whilst they do not propose directly to open the whole case so as to treat

(1) *Tunstall* v. *Trappes* 3 Sim. 286; *Richards* v. *Brereton*, 5 Ir. Jur. 336; *Lenahan* v. *M'Cabe*, 2 Ir. Eq. 342.

(2) 35 L. J. Eq. 69.

(3) 1 Ch. App. 310.

(4) Trin. Term 1867. See Ir. Rep. 1867.

1885

ROSE v. PETERKIN.

Strong J.

the first decree as erroneous for giving effect to a right of redemption when there was only right of re-purchase, yet, in effect, they do this indirectly when they come to deal with the secondary question of notice by holding that there having been originally, as between Macfarlane and the plaintiff, no right of redemption, notice of a right to redeem is unavailing. This is in effect to nullify the decree which, as I have already endeavoured to show, was *res judicata*, making the law between the parties and entirely concluding the question of mortgage or no mortgage. It being then an established fact that the conveyance to Macfarlane was, in equity, a mere mortgage, the notice to be proven is notice of that fact and of that fact only. I am also prepared to hold that, putting the decree aside altogether, the evidence and the admissions in the answers sufficiently show that the transaction was really a mortgage and not a sale.

As regards the case of *Barnhart* v. *Greenshields* (1), that was not a case of the registry laws at all, an observation which is of course in the defendant's favor. What is there said as to notice coming from strangers was extra judicial, as the real ground of the decision was that the notice, even if it had come from a party interested, was notice of a fact too remotely connected with the fact of which notice had to be made out, to put the parties on enquiry; but accepting what is there said as giving the correct rule by which to test the evidence in the present case, it may be held that if there was no other evidence of notice here than that alleged to have been received by these defendants in conversation with strangers, that would not be sufficient.

It is to be remarked that the supplemental answer filed by Thomas Burke under the order of the Court of Appeal permitting him to set up in that way the defence of the Registry laws or such other defence as

(1) 9 Moo. P. C. 36.

1885

ROSE v. PETERKIN.

Strong J.

he might be advised does not properly and sufficiently plead this defence. What should have been pleaded was that the defendant Thomas Burke had duly registered his deed, accompanied by a denial of the allegations of notice in the bill at the time of registration; and the registration of the deed by which the lands were conveyed to Rose and McKenzie should have been pleaded in the same way, accompanied by a similar denial of notice to them at the time of registration. This however is not the mode of pleading adopted, but it is alleged that when Thomas Burke purchased, the title was a registered title and that he purchased in reliance on the title "as shown by the records of the registry office"; there being no denial of the notice to Rose and McKenzie most distinctly and accurately charged by the 11th paragraph of the bill, nor any allegation that the conveyance to Thomas Burke was ever registered (indeed the registration of this last deed nowhere appears in the pleadings), and the only allegation of the registration of the deed to Rose and McKenzie is that included in the statement, already mentioned, that the title was a registered title when Thomas Burke purchased. This was manifestly not a proper mode of pleading and technically it was insufficient. After the great indulgence extended to the defendant by permitting this defence to be set up after decree, it would seem to be no hardship on the defendant to require that he should plead the defence he was permitted to add with reasonable precision and certainty, and in such a way as to show that the registry laws really did constitute a defence. As regards the defendant Thomas Burke I am not however disposed to decide the case on the narrow ground of a point of pleading. But as regards the registration of the deed to Rose and McKenzie the objection to the pleading is not merely technical but is substantial, and I think it is incumbent

1885

ROSE v. PETERKIN.

Strong J.

on us to hold, in accordance with the opinion of Mr. Justice Proudfoot, that the defence of the registry laws as applicable to the conveyance to them was not set up and was not intended to be set up, and therefore that the defence in question was confined to the conveyance to Thomas Burke, and that the plaintiff was consequently only called upon to prove notice to that defendant.

I am of opinion that the evidence at the first hearing, without more, was amply sufficient for the plaintiff's purpose in this respect, and was such that, taken in connection with the Chancellor's findings upon it in favor of the plaintiff, it ought to have been held a conclusive answer to the application to let in the supplemental defence; and had I been present when the appeal to this court was heard I should certainly have ventured to express this opinion. The evidence of notice I refer to is that contained in the deposition of the plaintiff herself and of James Peterkin; the latter I do not consider a stranger but as a person who throughout the whole of the transactions with reference to this land acted as the agent of the plaintiff. James Peterkin, it is indeed suggested, had some interest in the land, but however this might have affected the credit to be given to his testimony by the judge in whose presence he was examined, it is otherwise a matter with which these defendants have no concern. Mrs Peterkin in her evidence at the first trial says;—

Talked with Thomas Burke about the land. That was after the conversation with McKenzie, and the spring before McFarlane sold it. He came to the house to see if McFarlane had agreed to sell half of the land so that the other half could be redeemed. Burke was going to buy half if we could arrange about the other half. I told him McFarlane would not sell half to redeem the other. Burke asked me if McFarlane had got a clear deed of the place, and I said he had got a clear deed, giving McFarlane's lifetime to redeem it, or as soon as the money was made up. Burke said he thought that if McFarlane had a clear deed, that he could give a clear deed. I told

him he could give him a clear deed but not a good title. Burke said that if James Peterkin took some one to McFarlane that he would be a strange uncle if he would not do right. McFarlane was Peterkin's uncle by marriage.

James Peterkin, in his deposition taken at the first hearing, is equally explicit as to notice to Burke He says:—

Burke and I had some talk as to the way the property stood. I told Burke that the property was Mrs. Peterkin's, and that I was doing the business for her. Burke wanted me to go to McFarlane and reason the thing with him. But I told Burke I did not think it was of any use, as I had done the best I could. I explained to Burke that McFarlane had got a deed of the land, but that he had given Mrs. Peterkin his lifetime to redeem it.

I told Burke how much money McFarlane had advanced and that $500 was the amount required to redeem it.

If this is not (subject, of course, to the weight and credit to be attached to the witnesses) sufficient proof of notice, I am at a loss to know how notice could ever be proved.

It is direct actual notice that although McFarlane had an absolute conveyance of the land it was redeemable during his lifetime, a strictly true and accurate description of the agreement which had been made with McFarlane, as had been determined by a decree which at the time of the appeal was not open to question. The actual notice required is of course actual notice of facts and not of conclusions of law; it was not requisite that the plaintiff and James Peterkin should, in order to make what they told Burke sufficient notice, have gone further and stated that in legal effect the facts they communicated to him made McFarlane in law a mortgagee of the land. Upon this principle, had the transaction been a conditional sale with a sufficient memorandum in writing, I should still have thought this was sufficient actual notice of it. It is also to be said of this evidence that it establishes notice, not from strangers but from the

1885

ROSE v. PETERKIN.

Strong J.

plaintiff herself and her agent, and it was not in the course of a mere casual conversation that the statements were made, but when Burke was contemplating and in negotiation about a purchase of part of the property and was making enquiries about the title with a view to such purchase. Having regard to the nature of the evidence of notice at the first hearing, and to the consideration that the Chancellor had given credit to the witnesses, I should have thought that it would have been proper, in giving the defendant Thomas Burke leave to set up the registry laws, to have confined any further proceedings in the Court of Chancery to a mere argument of the question of law arising upon the 68th section of the registry act. This, however, was not done, and on the 31st March, 1881, nearly six years after the first trial, the issue went down to a second hearing before the same judge, when the same witnesses were again examined, but Thomas Burke, who on the first trial had given evidence on his own behalf and then denied notice, did not, on this subsequent occasion, venture to repeat his denial, though he was called on another point.

Mrs. Peterkin's evidence at the second trial, on the material point, was as follows:—

Q.—Had you ever any talk with Burke? A.—Yes, I had some talk with Mr. Burke.

His Lordship—That was Thomas? A.—Yes.

Mr. Boyd—Was it Thos. Burke? A.—Yes; he came to the house and asked me if McFarlane was agreed to sell one half of the land so as to redeem the other; Thomas Burke called at the house and asked me if Thomas was agreed to sell one-half so that we could redeem the other, and I told him I was not agreed to sell one-half so as to get the other redeemed, and he asked me who deeded the land to McFarlane, and I told him I did, and he asked me what kind of a deed I gave him, and I told him a clear deed, and Burke said he thought if McFarlane got a clear deed he could give a clear deed, and I told him he might give him a clear deed but not a good title, and I told him on account of the claim against it, that I was given McFarlane's lifetime to redeem it.

1885

ROSE v. PETERKIN.

Strong J.

Q.—When was this? A.—It was the Spring before Rose and McKenzie bought it; that would be the Spring of 1871.

Q.—You told him you had your lifetime to redeem it? A.—McFarlane's lifetime to redeem it; he came to see if McFarlane was agreed to sell one-half to allow us to redeem the other.

Q.—What led to that? A.—We sent James Peterkin, my husband and I, to Mr. Burke to see if he would buy the other one-half so that we could redeem the other.

Q.—Had you any other talk with Thomas Burke about this place after that? A.—Yes, I talked with him after that; he was at the house several times; once he said that no other one could do such a mean thing as McKenzie.

Then James Peterkin gives substantially the same account of what passed between him and Burke but more fully. He says:—

Q.—Had you any talk with Mr. Burke while McFarlane had the place? A.—Yes.

Q.—That is Thomas Burke? A.—Yes.

Q.—Well, what was that? A. I was sent to Mr. Burke to see if he would not buy a part of the place, half of their place to redeem the other.

Q.—Who sent you? A.—My sister-in-law, Mrs Peterkin; I went to Mr. Burke and he came the next day, I think it was, and I showed him over the land and he seemed to be satisfied with the land; still he would rather have the whole of it, he said, but he would give $550 for the half of it.

Q.—What was said to him about the state of the title, about McFarlane? A.—I explained to him that McFarlane had a deed of the land, that he had given his lifetime to redeem it.

Q.—To whom had he given his lifetime to redeem it, did you tell him? A.—To Mrs Peterkin.

Q.—When was that? A.—That was in the spring of 1871, I think; that was just before he sold it to Rose and McKenzie.

Q.—And you wanted to sell half to get money to clear off the rest? A.—Yes.

Q.—$500 was what Macfarlane advanced? A.—Yes.

Q.—Now after McKenzie bought had you any conversation with Burke? A.—I do not recollect of having any.

Q.—Did he say anything to you about McKenzie having bought? A.—Not that I recollect of.

MR. BOYD—You say you do not remember any conversation with Burke after that? A.—No.

Q.—Or his saying anything to you about the land? A. After Mc-

1885

ROSE v. PETERKIN.

Strong J.

Kenzie bought it?

Q.—Yes? A.—I think he said that there was not another man in the Township that was mean enough to buy it, knowing the way it was. Something to that effect.

HIS LORDSHIP—You think he said that? A—Yes, sir, something to that effect.

HIS LORDSHIP—I do not know exactly what you mean; you think he said something to that effect, and you think it was that; you think that that is what he said, that is what you mean? A.—Yes.

Burke did not venture to deny this latter evidence of the plaintiff and James Peterkin and it remains therefore uncontradicted.

As I have already stated this evidence, if worthy of credit which was a question for the judge, is in my opinion conclusive to establish actual direct notice, which made it a fraud in Thomas Burke to set up an absolute title under his purchase from Macfarlane and to claim the protection of the registry laws.

In his judgment delivered after the second hearing the Chancellor makes the following observations on the evidence:—

Before dealing with the further evidence I desire to say that I refused the indulgences asked for by Burke, because I was satisfied by the evidence which was taken *vivâ voce* before me that the defence set up was a righteous one. There was much in the evidence of Burke and McKenzie, especially in that of Burke which I discredited. I thought him untruthful, and that the weight of evidence upon the question of notice greatly preponderated in favor of the plaintiff. I formed my judgment, of course, not only from the words uttered by the respective witnesses, but from their demeanor, and the many circumstances which aid a judge of fact before whom evidence is given, to form a correct judgment as to its truthfulness and the weight properly due to it.

The remark attributed to Burke, (and I have no doubt truly attributed to him notwithstanding his denial,) that no one but McKenzie would be mean enough to make the purchase, is also material, for it assumed that McKenzie knew when he made the purchase that the plaintiff had a redeemable interest in the land, an interest which he appears to have supposed was extinguished by McFarlane's sale.

George Kime says that he was present when Burke and Alexander Hardy were talking together, when Burke said that he had consulted

Mr. Atkinson, and also Mr. Scane about purchasing this land; that Mr. Atkinson had advised him not to purchase and that Mr. Scane advised him that he could. Alexander Hardy, who had been examined at the former hearing, also says he had another conversation with Burke besides that spoken of by Kime; that in this other conversation Burke said that Mr. Atkinson had advised him that he could not purchase on account of the claim of the Peterkins; that Mr. Scane advised him that he could; that it was only a question between Mrs. Peterkin and McFarlane.

Burke was present in court while this evidence was given, but was not called as a witness for himself, his counsel saying that he relied upon the evidence given by him at the former hearing. He was called as to one point by the plaintiff, but said nothing as to the evidence which had just been given in his presence.

Actual notice to Burke is proved to my mind quite as satisfactorily. He learned what claim was made by the plaintiff from herself and from James Peterkin. And the evidence given at the recent hearing in addition to that at the former hearing, proves that he had knowledge, not from one quarter only, but from several, of the plaintiff's claim and of its nature. His own admissions to Kime and Hardy are corroborative of the same fact. To put it at the lowest, the evidence given at the recent hearing makes it impossible to believe the assertion of Burke that he had not, before he purchased, notice of the plaintiff's claim. It has been said in this case, as it has been said in other cases, that it is almost incredible that a man should purchase when he knows of a claim in another, to or upon the same land. But it is not every man that knows of the equitable doctrine that where a man has such notice of title in another as would make his purchase inequitable, an exception is created thereby to the effect given generally by the act of registration. Burke is not the first man who has thought that (to use his own words) if a man has a clear deed he can give a clear deed: and who, to his cost, has acted upon that belief. That belief, and reliance upon advice which he understood (perhaps mistakenly) to have been given to him that he could purchase, are, I can scarcely doubt, the key to his conduct.

In my judgment, the evidence has brought home both to McKenzie and to himself notice of the plaintiff's claim, and I think his abstaining from giving evidence at the recent hearing may properly be attributed to a consciousness that he could not deny the evidence given upon that occasion.

My conclusion, therefore, is that the notice amounts to actual knowledge brought home to Burke before he purchased, that the transaction with McFarlane was a

1885

ROSE v. PETERKIN.

Strong J.

mortgage, and that the learned judge who heard and saw the witnesses having found that they were truthful and worthy of credit, we must accept that finding as final and conclusive.

There remains to be considered the question of law relating to the effect to be attributed to the 60th section of the Statute 31 Vic. ch. 20, now the 81st section of ch. 111 of the Revised Statutes. This is certainly a point of great general importance, and one which it appears had never, before the present case came before the Court of Appeal, been the subject of decision in an appellate court.

The doctrine which sanctions the holding of notice of an unregistered conveyance to be sufficient to postpone the priority acquired by the statute owes its origin to the decision of Lord King in the case of *Blades* v. *Blades* (1), which was followed by that of Lord Hardwicke in *Le Neve* v. *Le Neve* (2), who then, (speaking of the Middlesex Act), says :—

> The intention of the Registry Act appears from its preamble to be plainly to secure subsequent purchasers and mortgagees against prior secret conveyances and fraudulent incumbrances. Where a person had no notice of a prior conveyance there the registering of the subsequent conveyance shall prevail against the prior, but if he had notice of a prior conveyance then that was not a secret conveyance by which he could be prejudiced * * * It would be a most mischievous thing, if a person taking advantage of the legal form appointed by an act of Parliament, might, under that, protect himself against a prior equity, of which he has notice.

It thus appears that in its origin this doctrine was founded on the construction of the statute into which it was held there ought to be read, as it were by implication, an exception of unregistered conveyances which are not secret but known to a purchaser claiming the protection afforded by the act to registered deeds. It is true that this doctrine has repeatedly been disapproved of by very eminent judges. Sir William

(1) 1 Eq. Cas. Abr. 358 (2) 3 Atk. 646.

Grant, M R., in *Wyatt* v. *Barwell* (1); Lord Romilly, M. R. in *Ford* v. *White* (2); Longfield J. in *re Rorke* (3); Lord Alvanley M R. in *Jolland* v *Stainbridge* (4); Lord Brougham in *Mill* v. *Hill* (5); Bramwell L. J. in *Greaves* v. *Tofield* (6).

But notwithstanding the formidable array of authority against the policy of this rule we find it, so recently as 1874, acted on by the House of Lords in the case of *Agra Bank* v. *Barry* (7), where Lord Cairns C., if he does not express approval of it, does very decisively state and act on the opinion that it is too firmly established to make it either desirable or possible that it should now be repudiated by judicial authority merely (8). He says :—

Any person reading over that act of Parliament (the Irish Registry Act) would perhaps in the first instance conclude, as has often been said, that it was an act absolutely decisive of priority under all circumstances, and enacting that under every circumstance that could be supposed, the deed first registered was to take precedence of a deed which, although it might be executed before, was not registered until afterwards. But, by decisions, which have now, as it seems to me, well established the law, and which it would not be, I think, expedient in any way now to call in question, it has been settled that, notwithstanding the apparent stringency of the words contained in this act of Parliament, still, if a person in Ireland registers a deed, and if at the time he registers the deed either he himself or an agent, whose knowledge is the knowledge of his principal, has notice of an earlier deed, which, though executed, is not registered, the registration which he actually effects will not give him priority over that earlier deed. And, my Lords, I take the explanation of these decisions to be that which was given by Lord King in the case of *Blades* v. *Blades* upwards of 150 years ago, the case which was mentioned just now at your Lordships' Bar. I take the explanation to be this, that inasmuch as the object of the statute is to take care, that by the fact of deeds being placed upon a register, those who

(1) 19 Ves. 435.
(2) 16 Beav. 120.
(3) 13 Ir. Ch. 275.
(4) 3 Ves. 478.
(5) 3 H. L. Cas. 837.
(6) 14 Ch. D. 577.
(7) L. R. 7 H. L. 147.
(8) See also the criticism on the observations of Bramwell L. J. in *Greaves* v. *Tofield* by an American author, the late Mr. J. N. Pomeroy in his treatise on Equity Jurisprudence, vol. 1 p. 472.

1885

ROSE v. PETERKIN.

Strong J.

come to register a subsequent deed shall be informed of the earlier title, the end and object of the statute is accomplished if the person coming to register the deed has, *aliunde*, and not by means of the register, notice of a deed affecting the property executed before his own. In that case the notoriety, which it was the object of the statute to secure, is effected, effected in a different way, but effected as absolutely in respect of the person who then comes to register as if he had found upon the register notice of the earlier deed.

Other authorities have more distinctly placed the doctrine on the ground, that a person who purchases with notice of the title of another is guilty of fraud, and that a Court of Equity will not permit a party, so committing a fraud, to avail himself of the provisions of a statute itself enacted for the prevention of fraud. And this principle is one which has long been recognized and applied by Courts of Equity, not merely in cases arising under the Registry Acts, but to cases arising under the Statute of Frauds and the Statute of Wills also; the doctrine of part performance, the admission of parol evidence to establish an absolute deed to be a mortgage, and the conversion of a legatee or devisee into a trustee, being all referable to the same general rule of equity. In *McCormick* v. *Grogan* (1), Lord Westbury says:—

> The Court of Equity has from a very early period decided that even an act of parliament shall not be used as an instrument of fraud; and if in the machinery of perpetrating a fraud an act of parliament intervenes, the Court of Equity, it is true, does not set aside the act of parliament, but it fastens on the individual who gets a title under that act and imposes upon him a personal obligation, because he applies the act as an instrument for accomplishing a fraud.

If we had here to consider only the same question which has been so often decided in England, and which was the subject of the decision in *Barry* v. *Agra Bank*, it would be mere useless prolixity to recapitulate the grounds of the previous decisions, and make the foregoing extracts. But we have not to decide the same question, but an entirely new

(1) L. R. 4 H. L. 97.

one arising on the 68th section of the registry act (Revised Statutes ch. 111 sec. 81), and it thus becomes essential to enquire whether the doctrine of Courts of Equity in postponing a registered purchaser, who has notice of a prior unregistered deed, is one founded on a general rule of equity applicable generally to all prior titles and equities, or upon an exceptional rule, which is to be confined to the case of notice of such titles and equities, as arise upon written instruments, which might themselves have been registered, and therefore a discussion of the reasons which have led Courts of Equity to apply this principle is not irrelevant, but on the contrary, such considerations must form the very foundation of the present adjudication. The section in question (I take it from the Revised Statutes) is as follows:—

No equitable lien, charge, or interest affecting land, shall be deemed valid in any court in this province as against a registered instrument executed by the same party, his heirs or assigns, and tacking shall not be allowed in any case to prevail against the provisions of this act.

The bad draftmanship which is conspicuous in this clause has been well pointed out by Mr. Justice Patterson, but I agree with him that it is impossible to give it any other construction than this, namely, that it only applies to "equitable liens, charges or interests" which arise purely by operation of equity and which do not arise on any written instrument. Such rights arising on written instruments are manifestly provided for by the preceding section, and to hold them to be within the provision now under consideration would be to introduce a direct conflict between the two clauses of the act.

Then it would seem to be proper, in the first instance, to consider what would be the consequence if this 81st section stood alone as an innovation upon the former legislation, and as if the act had contained

1885

ROSE v. PETERKIN.

Strong J.

no such enactment as to the effect of notice as that comprised in the 80th section. Would a court of equity in such case have been justified in applying the doctrine of notice, as theretofore applied in respect of unregistered instruments, to equities arising without writing?

Taking either the reasons given by Lord Cairns in *Agra Bank* v. *Barry* that notice affects in another way the same object as that for which registration was required, or the broader grounds for the general rule, laid down by Lord Westbury, that a party who is guilty of fraud is not entitled to the protection of an act of Parliament, it is, I think, manifest that a Court of Equity could not have refused to apply the doctrine of notice to the case of an equitable lien of which there was no written evidence, without making an arbitrary distinction entirely unwarranted by the statement of the law as we have it from both the eminent judges whose words have been quoted.

Then does the provision in the 80th section afford any reason why a distinction should be made.

It is a rule to be regarded in the construction of statutes, sanctioned by many authorities, that if a statute enacts that what was already before the statute a general rule of law applicable to all cases should be thereafter applied in some particular case, an intention to alter the law is not to be implied, but it is rather to be inferred that the legislature intended to lay down the particular rule for greater caution and certainty or for some other reasons. It is also a well understood principle that the jurisdiction of a Court of Equity is never to be considered as taken away because by statute a similar jurisdiction is imposed on courts of law.

If therefore we take these rules of construction as guides in construing the statute now in question there

1885

ROSE v. PETERKIN.

Strong J.

will, I think, be little difficulty in arriving at the conclusion that the former jurisdiction of Courts of Equity was retained, and was applicable to the 81st section, notwithstanding the provisions of the 80th section, making the former equitable doctrine of notice a statutory rule thereafter, and as such applicable in courts of law as well as in Courts of Equity, and that the rule "*expressio unius est exclusio alterius*" has no application to these two sections.

I am further of opinion that the omission to make notice applicable to the 81st section can be accounted for on sufficient grounds consistently with the foregoing construction. At the time the original act, from which the revised statute was consolidated, was passed the jurisdiction of law and equity in the Province of Ontario was administered by separate courts. In a court of law a case might frequently arise, and did frequently arise, where the legal title depended on prior registration, entitling a subsequent purchaser to priority over another claiming under a prior unregistered deed passing the legal estate. In such a case, owing to the different principles acted on with reference to the effect of notice by courts of law and courts of equity, the earlier grantee could not succeed at law, even though his adversary admitted the fact of notice; to obtain relief on that ground the first purchaser was compelled to resort to a Court of Equity, although the court of law could just as well have awarded him the same relief. It seems, therefore, very obvious that it was to remedy the inconvenience and injustice which arose in cases of this kind that the 80th section was passed. But as regards cases in which the prior claim was based on some lien, charge or other equity within the 81st section, and not depending on a deed or written instrument at all, such for instance as a vendor's lien, or an equitable mortgage by

1885

ROSE v. PETERKIN.

Strong J.

deposit of title deeds, there would have been no use in conferring jurisdiction on courts of law since the competition in such cases not being between two claimants of the legal title, as might well be the case when there were were two succesive deeds the first unregistered and the last registered, but between two equitable claimants, or between an equitable and a legal claimant, it would have been useless to confer jurisdiction upon courts of law to act upon the doctrine of notice in such cases, inasmuch as from the nature of the equitable title of the party claiming priority by reason of notice, such a case never could come within the jurisdiction of a court of law, as that jurisdiction existed when the registry act of 1868 was passed.

For these reasons I think it very clear that the decision of Mowat V. C. in *Forrester* v. *Campbell* (1), was in all respects right and ought to be adhered to.

Although it does not affect the present decision in any way, I think it not out of place to point out here, that the rule as to notice embodied in the 80th section is much more stringent than that recognized in the decisions either upon the English or Irish registry acts. As Mr. Justice Patterson has remarked in his judgment notice after a purchaser has acquired his title and paid his purchase money, if before he has registered his deed, is, by the express words of the 80th section, sufficient to postpone him. This seems a very harsh rule and is one which never prevailed in equity but is in direct opposition to the previous authorities, *Elsey* v. *Lutyens* (2); *Essex* v. *Baugh* (3); *Reddick* v *Glennon* (4); and also contrary to the analogy afforded by the doctrine of tacking and equitable priority generally, by which a purchaser or mortgagee without notice could at any time, and after having had

(1) 17 Grant 379.
(2) 8 Hare 159.
(3) 1 Y & C. 620.
(4) 6 Ir. Jur. 39.

notice, protect himself by getting in a prior legal estate. It is true that Lord Cairns in *Agra Bank* v. *Barry* speaks of notice before registration being sufficient, but as the point did not arise there, and as all the authorities and reasonings to be discovered on the point are against such a rule, I take this to have been unintentional. Having regard to the terms of the 80th section, a purchaser is hardly safe unless his conveyance is executed in the registry office so that it may be placed upon record without allowing an interval for subsequent notice. Indeed this practice of executing deeds in the registry office, is said in a late case in the English Court of Appeals actually to prevail in the North Riding of Yorkshire, though for a less urgent reason than that which calls for it in Ontario.

I am of opinion that this appeal must be dismissed, and with costs.

FOURNIER J.—concurred.

HENRY J.—I think the majority of the Appeal Court of Ontario came to the proper conclusion in this case, and I adopt the judgment of Vice Chancellor Proudfoot as embodying my views as to the issues raised.

When the case was previously before this court I was of the opinion that the money was loaned by Mr. McFarlane on the security of the land conveyed to him absolutely, but which was understood and agreed upon to be subject to the right of redemption during his life.

It has been considered that from the evidence there was but an undertaking in words on the part of Mr. McFarlane to re-sell the land and re-convey it, but I cannot so conclude. The words that are shown to have been used are that Peterkin had during Mr. McFarlane's life time to redeem the property—not to purchase it back.

I also fully concur with the views of Vice Chancellor Proudfoot and those other learned judges who coincided

1885

ROSE v. PETERKIN.

Henry J.

with him as to the effect of the Registry Acts in such cases

I think the judgment of court below and the decrees of the learned Chancellor herein should be affirmed with costs.

GWYNNE J.—I am of opinion that the appeal should be allowed with costs and that the plaintiff's bill should be dismissed from the Court of Chancery of Ontario with costs.

The case as asserted by the plaintiff in her bill, in short substance is, that being the owner in fee simple of the land in the bill mentioned, she, through the intervention of her agent, one James Peterkin, applied to one McFarlane for a loan of $500 which McFarlane agreed to lend to her upon the security of the said land, and that upon the advance of the said sum being made by him to her in pursuance of the above agreement, she, by deed dated the 31st August, 1866, conveyed the said land to McFarlane in fee simple, and that, although the said deed was in point of form absolute, it was expressly intended and understood between the plaintiff and McFarlane that it should stand as security only for re-payment of the said sum at any time to the said McFarlane; and that the said McFarlane afterwards in pursuance of a threat made by him to treat the said deed as absolute and thereby to cheat and defraud the plaintiff, by indenture bearing date the 13th June, 1871, in consideration of $1,200 absolutely sold and conveyed the said land to Colin H. Rose and Duncan McKenzie, who prior to the sale and conveyance of the said land to them had full knowledge and actual notice of the plaintiff's right to redeem the said land upon re-payment of the said sum to the said McFarlane, and that by indenture bearing date the 21st of June, 1872, the defendants Rose and McKenzie having previously cut and removed from the said land timber of great value—to wit of the value of $2,000—conveyed the said land in fee to the

defendant Thomas Burke, who prior to the sale of the said land by McFarlane to Rose and McKenzie, and by them to him had full knowledge of the plaintiff's right of redemption aforesaid, and became purchaser thereof with notice of the premises, and the bill prayed, among other things, that it might be declared that the indenture executed by the plaintiff to McFarlane, although absolute in its form, was intended by way of security only for re-payment of the said sum of $500, and legal interest at the most thereon from the date thereof, (although nothing had been said about interest in the bill, nor in the agreement therein alleged as to the borrowing by the plaintiff of the said sum of $500,) and that the plaintiff is entitled, and may be let in, to redeem the said land.

Now, if it were not for the frame of the answer, which upon the evidence as appearing in the cause must, I think, be admitted to have been improvident and uncalled for, there could not be any question upon the subject. But the appellants cannot, I think, in the face of the evidence, be prejudiced by the frame of their answers, the gist and substance of which is that admitting it to be true as alleged in the bill, that although the deed executed by the plaintiff to McFarlane was absolute in point of form, it was agreed between them that it should operate as a mortgage security only for re-payment of the said alleged loan of $500, and subject to redemption upon payment thereof to McFarlane, nevertheless the appellants are not to be prejudiced or affected by any such agreement, intent or understanding, for that they were respectively purchasers for value by registered title without notice of any such agreement or right of redemption.

I entirely agree with the very able judgments of Chief Justice Hagarty and Mr. Justice Burton, in which, as it appears to me, Mr. Justice Paterson also concurred, that the evidence clearly displaces the case

1885

ROSE v. PETERKIN.

Gwynne J.

as alleged in the bill, and shows beyond all doubt that McFarlane never lent or agreed to lend to the plaintiff the said sum of $500, nor any sum; that no debt was ever due from the plaintiff to McFarlane, and that he never agreed to hold the land by way of mortgage security for repayment of any debt; but on the contrary that the transaction which took place between James Peterkin and McFarlane was an out and out sale of land to McFarlane, which was perfected by the execution of the deed by the plaintiff to whom James Peterkin had but shortly previously by deed transferred the land. And the utmost extent of the evidence, assuming it to be uncontradictory in its character and quite true, is that McFarlane verbally and voluntarily, and so in a manner not binding upon him, promised James Peterkin, whom McFarlane regarded as the person selling the land, although the deed to McFarlane was executed by the plaintiff, that he, James Peterkin, might repurchase the land, and that he, McFarlane, would re-sell and convey it to him upon re-payment of the sum of $500 at any time during his, McFarlane's, life time, nothing whatever being said about interest. Now, whether any such promise ever could have been, or, in fact, was given, I do not think it necessary to enquire, for the case does not turn upon the credibility of witnesses; but upon this, that the promise, assuming it to be established by the evidence, is clearly not the agreement alleged in the bill upon which the equity relied upon by the plaintiff is made to rest, and such a promise, even though knowledge of it should be clearly brought home to the appellants, could not justify a finding against them upon the issue upon which they have rested their defence, namely, that they were purchasers for value without notice of the equity relied upon in the bill, namely, that McFarlane acquired the land upon the faith that he should hold it merely as a mortgage security for a loan of a sum of money made by

him to the plaintiff and for which she was his debtor, the land being only held as security for the debt.

The passages in the evidence which are relied upon by the late learned Chancellor as establishing notice to the defendant Thomas Burke are not, in my judgment, evidence of any notice whatever binding upon him, or which can have any effect to defeat his purchase; they are for the most part loose observations made by persons having no interest in the subject, and who had no knowledge whatever of the circumstances under which McFarlane acquired title, or of the nature of the claim which the plaintiff had, if she had any—and her own conduct in abstaining from asserting any claim if she had any while Rose and McKenzie were to her knowledge stripping the land of all its valuable timber might well be regarded as shewing that she had no claim such as she now asserts. A decree against Thomas Burke under the circumstances as appearing in the case cannot, in my judgment, be supported upon the authority of any precedent nor upon any principle of Equity. It carries the doctrine of notice of an equitable claim alleged to exist in a plaintiff defeating a sale to a defendant by a good legal conveyance executed for valuable consideration beyond anything which is in my opinion warranted by any decided case.

Appeal dismissed with costs.

Solicitors for appellants: *Scane, Houston & Craddock.*
Solicitors for respondent: *Atkinson & Christie.*

INDEX.

TRUST AND TRUSTEE—*Grant to Township—Land for school—Charitable trust—Acceptance of by trustees—Discretion of trustees—Doctrine of Cy-près.*] By the patent or grant of the township of Cornwallis, in King Co., N. S., made in 1761, four hundred acres of land were declared to be "for the school." By a subsequent grant from the crown in 1790, the said four hundred acres were declared to be vested in the rector and wardens by the name of the Church of Saint John, in the said township, and the rector and wardens of the said church for the time being "in special trust, to and for the use of one or more school or schools, as may be deemed necessary by the said Trustees, for the convenience and benefit of all the inhabitants of the said township of Cornwallis, and in trust that all schools in said township furnished or supplied with masters qualified agreeably to the laws of this province, and contracted with for a term not less than one whole year, shall be entitled to an equal share or proportion of the rents and profits arising from said school lands, provided the masters or teachers thereof shall receive and instruct, free of expense, such poor children as may be sent them by the said trustees." The grantees took possession of the land mentioned in said grant, and they and their successors in office have ever since remained in possession of it, and until the year 1873 the rents and profits arising from such land were distributed among the schools of said township, and poor children sent by the trustees to, and educated in, said schools according to the terms of the trust In 1873, however, the then trustees discontinued such distribution and allowed the funds realized from said lands to accumulate, the reason alleged therefor being that the schools of the township had become so numerous that the sum appropriated to each would be too small to be of use, and also, that under the free school system all the poor children of the township were educated free of expense and the object for which such funds had previously been supplied no longer existed. The present defendants were invested with the said trust in 1879, when the revenue of