REPORTS

OF THE

SUPREME COURT

OF

CANADA.

REPORTER

C. H. MASTERS, BARRISTER AT LAW.

ASSISTANT REPORTER

L. W. COUTLEE, B.C.L. ADVOCATE AND BARRISTER AT LAW.

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JUDGES

OF THE

SUPREME COURT OF CANADA

DURING THE PERIOD OF THESE REPORTS.

The Right Hon. SIR HENRY STRONG, Knight, C. J.

The Hon. HENRI ELZÉAR TASCHEREAU J.

" JOHN WELLINGTON GWYNNE J.

" ROBERT SEDGEWICK J.

" GEORGE EDWIN KING J.

" DÉSIRÉ GIROUARD J.

ATTORNEY-GENERAL OF THE DOMINION OF CANADA:

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SOLICITOR-GENERAL OF THE DOMINION OF CANADA:

THE HON. CHARLES FITZPATRICK, Q.C.

ERRATA.

Errors and omissions in cases cited, have been corrected in table of cases cited.

Page 176, line 13, after "auteurs" for "de" read "et."

Page 215, line 32, for "with s. 50," read "within s. 50."

Pages 216-219, marginal notes should read "West Assiniboia Election Case."

Page 232, line 22, for "C. C." read "C. C. P."

Page 374, line 20, for "city" read "company."

Page 632, for "*Bullock* v. *Davies*" read "*Bullock* v. *Downes*."

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Young, *re*	14 Ont. P. R. 303	641
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CASES

DETERMINED BY THE

SUPREME COURT OF CANADA

ON APPEAL

FROM

DOMINION AND PROVINCIAL COURTS

AND FROM

THE SUPREME COURT OF THE NORTH-WEST TERRITORIES.

PETER KEARNEY (PLAINTIFF).......... APPELLANT;

AND

ALPHONSE LETELLIER (DEFENDANT) RESPONDENT.

1896

*Oct. 8.

1897

*Jan. 25.

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

Contract — Sale by sample—Objections to invoice—Reasonable time—Acquiescence—Evidence.

If a merchant receives an invoice and retains it for a considerable time without making any objection, there is a presumption against him that the price stated in the invoice was that agreed upon.

(Judgment of the Court of Queen's Bench, that the evidence was sufficient to rebut the presumption, reversed, Gwynne J. dissenting and holding that the appeal depended on mere matters of fact as to which an appellate court should not interfere.)

APPEAL from a decision of the Court of Queen's Bench for Lower Canada, reversing the judgment of the Superior Court (1) in favour of the plaintiff.

The material facts of the case are as follows:—

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

(1) Q. R. 9 S. C. 128.

1896
KEARNEY
v.
LETELLIER.

In February 1895 the plaintiff Kearney, a wholesale tea merchant of Montreal, came to Quebec with a job lot of teas which the defendant Letellier agreed to buy, the plaintiff producing samples of the tea in tin boxes on which the price of each grade was marked. The price was to be paid by Letellier partly in wine and the balance by acceptances at 6, 8, 10 and 12 months. In March, 1895, the parties exchanged invoices, that of the plaintiff charging for the tea a uniform rate of 16 cents per pound, the defendant's being for the wine at the price agreed upon. In April part of the tea was shipped to the defendant and the balance in July in which month also the plaintiff received and stored the wine.

The defendant in April accepted three drafts on account of the price of the tea and a fourth for the balance claimed by the plaintiff was drawn on him after the last shipment of the tea, in August, which he refused to accept claiming that the amount was in excess of the balance actually due and alleging, for the first time, that he bought the tea at the several prices marked on the samples produced by the plaintiff when the bargain was made and not at one rate of 16 cents per pound for the lot. The plaintiff then brought an action to compel acceptance of the last draft, or, in default, for payment of the amount, and also for the value of 25 hogsheads of the wine, which he claimed was not of the quality agreed upon, and the charges thereon. At the enquête the plaintiff supported his own evidence as to the price being 16 cents per pound by the production of an invoice, sent to the defendant before the tea was delivered and kept by him some five months without objection, in which that price was charged. As against this there was the evidence of the defendant, who swore that the sample price was agreed upon, his son who swore that that the

tea was first offered to him at the prices marked on the samples and he referred the matter to his father, and a broker who was present when the bargain was made but who was not very positive as to the terms as appears from the following extracts from his testimony :—

Q. What did you do with the samples there in the hotel? A. Well, we looked at them, and I put the prices and quantities on them.

Q. Then, you went with Mr. Kearney to Mr. Letellier's? A. No, after that we went to the office with the teas, with the samples. I don't know whether we brought the samples down to the office, but eventually they got to the office.

Q. Did you go with Mr. Kearney to Mr. Letellier's? A. I am not sure whether we went over alone or went over together; however we eventually got there.

Q. Will you state what was the price agreed upon for the tea? A. I understood it to be the prices marked upon the samples.

Q. As a matter of fact, is that the price they were sold for? A. I think so.

Q. State whether after the sale was made, after the contract was completed, you said anything to Mr. Letellier about the price of the tea in the presence of Mr. Kearney? A. I think I said "let there be no mistake about this" and I wrote the terms down on a piece of paper.

Q. What terms? A. The time at which they were to be paid.

Q. Did you write the price on that piece of paper? A. No.

Q. Did you say anything about the price? A. There was a question about sixteen cents.

Q. That was a term of the bargain? A. I don't think so, I think that the idea was that these teas at these prices would come to sixteen cents. It appears they have not.

I guess he may have said it (that it would average sixteen cents) at Mr. Letellier's. There was so much talk about it I don't exactly remember.

Q. Can you remember exactly what he said about sixteen cents? A. No, I cannot.

Q. Did you mention at all * * and let there be no mistake * * * did you mention at all what was the price the tea was sold for? A. I don't think so.

Q. Did he ask you for the price? A. He must have done so. I left the samples and put the prices on there. I left the samples with Mr. Letellier.

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Speaking of the sale of teas by sample the witness says:

* * * Most of the Quebec people buy them in that way. Q. On what? On appearance? A. On appearance to see if they suit them. Q. And they can tell by appearance if they suit them? A. I presume so, if they buy them.

Q. Will you tell us exactly what took place at the time of the purchase of those teas between Mr Letellier and Mr. Kearney? A. I did tell you. Q. Repeat it over again in detail? A. When? Q. All that took place at the time the bargain was made? A. No, I cannot. * * * * * I will undertake to swear that according to the way I understood it, the prices marked on the samples would average about sixteen cents * * the prices marked on the samples I certainly understood the sale to be. Q. You have no doubt about that? A. According to my way of thinking I have no doubt whatever.

Q. Did you at that time (in a conversation within ten days before) tell him, (Mr. Kearney), you did not recollect whether it was for sixteen cents a pound or the prices marked on the samples? A. I may have said so.

Mr. Justice Andrews, who tried the case stated that he could not give credence to the evidence of the broker and he held that the defendant should pay at the rate of sixteen cents basing his decision on the retention by the defendant of the invoice without objection. He also held the plaintiff liable to pay for the wine as he had retained it for a long time without complaint and had credited it to defendant in the invoice for the tea. The plaintiff did not appeal from this judgment. The defendant appealed to the Court of Queen's Bench where the judgment against him was reversed, the court holding that though the acceptance of the invoice without objection afforded a presumption against the defendant, such presumption was completely rebutted by the evidence that the price of the tea was that stated on the samples.

The plaintiff then brought the present appeal to this court.

Fitzpatrick Q. C. for the appellant.

Languedoc Q.C. and *Dorion* for the respondent.

The judgment of the majority of the court was delivered by:

GIROUARD J.—La bonne foi, qui doit présider aux opérations d'un négociant, imposant à l'intimé la nécessité d'une protestation dans un délai raisonnable, s'il n'était pas satisfait de la facture de l'appelant. Non seulement il garde le silence, mais il en confirme la teneur en l'exécutant, c'est-à-dire en envoyant, ses traites pour des montants tellement rapprochés de la facture qu'il était raisonnable de supposer qu'elle était acceptée. Ce n'est qu'après cinq mois, lorsque le dernier lot des marchandises lui est expédié, qu'il communique à l'appelant ses objections au prix indiqué. C'était trop tard. Par son silence et sa conduite l'intimé avait élevé contre lui une présomption de fait que la facture était correcte, conformément à l'article 1242 du Code Civil, présomption qui militera contre lui tant qu'elle ne sera pas repoussée par une preuve contraire. Or cette preuve n'existe pas. Quatre témoins ont été entendus sur le fait du prix du thé. L'appelant et l'intimé se contredisent carrément. Le fils de l'intimé n'était pas présent lorsque la vente a été conclue. Le témoignage du courtier Baldwin est si vague et incertain que, selon moi, il est sans valeur. L'appelant doit donc avoir jugement selon la facture.

Cette présomption a reçu la sanction des plus hautes autorités françaises en droit commercial. Gilbert sur Sirey, art. 109 du Code de Commerce, n. 17, dit: "L'acheteur qui garde la facture que lui envoie le vendeur, l'accepte par cela même." Il cite Pardessus, no. 248; Delamarre et Le Poitvin, t. 1er n. 158; Massé, t. 4 no. 2445; Voir aussi dans le même sens, Rivière, p, 258; Boistel, p. 302; Bédarride, Achats et Ventes, nos. 320 et suivants.

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Namur, t. 1er, p. 376, observe que "lorsqu'une facture contient des énonciations contraires à la vérité, par exemple relativement à l'indication du lieu de paiement, l'acheteur doit s'empresser de réclamer, parce qu'une facture acceptée sans protestation fait preuve contre lui." Il cite un arrêt de Bruxelles du 13 octobre 1827, qui jugea ainsi. Bédarride nos. 320 et 322, en cite plusieurs autres dans le même sens ; Colmar, 18 juillet 1832 ; Nancy, 5 juillet 1837, et Aix, 24 juin 1842 ; Puis, au no. 323, il conclut :

Donc, dès qu'elle (la facture) arrive en ses mains, l'acheteur est en demeure, et par conséquent dans la nécessité de s'expliquer, de contrôler les prétentions du vendeur, d'en établir l'exactitude.... En conséquence, l'acceptation pure et simple de la facture, contrairement à cet intérêt, ne peut être que la reconnaissance de la sincérité des conditions qu'elle énonce, reconnaissance dont le bénéfice, désormais acquis au vendeur, ne saurait lui être enlevé par la prétention ultérieure de se refuser à la consommation du marché.

Puis, il ajoute au no. 325 :

La cour de Bordeaux consacrait le principe et l'appliquait même dans le cas où la chose vendue doit être livrée par parties et à des époques différentes.... Cet arrêt est juridique. L'exécution partielle de la vente régit le contrat quant aux conditions auxquelles elle a eu lieu.

Ajoutons que le Code de Commerce n'a pas de disposition particulière sur ce point. L'article 109 déclare simplement que les achats et ventes se constatent de différentes manières, et entr'autres par la correspondance, les livres des parties, la preuve testimoniale ou "une facture acceptée". Ce n'est qu'en appliquant les principes du Code Civil concernant les présomptions de fait, semblables en substance à ceux de notre code, que la doctrine la jurisprudence ont consacré la règle que nous venons d'indiquer.

Même, si notre code était silencieux, les règles sur la preuve prescrites par les lois d'Angleterre—que nous devons suivre en l'absence de dispositions dans notre code, art. 1206—sont sur ce point semblables à celles

du droit français. Taylor on Evidence, ed. 1895, sect. 810, dit: "*Among merchants*, an account rendered will be regarded as allowed, if it be not objected to within a second or third post, or, at least, if it be kept for any length of time without making an objection." Il cite plusieurs décisions qui ont jugé dans ce sens.

La majorité de la cour est donc d'avis d'infirmer le jugement de la Cour d'Appel, et de rétablir le jugement de la Cour Supérieure, avec dépens devant toutes les cours.

GWYNNE J.—This appeal must, in my opinion, be determined by application to it of the rule so often enunciated and acted upon in this court—that we will not reverse a judgment rendered in respect of a pure matter of fact unless we are clearly satisfied that it is manifestly wrong and wholly unsupported by the evidence, and this cannot, in my opinion, by any means be said of the judgment which is before us on this appeal

The question simply is, as to what in point of fact was the contract upon which certain teas, the price of which is the sole matter in dispute, were sold by the plaintiff to the defendant. The plaintiff who gave evidence on his own behalf swears that they were sold at 16 cents per lb. and he has shewn in evidence, and it is admitted by the defendant, that the plaintiff in a letter addressed to the defendant bearing date the 11th March, 1895, which was in due course received by the defendant, enclosed an invoice bearing date the 1st of March, wherein is shewn the weight of several half chests of tea numbering in the whole 1384, with marks upon each indicating the correspondence of the several packages with certain boxes of samples left with the defendant at the time of the sale at the foot of which the whole was summed up thus—62,601½ lbs. at 16 cents—$10,016.24.

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Gwynne J.

The evidence of the plaintiff was that on the negotiation for the sale, which took place through the intervention of a broker named Baldwin, he left with the defendant several boxes containing samples of the teas upon which were marked the brands and quantities of the several teas offered for sale In answer to a question whether certain figures indicating prices were not also on the several boxes of samples, he replied—*I presume so, I don't know I am sure.* Being further interrogated whether he had not himself mentioned to the defendant the prices marked on the boxes, he replied "I mentioned one price, I mentioned that ten cent one, saying it was very cheap," and being asked if he had not in a general way referred to the prices marked on the boxes, he replied—"not a general way no. I remarked these teas were very cheap; at the average price of 16 cents, they would be still cheaper at the prices marked on the tins. Being asked if he had not instructed his broker Mr. Baldwin to mark the prices on the boxes, he replied—"No, I did not give him any instructions; he asked me as a favour to give him the relative values of the different teas and to the best of my ability I did." He said further that Mr. Baldwin requested him to give an estimate of the different values of the teas, the *pro ratâ* value of the different teas; and being asked what this would be for, he replied:—

> To give Mr. Baldwin an idea of the different values. He said he did not know the value. I quoted the price to Mr. Baldwin that he was to give to Mr. Letellier. Mr. Baldwin said I don't know the different values of these goods. I said it doesn't matter to me, I don't know either. He said *we must put a value on the different lines.* I said it didn't make any difference to him *so long as they averaged sixteen cents.* So with that understanding he commenced to value them from ten cents to twenty-two cents *which would make an average of sixteen cents*; he commenced at the low line of ten cents and went to the top line

and he added that this marking of the prices on the

boxes had no bearing whatever as far as he knew with the contract of sale so far as Mr. Letellier was concerned. The defendant only consented to purchase the teas if the plaintiff would purchase from him certain wine which he had for sale, to the amount of $2,937.12, and this being agreed to by the plaintiff the bargain was concluded, as the plaintiff says, in this manner :

We had, he says, a good deal of talk. Mr. Letellier did not want to take the whole of it, and when he accepted the whole account Mr. Baldwin got up and said, "let this be distinctly understood, you take these teas at 16 cents a pound and you take this wine at Mr. Letellier's price." Mr. Letellier said all right and we packed up the samples,

and so they parted, the plaintiff leaving with the defendant the samples of the tea with the prices marked thereon, and taking away with him samples of the wine given to him by the defendant.

Now this account of the transaction is contradicted in the most unqualified manner by the defendant and his son, and I must say that I cannot dissent from the conclusion arrived at by the court whose judgment is appealed from, namely, that it is contradicted also by the broker Baldwin. The teas were first offered by the plaintiff in the office of the broker Baldwin to the defendant's son who swears in the most positive manner that the teas were offered to him by the plaintiff at the different prices and quantities marked on each box. His account of the transaction with him is this : Mr. Baldwin asked him : Is your father open to buy a big lot of tea?

J'ai dit, cela dépend de la quantité. Il dit, *I will show you the samples*, —monsieur Kearney s'est levé, il dit : il y a telle et telle marque et il y en a tant de caddys, le prix, et à côté, cela vaut tel et tel prix. Là-dessus, j'ai dit que le lot était pas mal considérable. J'ai dit qu'on prendrait peut-être une marque, ou une partie de chaque marque mais que je ne pensais pas qu'il prendrait tout le lot. Là-dessus, il dit : J'irai voir votre père au bureau. Il m'a demandé à peu près l'heure qu'il y serait, il dit · J'irai au bureau avec M. Baldwin et on arrangera cela.

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v.
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Gwynne J.

The witness added that Mr. Baldwin had sent on the samples in about half an hour after witness had returned to his father's office. The defendant says that the contract of sale was made on the 13th February, 1895; what took place on that day is in his own words as follows:

M. Kearney est arrivé au magasin après-midi, il était tard dans l'après-midi, avec M. Baldwin. Les échantillons étaient sur mon bureau, mais pas ouverts, et puis M. Kearney m'a demandé, tous les deux m'ont demandé si j'achèterais du thé. Ils ont ouvert les échantillons et me les ont montrés. J'ai trouvé la quantité un peu forte. J'ai hésité. Après les pourparlers, j'ai demandé à M. Kearney s'il achèterait du vin de messe et je lui ai montré mes échantillons. Nous avons convenu, je me suis décidé à prendre le thé au prix mentionné sur les échantillons et *je jure positivement qu'il n'a pas été question d'autre chose. Il m'a vendu les thés à ces prix-là.* Il a peut-être été dit dans la conversation que cela avei egerait, que cela faisait une moyenne de seize cents, je n'avais pas de chiffres pour établir cela, moi. Je crois qu'il a été mention de seize cents, *mais j'ai acheté positivement sur ces prix-là, sur les prix mentionnés.*

From the 13th February until the 9th March nothing was done. On the 9th March the defendant sent to the plaintiff an invoice of the wines sold by him, and on the 11th of March the plaintiff in his letter of that date enclosed the invoice of the tea which bore date as already said of the 1st March. The teas were forwarded in there parcels upon the 10th and 13th April and 8th July, 1895; the wines were at plaintiff's request left with defendant until required. Upon the 18th April the plaintiff drew two bills upon the defendant for $1750.00 each payable the one at six months and the other at eight months, and on the 15th July another for like amount payable at ten months from the 1st March as of which date all of the bills were drawn. All of these bills the defendant accepted and it was not until the 15th August, after the plaintiff had drawn a bill for $1829.12 which the defendant refused to accept, that he pointed out to the plaintiff what the

defendant insists now is an error in the invoice of the tea sent on the 11th March, the defendant being willing and offering to pay the amount really due according to defendant's contention at the prices named upon the respective boxes of samples; and he explains why he had not sooner drawn attention to the error which he now insists on by saying that he had the samples which shewed the prices at which he bought, and he never entertained the idea that Mr. Kearney would claim sixteen cents a pound when he had sold at the prices named on the samples; and he says that he accepted the bills because he had full value in his possession and he expected that Mr. Kearney when the last draft should be sent would correct the error in the invoice sent in March.

Mr. Baldwin says Mr. Kearney brought a lot of samples to him and handed them to him and asked him to try and sell them. At this time there were no prices marked on the samples. He put the prices on each box according to prices named to him by Mr. Kearney. The boxes with the prices and quantities marked upon them he left with the defendant; the plaintiff was present with him. Being asked whether the defendant asked for the price he answered, "He must have done so, I left the samples and put the prices on them and left the samples with Mr. Letellier"—and he adds "I always understood the prices were marked and the quantities." During the negotiations for the sale both he and the plaintiff had called on the defendant several times. Upon the day on which the sale was completed, he says that the defendant looked at the teas and at the prices and the quantities on each, the only discussion that there was being that the defendant thought it a big lot. Mr. Baldwin remembers no discussion with regard to prices at all; he says that the defendant looked at the teas upon which

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the prices were marked which spoke for themselves. He says that if he mentioned sixteen cents at all, but he does not think he did, he mentioned it as that the teas would average sixteen cents at the prices marked, and he says that he will undertake to swear that he understood the sale to be according to the prices marked on the samples and that these prices would average about sixteen cents, and that as to this, according to his way of thinking, he has no doubt whatever. He says in another place that although sixteen cents was mentioned he does not think it was mentioned as a term of the bargain; what he understood was that the prices marked on the samples were the prices at which the tea was sold but that at these prices the teas would come to sixteen cents, which, he says it appears now they have not. What took place at the close of the bargain according to him was this, that he said "let there be no mistake about this," and he wrote the terms of payment on a piece of paper but nothing whatever as to the price, which, according to his understanding of the bargain, was as already stated above.

Now upon this evidence it is impossible, I think, to say that there is manifest error in the judgment of the Court of Appeal at Quebec to the effect that Baldwin's evidence corroborates that of the defendant and his son, and that whatever may be thought to be unsatisfactory in the reasons given by the defendant for his not having sooner drawn the attention of the plaintiff to what the defendant insists is error in the invoice sent to him on the 11th March it cannot, I think, admit of a doubt that the evidence of the plaintiff as to the prices put upon the samples is equally unsatisfactory. It seems absurd that any man of business could for a moment entertain the idea that his broker was asking for and putting the prices named by the plaintiff upon the

samples placed in his hands for sale of the tea for any private purpose of the broker's own, or for any other purpose than to show the prices of the tea he was authorized to sell. So likewise is it impossible, in my opinion, to say that the judgment appealed from is manifestly erroneous in the estimate attributed by the court to the whole of the evidence unless in the face of the evidence of the defendant, his son and the plaintiff's broker, we must hold that the defendant's silence as to the error in the invoice he received in March, 1895, is absolutely uncontrovertible and conclusive. This we cannot do. The case therefore comes precisely within the class of cases with the judgments in which, as involving questions of mere matter of fact, this court will not interfere and this appeal therefore, in my opinion, ought to be dismissed with costs.

Appeal allowed with costs.

Solicitors for the appellant: *Fitzpatrick & Taschereau.*

Solicitors for the respondent: *Miller & Dorion.*

THOMAS ADAMS (PLAINTIFF)................APPELLANT;

AND

DUNCAN McBEATH (DEFENDANT)........RESPONDENT.

1896
*Oct. 20, 21.
1897
*Jan. 25.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

Will—Undue influence—Evidence.

In order to set aside a will on the ground that its execution was obtained by undue influence on the mind of the testator it is not sufficient to show that the circumstances attending the execution are consistent with the hypothesis that it was so obtained. It must be shown that they are inconsistent with a contrary hypothesis.

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

1896
ADAMS
v.
McBEATH.

APPEAL from a decision of the Supreme Court of British Columbia (1) reversing the judgment at the trial in favour of the plaintiff.

The action was brought to set aside the will of Samuel Adams, deceased, uncle of the plaintiff Thomas Adams, bequeathing all his estate, worth about $10,000, to the respondent a stranger in blood to the testator. The will was alleged to be invalid on the ground of undue influence on the part of the beneficiary.

The testator, Samuel Adams, was at the time of his death about 84 years of age. He had no relatives in Canada, the plaintiff and another nephew residing in England. He lived entirely alone, did his own cooking and took care of his house himself. On November 9th, 1891, a neighbour became uneasy at not having seen him for three or four days and summoned a friend of his (the testator's) to go into the house and see if anything was wrong, and he having done so the old man was found lying on the floor of his kitchen in a helpless condition having fallen in a fit or seizure of some kind and remained there for nearly three days. He was put in bed and assistance summoned. The respondent, with whom he had been somewhat intimate, came to see him and on the following day took him to his own house where he remained until his death.

The testator came to respondent's house on Tuesday November 10th, and on Wednesday he asked respondent to have a will drawn up in his (respondent's) favour. Respondent went to a solicitor and instructed him to prepare a will leaving all testator's property to him (respondent). The solicitor drew the will and went to the house, read it over to the testator and asked him if he understood it; on his replying in the affirmative the will was executed, the solicitor and a brother-in-

(1) 3 B. C. Rep. 513.

law of the respondent being the witnesses. The testator lived for a week after the execution of the will.

On the trial a number of letters written by the testator to the plaintiff were put in evidence, the correspondence beginning in 1878 and continuing at intervals down to June 1891. In the earlier letters the testator informed the plaintiff that he intended leaving him the property he owned and in 1884 he said in one letter "there will be no necessity for me to write to you again, as you now know what my intentions are, unless you should change your place of residence." After that there was no evidence of testamentary intentions in his letters and towards the end of the correspondence he once wrote expressing his satisfaction at plaintiff having entered an institution in Liverpool where, as he expressed it, "you were very fortunate in getting into that institution, as you will never want anything as long as you remain in it."

Shortly before the last illness of the testator he had a will drawn up leaving his property to the plaintiff, but it was never executed.

The doctor who attended him in his last illness testified that he was perfectly capable of attending to business and that his mental faculties were unimpaired.

The trial judge held that the will was invalid and made a decree setting it aside. The full court reversed this judgment holding that the evidence showed capacity in the testator, failed to prove undue influence, and satisfied the court that the testamentary intentions in favour of the plaintiff, contained in his earlier letters, had been abandoned. The plaintiff then appealed to this court.

Moss Q.C. for the appellant. The will having been executed under peculiar circumstances the onus is on the defendant, who is the sole beneficiary, to prove the testator's capacity. *Tyrrell* v. *Painton* (1).

(1) [1894] P. D. 151.

1896
ADAMS
v.
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The solicitor should have drawn the testator's attention to the fact that he was disinheriting his relatives and obtained positive evidence that he knew the full effect of his action. *Hanwood* v. *Baker* (1); *Wilson* v. *Wilson* (2); *Boughton* v. *Knight* (3).

The evidence sufficiently establishes that the testator did not express his own intention when he executed the will and was not in the mental condition required by law for such an act. See *Currie* v. *Currie* (4); *Baptist* v. *Baptist* (5).

S. H Blake Q.C. for the respondent. The respondent is only required to produce reasonable evidence to satisfy the court that the will was executed voluntarily and with knowledge of its contents. *Barry* v. *Dutlin* (6); *Brown* v. *Fisher* (7).

The evidence of the doctor as to the testator's mental condition, and that of the witnesses who knew the circumstances under which the will was executed, make a stronger case in favour of this will than many of those reported in which the courts have refused to undo the act of a testator. See *Martin* v. *Martin* (8); *Ashwell* v. *Lomi* (9); *Parfitt* v. *Lawless* (10).

The judgment of the majority of the court was delivered by:

SEDGEWICK J.—On the 18th of November, 1891, one Samuel Adams died at Victoria, B.C. On the 11th of November, a few days before his death, he had executed a will, by which all his property, consisting both of realty and personalty, and amounting in value to about $10,000.00, was given to one Duncan McBeath, the defendant and respondent in this case. The will

(1) 3 Moo. P. C. 282.
(2) 22 Gr. 82.
(3) L. R. 3 P. & D. 64.
(4) 24 Can. S. C. R. 712.
(5) 23 Can. S. C. R. 37.
(6) 2 Moo. P. C. 480.
(7) 63 L. T. N. S. 465.
(8) 12 Gr. 500; 15 Gr. 586.
(9) L. R. 2 P. & D. 477.
(10) L. R. 2 P. & D. 462.

was duly proved on the 24th of November and McBeath took possession of the property coming to him under it. On the 18th of October, 1892, this action was instituted, the plaintiff being the nephew of the deceased, for the purpose of setting aside the will and for the distribution of the estate as if the testator had died intestate. The suit was tried before Mr. Justice Crease, without a jury, and judgment was entered for the plaintiff. Upon appeal to the Supreme Court of British Columbia, (consisting of McCreight, Walkem, and Drake JJ.), the judgment of Mr. Justice Crease was unanimously set aside. This is an appeal from that judgment.

It was not contended at the argument that there was any lack of testamentary capacity on the part of the testator. The only ground upon which it was contended that the will in question was invalid was that it had been obtained by the sole beneficiary, the respondent upon this appeal, by exercise of undue influence upon the mind of the testator, and that the will in question did not represent his actual wishes in regard to the final distribution of his property; and the sole question at issue in this appeal is whether there was, as a matter of fact, any such undue influence.

In considering this question, the statement of a few obvious principles in regard to wills in general may not be out of place. In the first place, a document purporting to be a will executed in the manner prescribed by the statute, is *primâ facie* a valid instrument. The onus of setting it aside is, in every case, upon him who asserts the contrary; but a will apparently valid upon its face may be invalid for many reasons. The testator may not have testamentary capacity to execute the will. That being established the will ceases to have any effect as a testamentary in-

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strument. Or the testator, although possessing sufficient testamentary capacity, may, in the expression of his wishes, be improperly influenced by outside parties to such an extent that the will in question does not represent his will or wishes, but the will and wishes of the party unduly influencing him.

That, as I have said, is the contention in the present case, and that the will therefore is bad. Lord Cranworth, in *Boyse* v. *Rossborough* (1), at page 49, says :—

> One point, however, is beyond dispute, and that is, that where once it has been proved that a will has been executed with due solemnities by a person of competent understanding, and apparently a free agent, the burden of proving that it was executed under undue influence is on the party who alleges it. Undue influence cannot be presumed.

And again, at pp. 50, 51 :—

> The most I can find, if indeed that can be found, is evidence to show that the act done was consistent with the hypothesis of undue influence ; that the instrument, though apparently the expression of his genuine will, might in truth have been executed only in compliance with the threats or commands of his wife or that he had been led to execute it by unfounded prejudices artfully instilled into or cherished in his mind by his wife against those who would otherwise have been the probable objects of his bounty.
>
> But in order to set aside the will of a person of sound mind, it is not sufficient to show that the circumstances attending its execution are consistent with the hypothesis of its having been obtained by undue influence. It must be shown that they are inconsistent with a contrary hypothesis.

I am of opinion that this case can, and ought to be, determined upon the application of this principle laid down by Lord Cranworth. The evidence in the present case is, I admit, consistent with the contention that McBeath exercised an improper influence upon the mind of the testator, but the evidence is equally consistent with the hypothesis that he did not. I have been unable to find, apart from the fact that the testator

(1) 6 H. L. Cas. 2.

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left all his property to a person not a blood relative, a single scintilla of evidence to show that any improper influence was exercised upon him at all. The argument is:—There must have been undue influence; there must have been fraud or artifice, or improper representations on the part of McBeath, otherwise the testator would not have made the will he did; and they argue that the evidence showed a settled determination on the part of the deceased for many years to leave the property to his nephew, the appellant, and that that resolution, broken as it was by the execution of the will, could only have been broken under the overmastering pressure of McBeath at a time when the testator was approaching death and was completely under the control of McBeath. A careful perusal of the evidence, and particularly of the letters which the testator wrote to the present appellant, has convinced me that the intention of the testator to devise his property to the plaintiff underwent a change a considerable time before his death. The plaintiff had become a life inmate of a mariners' home near Liverpool, England, and the deceased's later letters contain reiterated statements to the effect that he might consider himself as provided for for life. I admit that under ordinary circumstances where a person possessed of property wills it wholly to a stranger, having at the same time a wife or family, or near relatives, in respect to whom he stands under a certain kind of moral obligation, that fact alone would afford some evidence, though not conclusive, that some malign influence had been brought to bear upon the testator to perform what would naturally be considered an unnatural act, but I must confess that in the present case there does not appear to be any incongruity or anything to shock one's natural sense of justice or propriety. The testator was a bachelor; had been living alone for many years

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of his life at Victoria; had no friends or relatives living with him or taking care of him in his declining years. He happened for only a short time to see one of his nephews in London, England, a great many years ago, and that nephew had eventually become, what I understand to be, a pauper in an alms-house. There never had been any love or affection, or confidence, as far as I can see, between them, and to my mind there was nothing unreasonable or unnatural in his leaving his property to kind friends whom he had met and known for years in his home at Victoria. From his point of view, it would be more probable that his property would be more properly dealt with by his friends about him whom he had known for many years and who had always acted kindly towards him, than by distant relatives whom he had never seen, or whom having seen, were more likely to do more harm than good were he to bestow upon them his bounty.

It was urged at the argument that a letter which the respondent wrote to the plaintiff after the death of the testator was convincing evidence of undue influence on the part of the respondent. That letter, as I have said, was written after the death of the testator, and is not relevant except in so far as it may show that its writer was not a man of truth. It otherwise has no bearing upon the issue as to whether there was or was not undue influence. No doubt there would be a desire on the part of McBeath, when he had reason to believe that the will might be attacked by the plaintiff, to write to him. The letter in question may not be strictly accurate in its minute details if one examines every word of it in a critical way. It is, however, substantially accurate and does not, in my view, in any way affect the credit or veracity of the respondent.

Stress was laid upon the fact that McBeath, the beneficiary, was the person who gave instructions to the solicitor who drew up the will, and it was contended that in consequence the full burden was placed upon the beneficiary to prove that that transaction was a proper one. I am not disposed to question that proposition. It has, in my view, however, been shown that the disposition that the testator made of his property was a reasonable and proper one, a disposition which might have been made, and which I believe was made, without any improper influence operating in favour of the beneficiary. The testator had a right to give his property to whom he pleased. It was, in my view, as reasonable that he should give it to a kind-hearted friend and companion whom he had known for years, and who, when he was unable to take care of himself, had kindly cared for him, as to give it to a comparatively unknown and distant relative whom he had never seen for many years, who had never shown him any evidence of affection or regard, and who had eventually become a ward of an eleemosynary institution.

The conduct of Mr Hall, the solicitor who drew the will, has been much criticised. All that is necessary for me to say is that there is nothing in the evidence to show that he departed from the line of professional duty. He was under no obligation, as has been contended, to explain in detail to his client the effect of the will. There could be no question as to what its effect would be. All the property of the testator would go to McBeath and none of his relatives would share in it. The solicitor was under no obligation to explain what the testator knew, or must have known, assuming testamentary capacity to exist. Whether he should have allowed McBeath to be in the room when the will was being executed is a question which must

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depend upon circumstances. I gather from the evidence that in the present case his presence in the room at the time of the execution of the will was in a certain sense a necessity, and nothing further need, I think, be said upon that point.

I have not considered it necessary to go more elaborately into the details of the evidence. The learned judges of the court below have done this with great power, and I adopt what they have said with so much ability upon the subject.

In my opinion the appeal should be dismissed with costs.

GWYNNE J.—This is an appeal from the judgment of the Supreme Court of British Columbia reversing a judgment of Mr. Justice Crease upon the trial before him without a jury in an action instituted by the above appellant against the above respondent for the purpose of rescinding letters of probate of a will purporting to have been executed by an old man, the uncle of the appellant, in favour of the respondent which had been caused to be prepared by the respondent himself in terms dictated by him. The sole question involved in the action was whether or not the will in question can, under the circumstances appearing in evidence, be held to be in fact and in law the true last will and testament of the deceased. None of the relatives of the deceased resided in British Columbia. The will purports to have been executed on the 11th November, 1891, and letters probate thereof were granted on the 24th of that month.

It will be desirable to draw attention to the law relating to cases of wills prepared or procured to be prepared as this will was, by the respondent the sole beneficiary thereunder. Lord Cairns in the case of *Fulton* v. *Andrew* (1) uses the following language :

(1) L. R. 7. H. L. 460.

It is said that it has been established by certain cases to which I will presently refer that in judging of the validity of a will or part of a will, if you find that the testator was of sound mind, memory and understanding, and if you find further that the will was read over to him, or read over by him there is an end of the case, that you must at once assume that he was aware of the contents of the will and that there is a positive and unyielding rule of law that no evidence against that presumption can be received. My Lords I should in this case as indeed in all other cases greatly deprecate the introduction or creation of fixed and unyielding rules of law which are not imposed by acts of parliament. I think it would be greatly to be deprecated that any positive rule as to dealing with a question of fact should be laid down, and laid down now for the first time, unless the legislature has, in the shape of an Act of parliament, distinctly imposed that rule.

He then lays down the rule which does apply as laid down in *Barry* v. *Butlin* (1) in the language of Baron Parke when delivering the judgment of the judicial committee of the Privy Council, thus:—

The rules of law according to which cases of this nature are to be decided, do not admit of any doubt so far as they are necessary to the determination of the present appeal and they have been acquiesced in on both sides. These rules are two: the first that the *onus proband* lies in every case upon the party propounding a will and he must satisfy the conscience of the court that the instrument propounded is the last will of a free and capable testator. The second is that if a party writes or prepares a will under which he takes a benefit that is a circumstance that ought generally to excite the suspicion of the court and calls upon it to be vigilant and jealous in examining the evidence in support of the instrument in favour of which it ought not to pronounce unless the suspicion is removed and it is judicially satisfied that the paper propounded does express the true will of the deceased. These principles to the extent I have stated are well established; the former is undisputed, the latter is laid down by Sir John Nicholl in substance in *Paske* v. *Ollat* (2); *Ingram* v. *Wyatt* (3); and *Billinghurst* v. *Vickers* (4); and is stated by that very learned and experienced judge to have been handed down to him by his predecessors and this tribunal has sanctioned it in a recent case namely *Baker* v. *Batt* (5).

Then upon a question arising as to whether any fraud does or does not appear in procuring the execution of a will he says on p. 463.

(1) 2 Moo. P. C. 480.
(2) 2 Phillimore 323.
(3) 1 Hag. Ecc. 388.
(4) 1 Phillimore 187.
(5) 2 Moo. P. C. 317.

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It is very difficult to define the various grades or shades of fraud, but it is a very important qualification to engraft upon the general state of things that the reading over of a will to a competent testator must be taken to have apprised him of the contents. If Your Lordships find a case in which *persons who are strangers to the testator, who have no claim upon his bounty, have themselves prepared for their own benefit a will disposing in their favour of a large portion of the property of the testator, and if you submit that case to a jury it may well be that the jury may consider that there was a want on the part of those who propounded the will, of the execution of the duty which lay upon them to bring home to the mind of the testator the effect of his testamentary act, and that that failure in performing the duty which lay upon them amounted to a greater or less degree of fraud on their part.*

Lord Hatherly in the same case p. 469 says :—

A matter which appears to me deserving of some remark and upon which the Lord Chancellor has already fully commented is *the supposed existence* of a rigid rule by which when you are once satisfied that a testator of a competent mind has had his will read over to him and has thereupon executed it, all further inquiry is shut out. No doubt these circumstances afford very grave and strong presumption that the will has been duly and properly executed by the testator. *Still circumstances may exist which may require that something further shall be done in the matter than the mere establishment of the fact of the testator having been a person of sound mind and memory and also having read over to him that which had been prepared for him and which he executed as his will. It is impossible, as it appears to me, in the cases where the ingredient of fraud enters to lay down any clear and unyielding rule like this.*

Again he says p. 471 :—

There is one rule which has always been laid down by the courts having to deal with wills and that is that a person who is instrumental in the framing of a will and who obtains a bounty by that will is placed in a different position from other ordinary legatees who are not called upon to substantiate the truth and honesty of the transaction as regards their legacies. It is enough in their case that the will was read over to the testator and that he was of sound mind and memory and capable of comprehending it. *But there is a farther onus upon those who take for their own benefit after having been instrumental in preparing or obtaining a will. They have thrown upon them the onus of shewing the righteousness of the transaction.*

In the introductory words of his judgment p. 468 Lord Hatherly had expressed his full concurrence in the

observation which had been made by Lord Cairns. It is plain therefore, I think, that concurring as he did with Lord Cairns' observations as to fraud, his Lordship considered that the non-establishment, by a party who had been instrumental in procuring a will to be made in his favour, of the righteousness of the transaction to the complete satisfaction of the tribunal, whether a judge or a jury, before which the question was tried constituted fraud in procuring the will so as to avoid it, although it might be impossible to lay down with certainty the precise mode by which the fraud had been effected.

Where the will is an inofficious one, that is to say one in which, like the one now under consideration, natural affection and the claims of near relationship have been disregarded, the person propounding the will must make out a case of full and entire capacity in the testator at the time when the paper was framed, and it will not be sufficient in order to do this to make out that he was of capacity to answer a few common questions or to make a few casual remarks or *even to concur and express some loose wishes and ideas as to altering his will and so on; he must satisfy the court that he was equal and alive to, and comprehended the full import of what he was doing at the time*, seriously important as what he actually did must be admitted to be. This is the language of Sir John Nicholl in *Montefiore* v. *Montefiore* (1). In *Baker* v. *Batt* (2), the language used is

If the person benefited by a will himself writes or procures it to be written the will is not void as it would have been by the civil law, but the circumstance forms a just ground of suspicion and calls upon the court to be vigilant and jealous and requires clear and satisfactory proof that the instrument contains the real intention of the testator.

In short the fact of the will being made in favour of the person who has prepared it or procured it to be

(1) 2 Addam 354. (2) 2 Moo. P. C. 321.

written is *primâ facie* evidence of fraud, which must be displaced to the satisfaction of the tribunal before which the case is tried *by clear and satisfactory proof*, and when the will is an inofficious one the evidence required must of necessity be of a much stronger and more conclusive character than that which might be sufficient where the party so claiming under the will was a relative of the testator.

In *Parker* v. *Duncan* (1) Sir James Hannen, following the rules as laid down by the House of Lords in *Fulton* v. *Andrew*, (2) adds the following:

> *It is the duty of any man who* expects *that a will is about to be made in his favour to see that the testator receives proper and independent advice* and he should take care that the testimony called in support of the will should not be that of himself alone but that it should be independent and impartial. A person (that is a testator) is entitled to have his mind perfectly free and untramelled and when one is so very ill (referring to the testator in that case) *he will do anything to get rid of importunity.*

And in *Brown* v. *Fisher* (3), after quoting at large the rules to govern courts in the case of a will prepared by and executed in favour of the person who prepared it, as laid down in *Fulton* v. *Andrew* (2), he concludes his judgment thus:—

> On the whole of the evidence *I find that the doubt and suspicion with which I was bound to watch this case in accordance with the passage I have read* (from *Fulton v. Andrew* (2)) *have not been removed*, and it has not been affirmatively established, as the plaintiff was bound to establish it, that the deceased knew and approved of the contents of this document.

The testator at the time of the making of the will now in question was a very feeble old man. He had almost completed his 83rd year. He had been for the preceeding four years at least a great sufferer from rheumatism. He lived in a small house, wholly alone, doing himself all his household requirements. One George Barrett who lived near him and who saw him

(1) 62 L. T. N. S. 642. (2) L. R. 7 H. L. 460.
(3) 63 L. T. N. S. 466.

almost every day, and to whom the old man used always to apply for anything he wanted done about the house, as, to use Barrett's own language, "picking the apples, trimming the trees or anything," and who had seen him last in his house on Friday, the 6th November, 1891, gives this account of the condition in which he found him on the following Monday the 9th November. He says :—

About noon on that day Mrs. Rivers came to my house, told me she had not seen Mr. Adams for the last two or three days—she lived next door to him. I went with her to the house, got a ladder and climbed to his bedroom window, knocked at it, found he was inside *by the groans and noises he made.* After a time he got to the door and let me in ; he was standing in his shirt just inside the door. I closed the door immediately when I saw what state he was in. He had one eye blacked and *he was in a very helpless condition,* and of course I closed the door and shut the other people out and went inside and asked him what was the matter and *he said he had a terrible time for the last three days and had not been able to get out of the house.* He had knocked his little stove down, I suppose by falling around the room, and he had a black eye. I put him into bed and straightened up the stove, and fetched the doctor ; I knew he had to have one. I went for Dr. Milne, he came immediately—felt his pulse, his heart, and sounded him around one way or another and made a remark that *the clock was pretty well run down* and instructed me to get some whiskey and eggs, flannel and other things and wrap him up and get him warm. *His extremities were all cold.* I went and got some flannel and wadding and bound him up as warm I could. I stayed with him that night, I was the only nurse that night. He could not feed himself, he was comparatively helpless. I would have to lift him out of bed and into bed and he would want to get out about every twenty minutes. * * * Mr. McBeath the defendant came there in the evening. He remained probably two hours. I think he went away about 9 or 9.30. On Tuesday morning Mr. McBeath came about 7 o'clock. I asked him if he would stay a little while I went home and got some breakfast. He said he would stay until noon-time. I went home and went to bed until noon-time and then I came back again. Mr. McBeath was there at the time. I asked him what we should do with the old gentleman, whether it would not be better to take him to the hospital. He said : "*No, he is going to my house with me.*" *This was said in Mr. Adams' presence but I could hardly imagine he knew what we were talking about.* I don't think he understood what was said ; I spoke to the old man about

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going to McBeath's house afterwards. *I wanted him to go and asked him to go. He was not very willing to go at first. He did not like to leave the house. He thought I had made an excellent nurse but I persuaded him to go afterwards as I could not stay with him and nurse him,* and so by the influence of Mr. Kirsop and two or three others we got him to go there * * * He did not want to leave the house. He would much rather I am sure have stayed there from what he said.

Accordingly he was taken down in a carriage to Mr. McBeath's house. McBeath and Barrett went with him. When leaving him he bade good-bye to Barrett, saying "George I wont forget you" or something to that effect, to which Barrett replied "I will come down and see you again" which he did on Thursday the 12th.

George Kirsop when he heard of Adams' illness went up to his house with one William McDonald on Tuesday the 10th November. Kirsop in his evidence says:

When we got into Mr. Adams' house we saw Mr. McBeath there and Mr. Adams was supposed to be asleep in his bed. He was quiet. I never looked at him in fact. Mr. McBeath said he was asleep and I never made any inquiry any further. I had seen Mr. McBeath up to visit Adams occasionally when I lived there. Mr. McBeath said he would like the old man to come down to his house, that he and his wife would take care of him. I thought that was a very good thing *if we could get him to go. Then I told Mr. McBeath that Adams had not got any will made yet, that he had been promising me for three or four years to make his will, and if we should get him to go down with him, McBeath, and if he was capable of making a will to get him to make his will. I told Mr. McBeath if he could get him to make a will if he was capable it would save the Government from eating part of it up. I told him there was* $2,000 *in the savings bank and this property, and that everything that he had had to go to his nephews in Liverpool*; after I told Mr. McBeath this Mr. Macdonald and I left the house and at the corner met Mr. Barrett; we had a conversation and Mr. Barrett thought it would be better to take him to the hospital. Mr. Barrett asked me to get the doctor to persuade Adams to go to McBeath's. McDonald and I went to the doctors and the doctor said he would and I went back to Mr. Adams' house and told him what I had done. I told him the doctor was coming up to persuade him to go down with Mr. McBeath. We thought it was best as he wanted nursing like a baby. I said: "*It is the best thing you can do.*" He said: "*George* (meaning Barrett) *is a*

good nurse and he will take care of me." I left, *he would not consent to go,* and I went home and got my dinner.

The doctor went up as he promised to use his influence to get Adams to go to McBeath's, but when he got there he found the matter had been arranged and that Adams had consented to go.

Mr. McDonald, the person referred to by Kirsop testified as follows :—

I remember before the death of Mr. Adams meeting Mr. Kirsop and going with him to Mr. Adams' house. When we got there Mr. Adams was lying in the bed asleep and Mr. McBeath was there. There was a conversation between Mr. Kirsop and Mr. McBeath in my presence. Mr. Kirsop told Mr. McBeath that if he was to take him over to his house, *to get him to make a will if he was competent to.* Mr. Kirsop told Mr. McBeath that he was trying to get the old man to make a will for some years; and he intended what money he had in the bank, something near $2000.00, and all the property to go to his nephews in Liverpool, that the old man had so said.

Certain letters were produced written by the old man to his nephew the plaintiff in the action between the month of October 1878 and the month of July 1891, shewing the friendly and indeed affectionate relations existing between the old man and his nephews in England and especially between the old man and the plaintiff in the action and his children. A few extracts will suffice. In a letter of the 28th October 1878 after mentioning his rambles over the world since they had last met, 30 years previously, he tells him of his arrival in Victoria, and he says :—

I would like to hear from you and know how you and your brother William are getting on, what business you follow for a living and also what family you have. I hope you will not think I am too inquisitive in asking you these questions—*I have a particular reason for doing so.*

In a letter dated 18th March, 1884, after telling him that he had been again rambling but had returned to British Columbia—he says :—

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Dear nephew. I am very anxious to hear from you and to know how you are getting on ; *it might be to you or your sons an advantage* for me to have your address for I am now well up in years. I was 76 years old last January but my health is good. I am smart and active on my feet yet for a man of my age thanks to Almighty God for all his mercies towards me. I would be very glad to hear from you and how you are getting on, and also how your son is getting along and if he is still in business for himself and if he is married. You did not give me the christian names of your son and daughter in your letter. *I have a little property here but no friend or relative to leave it to at my death ; it is worth looking after.*

In a letter of July 25th, 1884, after acknowledging the receipt of a letter from the plaintiff of the 20th of June and telling him all about his property and his mode of life, he says :—

If you should change your place of residence at any time you will be sure to let me know of it *for it will be necessary for me to have it always and if anything should go wrong with me I will let you know it also, but if it should be the Lord's will that I should outlive you it will be necessary for me to know your son and daughter's place of residence. The place can be sold after my death if there is none of your family here before then and the money sent to you if you are living, and if not to your son and daughter.* There will be no necessity for you to trouble yourself about writing to me after you receive this as I have your address now, unless you wish to do so.

In a letter dated August 22nd, 1884, after acknowledging the receipt of a letter from the plaintiff and also at the same time one from his son-in-law (Mr. Hatfield,) he says :

Please let Mr. Hatfield know when next you see him that I am too old now to become a regular correspondent with him but if he wants to know anything particular about this country I will give him all the information I can with pleasure. I have *given you all the particulars about myself* and *this place in my last and you may be sure I will do what I promised you. There will be no necessity* for you to write to me again *as you know what my intentions are,* unless you change your place of residence.

Then in a letter of the 22nd of August, 1886, acknowledging another letter from the plaintiff, he says :

I was very sorry when I read it to know of your son's death as he was quite a young man and also an only son. He is a great loss to his

poor wife and family, but the will of God must be done but I think it would be a great loss to you if it was God's will to take your daughter Mrs. Hatfield away. Your son did not assist you in any way for the last four or five years of his life or at least since he was married but I believe it is not so with your daughter, for I think she has been a great comfort to you. I am glad to hear that her husband is so steady a man and doing so well * * * *I hope you do not think I have forgotten you as I do not write occasionally to you but you may be sure I do not, for you are seldom out of my mind.* I would like to know how your brother William is getting on and what he is doing for a living.

Then he repeats his story of his lonely way of living and in a P.S. says:

Please give my respects to Mrs. Hatfield and tell her I am well pleased to hear she has got so good a husband.

Then in a letter of the 7th January, 1887, after acknowledging the receipt of four portrait cards of his nephew the plaintiff and all his family, he adds:

I am very thankful to Mr. and Mrs. Hatfield for their kindness in getting you to have their portraits taken and sent to me. *I will not forget this to you or them.* I thought there was no person now living that ever bestowed a thought upon me *but yourself and my poor old sister Margaret* but I see by this that I have been mistaken.

In a letter of the 24th August, 1887, he congratulates the plaintiff upon his having got into an institution, a mariners' or sailors' home, *so as to be no longer depending on his son-in-law.*

Then in a letter of January 2nd, 1888, he commences thus:

This season of the year sets one thinking of old friends and old times and somehow I got thinking of you to-day and thought I would send you a few lines from the city of Victoria wishing you the compliments of the season.

He then again congratulates the plaintiff upon his having got into the institution. He then repeats the story of his lonely life and adds:

I have *not many visitors coming to see me, now that I am old their visits are few and far between.*

He then mentions his suffering much from the rheumatism and expresses his fear that he will never get rid of it and concludes:

Please give my respects to Mr. and Mrs. Hatfield when next you see them.

Then in a letter dated October 18th, 1888, he says:

I still continue to live in a small house by myself and do my own cooking, which is not much. *I have not many visitors coming to see me but that does not trouble me much.* I have suffered considerable the last two years with rheumatic pains in my head, hands and feet; I have tried a great many remedies for it but cannot find anything that will improve them for me. I have to remain in the house most part of the time. I am not able to walk about the town as I used to do two years ago. I am getting old now and also very deaf, since I got the rheumatic pains *in my head.*

Then in a letter dated March 2nd, 1890, after giving a statement of his failing health and his still lonely life, he says:

I would like to know how your brother William is getting on *and also to have his address.* Please give my respects to Mr. and Mrs. Hatfield when next you see them.

In a letter of March 5th, 1891, he inquires about the plaintiff's son-in-law in the following terms:

I would like to know if it is your son-in-law's intention to continue on board the Liverpool and New York Packet. I think if he had a situation in some of the principal offices in New York he would do better; the next time you see him please to let him know I was inquiring about him.

Then in his last letter which is dated the 21st July, 1891, he says:

I have received yours of the 2nd instant in due time. *I am always well pleased to hear from you.* I think I have no relation now living that ever bestowed *a thought upon me but you.* * * * I wish you would let me know how your brother William is getting on and what he is doing for a living, and also I wish you would send me his address. I would like to know if it is your son-in-law's intention to remain in the situation he has at present, *I have a particular reason to know it.* * * * Please to send me Hatfield's address when next you write. * * * I am still troubled with rheumatic pains in my hands and

feet. I am now 83 years and six months old. The house I live in is a very comfortable one but very small. * * * I have not much furniture in it but just enough for my own use, *as I have no visitors coming to see me. Please give my respects to Mr. and Mrs. Hatfield when next you see them.*

In these letters the deceased never expressed a single sentence to warrant the conclusion that he had for a moment changed the intention expressed in some of them in the most explicit terms of leaving his property after his own death to his nephews and their children. It has been suggested that such an intention does appear in the congratulations which the letters contain upon the plaintiff's admission into the Sailors' Home. But the fact of the nephew having been admitted into that institution whereby his son-in-law was relieved from supporting him can surely afford no evidence of an intent to violate a voluntary, express declaration of intention as to the disposition by the uncle of his property after his death, or of his being no longer influenced by those strong sentiments of natural affection which pervade every letter to the last; however that no such conclusion can possibly be drawn from the congratulations is established beyond dispute by the evidence of the witnesses Kirsop, Williams, and Mrs. Noble, who, if those witnesses can be relied upon, prove that the deceased repeatedly expressed to them separately up to the time of his receiving the injury which he sustained on the 9th of November, 1891, such to be his intention. The learned judge appears therefore to have been perfectly justified in arriving at the conclusion as of a matter of fact that to the promises contained in those letters the deceased adhered without a single break or expression of change of intent. Yet, upon the day after he was carried in the wretched condition in which he was on the 10th of November to McBeath's house in utter disregard of all natural affection and of the sentiments to which he

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had always previously given expression verbally and in his letters he executed the will in question in favour of McBeath. It is admitted by McBeath that from the time of the deceased being carried to his house he never expected him to recover—he thought he would die at any moment—that the doctor had told him that he did not think he would get over it—that it would only be a matter of time, that he would be called away any time—in fact that he McBeath expected deceased's death at any moment and did not expect that he would ever get out of bed. Dr. Milne saw the deceased on the 11th November the day of the preparation and execution of the will—in the afternoon—he found the deceased still very feeble, in fact he was feeble all the time. The doctor could only make him hear by speaking very loud. He was very weak and suffering much pain; the doctor interrogated him as to his ailments and only as to them, and he answered him but only in monosyllables, yes, no; he was in such a weak condition and his pulse so weak and his heart so languid that on the 11th the doctor would not allow him to sit upright in bed. He directed that he should be allowed to lie down as much as possible. He was a man who in the doctor's opinion could not endure much pain. In the condition in which he was, although very weak and suffering much pain, the doctor thought him to be quite *compos mentis;* he could readily be persuaded to do what the doctor wanted. The doctor never heard that a will was contemplated to be made, or until after deceased's death that one had been made. About 5 o'clock upon this 11th of November, Mr. McBeath went to the office of a Mr. Hall, a young practitioner at law who was a stranger both to Mr. McBeath and to Adams, and he told Mr. Hall that the latter wished to make a will leaving all his property to him McBeath,

and asked him to prepare it. Hall accordingly while McBeath waited prepared the will, and when he had finished drawing it they both went down together to McBeath's house. While on the way or in Mr. Hall's office McBeath told Mr. Hall that Adams was alone in the world, had no relatives. When they got to the house they went into the sick man's room and McBeath in a loud voice said to Adams, "here is Mr. Hall a lawyer come with a will for you to sign." Mr. McBeath then, and his wife, went and lifted up Adams in his bed who during the process of being lifted up suffered much pain. With Mr. Hall's evidence as to what then took place the learned trial judge has so fully dealt in his very exhaustive judgment that I make no reference to it, further than to say that the will so prepared was signed before 7 o'clock and that during the whole time that Mr. Hall was in the sick room McBeath was also present, and assisting the deceased to sit up in his bed, to sign the will. Now from the cases already cited and others cited by the learned trial judge in his exhaustive judgment it is plain that the whole onus of removing by the most clear and satisfactory evidence, quite independently of McBeath himself, the doubt and suspicion as to the *bona fides* of the will and as to its not being the true and voluntary disposition of his property by the testator himself not only with full knowledge and appreciation of the contents of the will as appearing in it but uninfluenced in any way by McBeath, which doubt and suspicion the law attaches to the fact of the will having been prepared by and under the direction of McBeath, was cast upon him. The learned judge has found as a matter of fact in his most exhaustive judgment that the most material points relied upon by McBeath, namely the alleged promises by Adams to leave to him his property at his death and the instructions alleged to

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have been given to McBeath to get a lawyer to make a will in his McBeath's favour for Adams to sign depended wholly on McBeath's own evidence and that in the presence of the contradictory evidence to which the learned judge draws the fullest attention it was impossible to accept the evidence of McBeath as true. In fine he says, and it is to be remembered he is dealing with matters of fact and with credibility of witnesses examined before himself,

instead of removing the suspicion the necessary inferences from all the circumstances and facts before the court point rather to their increase than their dissipation. The doubtful and contradictory evidence of McBeath, the prevarication of his wife of a vital fact to Mr. Noble, the descrepancies in the evidence of the McBeath's and Modeland's; the refusal of wife and sister-in-law thrice repeated to support McBeath in his statement of old Adams' instructions and promises in his favour in making the will; the absurd pretension of intimacy for years with a man who would tell him nothing of his age, nationality, relations, or of his property; the alleged promises to leave the property to McBeath in violation of the written promises of his life, to leave all to his nephews and their descendants * * * * * * have only increased rather than cleared away those doubts and suspicions with which the law insists upon regarding a will made under such circumstances as the present.

Then in another place, drawing attention to a statement of McBeath's that (at a time when from deceased's letter to the plaintiff it appeared that he was in California) Adams had said to him,

that he had nobody to leave his property and he would just as soon leave it to me as to any one. Being asked upon this, did he say he had no one to leave his property to? He replied, yes sir, he said he had no friend to leave it to and would as soon leave it to me as to any one he knew of and he had no one else to leave it to?

What confidence, says the learned judge, can one place in such a witness?

He draws attention in another place to his statement of ignorance as to the property which the deceased possessed until after the will was made, and his contradiction of what Kirsop in Macdonald's pre-

sence had told him when he was taking Adams down to his house, and to what Williams also had told him about the will in pencil which the deceased had showed Williams in September 1891, whose testimony in rejection of McBeath's the learned judge believed, and then to the letter of the 28th December, 1891, to the plaintiff after his uncle's death which the learned judge characterised upon the evidence before him as being full of suggestion and suppression *i e*, *suggestio falsi* and *suppressio veri.* But it is useless to go through all the points in which the learned judge has found McBeath's evidence as unworthy of belief, and if unworthy of belief it is difficult to understand how the evidence of any of the other witnesses can remove the doubt and suspicions as to the *bona fides* of the will and as to its righteousness, as said by Lord Hatherley in *Fulton* v. *Andrew* (1).

As to the evidence of the doctor, after showing the very imperfect material upon which he based the opinion which he gave that upon the 11th November, 1891, the deceased was of perfectly sound mind and understanding to dispose of his property by will, and after citing passages of the law relating to wills made by a person *in extremis* as the deceased in this case was, as follows :

In examining the capacity of a person under these circumstances we should avoid putting leading questions which suggest the answer "yes or no." Thus a dying man may hear a document read over and affirm in answer to such a question that it is in accordance with his wishes but without understanding its purport. This is not satisfactory evidence of his having a disposing mind ; *we should see that he is able to dictate the provisions of the documents* and to repeat them substantially from memory if required. If he can do this accurately there can be no doubt of his possessing complete testamentary capacity. But it may be objected that many dying men cannot be supposed capable of such an exertion of memory. The answer is then very simple ; it is better that a person should die without a will, and his property be distributed according to the law of intestacy than that through any

(1) L. R. 7 H. L. 460.

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failing of his mind he should unknowingly cut off the rights of those who have the strongest claims upon him

he then shows that the doctor made no such, nor indeed any, examination of the deceased save of the most superficial character very far from establishing that an old man of the age of the deceased who had been for some years subject to the tortures of confirmed rheumatism in head, hands and feet, and who had been exposed to the frightful exposure, starvation and cold as the deceased had been exposed to for the three days preceding the 10th of November, could upon the 11th when in such a weakened condition of body, and *in extremis*, and dying as he then was, have had his mind quite unaffected by the physical tortures he had suffered and was still suffering, and in that perfectly sound condition required for the making of a will. The proper test to determine whether in the condition in which he was physically he had or not that mental capacity to make a will which in such a case ought to have been applied, never was applied.

Then as to the conduct of Mr. Hall who appears to have acted as being the solicitor of McBeath and not of the deceased, he points out that he did not, as he should have done if acting as the solicitor of the deceased, insist upon having a private interview with him, in which he should have put to him suitable questions to elicit what was the real intent of the deceased as to the disposition of his property, and from instructions so taken from the deceased himself and not from McBeath he should have prepared the will—and had he so done he would have been in a position to give evidence as to the capacity which he was not in, acting as he did.

The shortcoming of Mr. Hall was, he says, the want of experience in the ordinary practice of testing the capacity of a testator, ensuring the exercise of his free intelligence and bringing to his notice and

memory any relatives he might have intended to benefit in the disposition of his property. It is very possible that the recollection he twice mentioned of the defendant's having told him when he came to his office or on his way to the house that old Adams was alone in the world—that he had no relatives living—put all thoughts of possible relations out of his head.

Then as to the question testified to by Mr. Hall, "can I alter this," and the remark when told he could, "this ought to have been done long before," the learned judge asks what did the old man understand of it all in his feeble condition:

To my mind, says the learned judge "can I alter this," in view of all the circumstances, tells the tale, and, *this should have been done long before*, points the same way—what he wanted for years—*long before*, the letters to his nephew tell us, and the promises which, very likely, he thought he was carrying out through the medium of McBeath in favour of his relations.

There is, he adds, only one other alternative view, that, surrounded as he was in McBeath's by his family and relations, in this weak and feeble state in McBeath's arms and the other influences around him, when the question was put to him: Are you willing to leave everything to McBeath? what other answer could he give than what to him was far beyond the nature of a request.

And he concludes that the questions put by Mr. Hall to the deceased and his replies thereto were quite inadequate to remove the suspicion either of want of a clear understanding of the document or of *that form of coercion to which the surrounding circumstances in his view of them clearly point.*

In this judgment of the learned judge who tried the case, so far from finding anything which sitting in appeal I could pronounce to be clearly erroneous, I must say that I entirely concur. The question before the learned judge was one of fact depending upon the credibility of the witnesses and a due appreciation of the credible evidence given. The learned judge has, upon the most abundant evidence, found as fact that the deceased had for years and until the last moment

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preceding the frightful sufferings which he endured during the three days preceding the 10th November, 1891, entertained the fixed intention of leaving his property at his death to his own relations, in conformity with that natural affection for them which he appears to have had in an eminent degree. When then on the day after he was taken to McBeath's house we find him signing a will which leaves all his property to McBeath, who can be regarded in no other light than a perfect stranger, a mere acquaintance with whom the old man was less intimate than he was with Barrett or Kersop and Williams to whom he had often spoken of his relations and repeatedly stated his intention of leaving his property to them at his death; and when we find that the only instructions given for the will were given by McBeath himself, who also interfered in the manner described by Mr. Hall, by holding up the old man in his bed until the will was signed, it is but natural and reasonable that we should demand what in the case of a will so prepared and made the *law requires to be given* by a *person in the position of McBeath in such a case*, clear and intelligent and sufficient reasons for such a sudden and so extraordinary a change of intention and the most clear satisfactory and independent evidence to remove the doubts and suspicions which the law casts upon such a will so prepared, doubts and suspicions not only as to the perfect testamentary capacity of the testator in the miserably reduced physical condition in which he was, but also as to the *bona fides* of the will and of McBeath, and that the physical weakness of the testator was taken advantage of by McBeath in whose power he was and that the testator was in some manner influenced by McBeath to make the will in his favour. The circumstances as detailed in the evidence which the learned judge has accepted as true were well calcu-

lated to give rise to the very gravest doubt and suspicions both as to the capacity of the testator and also as to the *bona fides* of McBeath.

The reasons suggested by him as to the testator's motives in leaving his property to him the learned judge who had the best opportunity of forming an opinion upon the evidence has pronounced to be incredible, and McBeath to be unworthy of belief; the learned judge has given most full and satisfactory reasons for his arriving at this conclusion.

The learned judges of the Supreme Court of British Columbia sitting in appeal have thought that the evidence of Dr. Milne and Mr. Hall supplies all that is wanting in McBeath's evidence and in fact all that is at all necessary, but the learned trial judge has in his very exhaustive judgment shewn that in a case like the present the facts upon which these gentlemen formed their opinions are wholly inadequate to support the opinions formed and it is with the facts upon which opinions are formed and not the opinions themselves that we have to do. Those facts are of the most superficial nature possible. The opinions formed upon them might be allowed to pass without observation in the case of an ordinary will in which no doubt or suspicion existed as to the will being the voluntary expression of the intention as to the disposition of his property by a person of competent capacity; but in a case like the present where the greatest doubts and suspicions are by the law attached to the will which doubts and suspicions must be removed by the most clear and satisfactory evidence, the learned judge has, I think, shewn very clearly that neither the doctor or Mr. Hall applied the tests which the law and common sense required to be applied in such a case; neither the doctor nor Mr. Hall appear to have at all regarded the case as one which called for any special

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inquiry. In the doctor's evidence there are some facts however which might have led the doctor to see that there did exist some good reason for the doubts and suspicions which the law attaches to a will prepared and executed as was the one under consideration. He says that upon the 11th in the afternoon, before the will was signed (and of any intention to make a will at all the doctor had not any intimation whatever), he found Adams still suffering much—very feeble—very deaf—the doctor had to speak very loud to make him hear—the doctor interrogated him as to his ailments but only as to them—Adams answered intelligently—but only in monosyllables—Yes and no. He was a man, the doctor says, who could not bear much pain—that seemed to be the character of the man, however brave he might be otherwise—that is to say otherwise than in his then low suffering physical condition. In his then condition he could not stand much pain and the doctor could readily persuade him to do what he wanted. His pulse was very weak—his heart languid so much so that he would not allow him to sit up in bed and gave directions that he should be allowed to remain lying down perfectly quiet. Now in *Ingram* v. *Wyatt* (1) we find among the marks of senile imbecility constituting testamentary incapacity—"inertness of mind"—"paucity of ideas"—"timidity"—"submission to control"—"acquiescence under influence"—and the like. Two of these marks the doctor admits having observed without however inducing him to make any more than a cursory observation of the physical condition of the patient whom he knew to be on his death bed. The doctor's excuse must be that he never heard of any intention to make a will; a closer examination would, it seems not unlikely from the extremely low and painful condition

(1) 1 Hag. Ecc. 403.

in which the old man was physically, very probably have shown some of the other marks of senile imbecility above mentioned. Now if the doctor found his patient in such a low condition that he could be easily influenced to do what was wanted, it is possible that Mr. McBeath had acquired the same knowledge, and the circumstances attending the signing of the will by Adams as detailed by Mr. Hall himself are open to the gravest suspicion; they were well calculated to blind Mr. Hall, a perfect stranger both to McBeath and Adams, (and may be for that reason that he was the lawyer employed) to the true nature of the transaction in which he was taking part. That a man in the miserably low physical condition to which the old man was reduced by the sufferings which he had endured and was still enduring could, *to avoid importunity*, be easily influenced to do anything which the man in whose house he was dying, and in whose power he was and to whom he would be indebted for whatever ease of body and peace of mind he should enjoy in his dying moments, should ask or suggest, we can readily understand, and assuming any influence whatever of importunity or otherwise to have been exercised by McBeath certainly his conduct upon entering the sick man's room with Mr. Hall was well calculated to attain his object while concealing his intent. Upon entering the room he called in a loud voice to the old man lying down quietly in his bed apparently asleep "here is Mr. Hall a lawyer with the will for you to sign;" then he proceeded directly to lift the old man up and with the assistance of Mrs. McBeath lifted him up and made him sit up straight in the bed, (which the doctor that day had forbidden) until the will was signed. While being lifted up Mr. Hall observed that the old man suffered much pain. Then the fact of the will having been made, having been not only sup-

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pressed but actually denied by McBeath's wife who was a party assisting in holding the old man up until it was signed, and never spoken of until after the old man's death were facts which, together with the statements in the letter of the 28th December to the plaintiff, were well calculated to increase rather than remove the doubts and suspicions attending the transaction. Upon the authority of *Parker* v. *Duncan* (1) referred to by the learned trial judge among the numerous cases upon which he proceeded in forming his judgment, it was the duty of McBeath *upon his own showing* to have taken very particular pains to have provided the old man under his care and roof, and whom he admits he knew to be dying, with proper and independent advice in the preparation of his will; none was provided, for Mr. Hall cannot be said to have been, or to have acted as if he was, solicitor for Adams. There cannot be a doubt that Mr. Hall is right when he said that McBeath, either in his office or on the way down to the house with the will, told him that Adams was alone in the world without any relations, and that McBeath knew such statement to be false we cannot doubt to be established by the evidence of Kersop and McDonald which the learned judge has accepted and believed to be true while he rejected that of McBeath as unworthy of belief. What object can McBeath be supposed to have had in making this false statement to Mr. Hall unless for some purpose to blind him? Had this case been tried by a jury and had they arrived at the same conclusions as has the learned judge and had they rendered their verdict accordingly, such verdict could not possibly in my opinion be set aside either as being contrary to, or against the weight of evidence. The finding of the learned judge whose professional training has made him more competent to weigh evidence and appreciate

(1) 62 L. T. N. S. 642.

its value is surely entitled to equal weight with the verdict of a jury.

In fine I must say that I concur with the learned judge that the defendant in the action has wholly failed to remove the doubts and suspicions which the law attaches to the will by reason of its having been prepared under his direction; nay more that the defendant's untruthfulness in the many particulars in which the learned judge has found him to be unworthy of belief, rather tends to increase instead of removing those doubts and suspicions. The appeal therefore, in my opinion, should be allowed with costs and the judgment of the learned trial judge restored and affirmed, which, in my opinion cannot be reversed consistently with due regard being paid to the authority of the many cases cited by the learned trial judge as enunciating the law applicable to the case.

Appeal dismissed with costs.

Solicitor for the appellant: *Gordon Hunter.*

Solicitor for the respondent: *H. G. Hall.*

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*Oct. 22, 23.
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*Jan. 25.

THE CORPORATION OF THE CITY OF KINGSTON (DEFENDANTS)...... APPELLANTS;

AND

JENNIE C. DRENNAN (PLAINTIFF)......RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Municipal corporation—Negligence—Snow and ice on sidewalks—By-law—Construction of statute—55 *V. c.* 42, *s.* 531—57 *V. c.* 50, *s.* 13—*Finding of jury—Gross negligence.*

A by-law of the City of Kingston requires frontagers to remove snow from the sidewalks. The effect of its being complied with was to allow the snow to remain on the crossings which therefore became higher than the sidewalks, and when pressed down by traffic an incline more or less steep was formed at the ends of the crossings. A young lady slipped and fell on one of these inclines, and being severely injured brought an action of damages against the city and obtained a verdict.

The Municipal Act of Ontario makes a corporation, if guilty of gross negligence, liable for accidents resulting from snow and ice on sidewalks; notice of action in such case must be given, but may be dispensed with on the trial if the court is of opinion that there was reasonable excuse for the want of it, and that the corporation has not been prejudiced in its defence.

Held, affirming the decision of the Court of Appeal, Gwynne J. dissenting, that there was sufficient evidence to justify the jury in finding that the corporation had not fulfilled its statutory obligation to keep the streets and sidewalks in repair; *Cornwall* v. *Derochie* (24 Can. S. C. R. 301) followed; that it was no excuse that the difference in level between the sidewalk and crossing was due to observance of the by-law; that a crossing may be regarded as part of the adjoining sidewalk for the purpose of the act; that "gross negligence" in the act means very great negligence, of which the jury found the corporation guilty; and that an appellate court would not interfere with the discretion of the trial judge in dispensing with notice of action.

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

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APPEAL from a decision of the Court of Appeal for Ontario (1) affirming the judgment of the Common Pleas Divisional Court in favour of the plaintiff.

The plaintiff, who was a medical student attending college in the City of Kingston, on the eighth day of February, 1896, was descending Princess street in said city, and was crossing Montreal street, which intersects Princess almost at right angles, when she fell at the lower or east end of the street crossing on a declivity formed by the difference in level between the crossing, which was covered with snow, and the sidewalk which, under a by-law of the city, was kept clear of snow or nearly so by the tenant of the shop adjoining. The plaintiff was injured in her hip by the fall.

The action was brought under section 531 of the Municipal Act of the Province of Ontario passed in the year 1892, being 55 Vict. ch. 42. This act was amended in the year 1894 by 57 Vict. ch. 50, section 13, so that at the time of the accident subsec. 1 of the main section read as follows:—S. 531, (1) "Every public road, street, bridge and highway shall be kept in repair by the corporation, and on default of the corporation so to keep in repair, the corporation shall, besides being subject to any punishment provided by law, be civilly responsible for all damages sustained by any person by reason of such default; but the action must be brought within three months after the damages have been sustained."

"Provided, however, that no municipal corporation shall be liable for accidents arising from persons falling, owing to snow or ice upon the sidewalks, unless in case of gross negligence by the corporation; and provided also that no action shall be brought to enforce a claim for damages under this sub-section unless notice in writing of the accident and the cause thereof has

(1) 23 Ont. App. R. 406.

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been served upon or mailed through the post office to the mayor, reeve or other head of the corporation, or to the clerk of the municipality, within thirty days after the happening of the accident; and provided also that in case of the death of the person by whom the damages have been sustained, the want of notice shall be no bar to the maintenance of the action; nor in other cases shall the want or insufficiency of the notice be a bar to the action if the court or judge before whom the action is tried is of opinion that there was reasonable excuse for the want or insufficiency of such notice; and that the defendants have not thereby been prejudiced in their defence."

At the trial the defendants' counsel at the close of the plaintiff's case moved for a nonsuit substantially on the following grounds which are set up by the statement of defence, and which the appellants put forward as their grounds of this appeal.

1. That the crossing was not out of repair within the meaning of the statute, and that the defendants had not been shown to have been guilty of negligence in respect thereof.

2. That the accident had not happened on a sidewalk, and the defendants had not been guilty of gross negligence required by the statute to make them liable.

3. That the plaintiff had not given the notice required by the statute or proved circumstances sufficient to form a reasonable excuse for want of notice so as to justify the judge presiding at the trial in dispensing with notice.

The trial judge held that there was reasonable excuse for not giving notice of action and that the defendants were not prejudiced in their defence for want of it. Under his charge the jury found the corporation guilty of gross negligence and judgment was entered for the plaintiff with $1,500 damages. This judgment

was affirmed by the Court of Appeal from whose decision the corporation appealed to this court.

Walkem Q.C. for the appellant. The difference in level between the sidewalk and crossing was unavoidable if the by-law for removing snow on sidewalks was carried out. It could not, therefore, be deemed negligence on the part of the corporation. *Goldsmith* v. *City of London* (1); *Burns* v. *City of Toronto* (2).

Allowing snow and ice to remain on a sidewalk is not of itself evidence of negligence. *Ringland* v. *City of Toronto* (3); *Forward* v. *City of Toronto* (4).

At all events there was no evidence of gross negligence to be submitted to the jury.

Notice of action was not given and the discretion of the judge in dispensing with it is subject to review. *Hayter* v. *Beall* (5); *Jones* v. *Tuck* (6).

Hutcheson for the respondent. As to liability for accidents caused by snow and ice on the streets see *City of Halifax* v. *Walker* (7); *Caswell* v. *Corporation of St. Mary's* (8); *Gordon* v. *Belleville* (9); *Town of Cornwall* v. *Derochie* (10).

The discretion of the judge as to notice will not be reviewed unless it has led to a miscarriage of justice. *Ormerod* v. *Todmorden Mill Co.* (11); *In re Martin* (12); *In re Oriental Bank* (13).

The judgment of the majority of the court was delivered by:

SEDGEWICK J.—On the 8th of February 1895 the plaintiff, then being a student attending the medical

(1) 16 Can. S. C. R. 231.
(2) 42 U. C. Q. B. 560.
(3) 23 U. C. C. P. 93.
(4) 15 O. R. 370.
(5) 44 L. T. 131.
(6) 11 Can. S. C. R. 197.
(7) 4 Russ. & Geld. 371; Cass. Dig. 2 ed. 175.
(8) 28 U. C. Q. B. 247.
(9) 15 O. R. 26.
(10) 24 Can. S. C. R. 301.
(11) 8 Q. B. D. 664.
(12) 20 Ch. D. 365.
(13) 56 L. T. 868.

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Sedgewick J.

school in connection with Queen's University, Kingston, while walking in an easterly direction down Princess street and upon the crossing at its intersection with Montreal street, fell upon the slope of the crossing and sustained an injury to her hip so severe that she was laid up in the hospital for twenty-four weeks, and has been lame ever since. She brought this action against the municipality, and upon trial before Meredith C.J. and a jury a verdict was entered in her favour for $1500 damages. A motion to set aside the verdict was unsuccessful in the Divisional Court, and upon the case coming before the Court of Appeal there was an equal division of opinion, Hagarty C.J., and Maclennan J. thinking the verdict should not stand; Burton and Osler JJ. contra. From the judgment in the plaintiff's favour resulting from this equal division the City of Kingston has brought this appeal.

The substantial question is as to whether the City of Kingston in the present case has fulfilled the obligation imposed by the statute 55 Vict. ch. 42, s. 531, s.s. 1, which is as follows:

Every public road, street, bridge, and highway shall be kept in repair by the corporation, and on default of the corporation so to keep in repair, the corporation shall, besides being subject to any punishment provided by law, be civilly responsible for all damages sustained by any person by reason of such default, but the action must be brought within three months after the damages have been sustained.

Further questions arise from an amendment of this subsection, 57 Vict. ch. 50, sec. 13, which is as follows:

Provided, however, that no municipal corporation shall be liable for accidents arising from persons falling owing to snow or ice upon the sidewalks unless in case of gross negligence by the corporation; and provided also that no action shall be brought to enfore a claim for damages under this subsection, unless notice in writing of the accident and the cause thereof has been served upon, or mailed through the post office to, the mayor, reeve, or other head of the corporation, or to the clerk of the municipality, within thirty days after the happening of the accident; and provided also that in case of the death of

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the person by whom the damages have been sustained, want of notice shall be no bar to the maintenance of the action, nor in other cases shall the want or insufficiency of notice be a bar to the action if the court or judge before whom the action is tried is of opinion that there was reasonable excuse for the want or insufficiency of such notice and that the defendants have not thereby been prejudiced in their defence.

The main inquiry then is: Was Princess street at the place of the accident "kept in repair" by the municipal authorities within the meaning of the principal enactment?

The following facts appear to be undisputed. (*a*) The plaintiff fell not on what is usually known as the *sidewalk*, but on the *crossing*, and just before it joined the sidewalk. (*b*). Princess street goes easterly on a down grade. (*c*). A by-law of the city requires frontagers to remove snow and ice from sidewalks and in the present case the sidewalk was so cleared. (*d*). The snow is of course allowed to remain on crossings and on the remaining portions of the streets as it falls. The removal of the snow from the sidewalk, and its remaining on the crossing, must necessarily cause a difference of level between the sidewalk and the crossing and the injurious effect of the interference with travel and locomotion is modified or obviated by removing a portion of the snow from the crossing where it joins the sidewalk, making at that point a declivity or incline which may be greater or less according to the depth of the snow upon the crossing and which may be as gentle or precipitous as the authorities may choose to permit. Where a street is not on the level the angle of inclination would in ordinary cases be accentuated, and travel upon it more hazardous. It was at such a point and upon a declivity caused in some such way that the accident in the present case occurred. There is of course much question as to the dangerous character of this slope, the plaintiff contend-

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ing that the ordinary grade or slope was very greatly increased, forming a steep smooth icy declivity from two to four feet long, descending to the sidewalk, at an angle of from twenty-five to forty-five degrees.

The witness Atwood describes the slope as being at an angle of at least thirty degrees with the adjoining sidewalk, and thought this declivity extended a yard at least on the crossing, and described the surface of the incline as being highly polished, principally by footwear.

The witness Boyd describes the place as being "very slippery, a kind of deep incline; and although he worked in the adjoining store he had only seen the crossing cleaned off once all winter." In speaking of the incline, he said: "It came down very sharp just for probably two feet, back; it came down very steep."

The witness Brickwood says that the snow and ice were removed from the pavement but allowed to accumulate on the crossing, thereby leaving the crossing much higher than the adjoining pavement; and speaks of the approach from the pavement to the crossing being very sudden, and slippery, and illustrates it by a large book showing an angle of about forty degrees; while this place was in the same condition he says he saw a great many people slip there, and he says he saw two or three people fall, and speaks of one particularly bad fall.

The witness Garbutt says the accumulation on the crossing caused a steep incline extending about four feet from the pavement, and illustrated by the same large book, showing a slope at an angle of twenty-five degrees or thirty degrees, and describes the surface as being "icy, almost impossible to go down it with safety."

One White fell himself at the same place on the same day and was partially stunned by the fall, not

recovering for some hours. He describes the place as being "quite a drop from the snow down to the edge of the sidewalk where it had been cleaned"; and says the surface of the slope was "very glare, had been worn off; people, it seemed, stepping on it had made it smooth."

One Johnston fell at the same place within two or three days of the day in question, and describes the crossing as being in "a very slippery condition," and as being very much higher than the pavement or sidewalk.

Mr. Justice Osler in his opinion in the court below thus speaks:

The only question, therefore, as I have said before is whether there was evidence of such neglect proper to be submitted to the jury. The defendants are no backwoods township or small straggling village, but an ancient busy and populous city and the place where the accident happened was on the crossing of two of its principal and most frequented streets—Princess and Montreal—on one of the most important thoroughfares. The condition of this crossing, where it joined the sidewalks in the direction in which the plaintiff was going, is thus described in the evidence. The dip to the sidewalk was by reason of the ice and snow which had accumulated in it considerably more abrupt than the natural inclination of the crossing, a dip of 30 or 40 degrees in three feet, very slippery,—a kind of deep incline where the crossing joined the pavement—came down very sharp for probably two feet back,—approach very sudden—came down very sudden on a jog of 40 degrees—quite a drop from the snow to the edge of the sidewalk—it was dangerous—almost impossible to go down it with safety—a very bad crossing—many people had been seen to slip there and two or three to fall—had been more or less all the winter in a slippery and dangerous condition—in the condition in which it was when the plaintiff fell, for two weeks at least. There were three aldermen for the ward in which the crossing was, and the mayor lived "up that way." That the defendants recognised what ought to be done in respect of such a crossing there is the evidence of the city engineer who said that every time he saw it it was in good condition, if not, would send men to make it so; kept men cleaning snow off these crossings, maintained a general supervision on the streets and there was also a foreman; was often up and down Princess street in the winter; often went to look up and down it in icy weather to see

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if anything could be done; frequently got ashes and sand sprinkled on the whole surface of road and especially on the crossings; kept barrels of sand in the tool house for the purpose, and would send men to get ashes from the stores. One of plaintiff's witnesses said that ashes had been put on the street once during the winter.

The learned Chief Justice Meredith (a recognized authority on municipal law) in addressing the jury said:

> Now I may say this to you as applied to the facts of the case. If you think that owing to the condition of that crossing—the snow upon the slope, the condition of the snow, if you think it was dangerous—that that danger was a manifest danger to anybody who was caring to look—if that state of things had existed in a central portion of the city where many people were passing—in one of the most frequented parts of the city—if that condition had existed for many days; if the means of preventing that condition of things was simple; if the corporation neglected to discharge the duty of applying that simple remedy—then I think the case would be one of gross negligence. I will ask you therefore to say whether you think there was negligence on the part of the corporation or whether you think there was gross negligence.

This charge was not objected to, nor has misdirection been made a ground of setting aside the verdict. Upon the charge the jury found as I have said for the plaintiff and that the corporation was guilty of "gross negligence," bringing the case within the amending statute above set out.

Such being the evidence and such the charge and findings we are asked to set aside these findings substantially upon the ground that there was no evidence of negligence that could properly be presented to a jury.

It is not of course for me to say whether I believe the evidence—whether I would upon the evidence have found as the jury did. That is their function, not ours, and even if I disagreed with the result at which they arrived that is no reason why I should disturb it, unless I find that there was no evidence of negligence at all, or the finding so shocks my reason

as to convince me that the jury in coming to it were bereft of theirs.

The obligation of the city was to keep the streets and sidewalks in a reasonable state of repair—in such a condition that the traveller using them with ordinary care might do so with safety. There was evidence (and I think sufficient evidence) to justify the jury in finding a breach of that obligation. That evidence—a portion of it above set out—showed that the slope was unnecessarily, unreasonably, and unsafely steep; that its existence and character must have for some time before the accident been brought to the knowledge of the authorities, or at least they must be presumed to have had such knowledge; and that it was a feasible, simple and inexpensive matter to remove all occasion of injury.

There has been much difference of opinion in Canadian and United States courts as to municipal liability for accidents occasioned by snow or ice upon highways. That there is liability in certain cases in those provinces of Canada whose legislation imposes a civil liability for accidents occasioned by "default of repair," is unquestioned. That at least was held by this court in the late case of *Cornwall* v. *Derochie* (1).

This difference has been occasioned it seems to me more than a divergence of view as to facts than as to law. The learned Chief Justice of the Court of Appeal says in his able opinion :

We have so often had to comment on and review cases in which recoveries have been held for accidents on highways that it is hardly necessary again to discuss the subject in general. We are now face to face with the question whether the presence of snow on a road or street raised by the action of vehicles and partly by the law compelling sweeping or clearing of sidewalks, so as to be raised as here to a higher level than the sidewalk presenting a slippery descent of six or seven inches in the distance of from three to two feet creates a cause

(1) 24 Can. S. C. R. 301.

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of action against the city by an accident to a passenger slipping thereon.

This statement of the question it seems to me (and I say it with the utmost deference and respect) minimizes the result of the evidence as found by the jury. Had he added to his description a statement to the effect that by reason of the premises the place was made unnecessarily and unreasonably dangerous, a defect that by the exercise of proper diligence might easily have been removed, he would have introduced an element which must have had its effect upon the mind of the jury and which likewise must affect ours, since we must assume it to be the fact. Admit the presence of a defect by reason of changed conditions in a highway,—admit that this defect is dangerous to life and limb—admit that its removal may be accomplished without an unreasonable call upon municipal revenue and you have a case of municipal obligation and, in the event of accident from default, of municipal liability.

In the present case it seems to me the evidence showed that the municipality were not only passively negligent in not removing the defect, but they were actively instrumental in creating it. They were not bound to pass a by-law compelling the removal of snow and ice from sidewalks, but having passed it it became obligatory on them to take all proper precautions, looking to the safety of those points where the crossings and sidewalks meet. Had there been no by-law both would have been on the same level or grade, there would have been no extraordinary slope and probably no accident. The case is not one with special features or involving peculiar principles of law, because it deals with ice or snow. The city was not bound to build sidewalks, but having done so it is bound to keep them in repair to this extent at least

that they are not more dangerous than if they did not exist at all. It is the same case as if it was originally erecting a sidewalk and by defect of plan or specification or otherwise a particular part of it was so much more sloping than the natural way or necessity called for that an accident followed. Then, there would be liability as in any other case of structural defect.

A municipality (I repeat) is not liable for accidents occasioned solely by the presence of snow or ice upon a street or sidewalk. It is not, as a rule, bound to remove either. But if after a heavy rainfall a bridge is swept away there is a liability to replace it; so snow may so accumulate as to make particular places impassable and impose the obligation of removal. As stated in an American work (1)

it is only in such cases as where mounds of snow and ice are negligently allowed to remain on a street or where there is an unreasonable delay in making a road passable or where there is some defect in the way itself that is made more dangerous by the snow that the municipality will be held responsible for injuries occasioned by its presence in the street. In the country entire inaction is sometimes excusable, and the fact that a road was impassable from snow for three months has been held insufficient evidence of negligence.

After referring to the various views as to ice on sidewalks the learned author proceeds (sec. 100).

In a climate where snow and ice exist almost constantly through the winter season, the requirements of the duty to exercise reasonable care to keep the street safe for use would not oblige a corporation to attempt to accomplish that which is practically impossible. In such a climate to keep the sidewalks clear would require extraordinary and unreasonable care, and the common law puts no such obligation on a municipality.

In support of the general rule that mere slipperiness will not give rise to liability he cites *Kinney* v. *Troy* (2), where Danforth J. says:

The situation was one common to all cities in a northern climate and to all sidewalks in such cities. A sidewalk, difficult it may be of pass-

(1) Jones on Mun. Negligence sec. 98.

(2) 108 N. Y. 567.

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age, but if so, from the ordinary action of the elements only, and from a formation of ice which no body of men are competent to prevent nor under any ordinary circumstances to remove. Something more than a slippery sidewalk must be shown to enable one suffering from it to cast the burden of compensation upon the city.

Upon the general question reference may be had to *McGiffin* v. *Palmer's Ship Building Co.* (1), where Field, J., says :—

The case has been put of a way perfectly well constructed, but upon which, on a frosty December morning, water falls so that it gets into a dangerous state. I cannot help thinking that that would be a defect in the condition of the way, because the way is the thing which people walk upon, and the thing itself is actually altered.

In *Leek Commissioners* v. *Stafford* (2), Bowen, L. J., says :—

The repairing of a road includes whatever is necessary to keep it in a proper condition for the traffic, having regard to the character and original manufacture of the road.

The Canadian cases are illustrated by:

Caswell v. *St. Mary's* (3). Per Wilson, J., at page 251.

If a particular part for two or three rods in length happens to be in a very dangerous condition, exceptionally and particularly dangerous as distinct from the rest of the road, and it can be put in a safe state and at a reasonable expense, there is no reason why it should not be made safe for travel although it was caused by rain, snow or ice, or what may be called "natural means."

And again at page 252:

If the snow collects at a spot, and by thawing and freezing, travel upon becomes specially dangerous and if this special difficulty can be conveniently corrected by removing the snow or ice, or by other reasonable means, there must be the duty of the person or body on whom the care of reparation rests, to make such place safe and fit for travel.

Gordon v. *Belleville* (4). Where the plaintiff was injured by falling on a ridge of ice which had been allowed to form and remain for a long time along the

(1) 10 Q. B. D. 5.
(2) 20 Q. B. D. 794.
(3) 28 U. C. Q. B. 247.
(4) 15 O. R. 26.

centre of a sidewalk the plaintiff recovered, though he knew of its dangerous condition. The verdict was upheld by the Divisional Court.

Reference may also be had to the Nova Scotia case of *Walker* v. *The City of Halifax* (1), where Mr. Justice (afterwards Sir John) Thompson delivered an elaborate judgment (subsequently affirmed by this court) upon the liability of a city for damage caused by *cahots* on a public street. This case was overruled by the Privy Council in *Pictou* v. *Geldert* (2) but upon another ground.

Upon the whole I am of opinion that the verdict cannot be disturbed upon the question of negligence.

There are however three subsidiary questions still to be referred to, all arising under the amendment of 1894 above set out.

First, the appellants allege and the respondent denies that this amendment applies. The accident in question happened upon a "crossing." Was the crossing at that particular place a "sidewalk" within the meaning of the statute? The statute of which this amendment forms part in several places refers to sidewalks and crossings, and it is argued that these terms are mutually exclusive of each other. I have also in this opinion referred to them as different things. I am however of opinion that "sidewalks" here includes "crossings." In the case before us the street area covered by Princess and Montreal streets intersected has two names. Looking at it east and west it is Princess, north and south it is Montreal street. Here at the two sides of the first are walks or granolithic pavements for the special use of foot passengers walking up or down Princess street; they are called crossings but they are sidewalks *quoad* or in relation to Princess street. So also to the walks on each side of

(1) 16 N. S. Rep. 371. (2) [1893] A. C. 524.

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Montreal street. So far as my general observation goes a crossing is usually a sidewalk and I think that in the present case the statute should be so construed. We are doing no violence to the statute in so holding. On the contrary we are giving effect to what appears to me to have been the legislative intent.

Secondly it is contended that although there may have been negligence here there was no gross negligence such as the amendment requires to create a liability.

I am not bold enough to enter upon a detailed investigation as to the difference between gross and other kinds of negligence. That question has been discussed by civilians and text-book writers to such an extent that judges have been found to say that there are no degrees of negligence. However this may be we must, I suppose, give some meaning to this expression of the legislative will and the meaning I give to it is "very great negligence." The jury have found that species of negligence in this concrete case. The trial judge did not attempt, as I do not, to define. He merely put to the jury the contentions of fact and the supporting evidence stating that if these contentions were true there was gross negligence present here. That I think was the proper course and the jury's finding should not be disturbed on that ground.

Finally. The amendment provides that no action shall be brought unless notice in writing has been served within thirty days after the happening of the accident, but that the want or insufficiency of the notice should not be a bar if the court or judge before whom the action is tried is of opinion that there was reasonable excuse for the want or insufficiency of such notice and that the defendants have not thereby been prejudiced in their defence. Notice was not given, but at the trial

the appellants admitted that they were in no way prejudiced by the plaintiff's failure to give notice and the trial judge decided under the statute that there was reasonable excuse for the want of it. The appellants, although admittedly in no way prejudiced by want of notice, seek to set aside the verdict on that account. I do not feel called upon to decide whether in the present case the certificate of the trial judge is reviewable. The rule is universal however that when a statute gives a judge discretion to do a particular act his decision will not be interfered with by an appellate court unless he has made a palpable mistake or has acted upon a manifestly erroneous principle. That cannot be the case here. The main object of notice is to give the defendant a chance of getting at the facts while evidence is available and fresh in the minds of witnesses. For this purpose no notice in the present case was necessary as admitted by counsel. It was proved that the plaintiff was in the hospital twenty-four weeks, during the first thirty days enduring great physical pain. Little during that time would she think of her court remedies. She would probably not dream that she had any. Under the circumstances I am not disposed to question the discretion of the trial judge in dispensing with the notice.

The appeal should be dismissed with costs.

GWYNNE J.—In *The Municipality of the town of Pictou* v. *Geldert* (1), it was held by the Judicial Committee of the Privy Council that the default of a municipal corporation or other public body in keeping in repair a highway or bridge, the obligation to maintain which in repair was imposed upon such corporation or public body by statute or common law, does not give to any person injured by such default any cause of action to

(1) [1893] A. C. 524.

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recover damages in respect of such default and injury, and that such an action can only be maintained by force of some legislative provision indicating an intention upon the part of the legislature to give to a party injured by such default an action for the damages by him sustained in respect thereof. In the present case, however, we have such a legislative provision, for by "The Municipal Institutions Act" of the province of Ontario, 55 Vict. ch. 42, which was but a consolidation of previous Acts, having like provisions, it was enacted in sec. 531, that:

Every public road, street, bridge and highway, shall be kept in repair by the corporation, and on default of the corporation so to keep in repair, the corporation shall, besides being subject to any punishment provided by law, be civilly responsible for all damages sustained by any person by reason of such default, but the action must be brought within three months after the damages have been sustained.

Now, the true construction of this section is, as it appears to me, that the action which this statute gives to a private person injured by the default of a municipality to keep in repair the roads &c., under its control, is one founded upon the same precise default as would subject the municipality to criminal proceedings, and that therefore the same evidence of the *fact of the default* of the corporation is as necessary for the maintenance of the private action as for the maintenance of a criminal prosecution. This, as it appears to me, is the plain construction of the statute. I dwell upon this point no further than to refer to the cases cited by me in my judgment in *The Town of Portland* v. *Griffiths*, in this court (1).

It must, however, be, I think, admitted that juries, moved no doubt by sympathy for the sufferers, have rendered verdicts for damages in private actions which have been upheld by the courts upon evidence which

(1) 11 Can. S. C. R. 341.

would not have been for a moment entertained as sufficient to support an indictment for the same alleged default.

In a recent case of *The Town of Cornwall* v. *Derochie* (1), a verdict obtained by the plaintiff in an action like the present was upheld by this court, but in that case the judgment of the majority of the court, in which I was unable to concur, proceeded wholly upon this, that in their opinion the evidence sufficiently showed that the sidewalk, by falling upon which the plaintiff there received the injury complained of, was either originally improperly constructed, or by age and use had so sunk down as to allow water to accumulate upon it, in consequence of which the ice which caused the accident was formed. That judgment does not at all affect the present case, for there is not a tittle of evidence upon which could be rested a suggestion of any defect in the construction of the crossing by falling upon which the plaintiff sustained damage. That crossing, it is true, was higher in the centre of the street than at its sides, it was rounded off in the centre and sloped downwards to the sides of the street, and more, perhaps, on the side at which the plaintiff fell, because Princess street where it crossed Montreal street had itself a considerable natural descent of grade in that direction, but such formation of the crossing could not be, and has not been, relied upon as having been a defect in its construction, nor is the plaintiff's injury in any respect attributable or attributed to such construction. The whole of the plaintiff's case is, as it is put by the learned Chief Justice of Ontario in his judgment, as follows:

Princess street, in Kingston, which runs east and west, is crossed by Montreal street, and a granolithic pavement crosses the latter street on a down grade from west to east. At the southeast corner the

(1) 24 Can. S. C. R. 301.

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pavement joins or connects with the south sidewalk of Princess street. At that point the snow, under a city by-law, is habitually swept from the sidewalk adjoining the crossing, and the passage of sleighs had the effect of pushing or forcing the snow on or at the crossing upon or to the end of the sidewalk which sloped somewhat from north to sonth. The result was that where the sidewalk met the crossing the snow and ice had accumulated, and for from 3 to 2 feet back there was a descent in the crossing of 6 or 7 inches in the yard, and this descent was slippery. * * We are now, he added, face to face with the question whether the presence of snow on a road or street raised by the action of vehicles and partly by the law compelling the sweeping or clearing of sidewalks so as to be raised as here to a higher level than the sidewalk, presenting a slippery descent of 6 or 7 inches in the distance of from 3 to 2 feet, creates a cause of action against the city by an accident to a passenger slipping thereon.

The evidence given on behalf of the plaintiff for the purpose of establishing that default of the corporation in keeping the street, where the accident happened, in repair, which is made by the statute the foundation of the action, is in substance as follows. The day itself was very cold and stormy; it was snowing a little at the time of the accident. During that and the previous day it had been snowing off and on, while within the six days preceding there had been a very heavy fall of snow. All the plaintiff's witnesses concurred in saying that upon the crossing there was formed by snow and ice accumulated there an abrupt incline or dip down to the sidewalk at the junction of the crossing with which the plaintiff slipped and fell. This incline, according to one witness, commenced at the distance of about three feet, according to another, at about four, from the sidewalk; and one witness said that it was highly polished by traffic, by foot-wear principally, and, as he thought, by the wind that day. All proved that the sidewalk was kept almost without any snow upon it, it being required to be so kept by a by-law of the corporation. Upon it there was about an inch of snow, while upon the incline in the cross-

ing there was 6 or 7 inches, or perhaps more. The sidewalk being kept clear of snow the snow on the crossing accumulated by reason of the passing sleighs sweeping round the corner having the tendency to sweep the snow on to the crossing. This and the snow falls caused the incline to be formed. One witness who resided at the corner where the accident happened said that there is always, in winter, a certain amount of snow on the crossing, and that there will naturally always be a dip there which cannot be prevented.

There were as usual suggestions after the event as to modes by which the accident might have been avoided, some of which, if adopted, would seem to be injurious rather than otherwise. As for example, one witness suggested that a snow plough, which is used in keeping sidewalks clear of snow, should have been run along the crossing, that is, from one side of Montreal Street to the other; but such a proceeding, it is obvious, in a heavy fall of snow, by heaping the snow up on one side of the crossing across the whole width of the street, might cause an obstruction to passing vehicles, and in the case of an accident happening thereby might subject the corporation to actions, not for non-feasance but for actual mis-feasance; and the action of the snow plough on the crossing would naturally press down the edges to an icy, slippery condition more than would the footsteps of passing pedestrians. Another suggested that in lieu of the incline, and at the top of it, that is to say, at the distance of three or four feet from the sidewalk, a step should have been cut perpendicularly down to the level of the sidewalk. The benefit to be derived from such a step was not explained; and indeed while offering no benefit to pedestrians, it might be prejudicial to persons in sleighs coming round the corner. On the close of the evidence, counsel for the defendants moved for

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a non-suit which the learned judge refused to grant, and thereupon the defendants called the meteorological observer of the Dominion at Kingston, who testified as to the state of the weather on the 8th of February, 1895, the day of the accident. It was, he said, a very cold and stormy day; the thermometer at three o'clock in the afternoon stood at eight degrees below zero. It was snowing all day. It began to snow at seven o'clock the previous evening, and, judging from the snow-fall registered in the morning, he thought that it must have snowed all night. There was a snow-fall of four inches registered at eight o'clock in the morning, and between that and three o'clock in the afternoon it snowed 1·8 inches more. It snowed in fact almost continuously from seven o'clock the previous evening until ten o'clock on the night of the 8th February, making a snow-fall during that period of a little over six inches. The defendants called one other witness, the city engineer, who has charge of the streets of the city, who testified that after every snow-fall in the winter men are sent out to shovel snow off the crossings where necessary, but that it is utterly impossible to shovel off every crossing in the city at the same time; that on the day preceding the accident he had ten men, and on the day of the accident, the 8th of February, he had 34 men out shovelling snow off the crossings; that he had frequently during the winter seen the crossing where the plaintiff fell, but had never seen anything wrong with it.

The jury rendered a verdict for the plaintiff with $1,500 damages. Upon a motion to set aside that verdict and to enter a non-suit, or a verdict for the defendants, or that a new trial should be ordered, the Divisional Court of Common Pleas at Toronto discharged the motion, and upon appeal therefrom, the Court of Appeal at Toronto, by a divided court, dis-

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missed the appeal, and from that judgment this appeal is taken.

All the evidence, both that given on the part of the defendants and of the plaintiff, must be taken into consideration for the purpose of determining whether there was any evidence given sufficient to warrant a jury either in a criminal proceeding or in a civil action rendering a verdict against the defendants, as for any default upon their part in keeping the street, where the plaintiff fell, in repair within the meaning of the statute upon which the action is founded, and in my opinion the only conclusion which can reasonably be arrived at, is that there was not. If the verdict rendered in this case could be maintained, it would, I think, be quite useless for a municipal corporation ever to defend any action of this nature for any injury happening upon a street under their control, even though caused by the inclement state of the weather. To that cause, and to that alone, and not any want of repair in the crossing of which, in my opinion, there was no evidence whatever, does the evidence justify the conclusion that the plaintiff's accident was attributable. The evidence would not be entertained for a moment as sufficient to maintain a verdict against the defendants in a criminal proceeding, and it can be no more sufficient in a civil action than in a criminal proceeding. While the plaintiff is entitled to the deepest sympathy in the injury which she suffered, which appears to have been very great, we should be very careful not to suffer our sympathies to get the better of our judgment, as juries, it is to be regretted, in actions of this nature, too often do.

The appeal should, in my opinion, be allowed with costs, and a non-suit be ordered to be entered. It is unnecessary to express any opinion upon other points taken under the provisions of 57 Vict. ch. 50, sec. 13,

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as wholly independently of that Act, I am of opinion that there was no evidence given which was proper to be submitted to a jury as sufficient for the maintenance of the action.

Appeal dismissed with costs.

Solicitor for the appellant: *Donald M. McIntyre.*

Solicitors for the respondent: *Hutcheson & Fisher.*

1896 *Oct. 9. 1897 *Jan. 25.

OLIVER SALVAS (OPPOSANT)................APPELLANT;

AND

HENRI VASSAL (PLAINTIFF)................RESPONDENT.

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

Title to land—Sale—Right of redemption—Effect as to third parties—Pledge—Delivery and possession of thing sold.

Real estate was conveyed to S. as security for money advanced by him to the vendor, the deed of sale containing a provision that the vendor should have the right to a re-conveyance on paying to S. the amount of the purchase money, with interest and expenses disbursed, within a certain time. S. subsequently advanced the vendor a further sum and extended the time for redemption. The right of redemption was not exercised by the vendor within the time limited and S. took possession of the property, which was subsequently seized under an execution issued by V. a judgment creditor of the vendor. S. then filed an opposition claiming the property under the deed.

Held, reversing the judgment of the Court of Queen's Bench, that as it was shown that the parties were acting in good faith, and that they intended the contract to be, as it purported to be, *une vente à réméré*, it was valid as such, not only between themselves but also as respected third persons.

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

APPEAL from a decision of the Court of Queen's Bench for Lower Canada (1) reversing the judgment of the Superior Court in favour of the opposant.

The material facts of this case may be stated, briefly, as follows:

In 1894 the respondent, Vassal, obtained judgment in an action against a Mme. Plante and issued execution thereon under which the sheriff seized certain real estate and moveables in Drummondville as being property of said defendant. The appellant Salvas made an opposition to this seizure claiming to have acquired said real estate from Madame Plante by deed of sale executed in April 1893, and duly registered. The deed of sale is filed in the record, and by it Madame Plante conveyed to appellant a lot of land in Drummondville on which was a small house constructed and another building in course of construction. She also conveyed certain moveables, which are not in question on this appeal. The purchase money of the real estate was $300 and of the moveables $550, and the deed provided that the vendor might redeem the real estate by paying to Salvas the said sum of $850 within three months. He afterwards advanced to the vendor a further sum of $650 and extended the time for redemption for one month more, and subsequently granted her a delay of another month. The property was not redeemed and appellant took possession and leased it to one Hamel, but on account of this litigation he had to cancel the lease and pay $200 damages to the lessee.

The following is the text of the deed of sale of the 10th April, 1893, and of the deed extending the time for redemption of 8th July, 1893.

(1) Q. R. 5 Q. B. 349.

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DEED OF SALE À RÉMÉRÉ OF THE 10TH APRIL, 1893.

" Par-devant Louis Véronneau, notaire public pour la " province de Québec, résidant et pratiquant au village " de Saint-Michel d'Yamaska, dans le district de Riche-" lieu, soussigné.

" A comparu Dame Mélanie Lalanne, demeurant au " village Saint-Michel d'Yamaska, l'épouse séparée de " biens de M. L. Adolphe Plante, hôtelier, du même " lieu, lequel autorise sa dite épouse à l'effet des pré-" sentes.

" Laquelle a reconnu avoir vendu, cédé et transporté " avec garantie contre tous troubles, à Olivier Salvas, " cultivateur, de la paroisse de Saint-Michel d'Yamaska, " à ce présent et acceptant :

" 1. Une portion de terre située sur le côté sud-est " du chemin Saint-George, dans la ville de Drummond-" ville, connue sous le numéro cent quarante du " cadastre du quartier sud de la ville de Drummond-" ville, de la contenance de soixante-six pieds de front " sur cent-trente-deux pieds de profondeur, mesure " anglaise, plus ou moins; bornée en front par le " chemin Saint-George, en arrière par Edouard Rhéau-" me, d'un côté au nord-ouest par Ephrem Archambault, " et de l'autre côté par W. J. Watts, avec une petite " maison dessus construite et une autre maison en voie " de construction. *Laquelle maison la dite dame vende-" resse sera tenue et obligée de parachever à ses frais, sous " le plus court délai possible.*

" 2. Suit la description des meubles :—

" La dite dame venderesse déclare que tout ce que " ci-dessus vendu, lui appartient par bons titres de " propriété dont elle promet aider l'acquéreur au " besoin.

" Pour ce que ci-dessus vendu appartenir au dit " acquéreur, ses hoirs et ayant cause, en pleine et " absolue propriété de ce jour à toujours.

" Cette vente a été ainsi faite pour et moyennant le " prix et somme de huit cent cinquante dollars.

" Il est convenu entre la dite dame venderesse et le " dit acquéreur, que si la dite dame venderesse rem- " bourse au dit acquéreur, au domicile de ce dernier, " la dite somme de huit cent cinquante dollars, d'hui à " trois mois de cette date, et lui en paie d'ici lors " l'intérêt à sept pour cent par an, de ce jour au paie- " ment, et rembourse aussi au dit acquéreur le mon- " tant de tous déboursés qu'il aura faits sur, pour et à " cause de la dite portion de terre et autres objets " mobiliers présentement vendus, avec le même intérêt " à compter de leur date, la dite dame venderesse aura " droit à titre de faculté de réméré, de reprendre la " possession et propriété du tout présentement vendu " dans leur état d'alors; mais si la dite dame vende- " resse fait défaut en tout ou en partie d'opérer les dits " remboursement et paiement aux temps et lieu con- " venus, le dit acquéreur demeurera en tel cas pro- " priétaire incommutable du tout présentement vendu, " ainsi que de toutes les améliorations qui y auront " été faites sans être tenu à aucun remboursement ni " indemnité pour deniers reçus à compte, impenses ou " autres considérations.

" La dite dame venderesse conservera jusqu'à sa dé- " chéance de la dite faculté de réméré, l'usufruit du " tout présentement vendu en en supportant toutes les " charges et redevances seigneuriales, municipales et " autres et en jouissant des dits biens mobiliers en bon " père de famille.

DEED OF EXTENSION OF DELAY OF THE 8TH JULY, 1893.

" Par-devant Louis Véronneau, notaire public, pour " la province de Québec, résidant et pratiquant au " village de Saint-Michel d'Yamaska, dans le district " de Richelieu, soussigné.

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" A comparu M. Olivier Salvas, cultivateur, de la " paroisse de Saint-Michel d'Yamaska, d'une part.

" Et Dame Mélanie Lalanne, demeurant au village " de Saint-Michel d'Yamaska, l'épouse séparée de biens " de M. L. Adolphe Plante, hôtelier, du même lieu, " agissant et représentée aux présentes par le dit M. L. " Adolphe Plante, son procureur dûment autorisé par " sa procuration reçue devant W. L. M. Désy, notaire, " le six juin, mil huit cent quatre-vingt-neuf, d'autre " part.

" Lesquelles parties ont déclaré :

" Que par acte de vente avec faculté de réméré reçu " devant le notaire soussigné, le dix avril dernier et " enregistré au bureau d'enregistrement du comté de " Drummond, le ou vers le vingt-deux avril dernier, la " dite Dame Mélanie Lalanne a vendu au dit M. Salvas, " pour les prix et considérations et moyennant les con- " ditions y mentionnées, le terrain et dépendances et " effets mobiliers y désignés :

" Qu'entre autres conditions du dit acte, il a été " stipulé que la dite Dame Mélanie Lalanne aurait le " droit de rependre la possession et propriété des dits " terrain et dépendances et effets mobiliers dans le " cours de trois mois à compter de la date du dit acte, " c'est-à-dire, le dix de juillet courant, mais cela, en ' par elle remboursant au dit M. Salvas, une somme " de huit cent cinquante dollars, avec intérêt au taux " de sept par cent.

" Que la dite Dame Mélanie Lalanne se sentant " incapable de rembourser la somme capitale et intérêts " mentionnés au dit acte, aurait demandé au dit M. " Salvas de lui accorder une extension de délai pour " exercer la dite faculté de réméré, ce à quoi le dit M. " Salvas aurait acquiescé.

" En conséquence de quoi le dit M. Salvas a accordé " comme par les présentes il accorde à la dite Mélanie

"Lalanne, ce acceptant par son dit procureur, un délai "de un mois, à compter du dix juillet courant, pour "exercer la dite faculté de réméré qu'elle dite Dame "Mélanie Lalanne s'était réservée dans et par le dit "acte sus-daté. La convention des parties étant que "la dite Dame Mélanie Lalanne aura le droit, en rem-"boursant au dit M. Salvas à son domicile ici, les huit "cent cinquante dollars et intérêts, plus une autre "somme de six cent cinquante dollars dont deux cents "dollars avancés et fourmis à la dite Dame Mélanie "Lalanne depuis la date du dit acte, et employés par "elle à payer les ouvriers et les matériaux employés à "la construction de la maison et autres bâtiments que "cette dernière s'est, par le dit acte, obligée de para-"chever à ses frais, de reprendre la pleine possession "et propriété du tout vendu et mentionné au dit acte; "quatre cent cinquante dollars à être avancés et four-"nis d'hui à quelques jours, pour le même objet et "aux mêmes conditions."

The respondent Vassal contested the opposition, claiming that the property so sold was worth more than $2,000, that the sale was *simulée*, illegal, fictitious and fraudulent, and that it was in fact a pledge to secure a loan.

The Superior Court maintained the opposition, holding that on expiry of the time for redemption the title to the property was confirmed in appellant, and that the sale was made in good faith and without fraud. The Court of Queen's Bench reversed this judgment and held that the transaction was only a pledge to appellant without delivery or possession, under the form of a deed of sale, (*sous la forme d'une vente.*)

The appeal to this court was limited to the case respecting the real estate, the appeal as to the moveable effects having been refused.

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At the argument of the appeal before this court, the good faith of the transaction and absence of fraud were admitted by the respondent.

It is proved and admitted by the appellant that he adopted the sale with *faculté de réméré*, as offering him a better security than a simple hypothec that his advances would be repaid.

At the time of the sale the real estate, with the completed house, was worth from $2,000 to $2,500; some months afterwards, by reason of certain unforseen events in the locality, the value was reduced to not more than $1,200 or $1,500.

Geoffrion Q. C. and *Lavergne* for the appellant. There has been no subrogation to the subsequent creditor, the respondent, and he has no right to demand that the contract between Madame Plante and the appellant should be declared void. Art. 1039 C. C.

There is no fraud shown, nor is it proved that the deed was fictitious and it should not be set aside. Salvas paid a full and sufficient price and, notwithstanding indulgence granted to his debtor, the default to redeem made the sale absolute by lapse of time.

In *Bourque* v. *Lupien* (1) in conformity with Rolland de Villargues and Laurent's opinion, it was decided that there being here no laws against usury in Canada we can stipulate for any rate of interest, that there can not be any question of presumption against the deed because there is no prohibitive law to be eluded. The Court of Review based its decision upon *Francœur* v. *Biron*, (unreported) where one of the parties alleged that the redemption deed was not a real sale but a disguised pledge, supporting his pretensions upon the meanness of the price and the want of delivery. The Superior Court was reversed in Review, but the Court

(1) Q. R. 7 S. C. 396.

of Queen's Bench restablished the first judgment maintaining the sale.

If the object was not actually put into the possession of the creditor, it was not a pledge. Arts. 1966, 1970 C. C. The court cannot suppose that the intention of the parties was to make a pledge in the absence of delivery the essence of pledge.

In *Church* v. *Bernier* (1), the court maintained a sale where no delivery had been made. The present case offers stronger reasons to maintain the sale. By our law sale is perfected by consent alone although the thing sold be not then delivered. Art. 1472 C. C.

The deed was made public by registration and the respondent was a posterior creditor; there was no fraud and the appellant acted in perfect good faith. *Hunt* v. *Taplin* (2) must be distinguished, for in that case the sale was only colourable. The cases of *Rickaby* v. *Bell* (3); *Cushing* v. *Dupuy* (4); *Black et al* v. *Walker* (5); and *Carter* v. *McCaffrey* (6), are evident cases of collusion and fraud. The case of *Pacaud* v. *Huston* (7), cited by Mr. Justice Hall, is not at all similar to the present one.

Crépeau Q. C., and *Baudry* Q. C., for the respondent. The contract made by Madame Plante bears marks of fraud; the price is so low as to cause that presumption and the simulation to a deed with right of redemption is evidently for the purpose of evading the Quebec Statute 55 & 56 Vict., ch. 17, sec. 1. See 16 Laurent (8); Bedarride, Traité du Dol, etc. (9); and our courts follow this doctrine; *Trahan* v. *Gadbois* (10); *Wilson* v. *Mahon* (11); *Carter* v. *McCaffrey* (6). It is a

(1) Q. R. 1 Q. B. 257.
(2) 24 Can. S. C. R. 36.
(3) 2 Can. S. C. R. 560.
(4) 5 App. Cas. 409; 24 L. C. Jur. 151.
(5) M. L. R. 1 Q. B. 214.
(6) Q. R. 1 Q. B. 97.
(7) 3 Q. L. R. 214.
(8) Nos. 497, 498.
(9) Nos. 1429, 1446, 1447.
(10) 5 R. L. 690.
(11) Q. R. 3 S. C. 267.

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constructive fraud at any rate. The authors are unanimous in such a case in admitting a creditor, even posterior, in contesting the deed. Bedarride, Dol, etc. (1); Marcadé (2); Larombière (3).

The transaction was not seriously intended to be a sale, but was a disguised pledge, bad for want of delivery. See *Black* v. *Walker* (4). The transaction has all the defects mentioned by Bedarride, Traité du Dol, etc. (5); and Chardon, Traité du Dol, etc. (6). Salvas made subsequent advances on the same security. It is only upon our judgment and seizure that Salvas claimed the ownership whilst the insurance was taken by Plante as proprietor at his request.

There is a resemblance between the transaction and the "*Contrat pignoratif*," of the French law writers. In France, when the *contrat pignoratif* is usurious, the law declares it absolutely null and void, but when a deed of sale *a réméré* is declared a mere *contrat pignoratif*, on account of simulation, but without usury, it is declared null as a sale, but stands good as a covenant for debt. Bedarride, vol. III, nos. 946, 947, 1181. Guyot Vo. "Pignoratif." Duranton vol. 16, nos. 430, 431. Dalloz Rep. Leg. V° "Nantissement" Nos. 224, 233, 307, 314. Again in Dalloz Rep. de Leg. V° "Obligation," nos. 1035 and 1043, we see that third parties are always permitted to prove simulation in a deed which may affect their rights and interests, and that judges have power to decide that a sale *a réméré* is simulated and in reality nothing but a pledge. See also *Cushing* v. *Dupuy* (7); *Gendron* v. *Labranche* (8) per Casault J. at p. 92. The point involved was

(1) Vol. IV, nos. 1420-1422.
(2) Sur. art. 1167, vol. 4, p. 432, no. 502.
(3) Vol. 2 p. 228, sur. art. 1167, no. 20.
(4) M. L. R. 1 Q. B. 214.
(5) Vol. 4, nos. 1445, 1446, 1451.
(6) Vol. 3, no. 507.
(7) 5 App. Cas. 409; 24 L. C. Jur. 151.
(8) Q. R. 3 S. C. 83.

discussed and decided in our favour in *Rickaby* v. *Bell* (1); *Pacaud* v. *Huston* (2); *Fairbanks* v. *Barlow* (3); *Hunt* v. *Taplin* (4).

The deed violates the principle laid down by art. 1981 C. C. that a debtor's assets are the common pledge of his creditors. The further advances, extension of time and so forth were illegal and never consented to by the vendor but by her husband alone without her authority in writing. The extension is not recorded in the registry office.

THE CHIEF JUSTICE.—It is clear that no fraudulent intent to hinder, delay or defeat the creditors of the judgment debtor can be imputed to the appellant, who paid his money in good faith. Indeed the Court of Appeal does not dispute this.

The question whether a particular transaction was a sale with right of redemption, or a "*contrat pignoratif*" or an "*antichrèse*" all of which differ in their legal effects (5), must in every case depend upon the interpretation of the deeds passed between the parties and on proper appreciation of the evidence.

Considering the case in this way it appears to me free from doubt that the parties intended just what they have said in the two notarial deeds, and that these deeds were not intended to disguise any other or different contracts from those expressed in them.

This being sufficient for the decision of the appeal I need not say anything further.

The appeal must be allowed and the appellant's opposition maintained with costs to him in all the courts.

(1) 2 Can. S. C. R. 560.
(2) 3 Q. L. R. 214.
(3) 14 Can. S. C. R. 217.
(4) 24 Can. S. C. R. 36.
(5) Pothier, Traité de l'Hypothèque no. 242-245; Traité de Vente no. 285.

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GWYNNE, SEDGWICK and KING JJ. concurred in the judgment of Mr Justice Girouard.

GIROUARD J.—Nous avons donné à cette cause toute l'attention que son importance demandait, et ce n'est qu'après mûre délibération que nous sommes arrivés à la conclusion qui suit. Nous avons sérieusement examiné les raisons qui ont été avancées à l'appui de ce que l'on a appelé la jurisprudence de la Cour d'Appel dans la présente cause et aussi celle de *Pacaud* v. *Huston* (1), et si nous avions le moindre doute sur le sujet, notre devoir serait indubitablement de la confirmer; mais nous n'en avons aucun. Nous considérons que la jurisprudence de la Cour d'Appel est à la fois injuste et contraire au texte même du Code Civil. Cette injustice, M. le juge Ramsay l'a dénoncée dans des termes amers dans son dissentiment en *Pacaud* v. *Huston* (1).

> His deed of sale, "disait-il, en référant à la vente à réméré du créancier," is set aside, and when he comes to the distribution of the money, he will have no more claim than a chirographary creditor. And all this shuffling has no other object than that. It is a false pretence on the part of the contesting party to say that he wants to leave him with his *gage*, the judgment to be confirmed robs him of his *gage*.

M. le juge Plamondon, de son côté, qui avait décidé *Pacaud* v. *Huston* (1) en Cour Supérieure, vient nous dire qu'il n'est pas convaincu par la décision de la Cour d'Appel, puisque dans la présente espèce, il décide comme dans la première. Il est évident que la jurisprudence de la Cour d'Appel n'est pas encore acceptée par le Barreau et le Banc de la province de Québec.

A l'exposé des faits qui précèdent, je n'ai qu'une observation à ajouter et elle se rapporte à la bonne foi de l'appelant. Je crois qu'elle a été finalement admise à l'audience devant nous; elle est d'ailleurs incontes-

(1) 3 Q. L. R. 214.

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table. La Cour Supérieure le jugea ainsi : "Dans toute cette transaction," dit M. le juge Plamondon dans son jugement, "la bonne foi de l'opposant et l'absence de fraude sont évidentes." Le jugement de la Cour d'Appel ne contredit pas ce motif ; il déclare purement et simplement

qu'il ressort des faits et des circonstances de cette cause, que l'acte de vente à faculté de réméré consenti par Dame L. Adolphe Plante, autorisée par son mari, en faveur de l'intimé, du 10 avril 1893, devant Mtre. Véronneau, notaire, était un contrat de gage, sous la forme d'une vente, et que les prétendues vendeurs ne se sont pas dépossédés ni des meubles ni de l'immeuble vendus.

Le juge en chef Lacoste (1) admet implicitement la bonne foi de l'appelant.

Ainsi, dit-il, un acte simulé, qui n'a pas pour objet d'éluder une loi et qui est exempt de fraude, doit s'exécuter comme les parties ont entendu qu'il fut exécuté.

Puis, le savant juge ajoute :

Nous aurions maintenu la vente si la contestation eut été entre les parties au contrat.

M. le juge Hall (2), est plus explicite :

There can be no doubt as to the good faith of the purchaser Salvas ; he did not wish to buy the property, but would only provide the desired amount upon the condition of the title being conveyed to him, and he expected that Mrs. Plante would exercise her right of redemption, return his money and avail herself of the stipulated right of redemption.

M. le juge Blanchet trouve la conduite de l'appelant pour le moins étrange (3) ; il a des soupçons de fraude, mais il n'ose le dire dans ses conclusions. D'ailleurs, la preuve établit hors de tout doute que la transaction a été exempte de fraude. Mme. Plante, la venderesse, n'avait pas de créanciers valant la peine d'être mentionnés, si ce n'est l'intimé pour une somme de $200 pour matériaux fournis à la maison en voie de con-

(1) Q. R. 5 Q. B. 356. (2) Q. R. 5 Q. B. 360.
(3) Q. R. 5 Q. B. 352.

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struction, et il fut tout de suite payé à même les deniers de l'appelant. Ce paiement aurait dû ouvrir les yeux de l'intimé et le pousser au bureau d'enregistrement, qui est à quelques pas de son domicile. Il ne fit rien et continua à faire des avances de bois, s'en rapportant évidemment à la solvabilité personnelle de Plante ou de sa femme.

Les faits et circonstances de la vente à réméré étant établis, il ne nous reste plus qu'à examiner les questions de droit. La vente à réméré était-elle valide à l'égard des tiers, étant prouvé et même admis qu'elle fut passée dans le but de mieux assurer le remboursement des avances de l'appelant ? Même si elle n'est à leur égard qu'un nantissement d'immeuble, ce nantissement est-il parfait, et permet-il à l'appelant de garder l'immeuble ?

La Cour Supérieure a jugé que la vente était valide. La Cour d'Appel, à l'unanimité, ne voit dans la transaction qu'un nantissement d'immeuble, irrégulier et sans valeur légale, puisque, dit-elle, *il n'y a pas eu tradition de gage*. C'était le principe qu'elle avait consacré en 1877, dit M. le juge Hall, dans *Pacaud* v. *Huston* (1).

Plus prudent que les hommes d'affaires, l'acheteur, qui n'est qu'un simple cultivateur sans instruction, demeurant à 25 ou 30 milles des lieux en litige—qu'il ne connaissait pas—qui avait l'habitude de consulter le notaire de son village dans le cours de ses transactions, s'est cru le plus sûr des prêteurs. C'était en effet sa position à l'origine, lorsque la vente a été passée et qu'il n'y avait pas de créancier à redouter. Mais voilà que le vendeur fait des dettes ; il devient même insolvable. Dès lors, d'après la Cour d'Appel, la vente ne vaut plus rien et tout gage possible disparaît aussi, puisqu'à ses yeux, il n'y a pas eu de tradition. L'acheteur est

(1) 3 Q. L. R. 214.

devenu un simple créancier chirographaire, comme le plus imprévoyant des fournisseurs, par exemple, l'intimé qui ne se donne même pas la peine d'aller consulter les livres du bureau d'enregistrement. C'est bien le cas de dire, *summum jus, summa injuria.*

Pour décider la question, même vis-à-vis des tiers, il s'agit de rechercher non pas les motifs, ou le but immédiat ou ultérieur, ou les résultats possibles ou probables que les parties avaient en vue, mais la nature de la convention qu'elles avaient l'intention de faire, et qu'en réalité elles ont faite. Etait-ce une vente à réméré ou un nantissement ? Il suffit de poser la question pour la résoudre. Ce n'était certainement pas un nantissement, puisque, s'il faut en croire la Cour d'Appel, il n'y avait pas de tradition. Et pourquoi pas une vente ? La tradition ou possession n'est pas alors nécessaire. Il suffit que l'acheteur ait fait enregistrer son titre contre des acquisitions futures. Où est la loi qui empêche les parties de couvrir une avance, un crédit, ou même une spéculation, sous la forme d'une vente d'immeuble, soit absolue, soit résolutoire, comme une vente avec faculté de réméré ? Où se trouve ici la simulation ? Les parties n'entendaient-elles pas faire une vente irrévocable, si le prix n'était pas remboursé ?

La Cour d'Appel invoque dans cette cause la doctrine des commentateurs du Code Napoléon et la jurisprudence française. Mais, fussent-elles précises et unanimes ; s'appliquent-elles ? Pour donner à cette question tout le développement qu'elle exige, il est nécessaire de rappeler ce qu'était l'ancien droit en cette matière et déterminer le droit nouveau, tant en France que dans notre province.

Les lois en vigueur avant le Code n'offraient pas assez de liberté pour permettre des opérations de cette nature. Pour la vente, il fallait la tradition ; l'acqué-

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reur avait aussi à craindre la lésion d'outre moitié. Puis le défaut d'exercer la faculté de rachat dans le délai convenu n'était pas irréparable. Le délai pouvait être prolongé par le juge et l'acheteur ne devenait propriétaire irrévocable de la chose vendue que par un jugement en déchéance du droit de réméré. D'un autre côté, l'antichrèse ou le nantissement de l'immeuble était presque prohibé comme suspect d'usure. On trouve dans Merlin, Quest. vo. Contrat Pignoratif, un plaidoyer complet sur le droit ancien. Il y enseigne que la vente avec faculté de réméré a été substituée en France à l'antichrèse, c'est-à-dire, le nantissement des immeubles, qu'on ne pouvait plus y pratiquer ouvertement, après qu'elle eût été prohibée par le droit canonique, et dans un temps où les juges ecclésiastiques connaissaient de l'usure. Des créanciers ne prirent plus de fonds en gage, avec pacte d'en recevoir les fruits pour les intérêts ; ils adoptèrent le vente à réméré, et comme aux termes de la loi romaine 37, la chose donnée en gage pouvait être louée par le créancier à son débiteur, ils relouèrent à leurs vendeurs les fonds que ceux-ci leur avaient vendus.

Ces contrats furent nommés Pignoratifs, parce que la vente, qui y était stipulée, n'était véritablement qu'une impignoration déguisée. On conçoit que cette manière de violer indirectement la loi qui prohibait toute stipulation d'intérêts pour argent prêté ou dû—l'argent étant supposé ne rien produire—ne manqua point d'éveiller l'attention des autorités. Aussi, le Parlement de Paris rendit-il, le 29 juillet 1572, un arrêt de règlement par lequel il déclare ces sortes de contrats nuls et usuraires. Cependant, les auteurs et les arrêts sont unanimes à décider qu'il fallait au moins le concours de trois circonstances pour que les contrats de vente fussent réputés de vrais contrats pignoratifs simulés, savoir la vileté du prix de la chose vendue, la faculté de réméré et la

relocation ou le bail à louage fait au vendeur de la chose vendue.

Mais, continue Merlin, p. 309, quand même il réunirait les trois conditions, qui, par leur concours, faisaient autrefois, dans la jurisprudence de quelques parlements, considérer des actes de vente comme des contrats pignoratifs, il suffirait qu'il eût été passé dans un pays où le prêt à intérêt et l'antichrèse ont toujours eu l'approbation des lois; il suffirait qu'il eût été passé à une époque où la faculté de prendre des biens en antichrèse et de prêter à intérêt, était légalement établi dans tout le territoire français, pour qu'il demeura constant à vos yeux, qu'on n'a point voulu, qu'on n'a pas pu vouloir, dans ce contrat, cacher, sous une forme licite, des conventions défendues; que ce qui est annoncé, par ce contrat, avoir été stipulé entre les parties, l'a été réellement, et sans aucune ombre, comme sans aucnn motif de déguisement; qu'on ne peut pas dire de ce contrat, *aliud gestum, aliud scriptum*; en un mot, que ce contrat n'est point une antichrèse simulée, qu'il n'est point un contrat pignoratif, qu'il est, et rien de plus, une vente à réméré.

La Cour de Cassation, par arrêt du 16 juin 1806, adopta les conclusions de Merlin:

Vu la loi 23, D. *de regulis juris*, la loi 1, par. 6, D. *depositi*; l'art. 46 de l'ordonnance de 1510; l'art. 30, chap. 8, de celle de 1535; et l'art. 134 de celle de 1539; Considérant que le jugement du tribunal d'appel de Grenoble, du 11 pluviose an 12, en décidant qu'un contrat de vente sous faculté de réméré n'est qu'un contrat pignoratif, a dénaturé ce contrat;

Que la prohibition du contrat pignoratif, comme pouvant donner lieu à des intérêts plus forts que ceux que l'on retirerait d'une constitution de rente, n'a jamais eu lieu dans le resort du parlement de Grenoble.

Que, même dans les parlements qui avaient introduit cette prohibition, la relocation de l'héritage était l'un des caractères essentiels exigés pour en induire une pignoration, circonstance qui ne se rencontre pas dans l'espèce dont il s'agit;

Par ces motifs, la cour casse et annule, etc. Voir aussi 9 Marcadé et Pont, no. 1049 et suiv., 1215 et suiv.

Comment avant le Code du Bas-Canada, une vente comme celle qui faisait le sujet du savant plaidoyer de Merlin, aurait-elle été envisagée par nos tribunaux? On ne trouve aucune décision de nos cours dans un sens

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ou dans l'autre, si ce n'est celle de *Shaw* v. *Jeffery* (1). C'est un fait remarquable que nos rapports judiciaires avant le Code ne font presque pas mention des ventes à réméré ou des nantissements d'immeubles. Il y a lieu de croire qu'après l'abrogation des lois contre l'usure, une telle vente aurait été déclarée valable, comme elle le fût par la Cour de Cassation. *Shaw* v. *Jeffery* (1).

Le Code Napoléon, et surtout le Code de Québec, ont considérablement innové à l'ancien droit en cette matière. La vente est parfaite par le seul consentement des parties, quoique la chose ne soit pas encore livrée. Arts. 1025 et 1472 C. C. Faute par le vendeur d'avoir exercé la faculté de réméré, l'acheteur demeure propriétaire irrévocable de la chose vendue. Art. 1550 C.C. Les majeurs ne sont pas restituables pour cause de lésion seulement. Arts. 1001, 1012, 1413. C. C. Ces articles se trouvent en substance au Code Napoléon. L'article 1674 du Code Napoléon déclare néanmoins que la rescision de la vente d'un immeuble peut être demandée, s'il y a lésion de plus de sept douzièmes dans le prix.

Quant au nantissement des immeubles, les deux codes contiennent des différences plus nombreuses et plus radicales. Le Code de Québec, art. 1967, déclare que "les immeubles peuvent être donnés en nantissement aux termes et conditions convenus entre les parties," et que les règles concernant le gage des meubles, s'appliquent au nantissement des immeubles "en autant que ces règles peuvent y être applicables." Au contraire, dans le système du Code Napoléon, le nantissement des immeubles forme un contrat à part, appelé l'antichrèse comme dans l'ancien droit, (les vieux auteurs l'appelaient *mortgage*, 9 Marcadé et Pont, 1056, 1215), qui confère au créancier des droits bien différents du gage. Le créancier n'acquiert aucun droit

(1) 13 Moo. P. C. 432.

de propriété ou privilège sur l'immeuble même, mais seulement la faculté d'en percevoir les fruits, à la charge de les imputer annuellement d'abord sur les intérêts et ensuite sur le capital de sa créance. C. N. art. 2085 ; 28 Laurent, n. 528. D'après le Code Napoléon, art. 2078 et 2088, le créancier ne peut jamais s'approprier le gage, soit mobilier ou immobilier ; toute stipulation contraire est regardée comme un pacte commissoire et absolument nulle ; le créancier ne peut que poursuivre l'expropriation du gage par les voies ordinaires. Beaudry-Lacantinerie, dans son nouveau Traité du droit civil (1), observe que si en réalité la convention que les parties ont voulu faire révèle le pacte commissoire prohibé par l'art. 2088, on n'est plus en face d'une vente à réméré, mais bien d'un contrat pignoratif.

La convention est nulle, ajoute-t-il ; du moins elle ne peut valoir que comme simple contrat d'antichrèse. La vileté du prix de la vente et la relocation au vendeur sont encore ici les principaux signes qui trahiront le plus souvent l'impignoration.

Il cite plusieurs arrêts qui ont jugé dans ce sens ; mais ils n'ont aucune application dans le système de notre Code. L'article 1971 dit :

Le créancier peut stipuler qu'à défaut de paiement il aura droit de garder le gage.

Le pacte commissoire est donc permis parmi nous, et dans le gage des meubles et le nantissement des immeubles.

A ces différences fondamentales, ajoutons qu'en France les lois contre l'usure sont encore en force, tandis qu'elles ont été abrogées au Bas-Canada depuis près d'un demi-siècle. Ce qui est cause qu'en France les auteurs et les arrêts sont encore à la recherche du taux de l'intérêt, de la vileté du prix du pacte commissoire et des autres indices du contrat pignoratif dans les ventes avec faculté de réméré, et que si ces indices sont

(1) Ed. 1895, t. 1er p. 145.

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établis, le contrat est déclaré nul comme étant en fraude de la loi. C'est ce qu'enseignent Bédarride, cité par l'intimé, Duvergier et d'autres commentateurs, et ce qui a été décidé par un grand nombre d'arrêts recueillis par Dalloz, (1). Mais l'opinion de ces jurisconsultes et la jurisprudence de ces arrêts ne peuvent faire autorité parmi nous, où l'usure, la lésion même d'outre moitié, le contrat pignoratif et le pacte commissoire ne sont plus reconnus comme moyens de nullité des conventions. C'est ce que l'arrêt rendu sur le plaidoyer de Merlin, que nous avons cité, a décidé pour le ressort du parlement de Grenoble, où certaines lois prohibitives du prêt à intérêt n'étaient pas suivies; et c'est aussi la jurisprudence de la Belgique où le taux de l'intérêt est libre au comme Canada (2).

Mais, dit l'intimé, l'acheteur n'a pas eu de tradition et n'a jamais eu la possession de l'immeuble. Supposons qu'il en soit ainsi. Où est la loi qui exige la tradition ou la possession pour la validité de la vente à réméré d'un immeuble ? Le Code de Québec et le Code français disent que la vente est parfaite par le seul consentement des parties, *quoique la chose ne soit pas encore livrée.* (Art. 1472 C. C.). Et l'article 1025 qui déclare que,—

Le contrat d'aliénation d'une chose certaine et déterminée rend l'acquéreur propriétaire de la chose par le seul consentement des parties, *quoique la tradition actuelle n'en ait pas lieu.*

Le Conseil Privé a semblé concéder (sans cependant décider) dans la cause de *Cushing* v. *Dupuy*, (3) qu'à l'égard des tiers la tradition n'était pas une cause de nullité de la vente de meubles. A plus forte raison, doit-il en être ainsi de la vente d'un immeuble qui doit être enregistrée pour valoir contre les tiers inscrits.

(1) Vo. Vente, n. 1438 et suiv. Lacantinerie, 1 Dr. Civil 135 ;
(2) 24 Laurent 379 ; Baudry- 9 Marcadé et Pont, 1216, 1225.
(3) 5 App. Cas. 409.

Sans doute, le défaut de tradition sera toujours un élément important de la fraude *Cushing* v. *Dupuy*; mais hors ce cas, la tradition n'est d'aucune importance même vis-à-vis des tiers; parce que loin d'être prescrite par la loi, elle est déclarée étrangère au contrat. Tout ce qu'il suffit c'est que la vente soit faite de bonne foi et exempte de toute fraude. La jurisprudence française s'est prononcée dans ce sens par plusieurs arrêts. *Poteau* v. *Caillaut* Cass. 23 décembre 1845 (1); *Grassin* v. *Ravion* 22 avril 1846 (2); *Bonté-Barbe* v. *Mazurier*, 2 juillet 1856 (3); *Mazet* v. *Barrabé*, 26 décembre 1892 (4); *Rougeron* v. *Chabot*, 20 mars, 1888 (5); *Lamoureux* v. *Sous-Comptoir*, 13 juillet 1891 (6). Qu'il nous suffise d'attirer l'attention sur les motifs de ces deux derniers arrêts. Celui de 1888 déclare :—

Que cette vente était exempte de toute fraude, mais que dans les circonstances où elle a eu lieu, Chabot, loin de soustraire le gage à ses créanciers, n'y a eu recours que pour le leur conserver dans la mesure de ce qui lui était possible.

Par l'arrêt de 1891, la Cour de Cassation déclare, vu les art. 68 de la loi du 25 ventôse an XI et 1382 C. Civ. (C.N.); Attendu que

la convention par laquelle l'une des parties vend à l'autre, sous condition de réméré, une quote-part d'un immeuble, tout en lui conférant sur cet immeuble une hypothèque pour sûreté d'une créance, n'est interdite par aucune loi; que rien n'autorise à appliquer par analogie à une convention de cette nature les dispositions de l'art. 2088 C. Civ., qui régissent exclusivement le contrat d'antichrèse.

Puis les annoteurs observeront à la note :

La jurisprudence et la majorité des auteurs considèrent comme étant parfaitement valable, malgré l'art. 2088 C. Civ., dont les dispositions régissent exclusivement le contrat d'antichrèse, ainsi que le déclare la Cour de Cassation dans l'arrêt recueilli au texte, la convention par laquelle un débiteur, en hypothéquant des immeubles à son créancier,

(1) S. V. 46, 1,732.
(2) S. V. 46, 1,639.
(3) Dal. 56, 1,427.
(4) 4 Pand. Fr. Chr. 2, 59.
(5) Pand. Fr. 88, 1,386.
(6) Pand. Fr. 92, 1,237.

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consent à ce que les immeubles ainsi affectés deviennent et demeurent la propriété de ce dernier à défaut de remboursement de l'emprunt à l'échéance. (V. Toulouse, 16 mars, 1812, S. chr. 1er mars 1822, S. chr. Montpellier, 26 juillet 1833, S. 34, 2, 29, 6 mars 1840, S. 40, 2,531 ; Cass. 1er juillet 1844, Pand. fr. chr. S. 45, 1, 17, P. 44, 2,543. D. P. 44, 1, 344. Comp. Cass., 26 février 1856, S. 56, 1, 667, P. 57, 284. D. P. 56, 1, 116. Duranton, t. 18, p. 568 ; Troplong, Nantissement, n. 561, et Vente, n. 77 ; Duvergier, De la Vente, n. 118 et 119 ; P. Pont, Petits Contrats, t. 2, n. 1260 ; Championnière et Rigaud, Dr. d'enregistr, n. 2071 ; Aubry et Rau, 4e édit. t. 4, par. 438, p. 718. —V. cependant Paris, 22 messidor an XI, S. chr.—Montpellier, 17 août 1840, S. 40, 2, 531 ; ce dernier arrêt a été cassé par la décision précipitée du 1er juillet 1844. Comp. notre Rép. alph. v° "*Antichrèse,*" n. 35 et suiv.)

Nos tribunaux ont eu maintes occasions de considérer les articles du Code au sujet des ventes avec faculté de réméré et des nantissements de biens, tant mobiliers qu'immobiliers. Comme cette cause ne présente qu'une question de validité d'une vente à réméré ou du nantissement d'un immeuble, ayant eu lieu de bonne foi et sans fraude, nous devons écarter toutes les décisions où il s'agissait de transactions fausses ou frauduleuses, par exemple *Cushing* v. *Dupuy* (1), et *Rickaby* v. *Bell* (2), et même celles qui, comme dans *Hunt* v. *Taplin* (3), n'avaient en vue que la validité des ventes ou nantissements entre les parties contractantes, ou de choses mobilières, à moins que les principes qui y sont déclarés ne soient également applicables à la vente ou au nantissement de l'immeuble vis-à-vis des tiers. Nous n'avons donc qu'à confronter les décisions suivantes :

1er. *Burland* v. *Moffatt* (4).

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

2e. *Church* v. *Bernier* (5).

(1) 5 App. Cas. 409.
(2) 2 Can. S. C. R. 560.
(3) 24 Can. S. C. R. 36.
(4) 11 Can. S. C. R. 76.
(5) Q. R. 1 Q. B. 257.

Held, that although M. acting as agent for appellants, purchased the bark in his own name, and it remained in his possession, yet the whole transaction being in good faith and there being no suspicion of M's insolvency at the time of the transaction in question, appellant's right of property in the bark so measured and identified, was perfect without delivery.

Le juge en chef Lacoste disait :

Suivant l'ancien droit, ces ventes (de choses mobilières) n'auraient pas été parfaites sans délivrance. Le législateur a vu des inconvénients graves dans l'application de la loi telle qu'elle existait, il a cru y remédier en décrétant que la vente serait parfaite par le consentement des parties, non seulement entre elles, mais vis-à-vis des tiers. Pour l'interprétation de cet article 1027, il faut donc élaguer la question de fraude.

En rendant jugement dans la présente cause, le savant juge a exprimé son étonnement à la vue de la décision de cette cour dans *Hunt* v. *Taplin* (1), qui n'a cependant aucune analogie avec le cas présent, puisqu'il s'agissait de la validité d'une vente entre les parties contractantes. La Cour d'Appel avait jugé que la convention liait les parties contractantes ; mais la Cour Suprême renversa son jugement.

Cette décision, dit le juge en chef, bouleverse notre jurisprudence. Si cependant la Cour Suprême persiste, il sera de notre devoir d'accepter sa propre jurisprudence.

Il n'entre pas dans les attributions de cette cour de reviser ses propres décisions. On nous pardonnera si, en passant, nous signalons à l'attention un arrêt tout récent de la Cour de Cassation, rendu le 22 janvier 1895 *Spezzechine* v. *Culot* (2) ;

1o. La nullité d'une vente peut être demandée et prononcée pour cause de simulation, à la requête de l'héritier du prétendu vendeur, lorsque ce dernier établit, par des présomptions appuyées d'un commencement de preuve par écrit, que l'acte de vente dressé en vue de frustrer les créanciers de son auteur n'avait jamais dû recevoir, dans l'intention commune de ceux qui l'avaient souscrit, et n'avait reçu en fait aucune exécution.

Les annotateurs observent en note :

(1) 24 Can. S. C. R. 36.

(2) Pand. Fr. 95, 1, 486.

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La jurisprudence a quelque temps hésité sur le point de savoir si la nullité d'une convention pour simulation de cause peut être invoquée par les parties contractantes elles-mêmes. La négative, admise par plusieurs arrêts, s'appuyait sur l'adage : *Nemo auditur propriam turpitudinem allegans*, et prétendait refuser d'une manière générale à ceux qui avaient pris part à la fraude alléguée le droit d'en tirer parti pour se dérober à leurs engagements. (V. en ce sens, Cass. 8 janvier 1817 ; 5 décembre 1826 ; 6 août 1828, S. et P. chr. Paris, 26 novembre 1836, S. 37, 2, 34. Chambéry, 6 mai, 1861, S. 61, 2, 563, P. 62, 105). Mais l'opinion contraire semble avoir définitivement prévalu. (V. notamment, Cass. 19 janvier 1830, S. et P. chr. Lyon, 21 mars 1832, S. 32, 2, 391. Cass. 7 mai 1832, S. 36, 1, 574. P. 36, 2, 48, D. P. 36, 1, 161. 11 juin 1838, S. 38, 1, 494, P. 38, 1, 663, D. P. 38, 1, 269. Nîmes, 25 janvier 1839, S. 39, 2, 177, P. 39, 1, 209, D. P. 39, 2, 99. Limoges, 28 novembre 1849, S. 51, 2, 413. Cass. 23 juillet 1851, S. 51, 1, 753, P. 51, 2, 48, D. P. 51, 1, 269. 22 novembre 1869, S. 70, 1, 339, P. 70, 886, D. P. 70, 1, 273. Aix, 25 janvier 1871, S. 71, 2, 264, P. 71, 843, D. P. 71, 2, 52. Montpellier, 8 février 1876, S. 76, 2, 295, P. 76, 1130. Cass. 30 juin 1879, S. 81, 1, 397, P. 81, 1, 1031, D. P. 79, 1, 413. 25 avril 1887 dans ce Recueil, 87, 1, 135. 6 juin 1887 ibid. 87, 1, 289. Aubry et Rau, 4e édit., t. 1, par. 35, p. 116 ; Laurent, Principes de dr. civ. t. 16, n. 121). Les parties elles-mêmes peuvent donc se prévaloir de la nullité de l'acte simulé ; et ce qui est vrai des contractants ne l'est pas moins de leurs héritiers, qui succèdent à leurs droits et actions.

3e *Pacaud* v. *Huston* (1), décidé par la Cour d'Appel, composée de Monk, Ramsay, Sanborn et Tessier JJ., M. le juge Ramsay dissident.

Held that the deed of sale was simulated and void *for total want of consideration* and the property never passed under it.

Il est évident que cette cause n'a guère d'analogie avec celle qui nous occupe. M. le juge Sanborn, qui rendit le jugement de la majorité, observa :

Appellant appears to have had an intimate knowledge of his affairs, and there is much reason to believe that he considered him insolvent at the time. It is unnecessary to pronounce positively on this point to determine this issue. The first thing to be noticed as bearing upon the case, and in fact of determining the relations between appellant and Nault, is that appellant accepted a mortgage upon the property now in question at the same time as he took a deed. He could not

(1) 3 Q. L. R. 214.

really be at the same time owner and mortgagee of the same property. (La Cour de Cassation a cependant décidé le contraire par arrêt du 13 juillet 1891, cité plus haut). . . . It is argued that this is a deed with a right of redemption, and that appellant became absolute proprietor till the right of redemption is exercised by offering him the money. This is not so. A deed with right of redemption is one where there is a price paid and the right of redemption is stipulated by the deed. See art. 1546 C. C. In this case no such right is stipulated, and according to appellant's evidence, Nault could not have the property back by paying the stipulated price $400, but only upon paying the $1,300 mortgage and the notes. There was in fact no consideration for the deed, treated as a sale.

4e. *Bourque* v. *Lupien* (1), où il s'agissait de la validité d'une vente à réméré entre l'acheteur et l'acquéreur du vendeur, qui s'était cependant chargé de ses obligations, Larue J., disait pour la Cour de Revision de Québec :

En France où les contrats usuraires étaient défendus, et où, dans le contrat d'antichrèse (c'est-à-dire de nantissement des immeubles comme sûreté d'un prêt) il était défendu de prêter au-dessus du taux légal, les auteurs enseignaient qu'un contrat d'antichrèse déguisé sous le titre de vente à réméré n'était rien autre chose qu'un acte pignoratif. 3 Bédarride, no. 1179 ; Chardon, n. 512.

Laurent, vol. 28, no. 543, après avoir mentionné que sous l'empire de la loi du 3 sept. 1807 qui impose aux parties l'intérêt légal comme limites qu'elles ne peuvent pas dépasser, ajoute ce qui suit : 'Il va de soi qu'il n'est pas permis aux parties de faire indirectement ce qui leur est défendu de faire directement, éluder la loi, et surtout une loi d'ordre public. Les tribunaux ont donc le droit et le devoir d'annuler pour cause d'usure les contrats antichrétiques qui cachent des conventions usuraires, quels que soient le nom et la forme que les parties leur donnent. Il résulte de là des difficultés d'interprétation. Ces difficultés ne se présentent plus d'après notre législation qui laisse aux parties pleine liberté de stipuler tel intérêt qu'elles veulent. Il ne peut plus être question de contrat déguisé, puisqu'il n'y a plus de prohibition à éluder.

Ces dernières remarques s'appliquent à nous qui n'avons pas de loi contre l'usure.

Chez nous la vente est parfaite par le seul consentement des parties, (C. C. 1025, 1472), et le réméré n'est généralement stipulé que pour

(1) Q. R. 7 S. C. 396.

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donner une garantie plus sûre au créancier qui a prêté son argent et qui ne veut pas courir le risque d'en perdre une partie en faisant les frais nécessaires pour vendre l'immeuble en justice. Ce contrat est légal, pourvu qu'il n'y ait pas fraude, et ce, lors même que le prix de vente serait bien inférieur à la valeur de l'immeuble, car l'annulation d'un contrat pour lésion d'outre-moitié n'existe plus......

La cause qui a le plus de ressemblance à la présente est celle de *Francœur* v. *Biron*, jugée par la Cour d'Appel en 1887, et non rapportée. Francœur avait acheté de Biron deux immeubles, avec faculté de réméré. Le délai expiré sans que Biron eût exercé son droit, Francœur poursuivit le possesseur Giguère. Biron poursuivi en garantie, alléguait que l'acte n'était pas une vente réelle, mais bien un nantissement déguisé ; il s'appuyait sur la vileté du prix et le défaut de tradition. La Cour Supérieure a maintenu la vente. Ce jugement a été renversé par la Cour de Revision. La Cour d'Appel a infirmé le jugement de la Cour de Revision et rétabli celui de la Cour Supérieure, qui avait décidé que Francœur était devenu propriétaire en vertu de l'acte de vente à réméré et que ce droit lui était resté par suite du défaut du vendeur d'exercer son droit de réméré dans le délai stipulé, et qu'aux termes des arts. 1549 et 1550 C. C., il était déchu du droit de l'exercer.

Enfin, comment décider autrement en face de l'article 1027 de notre Code Civil, qui ne se trouve pas au Code Napoléon, bien que le principe en soit reconnu par des commentateurs comme conséquences de l'article 1583 C. N. (art. 1472 de notre Code), qui déclare la vente parfaite par le seul consentement des parties, quoique la chose n'ait pas encore été livrée, 24 Demolombe p. 467. L'alinéa 1er de l'art. 1027 dit :

Les règles contenues dans les deux articles qui précèdent, s'appliquent *aussi bien aux tiers qu'aux parties contractantes*, sauf, dans les contrats pour le transport d'immeubles, les dispositions particulières de ce code quant à l'enregistrement des droits réels.

En supposant que la doctrine des auteurs et la jurisprudence française seraient unanimes contre la validité de l'acte de vente à réméré, à titre de vente, comment, en présence d'un texte aussi formel peut-on décider que cette vente faite de bonne foi et sans fraude, valide entre les parties ainsi que l'admet la Cour d'Appel,

ne le serait pas également à l'égard des tiers, simples créanciers chirographaires du vendeur? C'est ce que l'intimé n'a pas même tenté de démontrer.

Nous sommes donc d'opinion que l'acte du 10 avril 1893, consenti par Mme. Plante dans le but de mieux assurer le remboursement des avances d'argent que lui faisait l'appelant, constituait une vente, avec faculté de réméré, valide non seulement entre les parties contractantes, mais aussi à l'égard des tiers, et que, faute par la venderesse d'avoir exercé cette faculté dans le terme prescrit, l'appelant demeure propriétaire irrévocable de l'immeuble vendu, même vis-à-vis des tiers et en particulier de l'appelant.

Ce premier point décidé en faveur de l'appelant—et sans contredit c'était le plus important—nous considérons qu'il n'est pas nécessaire de nous prononcer sur le second, savoir la validité de l'acte du 10 avril 1893 comme nantissement d'immeuble, et particulièrement la nature de la possession requise en pareil cas.

Enfin, nous sommes unanimement d'avis d'infirmer le jugement dont est appel, et de rétablir celui de la Cour Supérieure quant à l'immeuble. En conséquence l'opposition de l'appelant à la saisie du dit immeuble est maintenue avec dépens devant toutes les cours.

Appeal allowed with costs.

Solicitors for the appellant: *Laurier, Lavergne & Côté.*

Solicitors for the respondent: *Crépeau & Crépeau.*

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*Oct. 10.
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*Jan. 25.

DUNCAN MACDONALD (DEFENDANT)..APPELLANT;

AND

GEORGE WHITFIELD (PLAINTIFF)....RESPONDENT.

GEORGE WHITFIELD (PLAINTIFF IN WARRANTY).......................... APPELLANT;

AND

THE MERCHANTS BANK OF CANADA (DEFENDANTS IN WARRANTY) RESPONDENTS.

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

Suretyship—Recourse of sureties inter se—Ratable contribution—Action of warranty—Banking—Discharge of co-surety—Reserve of recourse—Trust funds in possession of a surety—Arts. 1156, 1959 *C. C.*

Where one of two sureties has moneys in his hands to be applied towards payment of the creditor, he may be compelled by his co-surety to pay such moneys to the creditor or to the co-surety himself if the creditor has already been paid by him.

Where a creditor has released one of several sureties with a reservation of his recourse against the others and a stipulation against warranty as to claims they might have against the surety so released by reason of the exercise of such recourse reserved, the creditor has not thereby rendered himself liable in an action of warranty by the other sureties.

APPEALS from a judgment of the Court of Queen's Bench for Lower Canada (appeal side) affirming the judgment of the Superior Court, District of Montreal, upon the trial of the united cases, by which the action by the respondent Whitfield against the appellant Macdonald was maintained with costs, and the action

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

en garantie by the appellant Whitfield against the Merchants Bank of Canada was dismissed with costs.

In the case instituted in February, 1886, by George Whitfield against Edward C. Macdonald, (represented in the action, since his death in 1889, by the appellant, *par reprise d'instance*,) the plaintiff recovered $19,716 partly for a moiety of the balance of a judgment debt paid by him to the Merchants Bank of Canada for which he and Macdonald were declared to be equally liable, as between themselves as joint sureties by their indorsements on notes of the Saint Johns Stone Chinaware Company, by a judgment of the Privy Council in 1883, (1), and a further sum of $5,234.10, amount of a dividend of 15 per cent on the full amount of the bank's claim against the insolvent estate of the company for which Macdonald had become liable on purchasing the assets by undertaking to pay, as part of the price, a dividend, at that rate, on the claims of all unsecured creditors.

The circumstances which led to the litigation between the parties may be briefly stated as follows :

The St. Johns Stone Chinaware Company carried on business in the Town of St. Johns, P.Q., and among the directors were the late Edward C. Macdonald, the said George Whitfield, Isaac Coote and James Macpherson. In July, 1875, the company made a promissory note for $10,000, payable on demand to the order of Macdonald, which was indorsed by him and by Whitfield, Coote and Macpherson, and discounted for the company by the Merchants Bank at St. Johns. On 21st March, 1877, the company made another note for $8,500, payable three months after date, to the order of Macdonald, which was indorsed by Whitfield and Coote, and also discounted for the company by the Merchants Bank. On 26th March, 1877, the company

(1) *Macdonald* v. *Whitfield* 8 App. Cas. 733; 52 L. J. P. C. 70.

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made a third note for $4,500 payable three months after date to the order of Macdonald, which was also indorsed by him and by Whitfield and Coote, and discounted by the same bank for the company.

The notes were not paid at maturity and were duly protested, and in December, 1877, the bank instituted an action in the Superior Court, for the district of Iberville, against Macdonald, Coote and Whitfield for the amount of the three notes, with costs of protest and interest. Whitfield alone pleaded, and the action was maintained as against him for the amount of the two last notes, the court holding that the bank had lost its recourse against him on the first note by delay in presentation for payment. The action was maintained as against the other defendants for the full amount. Whitfield had, in the meantime, instituted an action in warranty, against Edward C. Macdonald as prior indorser. This action was dismissed by the Superior Court. In the Court of Queen's Bench, however, on appeal, both judgments were reversed, the bank thus obtaining judgment against the three indorsers, Macdonald, Whitfield and Coote, jointly and severally, for the full amount of the three promissory notes, Whitfield's action in warranty being maintained, and Macdonald condemned to protect Whitfield against the claim of the bank. Macdonald appealed to the Privy Council, and his appeal was allowed (1), the judicial committee deciding that the three indorsers were equally liable, as between themselves, as the joint sureties of the company for whose benefit and accommodation they had indorsed. This judgment of the Privy Council finally established the position and rights of the indorsers as between themselves.

During this litigation the company had become insolvent, as had also Macpherson and Coote, leaving

(1) 8 App. Cas. 733.

Whitfield and Macdonald to satisfy the judgment in favour of the Merchants Bank. In the course of the winding up of the affairs of the company Macdonald purchased from the assignee all the assets agreeing to pay as part of the price a dividend of fifteen per cent on all the unsecured claims against the company.

The claim of the bank under its judgment as claimed by plaintiff amounted at the date of the action, in principal, interest and costs, to $34,894, and deducting $400 received by the bank from the insolvent estate of Macpherson, with accrued interest, left a balance of $34,350, as the claim of the bank. Whitfield paid the bank $29,740.50 which was more than sufficient to pay the claim of the bank less the fifteen per cent dividend payable by Macdonald, and instituted the present action, claiming $19,792.10, being fifteen cents on the dollar on the $34,894, which by the terms of purchase of said assets Macdonald was bound to pay and which had not been paid, and $14,557.95 being one-half of the balance of the claim of the bank after deducting the fifteen per cent and the $400 received from the estate of Macpherson.

The defendant admitted liability to a certain extent for the principal debt, but denied the claim for the interest and costs and for the payment of the 15 per cent dividend, claiming that he had finally settled with the bank for all claims they held against him by an agreement made on the 12th October, 1878. The agreement contained a clause to the effect that the bank reserved its rights against all other parties, except Macdonald, liable on the notes made by the company as indorsers, and specially declared that it gave no warranty against claims Whitfield or others might seek to enforce against Macdonald by reason of the exercise of the recourse reserved. After the filing of defendant's pleas the plaintiff took action against the

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bank *en garantie* asking to have the bank made a party to the cause to warrant him against the consequences which might result from the dealings with the defendant disclosed by the pleas. The cases were united and tried together, the judgment in the trial court being as above stated. The Court of Queen's Bench affirmed the judgment of the Superior Court, and from this latter judgment Macdonald appeals to have the judgment against him set aside, so far as it decreed payment of the dividend, Whitfield also appealing on the ground that his action in warranty against the bank was justified and consequently he should not have been mulcted with costs.

Macdonald v. Whitfield. *Geoffrion* Q.C., and *Fleet* for the appellant. The settlement made with the bank by Macdonald not only released him but all other co-sureties as well and had the effect of satisfying the bank's judgment against the indorsers of the notes. The judgment consequently was discharged by the payment of the consideration mentioned in the deed of release and if the respondent for any cause saw fit afterwards to make a payment thereon to the bank he did so at his own risk and can have no recourse in any event for the 15 per cent dividend. Possibly the Privy Council judgment is conclusive as to the balance.

His suretyship was at an end, for the creditor had by the deed extinguished the power of subrogation Art. 1959 C. C.

Under any circumstances there could be no reservation of recourse against co-sureties as to the amount of the 15 per cent dividend, for which there had been novation by the bank's concurrence in the sale of the insolvent company's estate on those terms, thereby accepting a new obligation to the extent of the promised dividend.

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Abbott Q.C., and *Taylor* for the respondent. The reservation in the deed still left the appellant Macdonald responsible for his share of all payments exigible from his co-sureties by the exercise of the recourse which the bank specially retained. It was impossible for the co-surety to claim any benefit for the amount of the 15 per cent dividend which the bank has in fact never received, consequently leaving that amount still exigible although funds were in Macdonald's hands specially applicable towards payment of the creditor to that extent on account of their mutual debt.

Whitfield v. The Merchants Bank. *Taylor* for the appellant. If we succeed in having the appeal by Macdonald dismissed the present appeal is merely as to the question of costs. We contend that instead of contesting our action *en garantie* the bank ought to have made common cause with us against Macdonald by becoming a party to our action against him. We were entitled to have them in the suit as warrantors. *Archbald* v. *deLisle* (1). We consequently ought not to pay costs.

Abbott Q. C. for the respondent. The relations between the co-sureties amongst themselves in this case result from the provisions of article 1156 C. C. and can have no possible effect upon the bank which is fully protected in the deed as to recourse and by the absence of any warranty. As to costs the court below has followed *Archbald* v. *deLisle* (1). It would have been improper for the bank to come into the original action and admit a warranty which did not exist in fact.

THE CHIEF JUSTICE.—These two cases are separate appeals from a judgment applying to both the actions.

(1) 25 Can. S. C. R. 1.

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I am of opinion that this judgment was in all respects free from error and must consequently be affirmed.

Whitfield was never a party to any arrangement or convention which in any way prejudiced his right to contribution from his co-surety Macdonald, and there was therefore no defence to his action to compel Macdonald to indemnify him to the extent of a moiety of the amount paid by him to the bank.

As regards the sum of $5,234.10 it is clear that that amount ought to have been paid over by Macdonald to the bank and applied in part payment of the amount due upon the three promissory notes. Under the arrangement by which Macdonald became the purchaser of the assets of the principal debtor—the Chinaware Company—as embodied in the notarial deed of 4th March, 1878, this amount of $5,234.10 being 15 cents in the dollar on the amount of the debt to the bank, was part of the purchase money realized by the sale of the assets of the company, the principal debtor, and as such must be considered as funds in the hands of Macdonald, lodged with him by the principal debtor for payment to the creditor.

It cannot be successfully contended that in point of law one of two co-sureties who has in his hands moneys of the principal debtor, deposited with him for the express purpose of paying the creditor, cannot be compelled by the other co-surety to pay such money to the creditor, or if the latter has already been paid by the surety seeking relief, then to pay over the amount to the latter. Then this is all the judgment decrees.

The action in guarantee brought by Whitfield against the bank had no legal foundation whatever, inasmuch as the bank had manifestly entered into no agreement which created an obligation in guarantee towards Whitfield. The action was therefore properly dismissed.

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Girouard J.

Both appeals are dismissed with costs.

GWYNNE, SEDGEWICK and KING JJ. concurred.

GIROUARD J.—From the admissions of the parties of the 7th of May, 1894, I find that the respondent, Whitfield, paid to the bank, at various times, from the 6th of August, 1885 to the 8th of May, 1889, a total sum of $36,534.19, for one-half of which the appellant was liable to him as co-surety, altogether $18,267.09½. But this sum included some costs incurred by Whitfield and more than two years' interest accrued from the day of the institution of the action to the day of the last payment in 1889, and consequently the trial judge fixed the amount paid by Whitfield to the bank at $34,288, or $17,144.35 for Macdonald's one-half, with interest from the day of the institution of the action. Adding to that amount $2,571.65, being one half of the dividend of $5,143.30, which the insolvent estate of the principal debtor, the St. Johns Stone Chinaware Company, realized, as admitted by both parties, and which Edward C. Macdonald undertook to pay as purchaser of the estate, but did not in fact pay, I find, although by a different process of calculation, that the total amount due by the heirs of the said Edward C. Macdonald to Whitfield, in consequence of his co-suretyship and purchase of said insolvent estate, is exactly the amount which they were condemned to pay, namely $19,716.00, with interest as mentioned in the judgment. The bank not having received more than its due the action *en garantie* was also rightly dismissed. I am therefore of opinion that both appeals should be dismissed with costs.

Appeals dismissed with costs.

Solicitors for Macdonald: *Robertson, Fleet & Falconer.*

Solicitors for Whitfield: *Taylor & Buchan.*

Solicitors for The Merchants Bank of Canada: *Abbotts, Campbell & Meredith.*

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THE CITY OF QUEBEC (DEFENDANT)..APPELLANT;

AND

THE NORTH SHORE RAILWAY COMPANY (PLAINTIFF)................. } RESPONDENT.

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

Deed—Construction of—Title to lands—Ambiguous description—Evidence to vary or explain deed—Possession—Conduct of parties—Presumptions from occupation of premises—Arts. 1019, 1238, 1242, 1473, 1599 *C. C.* —47 *Vic. c.* 87, *s.* 3 *(D.)*; 48 *&* 49 *Vic. c.* 58, *s.* 3. *(D.)*—45 *V. c.* 20 *(Q.)*.

By a deed made in August, 1882, the appellant ceded to the Government of Quebec, who subsequently conveyed to the respondent, an immovable described as part of lot no. 1937, in St. Peters Ward in the City of Quebec, situated between the streets St. Paul, St. Roch, Henderson and the river St. Charles, with the wharves and buildings thereon erected.

Of the lands which the respondents entered into possession by virtue of said deeds they remained in possession for twelve years without objection to the boundaries. They then brought an action to have it declared that, by the proper construction of the deeds, an additional strip of land and certain wharves were included and intended to be transferred. They contended that the description in the deed was ambiguous, and that Henderson street as a boundary should be construed as meaning Henderson street extended, and they sought to establish their case by the production of certain correspondence which had taken place between the parties prior to the execution of the deed of August, 1882.

Held, reversing the judgment of the Court of Queen's Bench for Lower Canada, the Chief Justice and King J. dissenting, that the words "Henderson Street" as used in the deed must be construed in their plain natural sense as meaning the street of that name actually existing on the ground; that the correspondence was not shown to contain all the negotiations or any finally concluded agreement, and could not be used to contradict or modify the deed which should be read as containing

*PRESENT:—The Chief Justice, and Gwynne, Sedgewick, King and Girouard JJ.

the matured conclusion at which the parties had finally arrived; that the deed should be interpreted in the light of the conduct of the parties in taking and remaining so long in possession without objection, which raised against them a strong presumption, not only not rebutted but strengthened by the facts in evidence; and that any doubt or ambiguity in the deed, in the absence of evidence to explain it, should be interpreted against the vendees, and in favour of the vendors.

APPEAL from the decision of the Court of Queen's Bench for Lower Canada (appeal side), reversing the judgment of the Superior Court for the District of Quebec, which had dismissed the plaintiff's action with costs.

The questions at issue in this case sufficiently appear by the statements in the judgments reported.

Pelletier Q.C. for the appellant. The property claimed by the respondent is not comprised in the deed of 21st August 1882, between the Quebec Government and the present appellant. We contend that the description means the lot bounded towards the west by St. Roch Street, towards the south by St. Paul Street, towards the east by Henderson Street, and towards the north by the river St. Charles. According to the respondent's construction of the deed the river St. Charles would not be a boundary, and there would not be a boundary given to the lot on the north side. The correspondence does not explain the deed, it merely shows that the parties were not agreed as to what the bargain should be; the deed alone must be looked at to discover the final arrangements, and the proper interpretation is found in the execution of their intentions by the delivery of the station grounds, Caron wharf, etc., to respondent, and the absence of any change of occupation of the property now in dispute. Each took possession of and continued to occupy their respective portions of the block no. 1937 for over 12 years prior to this suit.

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It is absurd to interpret the deed as actually including the "Palace Harbour," navigable waters, which the city could not convey in any event for private uses. The act 45 Vic. ch. 20 (Q.), confers no power on the appellant to sell the property claimed. The legislature of Quebec had no right to grant such power. The rights of the appellant over "Palace Harbour" are not rights of proprietorship, but of trust and administration for public purposes, therefore they cannot be compelled to transfer the property.

Should it be held that the property claimed by the respondent is comprised in the deed between the appellant and the government, still the respondent company has no right of action as it is in fact defunct and has ceased to have existence by the accomplishment of the purposes and object for which it was formed (Quebec Act 45 Vic. ch. 20), and all its the property and rights of every kind are now vested in the Canadian Pacific Railway Company by virtue of Dominion Acts 46 Vic. ch. 24, sec. 6 and ch. 54; 47 Vic. ch. 8, sec. 3, 48 & 49 Vic. ch. 58, sec. 3; and 54 & 55 Vic. ch. 11; art. 368 C. C. and the dealings had between the respondent and the Canadian Pacific Railway Company.

Langelier Q. C. for the respondent. The respondent company was not dissolved by the acts mentioned; the effect of the instruments referred to was merely to transfer the stock to persons interested in the Canadian Pacific Railway Company. The North Shore Railway Company has never become subject to any such conditions as would involve dissolution, but still holds title to the lands, notwithstanding the arrangements effected with the Canadian Pacific Railway Company, and is the only proper party to bring the present action. The lands were subject to alienation notwithstanding the public trust involved; see R. S. Q. art. 5164, clauses 3-8.

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The deed gives us, as the northern boundary, the main channel of the river St. Charles and all doubt as to the property intended to be surrendered to the government of Quebec is removed by the clear intention of the parties shown by their correspondence immediately preceding and leading up to the execution of the deed. We must regard the deed merely as giving effect to the bargain the parties had already made, through those negotiations. The rules of construction require that we should have recourse to the correspondence to explain so much of the deed as is ambiguous. The correspondence leaves no doubt that the government intended to acquire, and the appellant to transfer, all the Palace Harbour property still owned by the appellant, that is to say, not already transferred either to the Gas Company or to the Government. There is nothing in the correspondence from which one may suspect that the appellant was desirous of reserving any of the property; and that is what the parties intended, unless the deed is clearly to the contrary. Now, not only does it not contain anything contrary but it scarcely admits of any other construction. By the deed, the Government is to have all that is owned by the appellant, down to the river St. Charles, between St. Roch and Henderson Streets. By the construction of the respondent, the Government would not have acquired the property as far as the river St. Charles between these two streets nor any of the wharves, not even such as are admitted to have passed by that title.

The only construction in accord with the correspondence and the balance of the deed, would make the deed to read as follows: "All that belongs to the corporation between St. Paul Street to the south-east, the river St. Charles to the north-west, and Henderson Street continued to the river St. Charles to the north-east." With that description, the respondent is entitled to the two wharves claimed in this case.

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As to the conduct of the parties and actual possession by each of respective parts of the Palace Harbour properties, it is against all rules of evidence to interpret a written instrument by the conduct of the parties; Taylor on Evidence, 9 ed. secs. 1204, 1205; and as a matter of fact, that reasoning would work against the appellant. The appellant allowed respondent to take possession of all the wharves in Palace Harbour, except the two of which we now ask possession, and never protested nor pretended to have reserved any interest or claim in them, thus showing by their conduct in delivering a part of the property north of Henderson street to us, that we were entitled to all their lands and wharves in that quarter.

THE CHIEF JUSTICE.—I am of opinion that there is no error in the judgment of the Court of Queen's Bench which is the subject of this appeal. Upon the point principally insisted upon by the appellant, namely, that the description contained in the notarial deed of the 21st August, 1882, entered into between the Hon. Henry Starnes, the Provincial Commissioner of Railways, and the Mayor of Quebec, included the property sought to be recovered by the respondent in the present action, I am entirely of accord with the Court of Queen's Bench, and concur in the reasons given in the opinion of Mr. Justice Cimon. It is shown by the deposition of Mr. Baillairgé, the City Engineer of Quebec, that the properties in question form, and always formed, part of Palace Harbour (*Havre du Palais*), a lot or parcel of beach ground and premises which by that denomination the Crown had, by letters patent of the 22nd November, 1851, granted to the City of Quebec, and all of which, at the date of the notarial deed before mentioned, remained vested in the city, with the exception of so much as had been

previously expropriated by the Provincial Government for the purposes of the railway, and the portion sold to the Gas Company.

The seventh clause clearly recognises that all the property thus remaining vested in the city was intended to be sold to the Government. This appears conclusively from the words:

En considération de la cession par la dite corporation des revenus du havre du Palais cédés par les présentes.

This so clearly demonstrates what was the intention of the parties that it cannot possibly be controlled by any subsequent ambiguity and inaccuracy in the definition of the boundaries contained in the second paragraph. Without repeating the reasons of the Court of Queen's Bench and the argument in support of them, contained in the able opinion of Mr. Justice Cimon, I may say that I regard those reasons as unanswerable, and adopt them as the grounds of my judgment.

There is nothing in the point that the property in question has under certain contracts entered into between the North Shore Railway Company and the Grand Trunk Railway Company, between the Grand Trunk Railway Company and the Dominion, and between the Government and the Canadian Pacific Railway Company, become vested in the latter company. The first of these contracts, upon which any title in the Canadian Pacific under this pretended cession must depend, does not vest any property belonging to the respondent in the Grand Trunk Company, but merely embodies an agreement that the Grand Trunk shall have the control of the respondent's line of railway, and the direction of the traffic carried on upon it. The respondent was not a party to the subsequent agreements, and therefore is unaffected by those con-

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tracts. The legislature merely confirms the several contracts.

The objection that article 2098 of the Civil Code applies is destitute of foundation. The words "without effect" in that article manifestly apply to the registration of subsequent deeds made by the party making the acquisition of property, and not to the cession to him or to the title acquired by him under it. An unregistered deed is perfectly good and valid between the parties, and is only affected by non-registration when the vendor cedes the same property to a subsequent party who registers before the first purchaser has registered his deed.

It is contended in the appellant's factum that the respondents have become extinct as a corporation. There is no proof whatever of this.

The Letters Patent of the 22nd November, 1851, by which the Crown granted Palace Harbour to the City of Quebec, contained a clause prohibiting the alienation of the property granted by the city. Assuming such clause of prohibition to be valid it would not, I think, apply to an alienation such as that contained in the notarial deed of the 21st August, 1882, inasmuch as that was virtually a reconveyance to the Crown itself.

For these reasons I am of opinion the appeal must be dismissed.

GYWNNE J.—The learned counsel for the appellants in his very able argument made two main points in support of the appeal, upon both of which, in my opinion, our judgment must be for the appellant—namely:

1st. That the piece of land to recover possession of which this action is brought is not comprised in the deed of the 21st August, 1882, between the Quebec Government and the appellant; and

2nd. That whatever right, title or interest in the said piece of land, if any, did pass by the said deed to the Quebec Government the same is vested in the Canadian Pacific Railway Company, and the plaintiffs have no right, title or interest therein, nor any claim whatsoever thereto.

The piece of land surrendered by the appellants to the Quebec Government by the deed of the 21st August, 1882, is therein very explicitly described as being *that part of lot no.* 1937 *in the ward of St. Peter in the City of Quebec, which is situated between the streets, St. Paul, St. Roch, Henderson and the river St. Charles.* A reference to a plan produced in evidence shws that the piece so described is bounded on the west by St. Roch Street, on the south by St. Paul Street, on the east by Henderson Street, and on the north by the river. The language is free from ambiguity that all that was surrendered was that part of the lot of land known as no. 1937 which was within the boundaries above named; the quays and buildings which were erected within those boundaries were also expressed in the deed to be surrendered. The sole question involved in the present appeal is as to the construction to be put upon the words "Henderson Street" as used in the deeds.

The northern limit of Henderson Street was, prior to and at the time of the passing of the deed of 1882, and still is in point of fact, the southern limit of a street or highway in the City of Quebec shown as "Orleans Place." Of a portion of the lot 1937 immediately north of and abutting on the northern limit of Orleans Place a company called the Quebec Gas Company has been seized and possessed by title from the corporation since 1847. In the year 1875 the corporation of the City of Quebec entered into an agreement with the Gas Company for the sale to them of another portion

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of the said lot 1937, lying north of and contiguous to the piece of which they were already seized. On the 30th March, 1875, the said company paid the city the sum of $6,000.00, the purchase money agreed upon for the said piece of land. Many years prior to 1875 the City Corporation had constructed on the beach of the river St. Charles adjoining and along the western, northern and north-eastern limit of the said pieces of land a quay and breakwater extending into the river St. Charles in a north-westerly direction from the northern limit of the said pieces of land. No deed of sale of the piece of land agreed to be sold by the corporation to the company and for which the company paid the purchase money in 1875 appears to have been executed until November, 1887. By an act of the Legislature of the Province of Quebec passed on the 18th of May, 1887 (50 Vic. ch. 57, sec. 22) it was enacted as follows :—

The Mayor of the City of Quebec is hereby authorized to grant and sign, for and on behalf of the corporation, to the Quebec Gas Company a clear and valid title deed for the sale of the land situated in the Palais Market effected in the year 1875 by the said corporation to the Quebec Gas Company, which land the said company has ever since enjoyed, and the price whereof has been paid to the corporation.

On the 26th November, 1887, the Mayor of the City by deed expressed to be made and executed by him under the authority of the said act did sell and assign unto the said Gas Company with guarantee against all troubles the said piece of the said lot no. 1937 so purchased and paid for by the company in 1875, described as being situate on said Orleans Place in the City of Quebec and measuring one hundred and fifty-eight feet and six inches on the south-easterly line, two hundred and sixteen feet and two inches on the north-easterly line, one hundred and seventy-three feet

on the south-westerly line and thirty-six feet and five inches on the north-westerly line.

Now the piece of land for which this action is brought is the quay or wharf and embankment which the appellants had constructed on the beach of the river St. Charles extending from the northern limit of the said Orleans Place in a northerly direction along the westerly and northerly limit of the said pieces of land of which one had been so long in the possession of the Gas Company and the other sold to them in 1875 and extending from the northern limit thereof in a north-westerly direction into the river St. Charles. It is perfectly obvious and this is not disputed that "Henderson" Street as it was known to exist always prior to and at the time of the execution of the deed of August, 1882, did not at any point abut upon or bound the said quay or wharf and embankment or any part thereof. It never extended further north than the southern limit of said Orleans Place. The words "Henderson" Street as used in the deed must be construed in their plain natural sense, as meaning the street of that name as actually existing on the ground, and so construed, the piece of land for which the action is brought is plainly not within the limits which are assigned in the deed as bounding the piece of land thereby surrendered. But the contention of the respondents is, and this contention appears to have been adopted by the Court of Appeal at Quebec, that the deed is to be read as if Henderson Street was extended northerly across Orleans Place and through the pieces of land sold to the Gas Company and beyond the northern limit thereof; so extended it would leave a strip of land purchased by the Gas Company lying between the western limit of Henderson Street so extended and that portion of the quay or wharf for which this action is brought lying west of and con-

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tiguous to the Gas Company's lands. Such an extension could not in point of fact by possibility be effected except by purchase of sufficient land from the Gas Company for the purpose, and no principle can be urged upon which the deed should be construed as assuming that to be done which could not be done at all without the assent of the Gas Company who were no parties to the deed. The only suggestion upon which this construction is based is that it is necessary for the purpose of giving effect to an intention which is said to be apparent in certain letters which passed between the Quebec Government and the Corporation containing negotiations for the purchase by the Government of the piece of land which they required to be surrendered by the corporation, but these letters contain no stipulation in terms that the piece of land for which this action is brought should be included in the surrender, nor any finally concluded agreement, and we must read the deed as containing the matured conclusion at which the parties to the negotiation contained in the letters had finally arrived. It appears to me, I confess, inconceivable that the corporation after their sales to the Gas Company in 1847 and in 1875, and receipt of the purchase money for land which it is but natural to assume was enhanced in value by the quay wharf and embankment which are the subject of this action, when describing the piece of land surrendered as bounded on one side by Henderson Street could have contemplated that they should be understood as meaning not Henderson Street as it existed on the ground but as extended indefinitely across Orleans Place and through the pieces of land sold to the Gas Company from the southern to and beyond the northern limit thereof. The manner in which the parties to the surrender of 1882 have dealt with the property expressed to be surrendered is strong proof, as observed

by the learned judge in the Superior Court, that the Corporation of Quebec did not intend to surrender nor the Government to acquire the piece of land for which this action is brought.

For these reasons we cannot I think adopt the construction put upon the deed of surrender by the Court of Appeal at Quebec. The appeal therefore must be allowed upon the first of the above grounds as urged by the appellants. While it is therefore unnecessary to determine the second point I think it clear that whatever right, title or interest if any ever was acquired by the plaintiffs in or to the piece of land in question, has by force of the Acts of Parliament referred to in the case passed to and become vested in the Canadian Pacific Railway Company; but as already stated this point is immaterial as the piece of land in question did not pass by and is not included in the deed of surrender.

The appeal must be allowed with costs.

SEDGEWICK J.—I concur in the opinions expressed by my brothers Gwynne and Girouard. I think that the appeal should be allowed with costs for the reasons stated in their written judgments.

KING J.—I dissent and, for the same reasons as the Chief Justice, I am of opinion that the appeal should be dismissed with costs.

GIROUARD J.—L'appelante a soulevé plusieurs questions par cet appel; mais la principale, et la plus importante, est celle de savoir si la propriété revendiquée par l'intimée est comprise dans l'acte d'aliénation du 21 août 1882 consenti devant Mtre A. G. Tourangeau, notaire, par l'appelante au gouvernement de Québec.

Par cet acte, l'appelante

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cède et abandonne au dit gouvernement tous les droits de propriété et autres qu'elle a et peut avoir sur cette partie de l'immeuble maintenant connu et désigné sur les plan et livre officiels de renvoi du cadastre pour le quartier Saint-Pierre de la dite cité de Québec, sous le numéro (1937) dix-neuf cent trente-sept, située entre les rues Saint-Paul, Saint-Roch, Henderson et la rivière Saint-Charles, *avec les quais et bâtisses sus érigés*, le dit gouvernement s'engageant à faire draguer au bout des et entre *les quais du havre du Palais*, et à mettre les quais en bon ordre d'ici au trente novembre mil huit cent quatre-vingt-trois.

Par un autre acte, passé le même jour, devant le même notaire, le gouvernement de Québec céda les dits droits de propriété à l'intimée dans les termes suivants :

Tous les droits de propriété ou autres transportés par la corporation de la cité de Québec au dit gouvernement, en vertu du dit acte de convention, ici sus mentionné, dans ou sur l'immeuble connu et désigné dans le plan du cadastre et dans les livres du quartier Saint-Pierre de la cité de Québec, sous le numéro officiel 1937, situé entre les rues Saint-Paul, Saint-Roch et la rue Henderson et la rivière Saint-Charles, *comprenant les quais et les bâtisses y érigés, avec tous les droits de quaiage, taxes et revenus*, la compagnie du chemin de fer du Nord s'obligeant elle-même à faire creuser le havre *entre les dits quais*, draguer et mettre les dits quais en bon ordre de réparation, entre ce jour et le 30 novembre 1883.

Le havre du Palais était une propriété à l'usage du public dans le port de Québec depuis plus d'un demi-siècle, et par conséquent bien connu en la cité Québec. Elle devait l'être particulièrement de l'intimée, qui en possédait une très grande partie depuis le 4 mars 1882 ; d'ailleurs la loi présume que l'acquéreur a une exacte connaissance de l'immeuble simplement désigné par sa situation et ses confins (1). L'intimée prit donc possession d'une certaine lisière de terre et d'un quai projetant dans la rivière, connu sous le nom de Quai Carron, et d'autres quais bordant la rivière, en vertu des actes du 21 août 1882, et en reçut tous les fruits et revenus jusqu'au 26 juillet 1894, c'est-à-dire, durant

(1) 24 Laurent, no. 187.

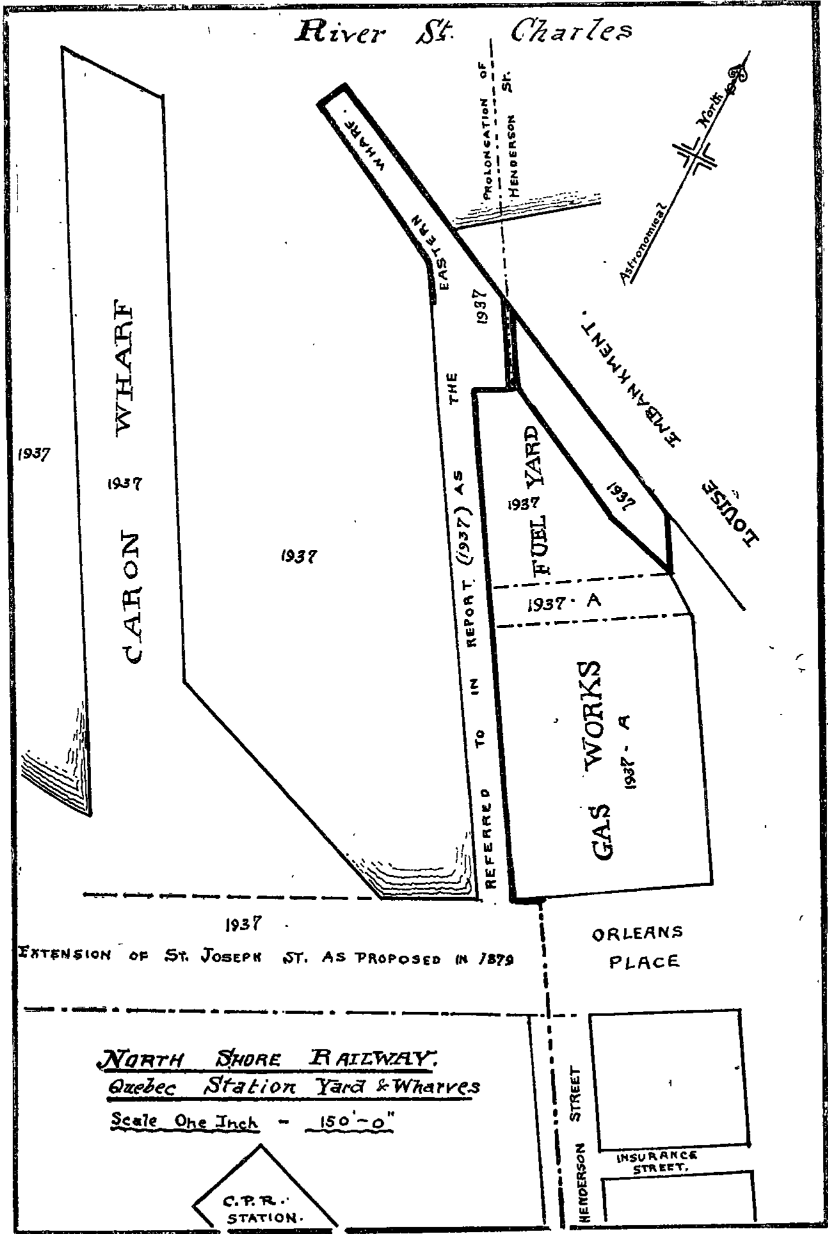
près de douze années, lorsque pour la première fois, elle s'aperçoit qu'il lui manque,—

Un quai d'enviion trente pieds sur six cents pieds situé à l'ouest du dit lot 1937A et la partie du dit lot 1937 appartenant comme susdit à la dite Compagnie du Gaz de Québec, et un terrain de forme irrégulière et un quai situés au nord et au nord-ouest de la dite partie du lot numéro 1937 appartenant à la dite Compagnie du Gaz de Québec.

Elle en fait alors demande de livraison et le 14 août 1894, elle intente une action contre l'appelante et demande les dits quais et terrain en faisant partie, ou $50,000, et de plus $20,000 pour les revenus du passé.

Ces quais et terrain sont vulgairement connus sous le nom de "Quais du Gaz," et sont indiqués aux plans produits par l'intimée sous les noms de "Eastern Wharf" et "Breakwater." Le croquis sur la page suivante, extrait des dits plans, montre la situation des lieux qui font l'objet du présent litige.

L'intimée a purement et simplement allégué ses titres et une certaine correspondance antérieure, sans allusion à aucune ambiguité, omission, ou erreur de description. Aucune demande n'est faite pour corriger l'inexactitude de cette description. Ce n'est qu'à la plaidoirie orale devant le juge que l'omission ou l'ambiguité apparaît pour la première fois. L'intimée soutient que la correspondance qui a précédé immédiatement les actes du 21 août 1882 fait voir que l'intention des parties était de transférer tout ce qui restait de la propriété du Havre du Palais, avec tous ses quais, et plus particulièrement le Quai Caron et le Quai du Gaz, et qu'à l'aide de cette correspondance, il faut corriger la description notariée, en prolongeant la rue Henderson jusqu'à la rivière Saint-Charles, par une ligne imaginaire à travers une place publique, appelée Place d'Orléans, et la propriété contiguë de la Compagnie du gaz, laquelle ligne est tracée sur les dits plans par l'intimée. L'honorable juge Andrews a été d'opinion que l'ambi-


River St Charles
Prolongation of Henderson St.
North
Astronomical
Wharf
Eastern
Wharf
Caron Wharf
1937
1937
1937
1937
The
Referred to in Report (1937) as
Fuel Yard
1937
1937
Louise Embankment.
1937 · A
Gas Works
1937 · A
1937
Extension of St. Joseph St. as proposed in 1879
Orleans Place
North Shore Railway.
Quebec Station Yard & Wharves
Scale One Inch - 150'-0"
C.P.R. Station.
Henderson Street
Insurance Street.

guité devait s'interpréter contre l'intimée à raison de sa conduite et de son long silence depuis le jour de son acquisition :

Considering that the validity of this contention turns upon the interpretation to be given to the description or designation of the real estate intended to be so conveyed by said deeds ; that is, whether such designation by the metes and bounds therein given does or does not include therein the said wharf ;

Considering that by their conduct the parties have themselves solved the said question ; for that they have—the defendants by retaining and not making delivery of the said wharf and by collecting for all the twelve years which elapsed between the execution of the said deeds and the month prior to the bringing of this suit all the revenues of the said wharf, and the plaintiffs by never during all that time making any claim thereto—interpreted the said ambiguous designation or description in said deeds as not including the said wharf, &c.

La Cour d'Appel, composée de Blanchet et Hall JJ., et Bourgeois et Cimon JJ., *ad hoc*, a recherché l'intention des parties dans la correspondance antérieure à l'acte notarié, et infirmé le jugement de la Cour Supérieure :

Considérant que ces quais et ce terrain, tel que ci-dessus décrits, se trouvent compris dans la cession que l'intimée a faite au gouvernement de Québec le 21 août 1882, par acte devant Mtre Tourangeau, notaire, et que le dit gouvernement a ensuite le même jour, par acte devant le même notaire, faite à l'appelante, etc.

M. le juge Cimon, qui a prononcé le jugement de la Cour, dit :

Cette correspondance antérieure à l'acte notarié—qui constitue une preuve écrite—contient, pour ainsi dire, le mandat que les représentants des parties ont rempli, en signant cet acte du 21 août 1882 ; elle fait voir l'intention commune, véritable des parties, et ce très clairement. Tous les auteurs et la jurisprudence sont d'avis que les écrits antérieurs émanés des parties peuvent être invoqués pour expliquer ou interpréter le contrat, *vide* 25 Demolombe, nos. 8 à 11 *(bis)* ; 16 Laurent, no. 508. D'ailleurs qu'y a-t-il de plus fort que des écrits ?

Or, ce que cette correspondance démontre clairement, c'est que la cité de Québec consentait de céder tout *le havre du Palais*, toutes les propriétés qu'elle avait là, les bâtisses, les quais et aussi tous les revenus du havre du Palais : et le gouvernement ne voulait pas avoir

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moins. Il y a spécialement une somme de $75,000 stipulée pour *l'abandon des revenus du havre du Palais.*

Je ne puis accepter la manière de voir du savant juge. Les principes qu'il invoque sont incontestables, mais ils ne s'appliquent pas à l'espèce. Je ne puis admettre que la correspondance antérieure suffit pour détruire ou contredire un contrat, ou y suppléer, à moins qu'il ne soit prouvé qu'elle fait partie du contrat, ou du moins qu'elle contient toutes les négociations, et c'est ce que l'intimée n'a pas fait. Si tel était le fait, il lui était facile d'établir que la correspondance produite forme toute la correspondance et toutes les négociations qui ont précédé les actes du 21 août 1882. Sans cette preuve, je ne puis accepter cette correspondance pour juger de l'intention des parties.

S'il y avait erreur ou lacune dans la description de l'immeuble et de ses accessoires, elle aurait dû l'alléguer et la prouver par les moyens ordinaires. Sans cette preuve, je ne me sens pas disposé de mettre de côté le contrat et d'accepter à sa place la correspondance antérieure.

Je dois supposer qu'au dernier moment, les parties ont modifié leur volonté et que l'intention qui doit décider des droits des parties est celle qui est manifestée au contrat.

Nul doute que la correspondance produite démontre que la première intention du gouvernement était d'acquérir tout ce qui restait du havre du Palais, moyennant considération qui, à l'origine, ne me paraît pas avoir été bien comprise Dans une lettre au maire, à la date du 17 août 1882, M. Würtele, le trésorier de la province, demande à acquérir "tous les droits qu'elle (la Cité) peut avoir sur le havre du Palais, et les propriétés connues sous le nom du Palais," et à payer $50,000 à la ville "pour l'abandon par celle-ci des revenus provenant du havre du Palais." Le lende-

main, 18 août, le maire répond qu'il consent à la "cession du havre du Palais et des terrains qui l'avoisinent," et il demande $100,000 "pour retour de l'échange des propriétés du Palais, au lieu de $50,000 que vous offrez." Le même jour, M. Würtele réplique que les conditions de l'arrangement "seraient définitivement comme suit: Entr'autres de la part de la Cité: "Cession du havre du Palais et des terrains qui l'avoisinent avec les bâtisses y érigées," et "paiement d'une somme de $75,000 en retour de l'échange des propriétés du Palais, au lieu de $50,000.

Puis, lorsqu'on arrive à la passation du contrat, trois jours plus tard, le 21 août, ce n'est plus le havre du Palais et tout ce qui en dépend qui sont cédés, mais simplement "tous les droits de propriété et autres qu'elle (la Cité) a et peut avoir," sur cette partie du numéro 1937 du cadastre, "située entre les rues Saint-Paul, Saint-Roch, Henderson et la rivière Saint-Charles, avec les quais et bâtisses sus érigés." Le gouvernement s'engagea de payer $75,000 "en considération de la cession par la dite corporation des revenus du havre du Palais cédés par les présentes."

Les parties avaient évidemment modifié leur intention, et, pour une raison ou une autre qui n'apparaît pas, la cession de la part de la cité était considérablement réduite.

Cette modification à la dernière heure n'a rien d'étonnant; bien au contraire. Durant le cours des négociations qui ont précédé ces actes, de nombreux changements ont été faits. En lisant la section 7 du chapitre 20 de la 45 Victoria, sanctionnée le 27 mai 1882, le gouvernement de Québec avait en vue des modifications importantes à son premier contrat avec la Compagnie du chemin de fer du Nord et la Cité de Québec. Ces modifications devaient être complétées le, ou avant le 27 août suivant, aux termes du statut.

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Le 17 août, M. Würtele ouvre une correspondance officielle avec le maire de Québec ; à la dernière heure, il a pu et a dû consentir à prendre moins de terrain, sans préjudicier aux intérêts du gouvernement qu'il représentait ; car il stipule dans les deux actes du 21 août 1882, que " le présent arrangement est sujet à la ratification du lieutenant-gouverneur en conseil."

Le 18 août, le maire de Québec demandait $100,000 " pour retour de l'échange des propriétés du Palais, au lieu de $50,000 que vous offrez." Le même jour, M. Würtele consentait à donner $75,000 " en retour de l'échange," et il demandait une réponse " au plus tôt." La correspondance produite finit là. Quand l'acte fut signé trois jours après, la cité accepte $75,000 " en considération de la cession des revenus du havre cédés par les présentes ; " et elle réduit la quantité des propriétés qui lui étaient d'abord demandées. Ce ne sont plus toutes les propriétés du Palais, mais seulement cette partie qui est décrite dans l'acte, qu'il aurait été si simple de décrire comme, dans la correspondance, si telle était encore l'intention des parties, savoir : tous les droits de propriété et autres de la Cité dans le havre du Palais avec le numéro du cadastre.

Mais il y a plus. Le 18 août 1882, M. le maire est autorisé à conclure avec le gouvernement. Cette autorisation est par résolution du conseil de la ville de Québec, comme suit :—

Résolu,—Que Son Honneur le Maire soit, et il est par la présente autorisé à conclure avec le gouvernement un arrangement de ses réclamations contre la corporation, découlant principalement de la souscription de la cité au fonds capital du Chemin de fer du Nord, et de la corporation contre le gouvernement, le tout aux conditions incorporées dans le rapport du comité des finances qui vient d'être unanimement adopté par le conseil

et précède immédiatement l'acte du 21 août, qui en fait une mention expresse. Or, cette résolution ne dit pas que l'acte sera fait conformément à la correspondance

du 17 et du 18 août entre le maire et le trésorier de la province, mais "aux conditions incorporées dans le rapport du comité des finances qui vient d'être unanimement adopté par le conseil." Quelles sont ces conditions? Sont-ce celles mentionnées dans la correspondance antérieure ? Le comité a-t-il accepté $75,000 au lieu de $100,000 pour le retour des propriétés que les parties se proposaient d'échanger ? Ou bien, a-t-il accepté cette réduction de la soulte en considération de la réduction de la propriété à céder ? Il est impossible de le dire. L'intimée, dont le devoir était de produire toute pièce essentielle de sa cause, n'a pas produit le rapport du comité des finances ; et à défaut de cette preuve, il est impossible, suivant moi, d'aller chercher l'intention des parties ailleurs que dans le contrat.

L'appelante a invoqué l'obligation contractée par le gouvernement de Québec " à faire draguer au bout des et entre les quais du havre du Palais et à mettre les quais en bon ordre, etc.," (et non pas seulement " entre les dits quais," c'est-à-dire, les quais cédés, ainsi que le déclare l'acte consenti par le gouvernement à l'intimée), comme une preuve ou au moins une forte présomption que tous les quais du havre du Palais ne lui étaient pas cédés. Si l'appelante, en effet, ne devait plus jouir d'un seul quai, elle n'avait aucun intérêt particulier à imposer cette condition. Il me semble qu'il y a lieu de présumer que le but de ce dragage était d'augmenter la facilité de la navigation auprès de tous les quais du havre du Palais, afin d'accroître par là les droits de quaiage perceptibles par la Cité sur le quai ou les quais qui lui restaient.

M. le juge Cimon ne peut accepter ce raisonnement.

Il y a, de suite," dit-il, " une réponse péremptoire à cette dernière raison—c'est que l'acte du 21 août 1882, stipule cette somme de $75,000 en faveur de l'intimée, en considération de la cession par la cité au gouvernement 'des revenus du havre du Palais cédés par les présentes'.

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Oui, des revenus du havre " cédés par les présentes," c'est-à-dire, tels que définis par la description des propriétés cédées, et non pas des revenus de tout le havre, qui ne sont pas cédés.

Le savant juge continue:

Draguer ' au bout des quais et entre les quais '—ce n'est donc pas pour accroître les droits de quaiage perceptibles par la cité, puisque l'acte déclare que la cité a cédé ces droits de quaiage au gouvernement moyennant ces $75,000.

L'acte déclare seulement que les quais des propriétés décrites sont cédés et rien de plus.

L'acte entre le gouvernement et la Compagnie du Chemin de Fer du Nord contient dans la description des expressions qui ne se trouvent pas dans l'acte entre le gouvernement et la cité de Québec, savoir: " avec tous les droits de quaiage, taxes et revenus ". Mais fussent-elles dans ce dernier acte, elles ne peuvent s'entendre que des " droits de quaiage, taxes et revenus," provenant des propriétés décrites et cédées, c'est-à-dire, tant du quai Caron, qui projette dans la rivière, que des quais qui bordent la rivière Saint-Charles.

Mais, observe l'intimée, à moins de prolonger la ligne de la rue Henderson, à travers la Place d'Orléans et les immeubles de la Compagnie de Gaz, jusqu'à la rivière Saint-Charles, la propriété cédée ne peut avoir cette rivière pour confin, et la Compagnie du Chemin de Fer du Nord n'a droit à aucun quai, pas même au quai Caron. La question soulevée par l'action de l'intimée n'est pas de savoir si elle a droit à d'autres quais, mais uniquement si le Quai du Gaz est compris dans le contrat, et sur ce point je n'ai aucun doute que ses prétentions sont mal fondées. Si jamais nous avons à nous prononcer sur une action en délimitation ou en bornage, ce sera alors le temps de définir les bornes de l'immeuble. Cependant, je ne vois pas que cette déli-

mitation puisse présenter des difficultés sérieuses. On ne devra pas tirer une ligne droite de l'extrémité de la rue Henderson près de la Place d'Orléans à la rue Saint-Roch. La rivière Saint-Charles doit être l'une des limites de la propriété et là où elle l'arrose au point le plus rapproché de la rue Henderson, là cette limite commence et se continue le long de la grève, jusqu'à la rue Saint-Roch, et comprend évidemment le Quai Caron et les autres quais qui bordent la rivière sur tout le parcours de cette limite. Elle ne comprend pas le Quai du Gaz qui touche à la propriété de la Compagnie du Gaz, une construction de ce genre ne pouvant être considérée comme la rivière elle-même qui se trouve couverte et remplie ; et si le doute était possible là-dessus, il suffirait de lire le contrat pour se convaincre que, dans l'esprit des parties, les quais et la rivière ne signifient pas la même chose, mais au contraire, sont deux choses distinctes. Je ne puis donc accepter la ligne imaginaire de l'intimée prolongée sur la Place d'Orléans et les propriétés de la Compagnie du Gaz, jusqu'au chenal de la rivière Saint-Charles.

C'est d'ailleurs l'interprétation que les parties ont donnée à l'acte par la prise de possession de l'intimée ; et si sa conduite postérieure ne constitue pas un aveu parfait de sa part que son titre exclut le quai du Gaz, elle est suffisante pour établir une forte présomption contre elle, qu'il est libre au juge d'apprécier d'après les circonstances, conformément aux articles 1238 et 1242 du Code Civil. M. le juge Andrews a considéré cette présomption comme concluante contre l'intimée, et à défaut de preuve pour la détruire, mais bien au contraire, en présence des faits et circonstances qui la confirment, je suis de son avis. La règle qu'énonce Demolombe (1), reçoit ici son entière application :

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Il faut encore mettre au rang des règles les meilleures d'interprétation, quoique notre Code ne la mentionne pas, celle que fournit l'exécution qui a été donnée par les parties de la clause de leur convention, dont le sens est maintenant controversé entre elles.

L'exécution de la clause, c'est l'interprétation vivante et animée !

C'est, en quelque sorte, l'aveu de la partie ! et à moins qu'elle ne prouve que l'exécution, qu'elle y a donnée, a été le résultat d'une erreur, il est logique et équitable qu'elle ne soit pas, en général, admise à revenir contre son propre fait :

Talis enim præsumitur præcessisse titulus, qualis apparet usus et possessio.

Tels sont les termes, dans lesquels on pourrait, d'après Dumoulin, poser notre règle. (Comm. sur la Cout. de Paris, § 68, no. 23 ; comp. Merlin, *Quest. de Droit*, t. II, pp. 232 et 238 ; Toullier, t. III, no. 320 ; D. *Rec. alph.*, vo. *Obligations.* No. 865).

Enfin reste-t-il encore quelque doute, qu'il soit impossible de dissiper ? La règle de droit, énoncée à l'article 1019 de notre Code Civil, devra être notre guide : "Dans le doute, le contrat s'interprète contre celui qui a stipulé, et en faveur de celui qui a contracté l'obligation." En France, en matière de vente ou d'échange, tout pacte obscur ou ambigu s'interprète contre le vendeur ou l'échangiste qui cède. C. N. art. 1602, 1707. Dans le système de notre Code, art. 1473, 1599, nous suivons les principes ordinaires, ceux énoncés en l'article 1019. Dans cette cause, c'est l'appelante qui a contracté l'obligation de livrer ce qu'elle a vendu ou échangé, et c'est en sa faveur que le doute doit s'interpréter. L'intimée, et dans sa plaidoirie devant nous et dans son factum, admet qu'il y a ambiguité dans la description de la chose vendue ou échangée.

All the difficulty in the case," dit-elle, "comes from the ambiguous manner the notary, who has drafted the deed of the 21st August 1882, has described the property sold by the appellant to the Government.

Je suis d'avis qu'en l'absence de tout autre moyen de découvrir la vérité, l'ambiguité doit être interprétée contre l'intimée, et en faveur de l'appelante, et ici je ne crois pas pouvoir mieux conclure qu'en rappelant à

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l'intimée ce passage de Demolombe dans ses commentaires sur cette règle d'interprétation :

Je ne comprends pas ; tant pis pour vous ; votre preuve n'est pas faite (1).

Pour toutes ces raisons, et sans me prononcer sur les autres moyens de l'appel, je suis d'opinion de renvoyer la demande de l'intimée et d'infirmer le jugement de la Cour d'Appel, avec dépens devant toutes les cours.

Appeal allowed with costs.

Solicitor for the appellant: *C. A. P. Pelletier.*

Solicitors for the respondent: *Montambeault, Langelier & Langelier.*

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(1) Vol. 25, no. 26.

1896
*Oct. 7.
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*Jan. 25.

JOHN B. MURPHY (DEFENDANT).... ....APPELLANT;

AND

GEORGE H. LABBÉ (PLAINTIFF).........RESPONDENT.

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

Landlord and Tenant—Loss by fire—Cause of fire—Negligence—Civil responsibility — Legal presumption — Rebuttal of — Onus of proof— Hazardous occupation — Arts. 1053, 1064, 1071, 1626, 1627, 1629 *C. C.*

To rebut the presumption created by article 1629 of the Civil Code of Lower Canada it is not necessary for the lessee to prove the exact or probable origin of the fire or that it was due to unavoidable accident or irresistible force. It is sufficient for him to prove that he has used the premises leased as a prudent administrator *(en bon père de famille)*, and that the fire occurred without any fault that could be attributed to him or to persons for whose acts he should be held responsible.

Judgment of the Court of Queen's Bench for Lower Canada affirmed, Strong C. J. dissenting.

APPEAL from the judgment of the Court of Queen's Bench for Lower Canada (appeal side) (1), reversing the decision of the Superior Court, which dismissed the plaintiff's action and condemned him, upon defendant's incidental demand, to pay damages for the loss of rent of premises destroyed by fire with a reservation to the defendant, incidental plaintiff, of his recourse by a subsequent action for further damages.

The respondent leased from the appellant certain premises in the City of Montreal described in the deed of lease for the purpose of carrying on the business of manufacturing and importing furniture, the property

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

(1) Q. R. 5 Q. B. 88.

at the time consisting of vacant lots upon which the buildings to be occupied by the respondent as a furniture factory were to be erected by the appellant. The lease was for ten years and two months from the 1st of March 1889, and the rental, to be determined by the value of the buildings so to be erected, was definitively fixed at $4,175 per annum, plus a certain amount for municipal and school taxes, to be paid on the 1st of November of each year. The lease provided that the lessee should pay to the lessor all extra premiums of insurance which the latter might be called upon to pay the insurance companies above the minimum rate in consequence of business carried on by the lessee, and in addition to the ordinary stipulations concerning the keeping of the leased premises in good condition and repair, etc... it was agreed that the respondent should pay the appellant $3,500 as a guarantee for the carrying out of the obligations of the lease, the said sum to bear interest at 7 per cent per annum which was to be set off against the rent, the principal to be imputed in payment of the balance of the last year's rent.

The respondent took possession of the leased premises and occupied them until July, 1894, regularly paying the rent, taxes and extra insurance premiums up to that date. On the 25th July, 1894, a fire broke out amongst some bales of tow or jute stored in the basement of the leased premises and almost completely destroyed the buildings occupied by the respondent. These buildings having become uninhabitable, the respondent brought his action for the resiliation of the lease and reimbursement of the sum of $2,500.35, being the difference between the said $3,500, with certain amounts of interest, and the sum of $1,060.90 representing three months' rent due on 31st July.

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The appellant, relying on art. 1629 of the Civil Code, answered the respondent's claim by stating that he held him responsible for the damages resulting from the fire and required him to reconstruct the buildings which had been destroyed, in default whereof he would himself reconstruct them at the expense of the respondent and hold him liable for all damages resulting from the fire; and further pleaded that in virtue of a stipulation contained in the lease, if the lease were dissolved before the end of the term in consequence of the non-fulfilment by the lessee of any of the obligations mentioned in the lease, the said sum of $3,500 and interest accrued thereon should be forfeited and should belong to the lessor as damages for the dissolution of said lease; that the fire in question was caused by the fault and negligence of the respondent or his employees so that the lease was dissolved by the non-fulfilment of the respondent's obligations and consequently the said sum of $3,500 became forfeited to the appellant.

The appellant also by an incidental demand alleged that the fire caused him damage to the extent of $12,897.79, and claimed that sum from the respondent.

The respondent replied by a general answer that the fire did not occur through his fault or the fault of persons for whom he was responsible, but that as far as ascertained it was purely accidental, and by a plea to the incidental demand containing substantially the same reasons as those of the declaration in the principal action.

In addition to the facts already stated the evidence taken at the trial shewed facts from which the appellant claimed that the respondent was guilty of acts of negligence in leaving dangerous matter such as tow in the basement which was frequently resorted to by the workmen for considerable periods of

time without supervision, and that they used to sit or lounge about on the bales of tow while waiting to get into the closet which was situated in the basement. That while thus waiting there was danger that the workmen might smoke or commit acts which might kindle a fire. That the tow was so kept without the appellant's knowledge and that respondent did not take the necessary precautions to prevent a fire breaking out in this inflammable substance. That no water buckets were kept in the basement ready for emergency in case of fire, although such buckets were provided in all other flats of the factory. That cotton waste, (rags and refuse saturated with oil, varnish and turpentine) was put into barrels after it had been used in the factory and was allowed to be carelessly removed by boys. That the message to the fire station was not by telephone although there was an instrument in the factory and that the respondent had not accounted for his actions at or about the time of the commencement of the fire. The respondent's proof in rebuttal of the presumption established by article 1629 was in substance as follows :—

The fire broke out in full daylight between 1.15 and 1.30 in the afternoon. Three or four of respondent's employees were in some manner witnesses of the beginning of the fire. There was no fire in the establishment with the exception of two or three gas jets in the basement attached to posts, carefully covered with tin. The watercloset was in this basement and all the employees of the establishment except those in the office had access thereto. At about 1.15 a witness (M) who went to the cellar, passing quite close to the spot where the fire broke out, saw no fire ; he was not smoking as he never smoked, and had no matches, or other explosive or combustible materials on his person, and as he was leaving met another witness (D), going

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in the direction of the closet. D entered the closet, and at the moment perceived through a crack in the door the fire which arose in puffs from the bales of tow. At the same moment another employee, going to the closet when within 15 feet of them, saw that the door was closed and at the same time saw the fire rising between two bales of tow. Thereupon the alarm was given and a messenger ran to call the firemen at a station within about a hundred yards, but the fire spread rapidly. There was no water tap in the basement. All the employees of the establishment swore positively that neither they nor the respondent did anything which could have caused the fire. Smoking was strictly prohibited in the establishment, and employees were not allowed to fill their pipes in the place nor to smoke on the side-walk along side of the factory. The establishment was kept in the most irreproachable manner and was considered a model establishment.

The judgment of the Superior Court declared the lease cancelled, reserved the appellant's recourse for the loss of rent which he might suffer from May 1st., 1894 to May 1st., 1899, dismissed the respondent's action and allowed the appellant on his incidental demand the sum of $640.90; the decision being based on the ground that the respondent had failed to prove the origin of the fire as required by art. 1629 of the Civil Code, and that he was consequently responsible for the damages resulting from the fire.

On appeal the Court of Queen's Bench reversed the judgment, holding that the evidence destroyed the presumption against the lessee and showed that the fire had not been caused by his fault or by that of the persons for whom he was responsible. From this latter decision the present appeal is taken.

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Trenholme Q.C. and *Béique Q.C.* for the appellant. The law governing the case is found in the Civil Code of Lower Canada, articles 1053, 1200, 1629, 1632, and 1633, which respectively correspond with the Code Napoléon, arts. 1382, 1383, 1302, 1733, 1730 and 1731. The Canadian codifiers remark on article 1629 that "it declares the same rule as that expressed in article 1733 C.N., but not in the same form, the object of both articles being to establish, that in case of loss by fire the presumption is against the tenant, and hence his liability."

The legal question involved, is as to what kind of evidence must be adduced by the tenant, in order to constitute proof that the fire was not caused by the fault of himself or his subordinates. The principle adopted by the Court of Queen's Bench, judged from the notes of Chief Justice Lacoste filed in the cause, is that "so soon as the lessee shall convince the mind of the judge that he is not in fault, by whatsoever proof he does it, he ought to be exonerated. There is no need for him to prove the cause of the fire, nor even the impossibility of establishing it otherwise than by a fortuitous event; it would be enough for him to establish by the circumstances of the case that there is not an act of negligence or imprudence attributable to him."

If the tenant is not bound to prove the precise cause of the fire, he must shew beyond question that it was due to fortuitous event or irresistible force, as otherwise he is to be presumed responsible. *Jamieson* v. *Steel* (1); *Evans* v. *Skelton* (2). In the case of the *Seminary of Quebec* v. *Poitras* (3) the defendant proved more than respondent has done in this case, yet the court held that, "in order to destroy the presumption declared in

(1) Cas. Dig. 2 ed. p. 465. (2) 16 Can. S. C. R. 637.
(3) 1 Q. L. R. 185.

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article 1629 C. C., it is not sufficient for a tenant to show that he acted with the care of a prudent administrator, and that the fire which destroyed the premises leased could not be accounted for; he must show how the fire originated, and that it originated without his fault." See also *Bélanger* v. *McCarthy* (1); and specially the remarks of Johnson J. at p. 182.

The lessee has been held responsible under art. 1733 C. N. even when there were defects in construction; *Zichitelli* v. *Gille et al.* (2). It is not enough for the lessee to say that as no fault has been proved against him, the fire must be attributed to a fortuitous event or irresistible force; *Compagnie d'Assurance le Nord,* v. *Carrier et al.* (3). Even where the fire is incendiary the lessee must exculpate himself; *Compagnie Nationale* v. *Pelcot* (4); *Compagnie d'Assurance le Monde* v. *Durand* (5); *Compagnie d'Assurance l'Orléanaise* v. *Compagnie d'Assurance l'Urbaine* (6). See also Pothier, *Louage* no. 194; Marcadé *sur l'art.* 1733; 4 Aubry & Rau, par. 367 and *nn.* 20-22. The case of *La Compagnie Nationale* v. *Chartrain* (7), cited by Mr. Justice Bossé in the appeal judgment, does not support his theory; the appellate court there held that:

By the terms of article 1733 Code Civil, the lessee is answerable for the fire, unless he proves that it has happened by fortuitous event or irresistible force, or by defect in construction, or that the fire was communicated by a neighbouring building, or at the very least unless he establishes the impossibility of his imprudence or fault.

In the case cited by Bossé J., *Société du Moulin du Château-Narbonnais* v. *Société Industrielle du Sud-Ouest* (8), decided by the Court of Toulouse, the tenant was condemned, so the judgment evidently cannot be

(1) 19 L. C. Jur. 181.
(2) Dal. 70, 1, 256.
(3) Dal. 81, 2, 111.
(4) Dal. 93, 2, 379.
(5) S. V. 84, 1, 33.
(6) Jour. du P., 88, 1, 853.
(7) Pan. Fr. 92, 2, 123.
(8) Dal. 85, 2, 137-140.

an authority against us. The question now in dispute did not present itself in that case, and no legal proposition applicable to the present controversy, was either required or intended to be laid down; the foot note shows no modification of opinion on the part of Dalloz. In fact, the note shows he never entertained the opinion he is supposed to have modified.

Our article 1629 is not in conflict with art. 1200, which alone is sufficient for our purpose, as it requires for the exculpation of the debtor the allegation and proof of fortuitous event. On this point see 24 Dem. no. 562; 28 Dem. no. 769; 25 Laurent, no. 284. Our code merely declares in general terms what the Code Napoléon expresses in detail.

The evidence shows respondent to have been guilty of acts of negligence, and his witnesses are manifestly interested and do not corroborate each other but each one speaks for himself. Judge Gill, who saw and heard them, gave a verdict for appellant, see *Arpin* v. *The Queen* (1), and it is altogether more probable (or to take the most extreme view, equally probable,) that some one of these many interested witnesses should be mistaken or untruthful, than that some wonderful phenomenon should have happened, at the very time when several of them were on the spot.

Article 1239 C. C. relieves us from making any direct proof of special negligence. We rely on the uncontradicted legal presumption against the tenant, that the fire was caused by some act or fault by him or his employees which neither he nor they are willing to acknowledge. They will not voluntarily accuse themselves but the law places on the respondent a burthen and he has failed to exculpate himself. See art. 1071 C. C.; *DeSola* v. *Stephens* (2); *The Canadian Pacific Railway* v. *Pellant* (3). The tenant in the

(1) 14 Can. S. C. R. 736. (2) 7 Legal News 172.
(3) Q. R. 1 Q. B. 311.

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circumstances was under the necessity of using extraordinary care to protect the premises against fire and in this obligation he made default. Sirey, Code an. art. 1733 no. 56. And in case of doubt the inference is against the tenant, upon whom has been laid the *onus probandi*.

Lafleur and *Fortin* for the respondent.

This is not a case where the trial judge has found facts which ought to be accepted in appellate courts; he merely has drawn inferences which are subject to the appreciation of the judges of the higher courts. The trial judge was mistaken in supposing that our Civil Code, art. 1629, corresponds with the Code Napoleon, art. 1733; our article is far less restricted than the French law, and consequently the rigorous interpretation given by French jurisprudence to the presumption there established against the lessee cannot be applied in construing the provisions of the Qubec Code. Even in France the rigorous application of art. 1733 C. N. has been modified by the courts. See Sirey, Code an. no. 41 and the authorities there cited. The respondent has disassociated himself from the facts attending the origin of the fire and has established in his evidence that he used the premises only for the purposes leased and with all care required of a *bon père de famille* (art. 1626 C. C.) and has thus made such rebuttal of the presumption under art. 1629 C. C. as excuses him from civil responsibility, and shifts the onus to the plaintiff, who is bound to prove negligence to sustain his case. *Evans* v. *Skelton* (1). He has failed to do so. On the other hand he not only leased but actually built the premises for the purpose of leasing them to the respondent for the risky purposes of a furniture factory and knew the risk so well that he stipulated in the lease for the payment

(1) 16 Can. S. C. R. 637.

by the tenant of the extra-hazardous fire insurance rating due to the character of the trade carried on in the building. If a loss by fire exceeded the amount of the insurance the appellant is the party to be blamed. *La Compagnie Royale d'Assurance* v. *Grandval et al.* (1). The landlord must also be held responsible, under these circumstances, for the effects of any overcrowding or want of accommodation in the building as a defect of construction, for instance for inadequate provision in the closets for the number of workmen employed in such an establishment, or for want of facilities for extinguishing incipient fires, all of which he might easily have foreseen and provided for when erecting the factory buildings.

Art. 1627 C. C. leads up to art. 1629 and shews that the lessee is permitted to rebut the presumption of fault or negligence. We have repelled the harsh presumption by evidence the credibility of which is not even attempted to be impeached, except by mere supposition or suggestion of human weakness as an obiter dictum by the trial judge (2) which can have no effect before this court. See remarks on the evidence by Bossé J. in the report of the Queen's Bench judgment.

On the evidence no fault or negligence can be imputed to the respondent or to his employees, and in consequence he cannot be held liable in damages.

THE CHIEF JUSTICE.—I am of opinion that the judgment of the Superior Court was in all respects free from error.

There can be no doubt of the application of art. 1629, the plain language of which required the respondent to displace the *primâ facie* presumption which the law raises against him.

(1) S. V. 39, 2, 156. (2) Q. R. 5 Q. B. 90.

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That the respondent did not destroy this presumption is, in my opinion, the inevitable conclusion from the evidence. It has indeed been proved that the fire was first observed in a bale of tow in the cellar, but there was nothing to show how the fire was communicated to the tow; it must therefore be presumed that the tow became ignited through some negligence or default of the respondent himself, or of persons for whom he is responsible. There is an entire absence of evidence sufficient to shift the burden of this presumption; it therefore follows that, unless we are altogether to ignore the provisions of this art. 1629, embodying what I admit to be a very harsh rule of law, we must give this lessor the benefit of it.

I am of opinion that the appeal should be allowed and the judgment of the Superior Court restored with costs to the appellant in all the courts.

GWYNNE, SEDGEWICK and KING J. J. concurred in the judment of Mr. Justice Girouard.

GIROUARD J.—De toutes les règles de notre Droit Civil, il n'y en a peut-être pas qui aient donné lieu à autant de procès et de divergences d'opinions que celles qui déterminent la responsabilité civile. Le principe général est cependant simple :

Toute personne capable de discerner le bien du mal est responsable du dommage causé par sa faute à autrui, soit par son fait, soit par imprudence, négligence ou inhabilité. C. C. 1053, 1071 ; C. N. 1382 et 1383.

Mais l'application en a toujours été fort embarrassante, car il n'est pas toujours facile de savoir quand il y a faute. C'est là plutôt une question de fait qui est laissée à l'appréciation des juges de première instance. Règle générale, c'est à celui qui allègue la faute à la prouver. Il y a cependant des exceptions à cette règle, et la responsabilité

du locataire envers le locateur en cas d'incendie des lieux loués en est une. Elle nous vient du Droit Romain où elle était pour ainsi dire une nécessité, vu que l'assurance y était inconnue. Cependant, elle n'y recevait pas l'application sévère que l'ancien droit français et le Code Napoléon lui ont donnée. Le locataire n'était responsable de ses domestiques que dans le cas où il aurait été lui-même en faute d'avoir pris à son service ou reçu chez lui des personnes de la part desquelles il y avait lieu de craindre de pareils accidents. Pandectes de Pothier, (1); 11 Touiller, n. 167, 168; Pothier, Contrat de Louage, n. 193; Rousseau de La Combe, vo. Incendie, n. 8; Guyot, vo. Incendie, L'ancienne France qui ne connut l'assurance contre le feu qu'après le milieu du dernier siècle, adopta tout naturellement la règle du Droit Romain. Les pays de droit écrit, régis par le Droit Romain, n'eurent pas d'objection à la suivre; elle faisait partie de leur droit commun; même les pays de droit coutumier, sans attendre l'intervention législative, n'offrirent aucune résistance qui vaille la peine d'être mentionnée. Il est vrai que Bouvot, vo. Brulement, et Guyot, vo. Incendie, citent plusieurs arrêts qui semblent annoncer que les parlements de Flandre et de Dijon étaient contraires. Parmi les auteurs dont l'opinion faisait autorité, on cite Bouvot, Henrys et Voet, et quelques autres moins connus, tels que Bertrand, Christin et Mascardus, qui soutiennent que c'est au propriétaire à faire la preuve de la faute du locataire. Mais Bretonnier, le savant annotateur d'Henrys, nous dit que son opinion a été rejetée par la jurisprudence bien établie du Royaume de France. Cette jurisprudence alla même plus loin que le droit Romain. Saligny et d'autres auteurs rendirent le locataire responsable de la faute "très légère"; mais Godefroy, Balde, Denizart et Rousseau de La Combe,

(1) Tome 20, pp. 83, 85.

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entreprennent de démontrer que cette opinion était mal fondée. Voir Guyot, vo. Incendie. Tous enseignent cependant que le locataire est responsable de ses domestiques et de tous ceux qu'il a sous son contrôle ; plusieurs arrêts vont jusqu'à exiger de sa part la preuve de l'origine de l'incendie ; mais il faut avouer que certains jurisconsultes se contentent de demander comme le Droit Romain, que le locataire établisse que l'incendie a eu lieu sans faute de sa part ou des gens de sa maison. Ajoutons ici que l'Angleterre, qui a connu l'assurance contre le feu près d'un siècle avant la France, n'a pas adopté la présomption du Droit Romain. Le propriétaire est tenu de prouver la négligence du locataire comme dans les cas ordinaires. Il en est de même en Ecosse et la Louisiane, où le Droit Romain forme pourtant le droit commun, surtout en matière de responsabilité civile. L'article 2723 du Code de la Louisiane dit en toutes lettres que le locataire n'est responsable de l'incendie, que lorsqu'il est prouvé qu'il a eu lieu par sa faute ou celle de sa famille. A l'époque de la promulgation du Code Napoléon, au commencement de ce siècle, l'assurance contre le feu en France était encore à son enfance, et il n'est pas surprenant qu'il ait reproduit l'ancienne jurisprudence. L'article 1733 se lit comme suit :

> Il (le locataire) répond de l'incendie, à moins qu'il ne prouve que l'incendie est arrivé par cas fortuit ou force majeure, ou par vice de construction : ou que le feu a été communiqué par une maison voisine.

Comme l'observent le juge en chef Lacoste et M. le juge Bossé, la doctrine et la jurisprudence en France ont réagi contre une interprétation littérale de cet article. Analysant les arrêts et les commentateurs, les savants juges trouvent que pas moins de trois systèmes différents ont des défenseurs distingués et que deux de ces systèmes ont pour but d'adoucir, je dirais pres-

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que de modifier, la rigueur du texte du Code Napoléon. Aujourd'hui que le propriétaire a toute la protection désirable dans une police d'assurance contre le feu, à des prix minimes qu'il peut entrer dans le prix de la location, l'esprit de justice s'est presque révolté contre la sévérité de l'article 1733 du Code Français et un projet de loi fut présenté dans le but de l'abroger. La commission chargée de l'examiner se prononça contre, il est vrai ; mais son rapport fait voir que l'état actuel de la jurisprudence en France est loin de la doctrine enseignée par Toullier, Marcadé et d'autres jurisconsultes non moins éminents :—

Ici, comme partout, dit la commission, les cours et tribunaux ont accompli leur œuvre. N'est-il pas de jurisprudence aujourd'hui, non-seulement qu'il n'est pas nécessaire que le locataire établisse la cause précise de l'incendie, non-seulement qu'il n'est pas besoin que la force majeure soit déterminée et spécifiée, mais même que l'appréciation des faits qui peuvent constituer une faute de la part du preneur ou qui peuvent, au contraire, mettre sa responsabilité à couvert, appartient souverainement aux juges de fait. 'Et,' ajoute Guillouard, vol. 1, no. 270 ; 'Désormais le sens de l'article 1733 est fixé, et il n'a été maintenu dans notre législation qu'avec cette interprétation.'

Le locataire prouve péremptoirement qu'on ne peut lui imputer aucune faute par imprudence ou par négligence ; cela ne suffirait pas. Il faudrait encore que pour échapper à la responsabilité qui pèse sur lui, il prouvât la cause précise de l'incendie. Pourquoi cette exigence ?

Nous comprenons que le législateur demande au locataire, comme à tout détenteur de la chose d'autrui, la preuve que la perte de la chose qu'il détient est arrivée sans sa faute.

Mais une fois cette preuve faite, que peut-on lui demander au delà ? Ni les règles des contrats, ni les principes de la responsabilité, si étendue qu'elle soit, ne pourraient justifier une pareille exigence et rien n'autorise à croire qu'elle ait été dans la pensée des rédacteurs du code. Guillouard, no. 269.

Il y a lieu de s'étonner que le Code de la province de Québec, qui a été adopté en 1866, ait consacré le principe de la présomption légale contre le locataire en cas d'incendie des lieux loués. Il est vrai que la jurisprudence qui l'a précédé était dans le sens littéral de

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l'article du Code Napoléon, que l'on considérait comme l'expression de l'ancienne jurisprudence française, et il faut bien avouer que les arrêts rendus depuis vont aussi loin. *Séminaire de Québec* v. *Poitras*, (1); *Bélanger* v. *McCarthy*, (2). Evidemment dans ces causes et autres, les tribunaux ont été entraînés par la doctrine ancienne et le Code Napoléon. Je dois dire de suite que je ne puis accepter leur interprétation de l'article 1629 du Code Civil. Cet article est d'une nature pénale et je ne puis lui donner que le sens et la portée que les expressions de cet article comportent. L'esprit de justice de nos gens s'est presque révolté contre la rigueur de cette loi, puisque presque toujours les propriétaires y renoncent sans même être requis de le faire ; les blancs imprimés des notaires ont même une renonciation préparée d'avance.

L'article 1629 du Code se lit comme suit :

> Lorsqu'il arrive un incendie dans les lieux loués, il y a présomption légale en faveur du locateur qu'il a été causé par la faute du locataire ou des personnes dont il est responsable ; et à moins qu'il ne prouve le contraire, il répond envers le propriétaire de la perte soufferte.

Et ici, je ne crois pas pouvoir mieux exprimer ma pensée qu'en citant ce passage de M. le juge Bossé :—

> On est donc fixé en France, sur ce point ; et si l'on y juge maintenant ainsi, après une longue expérience de l'application de l'article 1733, à plus forte raison, devons-nous, au Canada, faire de même, sous l'empire d'un texte bien plus large et en appliquant une loi qui, au contraire du Code Napoléon, libère en termes exprès le preneur, s'il prouve le contraire de la présomption de faute établie par le texte, sans limiter cette preuve à des faits ou des causes particulières, mais lui laissant sans restriction la faculté de prouver que l'incendie n'a eu lieu ni par sa faute ni par celle de ceux dont il est responsable.

Le savant juge en chef considère que la faute du locataire dont il est question dans l'article 1629 est celle "du délit ou quasi-délit présumé chez ce dernier." L'article 1629 dit plus que cela ; il consacre un prin-

(1) 1 Q.L.R. 185. (2) 19 L.C.Jur. 181.

cipe de droit pénal qui doit recevoir une interprétation stricte et rigoureuse. Le savant juge est d'opinion que le locataire est responsable de la faute "très légère," aux termes de l'article 1053. Sans admettre que la faute "très légère" soit celle qui est en vue dans l'article 1053—je ne puis accepter cette doctrine. L'article 1053 n'a jamais eu l'intention d'établir des règles concernant les délits et quasi-délits présumés ou établis par la loi, mais seulement les délits et quasi-délits résultant du fait de l'homme. D'ailleurs, l'article 1626 du Code indique hors de tout doute le degré de la faute du locataire dont fait mention l'article 1629. Cet article lui permet "d'user de la chose louée en bon père de famille" et évidemment il ne peut être en faute tant qu'il se tient dans la limite de son droit. Tel me paraît être le sentiment des commentateurs et en particulier de Laurent, (1) :

> D'après l'article 1732, le preneur répond des dégradations qui arrivent pendant sa jouissance, à moins qu'il ne prouve qu'elles ont eu lieu sans *sa faute*. Quelle est cette faute ? Pour le bail, il ne peut y avoir de doute, puisque le preneur est obligé d'user de la chose en bon père de famille (art. 1728) ; c'est donc la faute générale de l'article 1137.

Or cet article 1728 correspond à l'article 1626 de notre Code et l'article 1137 à notre article 1064. Domat, liv. 1, tit. 4, sect. 2, no. 4, n'exige rien de plus : Le preneur est responsable de toutes fautes "où ne tomberait pas un père de famille soigneux et vigilant." Merlin, au mot "Incendie" du Répertoire de Guyot enseigne la même doctrine :

> Ainsi, dit-il, point de doute que celui à qui j'ai accordé, pour un certain temps, l'habitation gratuite de ma maison, ne soit garant de l'incendie arrivé par sa faute même très légère. ....Si le contrat ou quasi-contrat a pour objet l'utilité commune des parties, la faute lourde et la faute légère sont régulièrement les seules dont on doit répondre en matière d'incendie.

(1) Vol. 16, n. 226.

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Merlin ajoute que ce sont les termes des lois romaines et qu'elles s'appliquent au locataire.

Je considère donc que le mot "faute" qui se trouve dans l'article 1629 réfère à l'obligation imposée au locataire par l'article 1626, et veut dire pratiquement contravention aux obligations que cet article décrète. C'est à lui à établir qu'il n'y a pas eu contravention de sa part, qu'il a joui des lieux loués en bon père de famille et qu'il n'a rien fait qui pût être la cause de l'incendie. C'est une question de fait qui est laissée à l'appréciation du tribunal.

L'appelant invoque deux décisions de cette cour à l'appui de ses prétentions ; *Jamieson* v. *Steel* (1), où, dit-il, cette cour décida en 1878, Henry J. dissident, que le locataire était responsable "as he had failed to *account* for the fire according to articles 1627 and 1629 of the Civil Code." La cause n'est pas rapportée. J'en trouve une mention plus précise dans le 2e tome du Digest de Stephens, p. 457 : "Held, confirming the judgment of the Queen's Bench, that having failed to establish that the fire occurred without *any fault of his or of his men*, in accordance with the terms of art. 1629 of the Civil Code, he (le locataire) should be condemned to pay the damages caused to the premises leased by him, and moreover that respondent (le propriétaire) having proved that it was through the negligence of appellant that the fire occurred, he was liable under art. 1630 of the Civil Code for the damages to adjoining premises." C'est précisément la doctrine que j'ai essayé d'établir. La décision de cette cour a été non pas que le locataire devait prouver l'origine du feu, ou même l'impossibilité qu'il eut pris par son fait ou celui de ses employés, mais simplement que le locataire n'avait pas repoussé la présomption de faute. M. le juge Beaudry, qui avait rendu le jugement de la

(1) Cas. Dig. 2 ed. 465.

Cour Supérieure avait exprimé la même opinion légale, mais avait différemment apprécié les faits. Suivant le résumé de M. Cassels, car son jugement n'est pas rapporté, le savant juge était d'opinion "that the weight of evidence was that no fault could attach to the defendant or his employees." En appel, cette appréciation de la preuve fut rejetée, Ramsay et Tessier JJ., dissidents. Il ne faut pas oublier que les juges Beaudry et Ramsay ont pris une large part à la confection du Code.

L'autre cause est celle de *Evans* v. *Skelton*, (1). L'interprétation de l'article 1629 donna lieu à une savante plaidoirie de la part des avocats ; mais le jugement de la cour fut basé sur une clause du bail qui disait que le locataire, à son expiration, serait tenu de rendre les lieux en aussi bon état qu'il les avait reçus, "*reasonable wear and tear and accidents by fire excepted.*" La majorité de la cour, composée de Strong, Fournier et Gwynne JJ., décida que ces expressions suffisaient pour constituer, de la part du locateur, une renonciation à la présomption consacrée par l'article 1629 du Code, Ritchie J. C. et Taschereau J. dissidents.

Il ne me reste qu'à examiner la question de fait. Le juge de la Cour Supérieur l'a décidé contre le locataire, mais il suppose qu'il était tenu d'expliquer l'origine du feu : "Il (le locataire) a bien prouvé où et à peu près quand le feu a pris, mais rien n'explique comment il a pris." Il n'était pas tenu, suivant moi, de faire cette preuve. Les témoins Major, Brien-Durocher et Martineau, les seuls employés qui étaient dans la cave avant et au commencement de l'incendie, ont vu le feu à son origine dans les balles d'étouppe qui étaient dans la cave ; ils ne peuvent l'expliquer, mais ils jurent positivement qu'il était impossible qu'ils aient pu causer l'incendie. L'honorable juge ne jette aucun discré-

(1) 16 S. C. R. 637.

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dit sur le témoignage de ces ouvriers; il ne dit pas qu'il ne les croit pas; mais il observe que s'ils ont commis quelque imprudence ou acte coupable, il n'est pas raisonnable de supposer qu'ils viennent s'en accuser. La Cour d'Appel, à l'unanimité, a été d'un avis contraire. M. le juge Bossé observe:

> Tout au contraire, rien n'indique chez ces témoins mauvaise foi ou mauvais vouloir. Ils ont été soumis à un interrogatoire des plus serrés et n'ont montré ni incertitude, ni hésitation. Leurs réponses sont claires et empreintes du cachet de la vérité. Leur caractère et leur réputation n'ont pas été attaqués. Nous devons croire qu'ils ne pouvaient l'être, et nous devons, partant, prendre leurs témoignages pour vrais.

Je suis aussi de cette opinion.

L'appelant signale particulièrement cinq ou six faits comme autant de fautes de la part de l'intimé.

1. Il n'y avait pas dans la cave, comme aux autres étages, de seaux d'eau pour éteindre un commencement d'incendie. Mais à qui la faute? L'appelant n'avait pas même placé de robinet dans la cave pour y prendre de l'eau. Le locataire était-il tenu d'y garder des seaux d'eau pour prévenir un incendie? Je ne le pense pas.

2. L'intimé n'a pas pris le soin nécessaire des déchets de coton saturés d'huile. En supposant que la preuve justifierait cet avancé, bien que c'est le contraire qui est prouvé, ces déchets n'ont eu aucun rapport avec l'incendie. *Evans* v. *Skelton* (1).

3. L'intimé laissait ses employés attendre dans la cave leur tour d'aller au cabinet, même de s'appuyer ou s'asseoir sur les balles d'étouppe qui ont pris feu. A qui la faute? si ce n'est à l'appelant qui a jugé qu'un seul cabinet d'aisance suffisait dans une usine où se trouvaient quarante ou cinquante ouvriers. C'était, à mon avis, un vice de construction de la part du propriétaire.

(1) 16 Can. S. C. Rep. 650.

4. L'intimé n'a pas rendu compte de ses mouvements au moment du feu. Il n'a pas été examiné par l'appelant et il ne pouvait offrir son témoignage dans une cause purement civile. Les témoins Martineau, Major et Brien-Durocher jurent qu'il n'y était pas. Il était en effet en dehors, vaquant à ses affaires, et il ne faisait qu'arriver à son bureau au moment de l'incendie, au dire d'autres témoins.

5. L'intimé n'a pas téléphoné à la station des pompiers de la Place Chaboillez, qui se trouvait à deux arpents de son établissement. Mais il a envoyé un courrier, ce qui était plus sûr et aussi expéditif, vu la courte distance à parcourir.

6. L'intimé a empilé des balles d'étoupe dans la cave, à quelques pieds du cabinet d'aisance. Ces balles étaient le long du mur, sur la terre et dans un endroit que l'intimé considérait comme offrant le plus de sûreté. Elles servaient à la manufacture de l'intimé qui est celle de fabriquer des meubles. La bâtisse avait été non seulement louée, mais construite par l'appellant pour l'intimé dans le but avoué d'y avoir cette manufacture et il avait même stipulé au bail que son locataire paierait tout excédent de prime que les compagnies d'assurance exigeraient à raison de la nature de son métier, et de fait il lui a payé cet excédent, presque le double de la prime ordinaire. En mettant ces balles d'étoupe dans la cave, il n'a fait qu'user du droit que lui garantissait son bail et l'article 1626 du Code Civil. Toutes les précautions possibles ont été prises pour empêcher la communication du feu à ces balles d'étoupe. Un passage avait été ménagé pour permettre aux ouvriers de se rendre au cabinet; le gaz éclairait toute la journée à divers endroits de la cave pour en faciliter l'accès; et les becs de gaz étaient soigneusement enclos dans du fer blanc ou du zinc. Personne ne fumait dans toute la bâtisse

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et les témoins qui ont vu commencer l'incendie jurent qu'ils n'ont rien fait pour le causer. L'incendie a eu lieu d'une manière inconnue, mais non imputable à l'intimé ou à ses employés. C'est la conclusion à laquelle en est arrivée la cour d'Appel à l'unanimité et à moins d'erreur manifeste de sa part, la jurisprudence de cette cour et celle du Conseil Privé ont été de ne pas intervenir sur une simple question de fait. *Gravel* v. *Martin*, (1); *Canada Central Railway Company* v. *Murray* (2); *McCuaig* v. *Keith* (3); *Arpin* v. *The Queen* (4); *S. S. Santandarino* v. *Vanvert* (5).

Appeal dismissed with costs.

Solicitors for the appellant: *Béique, Lafontaine, Turgeon & Robertson.*

Solicitors for the respondent: *Fortin & Laurendeau.*

(1) Beauchamp's Dig. 103; 22 L. C. Jur. 272.
(2) 8 App. Cas. 575.
(3) 4 Can. S. C. R. 648.
(4) 14 Can. S. C. R. 736.
(5) 23 Can. S. C. R. 145.

LE PRÉSIDENT ET SYNDICS DE LA COMMUNE DE BERTHIER (PLAINTIFFS) .... APPELLANTS;

1896 *Oct. 8, 9.

1897 *Jan. 25.

AND

PAUL DENIS (DEFENDANT) ....RESPONDENT.

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

*Title to lands—Seignorial tenure—Deed of concession—Construction of deed—Words of limitation—Covenant by grantee—Charges running with the title—Servitude—Condition, si voluero—Prescriptive title—Edits & Ordonnances, (L. C.),—Municipal regulations—*23 *Vic. (Can.),* c. 85.

In 1768 the Seigneur of Berthier granted an island called "l'île du Milieu," lying adjacent to the "Common of Berthier" to M. his heirs and assigns, *(ses hoirs et ayants cause,)* in consideration of certain fixed annual payments and subject to the following stipulation;—"en outre à condition qu'il fera à ses frais, *s'il le juge nécessaire,* une clôture bonne et valable, à l'épreuve des animaux de la Commune, sans aucun recours ni garantie à cet égard de la part de sieur seigneur, lesquelles conditions ont été acceptées du dit sieur preneur, pour sureté de quoi il a hypothéqué tous ses biens présents et à venir, et spécialement la dite isle qui y demeure affectée par privilège, une obligation ne dérogeant à l'autre."

Held, reversing the decision of the Court of Queen's Bench, Strong C. J., dissenting, that the clause quoted did not impose merely a personal obligation on the grantee, but created a real charge or servitude upon l'île du Milieu for the benefit of the "Common of Berthier."

That the servitude consisted in suffering inroads from the cattle of the Common wherever and whenever the grantee did not exclude them from his island by the construction of a good and sufficient fence.

This servitude results not only from the terms of the seignorial grant, but also from the circumstances and the conduct of the parties from a time immemorial.

That the two lots of land although not contiguous were sufficiently close to permit the creation of a servitude by one in favour of the other.

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

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That the stipulation as contained in the original grant of 1768 was not merely facultative.

That the servitude in question is also sufficiently established by the laws in force in Canada at the time of the grant in 1768, respecting fencing and the maintenance of fences in front of habitations or settlements.

APPEAL from the decision of the Court of Queen's Bench for Lower Canada (appeal side) affirming the judgment of the Superior Court by which the plaintiffs' action was dismissed with costs.

The action was brought for the purpose of obtaining from the defendant the recognition of a real right and damages, (*action confessoire*). The plaintiffs claimed the right as in the nature of a real servitude and damages for trouble and loss caused by failure to comply with it. A full statement of the facts appears in the judgments reported.

Geoffrion Q. C. for the appellants. We claim that a servitude was established by the original deed of concession of the *Ile du Milieu*, respondent's property, by Hon. James Cuthbert, seigneur de Berthier, to Zacharie Macaulay, bearing the date 17th February 1768, which provided as follows:—

"Cette concession ainsi faite à la charge de payer * * * deux cents livres tournois, pour tout droit de cens et rente seigneuriale, *en outre à condition qu'il fera à ses frais, s'il le juge nécessaire, une clôture bonne et valable, à l'épreuve des animaux de la Commune, sans aucun recours ni garantie à cet égard, de la part du Sieur Seigneur.*"

The "Common" or dominant land, is the property of appellants, which they administer in virtue of their act of incorporation, 23 Vict. ch. 85.

We have taken the confessory action (Pothier, *Servitudes*, nos. 11, 12,) founded on art. 2257 Civil Code, for the judicial recognition of the servitude in the terms

of the deed quoted and for a new title to be furnished by respondent according to law.

At the time of the deed one proprietor could force another to construct a division fence between their respective properties under the provisions of the Ordinance of Begon, dated 10th., June, 1724, respecting fences and ditches (1).

This constituted a reciprocal servitude which was modified by the agreement in the deed.

The deed made it a condition of the grant that Zacharie Macaulay should assume the sole responsibility for a fence, if he considered one necessary, and if he built a fence he alone should pay for it. It is therefore a charge on the land granted that it alone shall be responsible for the cost of any division fence. And such charge is laid upon it for the purpose of freeing the grantor and his land from the charge of contributing his share, in other words from the servitude due by his land. Thus on the one hand the servitude imposed by law on the land granted is augmented, and that on the land of the grantor is abolished by this condition of the grant. There can consequently be no doubt that this condition created a conventional servitude in the place of that formerly existing by virtue of the ordinance. If he does not think such a fence necessary, or fails to build one, he cannot complain if the animals from the Common stray upon his land. Any uncertainty on this point is removed by the words *sans aucun recours, ni garantie à cet égard de la part du Sieur Seigneur*. He must build a fence or suffer the animals trespassing as he is charged by his title with one or other of these alternatives.

But in addition to the charge laid on respondent's land it must be remembered that the land of appellants has been freed from the charge of contributing to

(1) 2 Ed. & Ord. 305.

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the expense of a division fence. This is a real right charged on respondent's land, and the appellants have clearly a right to ask that the respondent give them a new title to prevent the prescription of this right, *Monastesse* v. *Christie* (1). Otherwise after the lapse of ten years, the respondent could force the appellants to construct with him at their joint expense a division fence. C. C. arts. 505, 2251. The appellants ask for a new title in the terms of the original deed and for damages occasioned by the respondent's conduct. Cases of similar servitudes are reported in *Murray* v. *Macpherson* (2); *Hamilton* v. *Wall* (3); *Dorion* v. *The Seminary of St. Sulpice* (4); *Mondelet* v. *Roy* (5).

Robidoux Q. C for the respondent. The case raises simply a question of servitude. To the action the respondent has pleaded that the terms upon which the first purchaser obliged himself to fence said Isle du Milieu, if he thought fit, or if he deemed it necessary, did not create any servitude thereon to the benefit of the Common of Berthier; that the deed could only produce a personal obligation, if susceptible of creating any obligation at all; but that even a personal obligation could not arise from such a stipulation, which left its execution or non-execution to mere wish or caprice. Art. 1081 C. C.; Larombière, Théorie des Obligations (ed. 1885) vol. 2, p. 349 sur l'art. 1174 C. N. par. 2 & 3; 6 Touillier, no. 499; 11 Duranton, nos. 22 et 23; Dalloz, v°. "Servitude," art. 1001, règle 6.

The latter part of art. 1081 C. C. is elucidated by Pothier (6) who declares that where the act which constitutes the condition is done, or not done, according to the case, the obligation may be enforced.

No servitude can be created by the renunciation of an action of damages, or of the right to compel others

(1) 8 L. C. Jur. 154.
(2) 5 L. C. R. 359.
(3) 24 L. C. Jur. 49.
(4) 5 App. Cas. 362.
(5) 4 Dor. Q. B. 7.
(6) Obligations no. 48.

to make their share of fences between adjoining properties. Such a renunciation would create, by anticipation, a discharge in favour of appellants, but it would not create a charge on l'Ile du Milieu for the Common of Berthier, and the two essential elements of a servitude would still be wanting. The contract did not charge, but on the contrary actually discharged a duty, and even the Seignior could not complain if the fence was not built. The character and requisites of a servitude or easement are entirely wanting in this case. Goddard on Easements, 4 ed. ch. 1, s. 1; C. C. art. 499. There is no real property on which a charge has been imposed, nor is there any for the advantage of which a charge has been created. There is no obligation established as between the tenements. 1 Moncton, 835-837; 1 Beaudry-Lacantinerie, no. 1413 *et seq*; Rendu, nos. 3720-21; Pothier, Servitudes, nos. 1 & 2. A servitude cannot be *in faciendo*.

The demand for a renewal deed can be supported only in the cases particularized in arts. 2061, 2249 and 2257 of the Civil Code. None of these articles apply to fencing "*s'il le juge nécessaire.*" Neither do articles 504 and 505 C. C. apply, because the lands in question are not *contiguous*. They are divided and bounded by a channel. The same objection excludes the application of the ordinance of the Intendant Begon of 10th., June, 1724. The parties used words in the original deed of concession corresponding with the provisions as to the "*clôture bonne et valable,*" required by the same Intendant's ordonnance of 19th June 1714. Cuthbert and Macaulay had this ordinance in view, when they covenanted as they did in relation to the fence. The seignior wanted to release himself from the obligation of fencing and this is why we find in the deed the words: "*sans recours ni garantie à cet égard de la part du dit seigneur,*" meaning that

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he will not be responsible should cattle pasturing on the Common trespass on Macaulay's land.

THE CHIEF JUSTICE.—I am of opinion that the judgment of the Court of Queen's Bench ought to be affirmed.

This is an action *confessoire* to have it declared that a clause in a notarial deed passed on the 17th February, 1768, by which the Hon. James Cuthbert, then the Seigneur of Berthier, sold and conceded an island in a channel of the River St. Lawrence, known as l'Isle du Milieu to Zachary Macaulay, the predecessor in title of the respondent, constituted a servitude on the property so sold in favour of the common lands of the seigniory, situated on the main land retained by the vendor, and to have a renewal of title. If no servitude was established the action cannot be maintained. The clause in question is as follows:

Cette concession ainsi faite à la charge de payer, tous les ans, au jour de St.-Martin, onze de novembre, donc le premier paiement se fera à pareil jour de la prochaine, au Domaine de la Seigneurie de Berthier la somme de deux cents livres tournois, pour tout droit de cens et rentes seigneuriales, en outre à condition qu'il fera à ses frais, s'il le juge nécessaire une clôture bonne et valable, à l'épreuve des animaux de la Commune, sans aucun recours, ni garantie à cet égard de la part du Sieur seigneur.

The appellants who are the successors in title of the vendor, Cuthbert, contended that this clause imposed a servitude. The respondent insists that if it was obligatory at all, it constituted a mere personal obligation upon Macaulay and his heirs.

Both the courts below have held that no servitude was created, and in this view I entirely concur.

The decision must of course depend on the old law as it stood at the date of the concession, and the Civil Code is only applicable indirectly and so far as it tends to show what was the ancient law, so far as it has

been there reproduced and formulated. The law has always been as the articles 637 and 686 of the French Code, and more concisely the article 545 of the Quebec Code declare, viz., that a servitude is imposed upon an immovable in favour of an immovable, and not on a person nor in favour of a person (1); and this has always been the law as well under the codes as under the ancient *régime*.

The servitude, then, must therefore consist either in the submission of the owner of the servient property to have something done on his land by the owner of the dominant property, or in the abstention of the former from doing something which he otherwise would have the right to do on his neighbour's land.

The definition given by Pothier in his introduction to the 13th title of the Custom of Orleans (which applied also to the Custom of Paris), is most clear and decisive to show that the servitude must (subject to an exception not material, to be noticed hereafter) consist in a mere negative submission on the part of the servient owner to some right conceded to the dominant owner. Pothier (2) says:

Le droit de *servitude* est le droit de se servir de la chose d'autrui à quelque usage, ou d'en interdire quelque usage au propriétaire ou possesseur *jus faciendi aut prohibendi aliquid in alieno.*—La servitude, de la part de celui qui la doit, ne consiste donc à autre chose qu'à souffrir que celui à qui elle est due, se serve de la chose pour l'usage pour lequel il a droit de s'en servir, ou à s'abstenir de ce que celui à qui elle est due a droit d'empêcher qu'on y fasse. Au reste, les droits de servitude n'obligent point le possesseur de l'héritage qui la doit, à faire quelque chose ou à donner quelque chose : en quoi ces droits diffèrent des droits de redevance foncière et des droits de corvée. *Servitutum non ea natura est, ut aliquid faciat quis * * * * sed ut aliquid patiatur, aut non faciat. L.* 15, 1 *Dig. de servitutibus.*

That the principle of the Roman law, *servitus in patiendo non in faciendo consistit*, has always prevailed

(1) Demolombe vol. 12, p. 154, no. 675.

(2) Bugnet's edition, vol. 1, p. 312.

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in the French law, as well before as since the codes, is also clearly and directly shown by the following additional authorities:

Lalaure, Traité des Servitudes Réelles, p. 3. Merlin, Rep. V°. Servitude (1); Giraud, L'ancien Droit Coutumier (2). Demolombe, vol. 12, nos. 676-677-871 to 880, 881-883. Pandectes Francaises, vol. 5 (3). Maleville, vol. 2, p. 128. Pardessus, Traité des Servitudes, pp. 48-49. Toullier, vol. 3, p. 427. Huc, Commentaire du Code Civil, p. 403-406-432. Laurent, vol. 7, no. 147. Baudry-Lacantinerie and Chauveau, Traité de droit Civil Des Biens, no. 812. These authors all agree in stating that the rule of the Roman law in this respect is, and always was, that of the French law. If the service imposed consisted, as in the present case, entirely in some active duty or obligation imposed on the owner of the pretended servient property, it was not a servitude, but a mere personal obligation which bound the owner and his heirs, but did not form a charge upon the property itself accompanying it into the hands of purchasers and others to whom it might be subsequently conceded. No change in the law (if any there had been) by the Quebec Code could have made any difference in this respect, as the code had no retroactive effect. No change was, however, made. The definition of a servitude given in art. 545 of the Code is precisely the same definition which would have applied before its promulgation. Art. 686 of the Code Napoleon which defines a servitude is more full and precise than art. 545 of the Quebec Code, but both have the same meaning, and the provision of the former

que les services établis ne soient imposés ni à la personne ni en faveur de la personne mais seulement à un fonds et pour un fonds

(1) Ed. Bruxelles 1828, p. 44. (2) Ed. 2, p. 66.
(3) Code Civil, p. 500.

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is as much the rule under the Canadian law as under the French law. This proposition cannot and has not been disputed. The only question is as to the application of this well established rule of the law of property to the *Acte* of 1768.

The only qualification of the rule which requires that in order to constitute a servitude, the services imposed shall consist *in patiendo* and not *in faciendo* is that found in art. 554 of the Quebec Code which is verbally identical with 698 of the Code Napoleon, and which is thus expressed:

Ces ouvrages sont à ses frais, et non à ceux du propriétaire du fonds assujetti, à moins que le titre constitutif de la servitude ne dise le contraire.

This article is relied on as showing that the parties may by their conventions alter the rule referred to.

In the first place, as before observed, the present case does not depend upon the code, and the only purpose which a reference to it can serve is to show indirectly that the codifiers having reproduced this provision as part of the ancient law, and not as new law, it is to be assumed that the same rule prevailed under the Custom. Granting, however, that this was the rule of the ancient law, and that in this respect there has been no innovation by the new legislation, I am still of opinion that there is nothing in the provision, contained in the words, *à moins que le titre constitutif de la servitude ne dise le contraire* which in any way qualifies the rule that the services imposed by a servitude must be negative and not positive, and that this rule cannot be altered by the convention of the parties. For this the highest authorities may be quoted.

The proposition I advance is that this provision applies only to subsidiary and incidental acts, to be performed by the servient owner in the case of a servitude properly constituted, and not to the constitution

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of the servitude itself. This cannot be better explained than it is by Demolombe (1), who after having (in no. 676) laid down the principle that the servitude must be negative and cannot be active, proceeds in the next number (667) to discuss the exception, or supposed exception, to it contained in art. 698 C. N. (2). This passage is so apposite that I extract it at length:

No. 677. Mais, dira-t-on, il résulte de l'article 698 que le propriétaire du fonds assujetti peut être chargé par le titre de faire, à ses frais les ouvrages nécessaires pour l'usage ou la conservation de la servitude, et même l'article 699 ajoute que, dans ce cas, il peut toujours affranchir de la charge, en abandonnant le fonds assujetti au propriétaire du fonds, auquel la servitude est due. Voilà donc une charge qui peut être imposée à la personne, c'est-à-dire à tout propriétaire, quel qu'il soit et sera, d'un fonds, en cette qualité, pour l'utilité d'un fonds appartenant à un autre propriétaire ! N'y a-t-il pas dès lors antinomie entre l'article 686 et les articles 698 et 699 ? Non sans doute : et il importe de bien distinguer ici le fait principal, qui constitue la servitude elle-même, d'avec les ouvrages accessoires qui sont nécessaires pour en user ou pour la conserver. La servitude elle-même, le fait principal dans lequel elle consiste, ne peut jamais être imposé à la personne. Voilà l'article 686 dont la disposition absolue n'est aucunement modifiée, sous ce rapport par l'article 698. Ce que l'article 698 autorise seulement, c'est de mettre à la charge du fonds assujetti, les ouvrages accessoires et les moyens d'exécution nécessaires pour l'exercice de la servitude. Par conséquent, pour que l'article 698 puisse être appliqué, il faut toujours

(1). Qu'il y ait, indépendamment des ouvrages qui sont mis à la charge du propriétaire du fonds assujetti, une servitude principale, distincte de ces ouvrages eux-mêmes qui en doivent être que le moyen d'exercice (Comp. Vinnius Inst. de Servit. No. 1 ; Pardessus, tome 1, No. 19 ; Molitor de la Possession, p. 303 *in fine.*)

(2). Que les ouvrages aient en effet, véritablement pour but l'exercice ou la conservation de la servitude ; car il est clair que s'ils y étaient étrangers, ils constitueraient, par eux-mêmes, une autre servitude principale, qui serait imposée à la personne, contrairement à l'article 686.

In no. 873 of the same volume, Demolombe further discusses the same question as to the effect of art. 698 C.N. (3) and shews that this exception of an inci-

(1) Vol. 12.
(2) Art. 554 C.C.
(3) Quebec Code, art. 554.

dental or secondary servitude of repair or maintenance, might, in the case of one single servitude, that of *oneris ferendi*, even by the Roman law, have been imposed by convention on the servient owner, and that this exception prevailed without in any way infringing on the rule that such an active servitude could only be an accessory to some principal servitude which itself must have been constituted with due regard to the rule *in patiendo non in faciendo servitus consistit.* Next, the learned author points out that art. 698 was a generalisation of the exception of the Roman law, which in that system was confined to the particular servitude mentioned.

Baudry-Lacantinerie, et Chauveau, Traité de Droit Civil (1) no. 1,130, commenting on art. 698, say:

> Pour que la stipulation mettant les ouvrages à la charge du propriétaire du fonds assujetti soit valable il faut que ces ouvrages aient seulement pour but de faciliter l'exercice de la servitude, sans constituer la servitude elle-même. Ainsi en supposant que je stipule pour mon fonds le droit d'extraire de la marne du vôtre, je puis bien convenir avec vous que, vous ferez les travaux nécessaires pour empêcher l'eau d'envahir la marnière, mais non que vous extrairez la marne et que vous la répandrez tous les ans sur mon domaine en vue de l'amender; du moins, je ne puis pas stipuler cela à titre de servitude réelle.

Huc (Commentaire de Code Civil, Paris 1893) is to the same effect, and to these authorities might be added very many others, all establishing the same proposition.

Apart from all authority the very words of the art. 597 C. N., (533 Code, Quebec,) which, as I before said, is only applicable here as indicating the old law, which may indeed have been subject to the narrower restriction prevailing in the Roman law, indicate that it refers only to subsidiary works, necessary for the usage and conservation of the servitude, and not to the

(1) Des Biens, Paris, 1896.

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constitution of the principal servitude itself. Those words as contained in art. 553 Quebec and 597 C.N. are *tous les ouvrages nécessaire pour en user et pour la conserver*. I maintain therefore that there is nothing either in the old law or in the new law contained in these articles in any way impugning the rule that the principal servitude must consist *in patiendo non in faciendo*.

Applying that rule here it is clear that no servitude could have been created by the claim in question.

Then, I also agree with Mr. Justice Bossé that the construction of the fence here could not be a servitude for the reason that it was left optional with the purchaser, Macaulay, to make it or not, as he might think fit.

Qu'il pourrait trouver ou juger nécessaire entre les deux susdits héritages contigus.

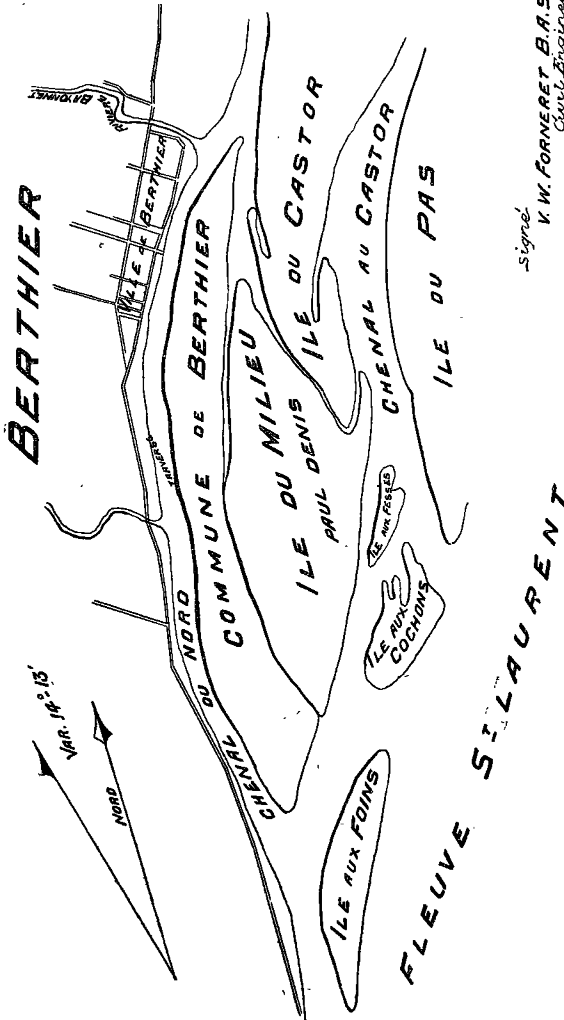
I also agree with the argument that the vendor, Cuthbert, stipulated not for any heritage which he retained, but for himself personally, which alone would be fatal to the constitution of a servitude. Further as regards any bearing which the contiguity of the two heritages might have, I do not enter into any discussion on the question of *mitoyenneté* for the reason that it is very plain that the property retained by Cuthbert was not adjoining to the island sold, but was separated from it by a channel of the River St. Lawrence.

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

GWYNNE, SEDGEWICK and KING JJ. concurred in the judgment of Mr. Justice Girouard.

GIROUARD J.—Cette cause soulève une sérieuse difficulté de servitude rurale établie par le fait de l'homme ; comme toujours, la question est de savoir s'il y a titre.

En face de la ville de Berthier, dans le fleuve Saint-Laurent, se trouve un groupe d'îles qui forment partie de la seigneurie de ce nom. L'extrait suivant du cadastre officiel, produit dans la cause, indique la situation des lieux:—



La première île est l'île Randin qui est la propriété de la Commune de Berthier et pour cette raison est

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mieux connue sous ce dernier nom. Cette commune fut créée, à l'origine même de la paroisse, par le premier seigneur, le Sieur de Berthier, en vertu de deux contrats de concession du 25 janvier 1683, l'un à Jacques Chamart et l'autre à Jean Piet "par lesquels il est dit que le sieur Berthier leur donne pour commune l'Isle Randin (1)." Cette île n'est séparée de la Grande Côte de Berthier, sur la terre ferme, que par un chenal de deux à trois arpents, appelé le chenal du Nord. S'il est permis d'en juger par le plan, elle a environ quatre à cinq milles de tour, bien que des témoins disent six à sept milles. Jusqu'à ces dernières années, elle n'a servi que de pâturage pour l'utilité de certains habitants de la Grande Côte de Berthier. Elle n'a jamais eu de clôture soit autour ou en travers du moins jusqu'à il y a huit ou dix années. Après cette époque, la Commune fut divisée en deux champs, l'un réservé au pacage, et l'autre aux grains, et finalement à une prairie. Alors, et comme conséquence, une clôture fut faite par la Commune à travers l'île pour diviser les deux champs et protéger la moisson.

L'île la plus rapprochée de la Commune est celle du Milieu. Elle fut concédée en 1768 à Zacharie Macaulay et possédée par lui et ses successeurs à titre particulier, Nouth, William Morrison, ses enfants et petits-enfants, et enfin l'intimé. Elle forme environ cinq cent vingt arpents de terre en superficie, et est d'une grande valeur, puisque le 9 décembre 1893, l'intimé l'achetait pour le prix de $14,000. C'est sur l'île même qu'il fait sa résidence ordinaire et exploite une grande ferme. Son titre déclare que l'île est bornée à l'ouest "par un marais qui la sépare de la Commune de Berthier." C'est ce marais qui est indiqué sur le plan par une forte ligne noire, comme étant la ligne de division entre les

(1) 3 Edits et Ord. 144.

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deux îles. Plus bas que ce marais, les deux îles sont séparées par l'eau. Il est prouvé qu'à certaines saisons et particulièrement le printemps et même l'automne, il y a assez d'eau dans le marais pour permettre le passage des canots des pêcheurs ou chasseurs, et même des chalands chargés de sable et tirés à la cordelle par des chevaux. Le témoin, Magloire Olivier, âgé de 66 ans, dit qu'il a vu plus que cela. " Il y a " dit-il, " un petit chenal qui coulait toujours assez épais d'eau entre l'île Morrison (c'est-à-dire l'île du Milieu), et la Commune de Berthier, et maintenant c'est comblé." Il est prouvé que de tout temps, les propriétaires de l'île du Milieu ont fait et entretenu une clôture partie sur leur île, partie sur la grève, et même à l'eau pour empêcher les animaux de la Commune de passer à l'île du Milieu, et que quand ils passaient—ce qui arrivait assez fréquemment—ils les renvoyaient sans aucune charge ou plainte. Cette clôture a été plus ou moins longue, renouvelée chaque année plus ou moins, réparée, changée et allongée plus d'une fois la même année, suivant les saisons et les circonstances, et aussi selon que la Commune servait au pâturage seulement, ou ensemble au pâturage et aux grains ou foins. Du temps de M. William Morrison, au dire de Magloire Olivier, et son témoignage n'est pas contredit, " il fallait une clôture sur tout le long de l'île du Milieu pour tenir les animaux, et ce sont les Morrison qui ont toujours fait la clôture," c'est-à-dire sur environ quatre-vingts arpents de parcours, ainsi que l'expliquent d'autres témoins, distance qui me paraît exagérée si l'on en juge par le plan. Après la division de la commune, comme il a été observé, la longueur de la clôture fut réduite de moitié à peu près, mais elle fut faite et entretenue chaque année par le propriétaire de l'île du Milieu, et à ses propres frais.

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En 1884, dans le délai fixé par la loi, l'appelante fit enregistrer la dite servitude, alléguant dans l'avis au régistrateur que l'île du Milieu est bornée à l'ouest par un marais qui la sépare de la Commune de Berthier, et au nord-est par un marais qui la sépare de l'île au Castor. En 1888, Paul Desmaray et autres héritiers Morrison, alléguant que l'île du Milieu est contiguë à l'île de la Commune, protestèrent contre l'enregistrement de la servitude et sommèrent l'appelante d'avoir à faire la moitié de la dite clôture, comme clôture de ligne. Mais ils n'ont pas donné de suite à leur protêt, et ont continué de faire la clôture et de renvoyer les animaux de la Commune, lorsqu'ils passaient au delà, et cela jusqu'à leur vente à l'intimé en décembre 1893.

Au printemps de 1894, l'intimé fit la clôture comme ses prédécesseurs, il est vrai sans préjudice, et en attendant la décision des tribunaux. Ce n'est que durant l'été, après avoir consulté un avocat, qu'il s'est insurgé contre la conduite de ses auteurs. Il n'y a pas de servitude, dit-il, et non seulement il refusa de réparer la clôture, mais il ne voulut pas permettre qu'elle fut réparée par des intéressés de la Commune ; il prit leurs animaux en fourrière et provoqua toutes espèces d'ennuis, de troubles, pas et démarches et litiges, et finalement le procès actuel qui est une demande en passation de titre-nouvel, aux termes de l'article 2257 du Code Civil. Elle a été intentée le 20 août 1894 et est fondée sur les faits ci-dessus et sur le titre de concession de l'Ile du Milieu.

Le 17 février 1768, par contrat de concession passé devant Faribault, notaire à Berthier, l'honorable James Cuthbert, propriétaire de la seigneurie de Berthier, concéda, à titre de cens et rentes seigneuriales, au Sieur Zacharie Macaulay, marchand à Québec, l'Ile du Milieu, décrite comme suit au contrat :

Tout l'Isle du Milieu, tenant d'un côté au chenal de l'Isle Du Pas et de l'autre à l'Ile Randin, sans en rien excepter, réserver, ni retenir, et que le dit sieur preneur a dit bien connaître pour l'avoir vu et visité, dont il se tient content et satisfait, pour en jouir, faire et disposer par le dit sieur preneur, ses dit hoirs et ayant cause, en toute propriété à commencer de ce jour. Cette concession ainsi faite à la charge de payer tous les ans, au jour de St.-Martin, onze de novembre, dont le premier paiement se fera à pareil jour de la prochaine, au domaine de la seigneurie de Berthier, la somme de deux cents livres tournois, pour tout droit de cens et rentes seigneuriales, en outre à condition qu'il fera à ses frais, s'il le juge nécessaire, une clôture bonne et valable, à l'épreuve des animaux de la Commune, sans aucun recours ni garantie à cet égard de la part du sieur seigneur, lesquelles conditions ont été acceptées du dit sieur preneur, pour sûreté de quoi il a hypothéqué tous ses biens présents et à venir, et spécialement la dite Isle qui y demeure affectée par privilège, une obligation ne dérogeant à l'autre.

La difficulté est de savoir ce que les parties ont voulu dire en stipulant : " en outre à condition qu'il fera à ses frais, s'il le juge nécessaire, une clôture bonne et valable, à l'épreuve des animaux de la Commune sans aucun recours, ni garantie à cet égard de la part du sieur seigneur."

La cour de première instance (Ouimet J.) a considéré que la stipulation de faire la clôture n'était pas clairement exprimée et que le fut-elle, elle n'établit qu'une obligation purement personnelle et même facultative de la part du concessionnaire.

La majorité de la cour d'Appel a confirmé le jugement de la cour Supérieure, sans apporter de nouveaux motifs, l'honorable juge Blanchet dissident. Nous avons cependant devant nous les notes de M. le juge Bossé ; il est d'opinion que, la clause ne contenant qu'une obligation personnelle de la part de Macaulay, il n'est pas nécessaire de décider si elle est simplement facultative. Le savant juge observe en terminant :—

Ajoutons que, dans le cas de doute, il faut toujours interpréter l'acte contre la charge imposée au fonds en faveur d'un autre fonds et opter pour la libération (1).

(1) 12 Demolombe, Servitudes n° 689.

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Ces principes ont été appliqués par cette cour dans une espèce plus favorable à la servitude. C'est la cause de *Mondelet* v. *Roy*, décidée le 20 novembre 1882, et rapportée au 4ième volume des Rapports de Dorion, p. 7.

Le principe énoncé par Demolombe est incontestable. C'est celui de l'article 1162 du Code Napoléon et de l'article 1019 de notre Code. "Dans le doute, le contrat s'interprète contre celui qui a stipulé et en faveur de celui qui a contracté l'obligation." Il ne s'applique cependant que quand toutes les manières de connaître l'intention des parties ont été épuisées. "C'est la dernière ressource de l'interprétation aux abois !" dit Demolombe (1),

C'est l'interprétation s'avouant impuissante devant l'impénétrable obscurité du contrat ! D'où il suit qu'on ne doit l'appliquer qu'autant que toutes les autres règles d'interprétation font défaut (1).

Demolombe, au numéro même cité par le savant juge, observe :—

En fait, avant tout, quel est le caractère du droit que le disposant ou les parties contractantes ont entendu créer ?

Est-ce un droit de propriété ou de co-propriété ?—ou de simple bail ?—ou une pure obligation de faire ou de ne pas faire ?—ou un usage irrégulier, une servitude personnelle ?—ou enfin une vraie servitude réelle ?

C'est d'après les titres et les circonstances du fait, et surtout d'après la nature propre du droit lui-même, que cette première question doit être résolue dans chaque espèce (comp. Cass. 7 fév. 1825, Tombette, D. 1825, 1. 84 ; Cass. 15 fév. 1842, Duvivier, Dev. 1842, 1, 344).

La qualification appliquée au droit par l'acte même qui l'établit, et les autres termes que cet acte peut renfermer encore, sont sans doute à prendre en très grande considération. S'il résulte en effet du titre que la concession n'a été faite qu'en vue d'une personne individuellement désignée, elle ne constituera qu'un droit personnel, lors même que, par son caractère propre, elle aurait pu être établie comme servitude réelle ; *si tamen testator demonstravit cui servitutem pecoris præstari voluit, emptori vel hæredi non eadem præstabitur servitus* (L. 8 ff. *de servit. præd. rust.);* mais on devra, au contraire, y reconnaître une servitude réelle, si le droit est accordé au propriétaire d'un fonds pour lui et ses successeurs ; ou même indépendamment de toute explication

(1) Vol. 25, p. 25.

pareille, si le droit, étant de sa nature une vraie servitude réelle, est concédé purement et simplement au fonds (comp. Cass., 7 fév. 1852, Tombette, D., 1825, 1, 84 ; Bourges, 3 janv. 1829, Bourdiaux, D., 1829, 2, 42 ; Proudhon, *des Droits d'usufruit, d'usage*, t. VI, nos. 3093 et suiv. ; Duranton, t. V. no. 34).

Mais, d'un autre côté, il ne faut pas oublier non plus que le caractère véritable d'un droit se détermine, avant tout, par lui-même, par sa propre substance, plutôt que par la dénomination, plus ou moins exacte, que les parties lui ont donnée ; et que, par exemple, l'emploi du mot *servitude* ne suffit pas pour imprimer ce caractère à un droit, qui, d'après l'acte même d'où il résulte, n'en est pas susceptible ; pas plus que ce mot n'est nécessaire pour faire naître une véritable servitude, quand tel est effectivement le droit qui a été constitué : *in contractibus rei veritas potius quam scriptum perspici debet......; non quod scriptum, sed quod gestum est* (L. 1 et 3, Cod. *plus valere*, art. 1156, C. Napol.)

C'est d'ailleurs ce qu'enseignent tous les auteurs. Solon dit (1) :—

Mais remarquez qu'en parlant de titre douteux, nous n'avons en vue que celui dont l'imperfection est telle qu'il est impossible d'en expliquer l'objet et l'étendue par les voies ordinaires de l'interprétation ; si malgré ses imperfections, la volonté des parties pouvait être comprise, nul doute qu'elle ne dût avoir une autorité complète.

Laurent, dit (2) :—

Mais il peut être douteux si le droit est une créance, une servitude réelle ou une servitude personnelle. C'est moins aux termes dont les parties se sont servies qu'il faut s'attacher qu'à la nature du droit et à l'intention des contractants. Il faut surtout tenir compte de la règle fondamentale établie par l'article 686 ; pour que le droit soit une servitude réelle, il doit être dû par un fonds et en faveur d'un fonds.

Cet article correspond à l'article 545 de notre code :—

Tout propriétaire, usant de ses droits et capable de disposer de ses immeubles, peut établir sur ou en faveur de ses immeubles telles servitudes que bon lui semble, pourvu qu'elles n'aient rien de contraire à l'ordre public.

Dalloz, (3) pose la première règle d'interprétation et observe :—

Quelque sage et absolue que soit la règle posée en tête du présent numéro, la constitution de servitude n'a pas besoin d'être faite en

(1) Des Servitudes réelles, p. 305. (2) Vol. 7, n. 148.
(3) V° "Servitude" no. 988.

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termes en quelque-sorte sacramentels (M. Pardessus, n° 268); elle peut résulter de la combinaison des clauses d'un ou de plusieurs actes.

Puis, v°. "Servitude" au numéro 1000, le même jurisconsulte ajoute :—

Les actes constitutifs des servitudes sont, comme tous les autres actes, soumis à la règle d'après laquelle on doit, dans les conventions, plutôt rechercher la commune intention des parties que s'attacher au sens littéral des termes.

Enfin, au no. 1002, sous le titre "Interprétation du titre," Dalloz, v°. "Servitude" ajoute :—

Les tribunaux ont une grande latitude, en matière d'interprétation. Il serait donc difficile de donner des règles rigoureusement exactes sur les principes qui les dirigent, et que l'équité quelquefois domine plutôt que la rigueur du droit.

Les annotateurs des Pandectes Françaises observent à la note (1) :—

Il est hors de doute que les titres constitutifs de servitudes sont soumis aux règles ordinaires qui gouvernent l'interprétation des contrats. Le juge doit, dès lors, s'attacher à déterminer quelle a été la commune intention des parties et suppléer par cette recherche au silence ou aux obscurités de l'acte litigieux.

Ils citent dans ce sens :—

Cessation, 26 janvier, 1875, S. 75, 1. 121 ; 19 juillet, 1887, Pand. Fr. 87, 1. 329 ; 16 janvier 1889, id. 89, 1. 451. Voir aussi Lalaure et Paillet, Servitudes, liv. 1, ch. 2, p. 53.

La décision de la Cour d'Appel dans la cause de *Tétu* vs. *Gibb* (2), est aussi précise. M. le juge Casault avait décidé, en cour de première instance, que les servitudes, en cas de doute, doivent être plutôt restreintes et ne jamais être maintenues, à moins de stipulations claires et précises. Mais cette doctrine fut rejetée par la Cour d'Appel, composée de Dorion J. C., Monk, Ramsay et Tessier JJ. (Cross J. dissident) :—

Considérant...... que quoique ces faits de jouissance ne suffiraient pas seuls pour établir une servitude de passage sur le terrain des intimés, ils servent à expliquer les droits de servitude et de passage conte-

(1) 1892, 1, 65.

(2) 10 R. L. 483.

nus aux dits actes de vente et de promesse de vente et aux anciens titres précédents et à l'intention des parties aux dits actes.

On cite la décision de la Cour d'Appel dans la cause de *Mondelet* v. *Roy* (1). Mais c'est tout le contraire qui a été jugé à propos d'une servitude créée en 1811 dans un acte de partage, ainsi que nous le verrons plus loin. Ce n'est qu'à l'égard d'un acte de vente ordinaire passé en 1850 que la Cour d'Appel a jugé dans la même cause, et avec raison, qu'il n'avait pas créé une servitude réelle, *attendu qu'il n'indique aucun héritage dominant.* C'était le cas d'une obligation personnelle qui ne pouvait être garantie que par hypothèque.

M. le juge Bossé observe que si l'intimé ne fait pas une clôture pour se protéger, " cela donnerait bien ouverture à une action en dommages pour détention des animaux illégalement mis en fourrière." Je ne puis comprendre ce recours en dommages, s'il n'y a pas de servitude. S'il existe, et je crois qu'il a été concédé par l'avocat de l'intimé, qui a admis à l'audience devant nous que l'intimé n'a pas le droit de se plaindre si les animaux de la Commune vont chez lui, ça ne peut être qu'en vertu du contrat de concession et de la clause qui s'y trouve créant une charge foncière, une servitude en un mot, sur l'Ile du Milieu en faveur de l'Ile de la Commune. De droit commun, un propriétaire n'est pas tenu de souffrir les animaux de son premier ou de son deuxième voisin. Ça ne peut être qu'en dérogeant à la règle ordinaire, par des stipulations particulières, que le contraire peut avoir lieu ; et à moins d'une convention grevant le fonds, l'action en dommage que l'on concède à la Commune ne peut être exercée. Et puis, que deviendrait l'action en dommages après que Denis en aurait acquis la prescription ?

Afin de mieux juger de l'intention des parties, il est à propos d'examiner les lois au sujet des clôtures en

(1) 4 Dor. Q. B. 7.

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force à l'époque où le contrat de concession fut passé en 1768. Je crois que l'appelante fait erreur, lorsqu'elle considère la clôture en question comme une clôture de ligne. Elle cite l'ordonnance de l'intendant Bégon du 10 juin 1724 (1) "au sujet des clôtures et fossés de ligne." Il suffit de lire le titre de cette loi, et à plus forte raison le texte, pour voir qu'elle ne s'applique qu'à des immeubles qui sont contigüs.

Je suis d'avis, avec l'intimé, que la clôture que les parties avaient en vue dans le contrat de concession était plutôt une clôture de la nature de celle mentionnée en l'ordonnance de Raudot du 12 mars 1709, (2) et il aurait pu ajouter celle du même intendant du 18 juin 1709 et celle de Bégon du 19 juin 1714 (3). Toutes ces ordonnances contiennent les mêmes dispositions: 1° Obliger

chaque habitant de toutes les Côtes de ce pays de faire une clôture bonne et valable le long du front de son habitation......, soit que le front ou la profondeur soient le long du fleuve Saint-Laurent (4);

et 2° Forcer les seigneurs de faire une clôture

le long de leurs domaines ou des terres non concédées......... "sauf aux dits seigneurs," ajoute l'ordonnance du 18 juin 1709, "à se faire rembourser des dits chemins et des clôtures et fossés, lorsqu'ils concéderont les dites terres."

Le but de ces lois était d'empêcher

que les bestiaux ne puissent aller dans les grains (5),

c'est-à-dire, les grains de chaque habitant tenu de faire la clôture, ainsi que l'explique le jugement de Bégon du 5 juin 1716:

Nous condamnons les héritiers Gamache à clore la devanture de leurs habitations, en sorte que les bestiaux de leurs voisins ne puissent aller dans leurs grains; et faute par eux d'avoir fait la dite clôture dans la quinzaine du jour que la présente ordonnance leur aura été notifiée, leur faisons défenses de saisir et arrêter les bestiaux qui pourraient aller sur leurs terres (6).

(1) 2 Ed. & Ord. 305.
(2) 2 Ed. & Ord. 270.
(3) 2 Ed. & Ord. 430, 441.
(4) 2 Ed. & Ord. 270, 430.
(5) 2 Ed. & Ord. 441.
(6) 2 Ed. & Ord. 452.

Un pareil arrêt avait été rendu par le Conseil Supérieur le 7 juillet 1670, (1).

Ainsi donc, à la date du contrat de concession à Macaulay, et l'intimé l'admet dans son factum, le seigneur de Berthier était tenu de clôturer l'île du Milieu non encore concédée, à l'épreuve des animaux de l'île de la Commune, et dès qu'elle était concédée, Macaulay devenait soumis à la même obligation, cette clôture formant en effet le front de son habitation.

Ces règlements ne s'appliquaient pas aux communes qui n'étaient pas des habitations, et où il n'y avait pas de récoltes à protéger. C'est ce que disent assez clairement les lois que nous venons de citer, auxquelles on peut en ajouter d'autres. L'ordonnance du 12 mars 1709, citée par l'intimé, déclare que les clôtures de front "partagent ordinairement les communes des terres labourées (2)." Le 26 juin 1707 et le 11 juin 1709, pour des raisons particulières qui n'apparaissent pas, les Intendants Raudot, père et fils, ordonnent aux habitants de Boucherville de clore la commune vis-à-vis la terre d'Adrien Lamoureux, (3) Le 3 juin, 1714, le seigneur des îles Bouchard, dans le voisinage des îles de Berthier, fait à ses censitaires l'offre d'une commune "à la condition que les dits habitants feront enclore de pieux la dite commune," offre qui fut refusée, parce qu'ils ne pourraient la faire assez forte pour résister aux glaces et aux grandes eaux qui emporteraient la dite clôture, ce qui obligerait les dits habitants à faire une dépense considérable tous les ans pour l'entretenir, (4). Le 14 mars 1735, l'intendant Hocquart, dans le but de défricher et améliorer la commune des Trois-Rivières ordonne à tous les habitants de la ville de faire "une clôture solide et à l'épreuve des bestiaux, autour de la dite commune (5)." Toutes ces exceptions établissent

(1) 2 Ed. & Ord. 50.
(2) 2 Ed. & Ord. 270.
(3) 3 Ed. & Ord. 255.
(4) 2 Ed. & Ord. 437.
(5) 3 Ed. & Ord. 465.

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la règle. Il n'y avait pas en effet de loi générale obligeant à clôturer les communes, tandis qu'il en existait plusieurs au sujet des habitations et même des terres non concédées et domaines seigneuriaux.

A l'égard de la commune de Berthier, on trouve plusieurs jugements et une ordonnance de l'intendant pour en assurer la paisible jouissance aux habitants de Berthier, sans faire de clôture. Dès l'origine, cette commune donna lieu à des troubles et des querelles nombreuses, même des voies de fait, entre les habitants de Berthier et ceux des îles voisines. Le 21 juin 1707, l'intendant Jacques Raudot, rend un premier jugement en forme de règlement, qui, sur les contestations mues entre les habitants de Berthier et ceux de l'Isle-au-Castor et le seigneur de Berthier, au sujet des communes de Berthier et de l'Isle-au-Castor, ordonne que le dit seigneur rentrera en possession d'icelles, pour en disposer comme bon lui semblera, " à la charge par les dits habitants de faire garder leurs bêtes dans leurs habitations, et de cinq livres d'amende *contre ceux qui les laisseront aller dans les dites communes* (1)."

Le 1er juillet de la même année, intervient un autre arrêt qui ordonne " que le dit sieur Berthier ou son procureur, sera tenu de clore ou faire clore les habitations par lui concédées dans l'Isle-au-Castor, *en sorte que les habitans de Berthier puissent jouir de leur commune*, et, jusqu'à ce sursis au payement de ce qu'ils lui doivent pour le droit de commune (2)."

Enfin, le 20 juin 1708, Jacques Raudot, après enquête faite sur les lieux par Denis Raudot, son conjoint, rendit une ordonnance qui ordonne aux habitans de l'Isle-au-Castor de faire une clôture solide en travers de l'isle, moyennant quoi, ils seront déchargés de la rente qu'ils s'étaient obligés de payer par leurs contrats de concession pour la Commune : "Ordonnons," y est-il déclaré,

(1) 3 Ed. & Ord. 131. (2) 3 Ed. et Ord. 134.

"que le sieur Berthier sera tenu de faire clore les habitations par lui concédées dans l'Isle-au-Castor, *en sorte que les habitans de Berthier puissent jouir de leur commune*, et que jusqu'à ce, sursis au payement des rentes qu'ils doivent pour le droit d'icelle (1)."

Tous ces faits et règlements se trouvent aux *Edits et Ordonnances*, et il ne faut pas oublier qu'ils sont authentiques "et font preuve de leur contenu," comme les Statuts de la province de Québec. C. C. art. 1207.

Par ces règlements, qui font loi jusqu'à ce qu'ils soient abrogés, l'intendant introduisait dans les îles de Berthier pour la protection de la Commune des habitants de Berthier, la règle qu'il avait établie dans les Côtes pour la protection des grains et récoltes. Il ne peut y avoir de doute que cette commune est celle de l'île Randin, puisqu'elle est mentionnée dans l'ordonnance même (2). Il est vrai que l'île du Milieu n'y figure pas, pour la bonne raison qu'elle n'avait pas été concédée et qu'elle ne pouvait l'être avant longtemps, à cause de sa proximité avec l'île Randin et des dépenses considérables que la construction et l'entretien d'une clôture de front entraîneraient. Ce ne fût qu'en 1768 que le seigneur put trouver un acquéreur, et pour l'y décider, il lui fallut se départir des règles ordinaires.

Lorsque le seigneur Cuthbert a accordé le titre de concession à Macaulay, il ne l'a pas assujetti à la rigueur des concessions seigneuriales ; il ne l'a pas soumis à la nécessité de tenir feu et lieu, ou de faire des défrichements, ou de moudre au moulin banal ou de fournir la journée de corvée ; il n'a pas exigé de lui une clôture le long ou sur le front de son île pour protéger la Commune de Berthier. Cependant, il ne pouvait laisser ses censitaires communistes à la merci du propriétaire de l'île du Milieu. Les sorties des animaux qui y pacageaient chaque été seront inévitables et elles cause-

(1) 3 Ed. et Ord. 143. (2) 3 Ed. et Ord. 144.

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ront indubitablement des dommages aux grains de l'île du Milieu, lorsqu'elle sera mise en valeur, ce qui devra avoir lieu dans un avenir plus ou moins rapproché. Il ne pouvait songer à clôturer, ou faire clôturer par les Communistes, l'île de la Commune de quatre à cinq milles de tour; d'ailleurs, les règlements de l'intendant leur assuraient la jouissance de cette commune sans aucune clôture. Dans ces circonstances difficiles, le seigneur et le concessionnaire adoptèrent ce qu'ils considérèrent un accommodement. Le concessionnaire sera obligé de souffrir les animaux de la Commune, mais il ne sera pas tenu de faire la clôture que lorsqu'il le jugera nécessaire, c'est-à-dire, quand il aura une habitation et des grains à protéger. Il se passera probablement des années avant que cette nécessité se fasse sentir. Son censitaire nouveau, Zacharie Maccauly, selon l'orthographe française du notaire, n'est pas un colon ordinaire, ou un habitant à la recherche d'une habitation. C'est Zachary Macaulay, un personnage important de Québec au commencement du régime britannique au Canada, que Watson (2), dit être ni plus, ni moins que le père de Lord Macaulay, mais que M. Douglas Brymner, notre archiviste canadien, présente tout simplement comme un marchand de bois influent, ayant sa résidence d'abord à Québec et ensuite, vers 1776, à Machiche, qui, comme on le sait, est à quelques lieues de l'île du Milieu (1). Quoi qu'il en soit, le contrat de concession du 17 février 1768, nous l'introduit comme "marchand de Québec," et le Seigneur de Berthier avait raison de supposer que c'était moins une habitation que Maccauly cherchait, que du bois ou peut-être même une place de chasse et de pêche. En conséquence, il l'oblige à souffrir les animaux de la commune et à faire, lorsqu'il le jugera

(1) Constitutional History of Canada, p. 22.

(2) 2 Bulletin des Recherches Historiques 172.

nécessaire, une clôture à l'épreuve de ces animaux, à l'endroit qu'il jugera le plus convenable, mais évidemment sur son île ou sa grève, car Maccauly n'avait pas de titre pour la faire ailleurs. Cette concession ou plutôt cette libéralité de la part du seigneur lui causera des ennuis : la Couronne se plaindra peut-être qu'il ait concédé une terre en bois debout (1) ; il est possible encore que ses censitaires communistes, qui ont le domaine utile de la commune, protestent contre cette exemption temporaire de la clôture de front ; mais il se soumet d'avance à ces inconvénients et à ces dangers et voilà pourquoi, il stipule qu'il n'aura pas de recours contre le propriétaire de l'île du Milieu. Ses censitaires communistes ont aussi des droits ; ils seront exposés à aller chercher leurs animaux à quinze ou vingt arpents hors l'enceinte de la commune, ainsi que l'expliquent des témoins ; mais il ne peut répondre, ni stipuler pour eux.

Le propriétaire de l'île du Milieu pourra aussi souffrir quelques dommages provenant des animaux de la commune, particulièrement s'il a récolte. De là, la stipulation que le seigneur ne sera pas responsable ou garant envers le censitaire : "Sans aucun recours, ni garantie à cet égard de la part du Sieur Seigneur." Jusqu'à ce que le concessionnaire ait une habitation et des grains, la convention lui est évidemment favorable et est défavorable au seigneur et à ses communistes, excepté en ce que leur commune se trouve pratiquement agrandie. D'ailleurs, il ne sera jamais dans une position plus onéreuse que les autres habitants qui sont tenus d'avoir une clôture de front. Voilà comment je comprends l'intention des parties, le sens de la clause du contrat de concession.

Mais, dit-on, il n'y a pas de stipulation que Macaulay s'engageait pour lui et les détenteurs successifs, c'est-

(1) 1 Ed. et Ord. 531, 572, 590.

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à-dire, à perpétuité. Mais dans les circonstances, à quoi bon, une obligation personnelle, qui pourrait s'éteindre le lendemain ou dans un temps rapproché? C'était surtout contre l'avenir, contre l'époque où l'Ile du Milieu serait cultivée, que le Seigneur voulait se garder. Evidemment, l'obligation personnelle n'aurait pas atteint le but que le Seigneur et les règlements en force se proposaient et la situation des lieux garantissait, savoir, celui d'assurer la paisible jouissance de la commune de Berthier. Il convient donc d'appliquer les principes des articles 1014 et 1015 du Code Civil, aussi anciens que nos tribunaux: Art. 1014.

Lorsqu'une clause est susceptible de deux sens, on doit plutôt l'entendre dans celui avec lequel elle peut avoir quelqu'effet, que dans le sens avec lequel elle n'en pourrait avoir aucun.

Art. 1015:

Les termes susceptibles des deux sens doivent être pris dans le sens qui convient le plus à la matière du contrat.

Et comment supposer que Macaulay ne stipulait pas pour lui et tous les propriétaires subséquents? Remarquons qu'il s'agit du titre primordial de l'île du Milieu où les parties n'ont en vue que des stipulations foncières. Ce n'est pas une vente; c'est une concession seigneuriale, et en l'interprétant, il faut tenir compte de cette importante circonstance. Si dans les actes ordinaires (C.C. 1030), "lui, ses hoirs, et ayants cause" ou même "lui et les siens", en matière de servitude, signifient non seulement les descendants, mais tous les propriétaires successifs, ainsi que l'affirment Dalloz et un arrêt qu'il cite, *Bourdiaux* v. *de Castries* (1), à plus forte raison, doit-il en être ainsi dans les contrats de concession, où les parties ne voient qu'un seigneur et un censitaire. *Dorion* v. *Le Séminaire de Montréal* (2).

Macaulay accepte la concession "pour lui, ses hoirs et ayants cause", et il ajoute que c'est pour en jouir et

(1) Vol. 40, p. 262, n. 3. (2) 5 App. Cas. 362.

disposer en toute propriété "par le dit sieur preneur, ses dits hoirs et ayants cause." Il déclare bien connaître "toute l'île du Milieu......pour l'avoir vu et visité", et il connaissait pareillement l'île Randin et la Commune qui sont mentionnées à l'acte. Puis le titre ajoute que la concession est faite "à la charge de payer les cens et rentes seigneuriales, en outre à la condition qu'il fera à ses frais, s'il le juge nécessaire " etc., *lesquelles conditions ont été acceptées du dit sieur preneur.*

Ici les mots "ses hoirs et ayants cause" ne sont pas répétés. Mais ils sont sous-entendus, et d'ailleurs, le preneur avait déjà déclaré qu'il acceptait la concession pour lui, ses hoirs et ayants cause. Il ne peut y avoir de doute que les acquéreurs subséquents étaient responsables de la rente seigneuriale, malgré que l'acte ne déclare pas par qui elle sera payable, le mot "preneur", étant même omis. Il faut décider la même chose à l'égard de l'autre stipulation, bien que les parties se servent de l'expression "à condition", mais il est évident que dans leur esprit "charge" et "condition" signifiaient la même chose, car immédiatement après la mention de la rente seigneuriale et de la clôture, elles ajoutent " lesquelles conditions ont été acceptées du dit sieur preneur "D'ailleurs, aux yeux de la loi, ces expressions ont la même signification en matière de contrats de concession et de servitudes (1).

Macaulay, ses hoirs et ayants cause, c'est-à-dire, tous les propriétaires successifs de l'île du Milieu, devront exécuter la stipulation concernant la clôture et les animaux de la commune, comme ils sont tous également tenus au paiement des cens et rentes. Telle était évidemment, l'intention des parties et invariablement depuis, au moins en autant que la mémoire humaine et la tradition peuvent testifier, c'est cette intention qui a été exécutée et suivie par tous les propriétaires.

(1) 1 Domat, ed. Remy, p. 142, n. 5; Ques. Seig. vol. A. p. 70 b.

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Il est vrai que la Coutume de Paris, dit (1) :

Droit de servitude ne s'acquiert par longue jouissance quelle qu'elle soit, sans titre, encore que l'on en ait joui par cent ans ;

règle qui a été reproduite dans l'article 549 du Code Civil :

Nulle servitude ne peut s'établir sans titre ; la possession, même immémoriale, ne suffit pas à cet effet.

Mais la Coutume aussi bien que le Code ne disent pas que la possession immémoriale ne peut servir à interpréter le titre, et même le compléter. Je ne puis donc accepter la doctrine des tribunaux de première instance que la conduite des parties ne signifie rien ; elle est repoussée par tous les auteurs de la jurisprudence, tant française que canadienne. La décision de la cour d'Appel dans la cause de *Tétu* v. *Gibb* citée plus haut, est formelle. Notre propre cour vient de décider la même chose dans la cause de *La cité de Québec* v. *la Compagnie du chemin de fer du Nord* (2). Deux arrêts de la cour de Cassation, rapportés dans Dalloz (3), (*Bourdiaux* v. *de Castries*, et *Rebuffat* v. *Aubert*) sont dans le même sens. Le second, à la date du 8 novembre 1842, s'explique comme suit :

Attendu que les dispositions de l'arrêt se bornent à interpréter la convention intervenue entre les parties tant par les termes de l'acte passé entre elles que par l'exécution prolongée qu'elles lui avaient donnée et qu'en usant d'un droit qui lui appartenait incontestablement, la cour royale ne peut avoir contrevenu a aucune loi. Rejette le pourvoi contre l'arrêt de la cour d'Aix, du 29 avril 1841.

Demolombe (4), dit :

Il faut encore mettre au rang des règles les meilleures d'interprétation, quoique notre code ne la mentionne pas, celle que fournit l'exécution qui a été donnée par les parties de la clause de leur convention, dont le sens est maintenant controversé entre elles. L'exécution de la clause, c'est l'interprétation vivante et animée.

Pardessus (5) :

(1) Art. 186.
(2) 27 Can. S. C. R. 102.
(3) Vol. 40, p. 262, notes 3 and 4.
(4) Vol. 25, no. 36.
(5) Des Servitudes, p. 543.

Dans l'embarras véritable que produit la force des arguments respectifs, on peut nous le croyons, présenter un guide assuré. C'est le principe que l'exercice d'un droit, et surtout la souffrance volontaire d'une charge pendant un long temps forme une sorte de contrat, contre lequel personne n'est recevable à réclamer.

Solon (1):

Rien ne peut mieux ajouter à un titre et en former le complément, que l'existence de faits multipliés pour démontrer que les parties n'ont pu ignorer la servitude mentionnée au titre recognitif. De pareils faits joints au titre, même imparfait, suffisent pour prouver que la servitude ne s'exerce pas à titre de familiarité et de simple tolérance et lui impriment les caractères les plus favorables.

Voir aussi un arrêt de la cour de Cassation du 27 février 1882 (2).

Voyons maintenant si la loi, et c'est la principale question à mon avis, autorisait une servitude comme celle que réclame l'appelante en vertu du contrat de concession. Quelle est donc la nature de la stipulation qu'il contient? Est-ce une obligation personnelle ou une servitude réelle?

Si nous n'avions qu'à consulter le Code Civil, la réponse ne serait pas embarrassante. L'article 499 dit:

La servitude réelle est une charge imposée sur un héritage pour l'utilité d'un autre héritage appartenant à un propriétaire différent.

Pas de distinction entre l'obligation de faire et celle de souffrir ou laisser faire quelque chose. Voir *Dorion* v. *Le Séminaire de Montréal* (3). Il n'est pas nécessaire que les deux héritages soient contigüs; ils peuvent être séparés par une rivière guéable et même par un cours d'eau qu'on ne peut traverser qu'en bateau; il suffit en général qu'ils soient assez rapprochés l'un de l'autre pour que l'exercice de la servitude offre un avantage appréciable. Ces principes sont conformes au droit français ancien et au droit romain (4).

(1) Des Servitudes, p. 303.
(2) Dal. 82, 1. 415.
(3) 5 App. Cas. 367.
(4) 3 Aubry et Rau p. 63; 3 Toullier, no. 595; 5 Duranton, no. 494; 12 Demolombe, no. 692; 4 Huc, no. 260.

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Puis vient l'article 545 :

Tout propriétaire usant de ses droits et capable de disposer de ses immeubles, peut établir sur ou en faveur de ses immeubles telles servitudes que bon lui semble, pourvu qu'elles n'aient rien de contraire à l'ordre public.

Pas de distinction non plus entre la stipulation de faire et celle de souffrir et laisser faire. Enfin, l'article 553 dit :

Celui auquel est due une servitude a droit de faire tous les ouvrages nécessaires pour en user et la conserver.

Art. 554 :

Ces ouvrages sont à ses frais et non pas à ceux de propriétaire du fonds assujetti, à moins que le titre constitutif de la servitude ne dise le contraire.

Ces articles de notre code ne sont pas indiqués de droit nouveau ; et si nous n'avions qu'à les appliquer à cette cause, nous pourrions facilement décider que l'obligation de faire la clôture était une charge imposée sur l'île du Milieu au profit de l'île de la Commune.

Mais le titre que l'appelante invoque a été passé en 1768, et évidemment les droits des parties ne peuvent être déterminés par les articles du Code Civil, qui, prétend l'intimé, ont changé l'ancien droit. Il invoque le droit romain et cite plusieurs commentateurs français, entre autres Pothier, Guyot, Toullier, Mourlon, Beaudry-Lacantinerie, pour démontrer que, jusqu'à la promulgation du Code Napoléon, une servitude ne pouvait consister qu'à souffrir et laisser faire, jamais à faire quelque chose. Il a même sur ce point, la haute autorité du Conseil Privé dans la cause de *Dorion* v. *Le Séminaire de Montréal* (1).

The question in this case is, whether the obligation contained in the original deed of grant of this estate to Smith created a servitude. In considering this question, the provisions of the Civil Code of Canada which define and enumerate servitudes are to be regarded. Article 499 of that code defines generally a servitude. "A real servitude is

(1) 5 App. Cas. 367.

a charge imposed on one real estate for the benefit of another belonging to a different proprietor". The obligation to repair a road imposed on one estate for the benefit of the owners of another would, *prima facie*, seem to be a charge within the terms of this article. No doubt, by the old French law founded on the Roman law, and by the law of Canada before the code, a servitude was understood to be, that the owner of the servient tenement was only to suffer and not to do any act. It is unnecessary to cite the authorities on that subject, because the old law is clear, and may be taken to be correctly stated by Toullier (3rd volume) in Nos. 377 and 378, which are cited by Mr. Justice Bélanger in his judgment. Toullier's observations are an exposition of the maxim : *Servitutum non ea natura est ut aliquid faciat quis sed ut aliquid patiat ut aut non faciat.*

Le Conseil Privé, confirmant le jugement de la Cour d'Appel, a cependant jugé dans cette espèce que l'obligation contractée par un concessionnaire dans un contrat de concession seigneuriale, passé en 1804, de fournir, faire et entretenir, à ses propres frais, le chemin de front, qui divisait sa concession du domaine du Seigneur, était une véritable servitude réelle et non une obligation personnelle. Sir Montague Smith, en rendant le jugement, dit :

In the present case, their Lordships think that the effect of the deed is, that the estate was conveyed to Smith subject to the obligation that part of it was to be used for a road which the grantee was to make and keep in repair. The land to be so used was not excepted out of the grant to Smith, but on the contrary was granted to him as part of an entire estate, subject to the obligation that it should be used for the purpose of a road. The obligation to repair was not an independent servitude separately created, but was part of the entire servitude imposed upon the land on the grant of it. In its inception there can be no doubt that this was so, and that the obligation was for the benefit of the estate which the seminary retained, and which may be called the dominant tenement.

Peut-on signaler quelque différence entre l'obligation de faire et entretenir une clôture sur le terrain concédé et celle d'y faire et entretenir un chemin ?

Il n'y en a aucune en principe.

Il n'y a pas de doute que dans l'ancien droit qui était suivi au Canada, le seigneur pouvait insérer dans les

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actes de concession plusieurs charges et conditions que l'état d'une colonie naissante imposait ; mais qui depuis longtemps n'avaient plus leur utilité dans un pays peuplé et habité comme l'était l'ancienne France depuis des siècles. Les clauses des contrats de concession faisaient partie du droit féodal, à moins d'être contraires à l'ordre public ou à un texte formel de loi (1). C'est ainsi que longtemps avant l'arrêt de Marly de 1711 (2) les seigneurs et particulièrement celui de Berthier stipulaient invariablement que leurs concessionnaires tiendraient feu et lieu et feraient quelques arpents de défrichement dans un certain délai (3). Egalement ils pouvaient les charger des clôtures, chemins et fossés, se faire indemniser quant au passé (4) et se protéger quant à l'avenir, comme le fit le Séminaire de Montréal avec l'auteur de Dorion et le Seigneur de Berthier avec celui de Denis. Ces stipulations et autres semblables n'ont jamais été considérées comme des obligations personnelles, mais toujours comme des charges ou servitudes réelles s'attachant à chaque détenteur subséquent. La jurisprudence a même été d'interpréter les contrats de concession généralement d'une manière libérale au seigneur, et contre le censitaire, parce qu'on les considérait comme des gratuités et qu'il est contraire aux principes de droit et d'équité qu'un bienfait puisse tourner au détriment de son auteur (5). Dans l'espèce actuelle, on voudrait que le seigneur se fût chargé de faire quatre à cinq milles de clôture, tout le tour de l'île de la Commune, à des frais considérables répétés en partie annuellement, en considération des deux cents livres tournois ou $33.33 de rente annuelle. Voilà la conséquence rigoureuse d'un jugement qui libérerait le pro-

(1) Questions Seigneuriales, Vol. A. p. 53a, 65a.

(2) 1 Ed. et Ord. 324.

(3) 2 Ed. et Ord. 51 ; 3 id. 146.

(4) 2 Ed. Ord. 430.

(5) Pardessus, Des Servitudes, vol. 1er, p. 540 ; 2 Ed. et Ord. 489.

priétaire de l'île du Milieu de se clôturer. Ce résultat n'est ni raisonnable, ni équitable, pas même vraisemblable.

La jurisprudence de nos cours a admis le même principe chaque fois qu'il s'est agi d'une simple division ou d'un partage ordinaire d'immeubles entre particuliers. Je trouve pas moins de trois décisions de la Cour d'Appel, qui maintiennent que des stipulations de cette nature ont le caractère de servitudes réelles.

La première est celle de *Hamilton* v. *Wall* (1) décidée par la cour d'Appel, composée de Dorion, J.C., Monk, Ramsay, Tessier et Cross, JJ. Il est vrai que la servitude dont il s'agissait avait pris naissance sous l'empire du Code ; mais à cet égard, le Code n'a pas introduit un principe nouveau. L'ancien droit, comme l'article 499, considérait comme de l'essence de la servitude qu'elle fût une charge sur un héritage pour l'utilité d'un héritage voisin appartenant à un propriétaire différent. Hamilton, propriétaire d'un grand terrain de ville, le divise et en vend un lot à l'auteur de Wall. L'acte de vente contenait la clause suivante : "Il est expressément convenu entre les dites parties qu'il ne sera construit sur le dit terrain aucune boucherie, tannerie, manufacture, etc." Puis suivait cette clause : "Il est encore bien entendu que toute bâtisse, qu'érigera le dit acquéreur sur le dit terrain, sera en ligne avec celle du dit vendeur." Comme on le voit, l'acquéreur ne dit pas qu'il s'engage "pour lui, ses hoirs et ayants cause," ni que son engagement était une charge sur l'immeuble qu'il achetait, ou même une condition de la vente. La cour Supérieure (Papineau J.) a considéré que la servitude n'était pas suffisamment établie. En appel, ce jugement fut infirmé, Monk J., dissident. M. le juge Tessier disait :—

La question s'élève donc : est-ce là une servitude ou une simple obligation personnelle. Vide art. 414 Code Civil.

(1) 24 L. C. Jur. 49.

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Les autorités sont nombreuses sur ce point, et pour n'en citer qu'une seule, je réfère à Toullier, 3 volume, No. 588, où la question est clairement discutée.

Il est donc important de distinguer quand le droit est imposé pour un fonds ou seulement stipulé en faveur de la personne. Si la concession énonce qu'il ait été concédé pour l'utilité d'un autre fonds il ne peut y avoir de doute, quand même le droit ne serait pas qualifié de servitude. Cette qualification n'est pas nécessaire, tout service imposé sur un fonds en faveur d'un autre fonds est essentiellement une servitude. La nature d'un droit se détermine par sa qualité plutôt que par la dénomination qu'on lui a donnée.

Idem, vide No. 589.

La seconde question c'est de savoir si cette servitude est exprimée d'une manière certaine, précise et suffisante. N'est-elle pas trop vague? Je crois qu'elle est facile à comprendre ; cette stipulation est d'usage ordinaire dans les grandes villes. Si cette stipulation veut dire quelque chose, que veut-elle dire? Il faut lui donner le sens le plus raisonnable.

Le juge en chef Dorion, s'appuyant aussi sur 3 Toullier No. 588, dit :

According to the Civil Code, art. 499, "A servitude is a charge imposed upon one property for the benefit of another."

When the charge is designated in the deed as being a servitude, or when it is declared to be for the benefit of a property belonging to another, there can be no difficulty that it is a servitude.

When, however, the character of the charge is not sufficiently indicated by the deed, it must be determined by the nature of the obligation, and if, from the circumstances, the obligation appears to have been stipulated for the personal advantage of the creditor, without reference to his property, it will be considered as a personal right, and will not follow his property, although it may follow that upon which it is imposed according to the conditions of the stipulation. If, on the contrary, the charge is either necessary to the enjoyment of the property of the obligee, or confers upon it some substantial advantage sufficient to indicate that it was for the property and not for the person of the creditor that it was imposed, then it will be considered as a real servitude created on the property of the obligor in favour of that of the obligee and following the two properties in whatever hands that may pass.

Dans les deux autres causes, il s'agissait de servitudes créées avant le Code

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La première est celle de *Murray* v. *MacPherson* (1), où la cour d'Appel, composée de LaFontaine, J.C., et Aylwin, Duval et Caron JJ., jugea que l'obligation par une partie *en un partage*, de laisser un chemin sur sa portion de terre, *et d'y faire et macadamiser une voie de trente pieds de largeur*, est une servitude et charge réelle. La cour Supérieure avait décidé qu'il n'y avait pas servitude. Sur appel de ce jugement, l'appelant se fondait sur ce qu'aucune forme d'expression n'est requise pour constituer une servitude, et qu'il suffit d'une intention bien marquée de grever un fonds en faveur d'un autre. La Cour à l'unanimité accueillit ce raisonnement et infirma le jugement de la Cour Supérieure.

3. Considering that the said *acte de partage* contains a certain stipulation to the following effect, viz : "That the said James Patterson shall also be bound, and doth hereby promise, bind and oblige himself to make, at his own costs and expense, in the course of the present summer, a road.........whereof thirty feet in the centre shall be gravelled.........

4. Considering that the right settled by the parties, by and in virtue of the aforesaid stipulation, is a *droit réel*, in the nature of a *servitude* etc.

Il faut bien remarquer que la clause de l'acte de partage ne disait pas que Patterson s'obligeait "lui ses hoirs et ayants cause", ni que l'immeuble était *chargé* de ce chemin et de cet ouvrage (qui devaient être faits une fois pour toutes), ou que les parties en faisaient une condition du partage. Ajoutons que la décision dans la cause de *Murray* v. *MacPherson* (1) a reçu l'approbation du Conseil privé dans celle de *Dorion* v. *Le Séminaire de Montréal* (2).

L'autre décision, sur laquelle je désire attirer l'attention, est celle de *Mondelet* v. *Roy* (3), décidée encore par la Cour d'Appel en 1882, par Monk, Tessier, Cross et Baby JJ. La servitude en question avait été créée en 1811, dans un partage entre deux seigneurs. Les partageants s'obligeaient mutuellement "de ne bâtir aucun moulin à farine ou à scie pour leur compte particulier

(1) 5 L. C. R. 359.
(2) 5 App. Cas. 370.
(3) 4 Dor. Q. B. 7.

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à une lieu à la ronde des dits moulins à farine" etc. Pas de mention de leurs successeurs, ni des héritages servant et dominant. Mais cela résultait des circonstances et de la nature du contrat. La Cour Supérieure (Sicotte J), jugea qu'il n'y avait pas servitude, mais simplement une obligation personnelle. En appel, la cour décida, au contraire, que l'acte de partage avait créé une servitude réciproque en faveur de chaque portion de la seigneurie partagée.

Il ne me reste plus qu'à examiner la prétention de l'intimé que la servitude de se clore avait été contractée sous une condition purement facultative de la part de son auteur. Il veut appliquer l'article 1081 du code civil correspondant à l'article 1174 du Code Napoléon (qui, cependant, a omis le mot *purement*), conforme d'ailleurs au droit romain et l'ancien droit français. Tous les auteurs enseignent que l'obligation contractée sous la condition, *si voluero*, *si je le veux*, *si ça me plaît*, ou *si je le juge à propos*, n'est pas valable. Pothier, (1), pense qu'il y a une vraie obligation lorsque je promets de vous donner quelque chose, *si je le juge raisonnable*, puisque, dit-il, je suis obligé au cas que cela soit raisonnable. Demolombe, Larombière et Duranton disent que Pothier fait une fausse interprétation d'un texte d'Ulpien, sur lequel il s'appuie. Ils observent néanmoins que la condition *si cela est raisonnable*, n'est pas facultative. Larombière en dit autant de ces mots : *Si je suis content ;* mais Demolombe le critique. Duranton et Marcadé admettent l'obligation contractée en ces termes *Quand je voudrai*, *Cum voluero* en faisant la distinction du droit romain que Pothier et Delombe rejettent. Savigny est d'opinion que la convention de vendre à Paul, sous la condition *s'il le veut* dans un délai déterminé, est nulle, tandis que Ducaurroy et Ortalan sont d'avis contraire. Demolombe

(1) Obligations, n. 48.

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et Fenet concluent que l'indication d'un délai déterminé n'est pas même essentielle, tandis que Merlin—et son sentiment a été consacré par deux arrêts—enseigne tout l'opposé. Tel est l'état de la doctrine en France, qui est développée au long dans Demolombe (1); et il faut bien avouer qu'elle est loin d'être satisfaisante. Marcadé est peut-être le commentateur qui soit arrivé à la conclusion la plus juste et la plus pratique. Selon ce profond jurisconsulte (2), il faut distinguer trois classes de conditions potestatives, dont les deux premières, mais non la dernière, emportent la nullité dont parle l'article du Code.

Ce sont 1° celles dont l'objet consiste *in ipsâ voluntate*, et qui signifient nettement *si voluero*; 2° Celles qui consistent bien *in facto*, mais dans lesquelles l'accomplissement ou l'abstention, du fait dépend tellement de la fantaisie du débiteur qu'elles sont exclusives de l'existence d'un lien et équivalent au *si voluero;* 3° Enfin, celles dans lesquelles les circonstances sont telles que le débiteur ne puisse faire accomplir ou défaillir le fait qu'en s'imposant un préjudice, une gêne, qui forment pour le créancier une garantie contre le caprice de ce débiteur, ou en procurant à ce créancier un avantage qui lui offre une compensation à l'inaccomplissement de la promesse. Ces dernières seules échappent à la disposition de notre article.

L'intimé est précisément dans le cas de la troisième classe des conditions que distingue Marcadé. Ses auteurs ne pouvaient faire défaillir le fait de la clôture qu'en s'imposant non seulement une gêne, mais un véritable préjudice, celui de laisser les moissons de l'île du Milieu aux dégâts des animaux de la Commune. Ce préjudice inévitable était dès l'origine une garantie pour le seigneur contre le caprice de son censitaire. Enfin, l'avantage de laisser les animaux de la Commune errer sur l'île du Milieu, tant que la clôture ne serait pas faite, procurait aux habitants de la Commune une évidente compensation à l'inaccomplissement de la promesse.

Enfin Gilbert sur Sirey, sur l'article 1174, dit que l'obligation qui dépend non de la seule volonté du

(1) Vol. 25, no. 313, suiv. (2) Vol. 4, p. 464.

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débiteur, mais d'un fait qu'il est toujours en son pouvoir d'exécuter, est valable et il cite un grand nombre d'autorités à l'appui de cette proposition. Si nous consultons l'intention du Seigneur de Berthier et de Maccauly, il ne peut y avoir de doute que l'obligation de clore l'île du Milieu à l'épreuve des animaux de la Commune devait être exécutée, lorsqu'il y aurait une habitation et des grains à protéger. C'est ce que voulaient dire ces mots, *s'il le juge nécessaire.* Ce temps sera plus ou moins éloigné, mais lorsqu'il arrivera, le propriétaire de l'île du Milieu devra exécuter son obligation ; en attendant il devra souffrir les animaux de la Commune. Il y a simplement suspension de l'obligation par un événement qui arrivera dans le cours naturel des choses. Cette nécessité se fait sentir depuis cinquante à soixante ans et même au delà ; c'est l'intimé et ses auteurs qui en ont jugé ainsi par leurs actes, en faisant la clôture sans interruption depuis un temps immémorial, et je crois que l'intimé a mauvaise grâce aujourd'hui de venir prétendre que ce qui a été fait était purement facultatif. Il doit être tenu de clore son île et de souffrir les animaux de la Commune si sa clôture n'est pas bonne et valable.

En décidant ainsi, nous ne faisons que nous conformer aux jugements et ordonnances des intendants du pays qui enjoignent aux propriétaires d'habitations d'en clôturer la devanture et qui déclarent que les habitants de Berthier jouiront pleinement et paisiblement de leur commune, sans se clôturer. Même si le doute était permis—ce que je ne conçois pas—sur le point de savoir si le titre de concession contient une servitude conventionnelle, je crois qu'en face de ces jugements et de ces ordonnances, qui font encore la loi entre les parties, notre devoir serait de décider que la servitude de clôturer l'île du Milieu en faveur de l'île de la Commune a été établie par la loi.

Finalement, je suis d'opinion d'accorder un titre-nouvel aux termes du contrat de concession, et de l'interpréter dans le sens que je viens d'indiquer. Je serais encore d'avis de condamner l'intimé à payer à l'appelant $50 pour les dommages du passé et aux dépens devant toutes les cours.

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Appeal allowed with costs.

Solicitor for the appellants: *J. B. Brousseau.*

Solicitors for the respondent: *Robidoux & Chénevert.*

J. ALEXANDER STEVENSON, *et al.* (PETITIONERS)........................ APPELLANTS;

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AND

THE CITY OF MONTREAL.............RESPONDENT;

AND

RICHARD WHITE ....MIS-EN-CAUSE.

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

Appeal—Jurisdiction—Expropriation of lands—Assessments—Local improvements—Future rights—Title to lands and tenements—R. S. C. c. 135, *s.* 29 *(b)*; 56 *V. c.* 29, *s.* 1 *(D).*

A by-law was passsed for the widening of a portion of a street up to a certain homologated line, and for the necessary expropriations therefor. Assessments for the expropriations for certain years having been made whereby proprietors of a part of the street were relieved from contributing any proportion to the cost, thereby increasing the burden of assessment on the properties actually assessed, the owners of these properties brought an action to set aside the assessments. The Court of Queen's Bench affirmed a judgment dismissing the action. On an application for leave to appeal:

Held, that as the effect of the judgment sought to be appealed from would be to increase the burden of assessment not only for the expropriations then made, but also for expropriations which would have to be made in the future, the judgment was one from which an appeal would lie, the matter in controversy coming within the meaning of the words "and other matters or things where the rights in future might be bound," contained in subsec. (*b*) of sec. 29 Supreme and Exchequer Courts Act, as amended by 56 Vict. ch. 29, sec. 1.

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MOTION before a judge in chambers, pursuant to section 46 of "The Supreme and Exchequer Courts Act," to have the security approved on an appeal from the judgment of the Court of Queen's Bench for Lower Canada (appeal side), rendered on the 17th day of December, 1896.

A sufficient statement of the facts as shown upon the application is given in the judgment of Mr. Justice Sedgewick now reported.

Weir in support of the motion.

J. A. Ritchie, contra.

SEDGEWICK J.—The facts out of which this case arose may be briefly stated as follows:

Stanley street, in the city of Montreal, runs in a northerly and southerly direction and extends from Osborne street to the confines of Mount Royal Park, being intersected at right angles by Osborne, Dorchester, St. Catherine and Sherbrooke streets. From Sherbrooke street to its northerly limit it extends for a distance of 585 feet. Prior to the proceedings which gave rise to this action it had been determined by the corporation of the city that that portion of this street between Sherbrooke and St. Catherine streets, which was then of the width of 30 feet, should be widened to an additional width of 20 feet, or to 50 feet in all, and a by-law was passed fixing a line 20 feet back from the original line of the street, up to which the properties upon said street should be expropriated for the purpose of carrying out the intended widening of the street. Thereupon a part of the property on this homologated line between Sherbrooke and St. Catherine streets was expropriated and an assessment roll prepared by which the cost of the widening, so far as the expropriation in question was concerned, was cast

upon all the immoveable property situated, not only between St. Catherine and Sherbrooke streets, but also to the north of Sherbrooke street; in other words, the burden of the cost was distributed over the properties on Stanley street from St. Catherine street to the extreme northerly limit of Stanley street. This assessment roll was attacked by Mr. Richard White, a proprietor of an immoveable on that part of Stanley street to the north of Sherbrooke street, who claimed that his property should not be assessed for the widening of Stanley street, because the upper part of Stanley street, as that part north of Sherbrooke street may be called, was, as he alleged, a private and not a public street. This contestation proceeded to judgment, and in June, 1894, the Superior Court maintained the contentions of Mr. White, and quashed the assessment roll.

Further expropriations to carry out the proposed widening of Stanley street, between St. Catherine and Sherbrooke streets, were then proceeded with in the years 1891, 1892 and 1893, and assessment rolls were prepared by which the whole cost of these expropriations was thrown upon the proprietors on Stanley street, between St. Catherine and Sherbrooke streets, and no part of the cost upon Mr. White or other proprietors on Stanley street north of Sherbrooke street.

Thereupon Messrs. Stevenson, Greene and Graham, who seek to appeal in this case, filed petitions asking to have these various assessment rolls set aside on the ground that their assessments were considerably augmented by the improper release of the property on Stanley street north of Sherbrooke street from any portion of the assessment. Mr. White was brought into the case to defend his interests. He contended, among other things, that that part of Stanley street north of Sherbrooke street could not be subjected to

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any part of the burden of the assessment, first, because the judgment of June, 1894, was *res judicata*, and binding on the petitioners, and settled this point; and secondly, because if not now a private street, it, by agreement with the corporation, was made a public street only on condition that the properties on that part of the street should not be liable to bear any part of the cost of widening the street.

The petitioners joined issue on these pleas, and the case came before the court below for judgment, and the Superior Court held, first, that the judgment of June, 1894, in the action between Mr. White and the city of Montreal, was *res judicata*, and established the fact that the portion of the street north of Sherbrooke was a private street, and therefore not liable to assessment, and secondly, even if that point had not been settled by the judgment, the petitioners had failed to prove that the street was not a private street. This judgment was up held by the Court of Queen's Bench for Lower Canada, and from this latter judgment the petitioners now seek to appeal.

The application in the first instance came before the registrar, who decided that in view of the importance of the case, and in view of the fact, which was mentioned to him by counsel, that several of the judges of the Court of Queen's Bench for Lower Canada had decided to refuse leave to appeal to this court, he ought to refer the application to the judge on the rota, and it therefore came before me in the ordinary course, and I heard counsel for the various parties interested.

After giving the matter careful consideration, I have come to the conclusion that the security should be allowed and the parties permitted to prosecute their appeal before this court. The only question to be determined on this applicatipn is as to whether the case is one coming within section 29 (*b*) of the Supreme

and Exchequer Courts Act, which now reads as follows:

No appeal shall lie under this Act from any judgment rendered in the province of Quebec in any action, suit, cause, matter or other judicial proceeding wherein the matter in controversy does not amount to the sum or value of $2,000, unless such matter, if less than that amount—

(*b*) Relates to any fee of office, duty, rent, revenue or any sum of money payable to Her Majesty, or to any title to lands or tenements, annual rents and other matters or things where the rights in future might be bound.

And narrowing the question to be decided still further, it is, whether the appeal is one which comes within the words of this section " and other matters or things where the rights in future might be bound."

It is true that Mr. Weir, for the appellants, contended that this matter was one which " relates . . . to . . . title to lands or tenements," but I think no question of title within the meaning of this section is involved, and that the sole question is as to whether any future rights within the meaning of the last clause of the section, might be bound by this judgment.

Many cases were cited to me bearing upon the construction of this statute, but there is one which is not easily to be distinguished from the present case, *Les Ecclésiastiques de St. Sulpice* v. *The City of Montreal* (1). I do not think that any of the later cases impair the effect of this case, which, moreover, was decided before the alteration in the statute which changed the words " such like matters or things," as originally used in the section, to " other matters or things." The effect of the change has been to widen and not restrict the scope of the section. The section as it now stands has been considered in several cases, particularly *Chamberland* v. *Fortier* (2), and *O'Dell* v. *Gregory* (3). In the

(1) 16 Can. S. C. R. 399. (2) 23 Can. S. C. R. 371.
(3) 24 Can. S. C. R. 661.

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latter case the only point decided was that the statute as amended does not apply to personal rights. The rights questioned in the present case are certainly not personal rights, but, if not real rights, are at least analogous to real rights, and therefore, in my opinion, within the contemplation of the statute. The question is whether certain properties on Stanley street shall bear a greater or lesser burden of taxation, not only as the result of the expropriations which have already been made, but as the result of expropriations to be hereafter made for the purpose of carrying out the widening of Stanley street to the full width of the homologated line. This appeal will settle the liability of the properties of these petitioners, not only as regards the assessments already made, but the liability of such properties for assessments to be made in the future as the result of further expropriations upon the basis of the homologation. That further expropriations are contemplated as necessary, and will be made, and further assessments imposed similar to those in question herein, is established beyond dispute by the papers which have been put in on the application before me.

Upon consideration of all the cases bearing upon the subject, I have come to the conclusion that this appeal comes within the effect of s.s. (*b*) of s. 29, as it now stands, and that the application should be allowed. I therefore allow it with costs fixed at the sum of $25 to the appellants.

The order will go *nunc pro tunc* as of the 26th day of January last, when the application was first heard before the registrar.

Motion allowed with costs.

Solicitors for the appellants: *Weir & Hibbard.*

Solicitors for the respondent: *Roy & Ethier.*

JAMES McGOEY (PLAINTIFF)..............APPELLANT;

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AND

SARAH ELIZABETH LEAMY (DEFENDANT)....................................RESPONDENT.

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

Appeal—Action en bornage—Future rights—Title to lands—R. S. C., c. 135, s. 29 s.s. (b)—54 & 55 V. c. 25, s. 3—56 V. c. 29, s. 1.

The parties executed a deed for the purpose of settling the boundary between contiguous lands of which they were respectively proprietors, and thereby named a provincial surveyor as their referee to run the line. The line thus run being disputed, M. brought an action to have this line declared the true boundary, and to revendicate a disputed strip of land lying upon his side of the line so run by the surveyor:

Held, that under R. S. C., c. 135, s. 29, s.s. (*b*), as amended by 56 V. c. 29, s. 1, (D), an appeal would lie to the Supreme Court of Canada, first, on the ground that the question involved was one relating to a title to lands, and second, on the ground that it involved matters or things where rights in future may be bound. *Chamberland* v. *Fortier* (23 Can. S. C. R., 371), referred to and approved.

APPEAL from the decision of the Court of Queen's Bench for Lower Canada (appeal side), reversing the judgment of the Superior Court in the District of Ottawa, which maintained the plaintiff's action with costs.

The circumstances giving rise to the action were as follows: The plaintiff and defendant being owners of contiguous lands in the Township of Hull, in the County of Ottawa, between which no regular division line appears to have existed, entered into an agreement in writing before a notary public to have the line

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

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established by a provincial land surveyor therein named, and thereby bound themselves to abide by the survey and report to be made by him in conformity with such agreement as indicating the boundary line between their respective lands.

The survey was made accordingly, and a line reported as the true line of delimitation between the lands which was agreeable to the plaintiff, but the defendants refused to acquiesce in the line so determined, or to sign the *procès-verbal* of the survey, and continued to occupy a strip of land on the plaintiff's side of the line so defined, which appeared by affidavits filed to be valued at less than $2,000.

The plaintiff brought his action to have the said line declared to be the true boundary between such lands, to enjoin the defendant against trespassing beyond it, and to be declared the owner and put into possession of the disputed strip of land, and further, to have boundary marks placed, and so forth.

The Superior Court adopted the surveyor's report and granted the conclusions of the plaintiff's action. On appeal the Court of Queen's Bench reversed the judgment and held that the report and *procès-verbal* of the surveyor did not bind the parties.

Geoffrion Q.C. and *L. N. Champagne* for the respondent moved to quash the appeal for want of jurisdiction on the grounds that the matter in controversy did not amount in value to $2,000; that the action was in the nature of an action merely to establish a boundary, and did not relate to a title to lands or tenements or otherwise come within the classes of actions appealable from the courts of the Province of Quebec under the provisions of the 29th section of The Supreme and Exchequer Courts Act as amended. *Hood* v. *Sangster* (1); *Wineberg* v. *Hampson* (2); and

(1) 16 Can. S. C. R. 723. (2) 19 Can. S. C. R. 369.

The Emerald Phosphate Company v. *The Anglo-Continental Guano Works* (1); were cited in support of the motion.

Foran Q.C. *contra*. This court has frequently entertained appeals in actions *en bornage; McArthur* v. *Brown* (2); *The Bell's Asbestos Co.* v. *The Johnson's Co.* (3); *Mercier* v. *Barette* (4); *Grasett* v. *Carter* (5); Cass. Dig. 2 ed. *vo.* "*Boundary;*" and even in possessory actions (*en complainte*); *Pinsonnault* v. *Hébert* (6); *Chamberland* v. *Fortier* (7).

This action affects a title to lands, and by the decision rights in future may be bound within the meaning of the statute as amended. Actions *enbornage* may, and this action does, seek the revendication of lands; 6 Laurent, no. 167. It is a mixed action; Nouveau Denizart, Vo. "*Bornage;*" and the obligation to set boundaries strongly savours of the realty; 1 Mourlon, Code Civil, p. 835; 7 Laurent, no. 428; 8 Poullain du Parc, p. 12. We claim that the notarial agreement is to be read as including the surveyor's report, thus constituting a conveyance and part of a chain of title to the disputed strip of land. See 2 Aubry and Rau, section 199. We are a step in advance of the action under art. 971 C. C. P., and actually demand a declaration of our title, as well as to have boundary marks placed and fences constructed with the object of preventing *troubles* in the future. The judgment under appeal destroys our title and bars further action on our part. *Hood* v. *Sangster* (8) only affected personal rights of a value under $2,000, whilst in *The Emerald Phosphate Company* v. *The Anglo-Continental Guano Company* (1) no boundary line had been run and no real right to specific lands was affected.

(1) 21 Can. S. C. R. 422.
(2) 17 Can. S. C. R. 61.
(3) 23 Can. S. C. R. 225.
(4) 25 Can. S. C. R. 94.
(5) 10 Can. S. C. R. 105.
(6) 13 Can. S. C. R. 450.
(7) 23 Can. S. C. R. 371.
(8) 16 Can. S. C. R. 723.

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McGOEY v. LEAMY.

The Chief Justice.

The judgment of the court was delivered by

THE CHIEF JUSTICE (*oral*).—The Supreme and Exchequer Courts Act, as amended by the statutes of 1891 and 1893, extends the jurisdiction of this court to controversies involving questions of "title to lands or tenements, annual rents, or other matters or things where rights in future may be bound," and it seems clear that this case comes within these provisions on two points.

First, the question is one which relates to a title to lands.

If the parties had agreed to the line in the first instance between themselves the plaintiff would have been entitled to a piece of land in possession of the defendant.

It appears that the parties executed a notarial deed for the purpose of settling the boundary between contiguous lands of which they were respectively proprietors, and thereby constituted a provincial land surveyor, therein named, their referee to run the line, and it is upon his report made in conformity with the agreement that the action is based. So far as the present motion is concerned the deed must be regarded as if it had in fact contained the report of the surveyor as subsequently made, and thus read it constitutes a title to lands and tenements.

The case of *Wineberg* v. *Hampson* (1) referred to on the motion depended on the jurisdiction as settled by the statute before the amendments mentioned, and is referred to and distinguished in *Chamberland* v. *Fortier* (2), as having been overruled by the amending Acts. This latter case determined that the court has jurisdiction in cases of servitude, and it must be followed in cases like the present.

(1) 19 Can. S. C. R. 369.

(2) 23 Can. S. C. R. 371.

On the other point, although the action is not actually in the form of an action *en bornage*, the plaintiff seeks such relief as is usually granted in such cases, which is in effect to have the boundaries established for the purpose of quieting the titles to the contiguous lands, and under the present practice the form of action is immaterial. In such a case the rights in future of the parties would certainly be bound by the judgment. Therefore, on this ground also the court has jurisdiction to hear the appeal. The motion must therefore be refused with costs.

Motion refused with costs.

Solicitor for the appellant: *T. P. Foran.*

Solicitors for the respondent: *Rochon & Champagne.*

DEMERS v. THE BANK OF MONTREAL.

1897
*Feb. 26.

Appeal—Interlocutory order—Trial by jury—Final judgment—R. S. C. c. 135, s. 24—Arts. 348-350. C. C. P.

APPEAL from a decision of the Court of Queen's Bench for Lower Canada (1) affirming the judgment of the Superior Court by which the application of the defendant to have the issues in the cause tried by a jury under arts. 348-350, C. C. P., was refused on the ground that the action was not founded on a debt, promise or agreement of a mercantile nature.

A motion was made by the respondent (plaintiff), to quash the appeal taken by the defendant, on the ground that the judgment appealed from was rendered upon a proceeding which was interlocutory only and was not a final judgment within the meaning of "The Supreme and Exchequer Courts Act."

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

(1) Q. R. 5 Q. B. 535.

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The Supreme Court of Canada, after hearing counsel for and against the motion, quashed the appeal with costs on the ground that the decision appealed from was an interlocutory judgment only from which no appeal could lie under the provisions of R. S. C. c. 135 and amending acts.

Appeal quashed with costs.

Fitzpatrick Q.C. and *Ferguson* Q.C. for the motion.

Lane contra.

1897
*Mar. 10.

THE CANADIAN COLOURED COTTON MILLS (DEFENDANTS)........... APPELLANTS;

AND

ELIZABETH TALBOT (PLAINTIFF)......RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Negligence—Defective machinery—Evidence for jury.

T. was employed as a weaver in a cotton mill and was injured, while assisting a less experienced hand, by the shuttle flying out of the loom at which the latter worked, and striking her on the head. The mill contained some 400 looms, and for every forty-six there was a man, called the "loom fixer," whose duty it was to keep them in proper repair. The evidence showed that the accident was caused by a bolt breaking by the shuttle coming in contact with it, and as this bolt served as a guard to the shuttle the latter could not remain in the loom. The jury found that the breaking of the bolt caused the accident, and that the "loom fixer" was guilty of negligence in not having examined it within a reasonable time before it broke. T. obtained a verdict, which was affirmed by the Court of Appeal.

Held, Gwynne J. dissenting, that the "loom fixer" had not performed his duty properly; that the evidence as to negligence could not have been withdrawn from the jury; and that, as there was evidence to justify their finding, the verdict should stand.

Per Gwynne J., that the finding of the jury that the negligence consisted in the omission to examine the bolt was not satisfactory, as there was nothing to show that such examination could have prevented the accident, and there should be a new trial.

APPEAL from a decision of the Court of Appeal for Ontario, sustaining the verdict for the plaintiff at the trial.

The facts of the case are set out in the above head-note.

Martin Q.C. for the appellants.

Tate for the respondent was stopped by the court.

The judgment of the majority of the court was delivered by:

THE CHIEF JUSTICE (*oral*).—The injury to the plaintiff was due to the breaking of the bolt, and the only question is whether or not there is proof of negligence on the part of the servants of the company sufficient to justify the verdict.

I quite agree with the ruling of the court below that the plaintiff had no cause of action at common law, but I think she was entitled to recover under the Act of 1892.

Mr. Justice Osler was of opinion that the case could not have been withdrawn from the jury, and refers especially to the evidence of Bradley, whose duty it was to look after the looms. This witness states that although notified that something was wrong with the loom at which the accident occurred he did not examine it. I entirely agree with the view taken by Mr. Justice Osler that there was evidence for the consideration of the jury, and further, that there is no ground for a new trial.

The appeal is dismissed with costs.

GWYNNE J.—I am of opinion that the appeal should be allowed and a new trial ordered. The answers of the jury to the questions submitted to them are not sufficient to maintain the plaintiff's action; that action

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can only be sustained by proof that the loom out of which the shuttle proceeded which caused injury to the plaintiff was defective in some particular which could and should have been discovered by the defendant or his servants, and repaired so as to prevent the occurrence of the accident by which the plaintiff was injured, but the jury have not found that there was any defect in the loom, or if any, in what it consisted, so that it has not been proved whether it was of such a nature that the non discovery of it by the defendants or their servants in charge of the factory, and the non repair of the defect, constituted negligence for which the defendants are responsible. For this reason I am of opinion that there should be a new trial.

Appeal dismissed with costs.

Solicitors for the appellants: *Martin & Martin.*

Solicitors for the respondent: *Carscallen & Cahill.*

1897
*Feb. 16.
*Mar. 24.

CONTROVERTED ELECTION FOR THE ELECTORAL DISTRICT OF THE CITY OF WINNIPEG.

HUGH JOHN MACDONALD (RESPONDENT)........................ APPELLANT;

AND

OWEN DAVIS AND KENNETH SUTHERLAND (PETITIONERS).... RESPONDENTS.

ON APPEAL FROM THE DECISION OF MR. JUSTICE DUBUC.

CONTROVERTED ELECTION FOR THE ELECTORAL DISTRICT OF MACDONALD.

1897
*Feb. 17.
*Mar. 24.

NATHANIEL BOYD (RESPONDENT).......APPELLANT;

AND

EDWY WILLIAM SNIDER (PETITIONER)................................ RESPONDENT.

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

Election petition — Service — Copy — Status of petitioner — Preliminary objection.

On the hearing of preliminary objections to an election petition to prove the status of the petitioner a list of voters was offered with a certificate of the Clerk of the Crown in Chancery which, after stating that said list was a true copy of that finally revised for the district, proceeded as follows: "And is also a true copy of a list of voters which was used at said polling division at and in relation to an election of a member of the House of Commons of Canada for the said electoral district * * which original list of voters was returned to me by the returning officer for said

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

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electoral district in the same plight and condition as it now appers, and said original list of voters is now on record in my office."

Held, that this was, in effect, a certificate that the list offered in evidence was a true copy of a paper returned to the clerk of the Crown by the returning officer as the very list used by the deputy returning officer at the polling district in question, and that such list remained of record in possession of said clerk. It was then a sufficient certificate of the paper offered being a true copy of the list actually used at the election. *Richelieu Election Case* (21 Can. S. C. R. 168) followed.

APPEAL from decisions of Mr. Justice Dubuc in the Winnipeg case, and the Court of Queen's Bench in the Macdonald case, overruling preliminary objections to the petitions filed against the return of the respective appellants.

The appeal was limited in each of these cases to two grounds. 1. That the petitions were not properly served. 2. That the status of the petitioners was not proved. The first ground was not strongly pressed on the argument, and is not dealt with by the judgment of the court on this appeal.

The evidence offered in each case to prove status was a copy of a list of voters containing the name of the petitioner, to which was annexed a certificate of the Clerk of the Crown in Chancery. In the Winnipeg case the certificate was as follows:

I, Samuel E. St. O. Chapleau, the undersigned Clerk of the Crown in Chancery for Canada, do hereby certify that the foregoing list is a true copy of the list of voters of polling division number seven in the electoral district of the city of Winnipeg, Man., which remains of record in my office, and is also a true copy of the list of voters which was used at said polling division, at and in relation to an election of a member to the House of Commons of Canada, for the said electoral district, holden on the sixteenth and twenty-third days of June, A.D. 1896, held pursuant to a writ of election issued therefor and dated the twenty-fourth day of April, A.D. 1896, which original list of voters was returned to me by the returning officer for said electoral district

in the same plight and condition as it now appears, and said original list of voters is now on record in my office.

Dated at Ottawa, this twenty-second day of August, A.D. 1896.

[Sgd.] SAMUEL E. ST. O. CHAPLEAU,
C.C.C.C.

{ C.C.C.C. Seal. }

The following was the certificate in the Macdonald case:

I, Samuel E. St. O. Chapleau, the undersigned Clerk of the Crown in Chancery for Canada, do hereby certify that the foregoing list, consisting of two pages, and containing 231 names, is a true copy of the list of voters for polling district number thirteen, in the electoral district of Macdonald as finally revised for the year 1894, under "The Electoral Franchise Act," and as used at and in relation to an election of a member of the House of Commons of Canada for the said electoral district, holden in the sixteenth and twenty-third days of June, 1896, held pursuant to writ of election issued therefor and dated the twenty-fourth day of April, A.D. 1896, which original list of voters was returned to me by the returning officer for said electoral district in the same plight and condition as it now appears, and said original list of voters is now on record in my office.

Dated at Otttawa, this 8th day of August, A.D. 1896.

[Sgd.] SAMUEL E. ST. O. CHAPLEAU,
C.C.C.C.

{ C.C.C.C. Seal. }

It was contended that these certificates were not sufficient; that the *Richelieu Election Case* (1) decided that it was necessary to prove that the petitioner's name was on the list actually used at the election, and the Clerk of the Crown in Chancery could not certify to a copy of the list so used, as he could have no knowledge, except by information from others, that it was such a copy. The objections were dismissed by the court below in both cases.

Stewart Tupper Q.C. for the appellants. The petitioner must prove his status. *Stanstead Election Case* (2); *Bellechasse Election Case* (3).

(1) 21 Can. S. C. R. 168. (2) 20 Can. S. C. R. 12.
(3) 20 Can. S. C. R. 181.

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The certificates of the Clerk of the Crown in Chancery are worthless as he professes to certify to a fact of which he can have no knowledge. See *Richelieu Election Case* (1).

Howell Q.C. and *Chrysler* Q.C. for the respondents. Petitioners having voted in *primâ facie* evidence of status. *Rex.* v. *Gordon* (2). *In re Stormont* (3).

The appellants have not made out the strong case required on preliminary objections. *Shelburne Election Case* (4).

The judgment of the court was delivered by:

GWYNNE J.—The grounds of appeal in these cases are identical. By the 21st section of the Electoral Franchise Act, 49 Vict. ch. 5, as amended by 53 Vict. ch. 8, it is enacted that after the lists for the several polling districts have been finally revised the revising officer shall prepare the final list of voters in the form prescribed in the Act and shall certify the *original* list as corrected and so finally settled in the form E set out in the schedule to the Act. Then in subsection 3 it is enacted that *copies in duplicate* of such revised lists shall be prepared by the revising officer *who shall retain one copy and forward the other* by registered letter, to the Clerk of the Crown in Chancery at Ottawa. Then by subsection 7 it is enacted that the Clerk of the Crown in Chancery as such *lists* are received by him shall cause them to be printed by the Queen's Printer, and after the verification of the printed copy by the revising officer who has prepared such list he shall transmit a sufficient number of such printed copies to such revising officer. It is thus apparent that the duplicate copies of such finally revised list of which one is retained by the revising

(1) 21 Can. S. C. R. 168.
(2) Leach C. C. 515.
(3) Hodgins Elec. Cas. 21.
(4) 14 Can. S. C. R. 258.

officer in each district, and the other transmitted by him to the Clerk of the Crown in Chancery, are duplicate originals of the finally revised lists in the several electoral divisions. So likewise the printed copy first prepared by the Queen's Printer from the list furnished to him by the Clerk of the Crown in Chancery *after verification* by the revising officer who prepared the list as required by subsection 7 may also be said to be a duplicate original of the list as finally revised. It is in this view as it appears to me that the 32nd section of the said Electoral Franchise Act as amended by the said Act 53 Vict. ch. 8, enacts that the revising officer, the Clerk of the Crown in Chancery and the Queen's Printer shall supply certified copies of the *said lists finally printed and verified as hereinbefore provided* to any person applying for the same and paying therefore, &c., &c.

2. Every copy of a list of voters supplied by the revising officer, the Clerk of the Crown in Chancery, or the Queen's Printer, and certified by any one of such officers as correct *in the form E* in the schedule to the Act shall be deemed to be an authentic copy of such list.

Now the form E is that prescribed for the certificate to be attached by the revising officer to the finally revised lists, duplicate originals of which he is, as above shown, required to prepare and to transmit one to the Clerk of the Crown in Chancery, and is as follows:

"I, ——, the undersigned revising officer for the electoral district of do hereby certify that the foregoing list is a *true copy* of the *list* of voters for polling district number , in the said electoral district as finally revised (or, as finally revised and corrected on appeal as the case may be) for the year under the Electoral Franchise Act." Now

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it appears to me, I confess, to be free from doubt that the only document in the Queen's Printer's possession which would enable him to give a certificate in the above form is the copy printed by him from the list furnished to him by the Clerk of the Crown in Chancery, after verification thereof by the revising officer who had prepared the list as required by the above subsection 7 of section 21, and that therefore *such verified* printed copy may, as I have said, be well regarded also as a duplicate original of the list as finally revised, with which, upon the copy proposed to be certified by the Queen's Printer being compared he may give a certificate in the form prescribed, and that such certificate shall be sufficient evidence that the copy so certified is *an authentic copy* of the list as finally revised and of which it is certified to be a copy, so the Clerk of the Crown in Chancery can only certify a copy presented to him for his certificate in the form prescribed upon comparing it with the duplicate original of the list as finally revised transmitted to him by the revising officer under the subsection 3 of the above 21st section, or possibly he might consider himself to be justified in giving his certificate upon satisfying himself that the list presented to him for his certificate was one of the copies printed by the Queen's Printer *from the printed copy verified* by the revising officer and furnished to the Queen's Printer. But this 32nd section does not appear to contemplate giving the character of authenticity in evidence to any document that is not certified (by whomsoever it may be certified whether by the revising officer, the Clerk of the Crown or the Queen's Printer) to be a true copy of the list as finally revised by the revising officer of the electoral district under consideration, that section does not give authenticity or validity to any other certificate.

Then by the Dominion Elections Act 49 Vic. ch. 8, sec. 13, it is enacted that the returning officer for each electoral district shall forthwith upon the receipt of a writ of election, obtain from the revising officer of the electoral district for which he is returning officer, at least one *copy* of the *list* of voters as finally revised and certified by the revising officer and then in force for each of the polling districts in such electoral district, &c., &c.

Then by section 30, subsection *b*, it is enacted that on a poll being granted the returning officer shall furnish each deputy returning officer with *a copy* of the *list* of voters in the polling district for which he is appointed, each *copy* being first certified *by himself or* by the revising officer for the electoral district in which such polling district is situate.

Then by section 41 it is enacted that subject to the provisions thereinafter contained all persons whose names are registered on *the list* of voters, for polling districts in any electoral district, *in force under the provisions of the Electoral Franchise Act* on the day of the polling at any election for such electoral district, *shall be entitled to vote* at any such election, and no other person shall be entitled to vote thereat. Then in section 42 is inserted an enumeration of the persons who although registered as voters on the *list* as finally revised by the revising officer under the Electoral Franchise Act are by section 41 disqualified and rendered incompetent to vote, namely, judges, revising officers, returning officers and others. The persons here named are the only persons deprived of the qualification to vote conferred upon them by their names being registered on *the lists* as *finally* revised by the revising officers.

The Acts of the legislature, always dealing as they do with the list of voters actually used by a deputy

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returning officer at an election as a *copy* of the original list *as finally* revised by the revising officers, there is nothing in the Acts providing for the possible but unlikely occurrence of an error or errors in the *copy* furnished to the deputy returning officers by reason of the names of one or more voters which are registered upon the *finally* revised list as voters being by mistake omitted in the copy furnished to a deputy returning officer. Such an omission could only take place by error, and although by the provisions of the Act as to the deputy returning officer furnishing ballot papers to all persons coming forward to vote, the deputy returning officer by reason of such name or names being so by error omitted from the copy of the list furnished to him might refuse to give to such party or parties, ballot papers, and so they might be unable to have their votes recorded, yet in such a case it would be more proper to say that those persons were by such neglect and error of some person deprived of the power to exercise their absolute inextinguishable right to vote by reason of their being registered on the list as finally revised under the provisions of the Dominion Franchise Act. They cannot with any propriety be said to be disfranchised or at all disqualified and deprived of their right to file a petition to set aside an election under 49 Vict. ch. 9, sec. 5. Their status as petitioner in such a petition would, in my judgment, be unaffected by such an error. But for the judgment of this court in the *Richelieu Case* (1) I should have no doubt that upon an issue calling in question the status and qualification of the petitioner in an election petition a copy of the finally revised list in force under the Electoral Franchise Act certified by the revising officer or by the Clerk of the Crown in Chancery to be a true copy of such finally revised list upon which the

(1) 21 Can. S. C. R. 168.

name of the petitioner appeared to be registered as a qualified voter, was conclusive evidence of his status and qualification to file the petition. This court, however, in that case decided otherwise, and held that such a certified copy was of no use whatever, and that the only certificate which would be of any use was a certified copy of the copy actually used by the deputy returning officer at the election under consideration, which certificate the court held could be given by the Clerk of the Crown in Chancery. In the present cases the petitioners respectively produced copies of a list of voters whereon their names respectively appeared. That in the Winnipeg case was intituled and headed: "List of voters, 1894, for the polling district no. 7, in the city of Winnipeg, in the electoral district of Winnipeg," that being the polling district under consideration in that case. At the foot of this list is a certificate purporting to be a copy of a certificate of the revising officer of that electoral district in the words following:

I, David M. Walker, the undersigned revising officer for the electoral district of Winnipeg, do hereby certify that the foregoing list consisting of three pages, and containing 507 names, is a true copy of the list of voters for polling district number seven, in the electoral district of Winnipeg, as finally revised for the year 1894, under the Electoral Franchise Act.

Dated at Winnipeg, 20th March, 1896.

(Sgd.) D. M. WALKER.

Immediately under this is a certificate signed by the Clerk of the Crown in Chancery, in the words following:

I, Samuel E. St. O. Chapleau, the undersigned Clerk of the Crown in Chancery for Canada, do hereby certify that the foregoing list is a true copy of the list of voters of polling division number seven in the electoral district of the city of Winnipeg, Man., *which remains of record in my office*, and is *also* a true copy of *the list* of voters which was used at said polling division at and in relation to an election of a member of the House of Commons of Canada for the

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said electoral district holden on the sixteenth and twenty-third days of June, A.D. 1896, held pursuant to a writ of election issued therefor, and dated the twenty-fourth day of April, A.D. 1896, *which original list* of voters was returned to me by the returning officer for said electoral district in the same plight and condition as it now appears, and said original list of voters is now on record in my office.

Dated at Ottawa, this twenty-second day of August, A.D. 1896.

SAMUEL E. ST. O. CHAPLEAU,
C.C.C.C.

The list of voters produced in the Macdonald case was intituled and headed: "List of voters, 1894, for polling district no. 13 of Portage la Prairie, East Centre, in the electoral district of Macdonald," (that being the polling district under consideration in that case). At the foot of this list is a certificate signed by the Clerk of the Crown in Chancery in the words following:

I, Samuel E. St. O. Chapleau, the undersigned Clerk of the Crown in Chancery for Canada, do hereby certify that the foregoing list consisting of two pages and containing 231 names, is a true copy of the list of voters for polling district number thirteen in the electoral district of Macdonald, as finally revised for the year 1894, under the Electoral Franchise Act, and as used at and in relation to an election for a member of the House of Commons, holden on the sixteenth and twenty-third days of June, 1896, held pursuant to writ of election issued therefor and dated the twenty-fourth day of April, A.D. 1896, which original list of voters was returned to me by the returning officer for said electoral district in the same plight and condition as it now appears and said original list of voters is now on record in my office.

Dated at Ottawa this 8th day of August, A.D. 1896.

SAMUEL E. ST. O. CHAPLEAU.

These certificates appear to have been framed in the above form under the erroneous impression that the decision of this court in the Richelieu case was that certified copies both of the list as finally revised by the revising officer and in force under the Electoral Franchise Act, and of the copy which was actually used by the deputy returning officer at an election

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brought into contestation by an election petition, must be produced in support of the status and qualification of the petitioner, and the learned counsel for the appellants in his argument before us contended that the certificates of the Clerk of the Crown in Chancery produced in these cases were defective in both characters, that is to say both as certificates that the copies produced were respectively true copies of the lists as finally revised by the revising officer under the Electoral Franchise Act as the lists applicable to the elections under consideration, and also as certificates that the copies produced are respectively true copies of the lists or copies of lists which were actually used by each of the deputy returning officers at the polling districts under consideration. His objection to the certificates in so far as related to the question whether the list produced in the Macdonald case was a true copy of the list as finally revised by the revising officer under the Electoral Franchise Act was that it is not in the form E prescribed by the statute inasmuch as it does not state the year to which the list relates as required by the form prescribed by the statute, so as to show that it was the list in force at the election in question. This objection does not appear to be open upon the certificate in the Macdonald case which is in the form E as prescribed in the statute in so far as relates to the lists as finally revised is concerned, but as the decision in the Richelieu case is, that certified copies of the list as finally revised under the Electoral Franchise Act cannot be received at all in evidence of a petitioner's status to file an election petition when such status is called in question it is unnecessary now to deal with that part of the certificates. The learned counsel's main argument, however, was that the certificates were wholly defective in so far as they purport

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to be certificates that the copies produced are true copies of lists or rather of the copies of lists which were actually used by the deputy returning officers at the respective polling districts under consideration. His argument was that the statute cannot be construed as contemplating the Clerk of the Crown in Chancery giving a certificate of the truth of a fact of which he has not in virtue of his office or of his duties as Clerk of the Crown in Chancery any direct knowledge whatever, of which he can know nothing except by hearsay or information from others, or as giving any statutory authenticity to such certificate if inadvertently or otherwise given; that the utmost that the statute can contemplate the Clerk of the Crown in Chancery certifying so that any effect should be given to his certificate is as to copies of documents coming under the provisions of the statute into his custody and care in the character of his office as Clerk of the Crown in Chancery; that by the express terms of section 32 of the Electoral Franchise Act the only certified copy there referred to as being given authenticity to when certified by him is a copy of the lists finally printed and verified under the Electoral Franchise Act, a duplicate original of which the 21st section provides shall be furnished to him by the revising officer, and that the only other section authorizing the Clerk of the Crown in Chancery to give any certificate which shall be received in evidence at all is the 114th sec. of 49 Vic. ch. 8, which enacts that: "The Clerk of the Crown in Chancery may deliver certified copies of any *writ*, *list of voters*, poll books, returns, reports, and other documents *in his possession* relating to an election except ballot papers, and such copies so certified shall be received as *primâ facie evidence* before any election judge or court, or before any court of justice in

Canada." Now the argument of the appellant's counsel is that this section only authorizes, and cannot be construed as authorizing more, the Clerk of the Court in Chancery to certify copies of documents in his custody as such Clerk of the Crown as true copies of such documents in his possession, and that as the Clerk of the Crown has no knowledge and can have no knowledge of what list of voters was actually used by any deputy returning officer, the only certificate which he can give to which any effect is given by the 114th section must be a certificate that a paper signed by him is a true copy of a copy of a list of voters as returned to him by the returning officer as the list which was actually used by the deputy returning officer at a particular election, and which is in his possession, and such a certificate, the argument is, can only under the section be received as *primâ facie* evidence that the copy certified is a true copy of the paper returned to the Clerk of the Crown in Chancery by the returning officer as having been the one used by the deputy returning officer, and not as evidence of the fact that the paper so returned by the returning officer was in truth the list or copy which the deputy returning officer had actually used, and in support of his argument the learned counsel dwelt upon certain passages in the judgment in the Richelieu case which he relied upon as supporting his contention. The argument of the learned counsel appeared to me, I confess, a very able argument in support of a contention that, a list certified by the Clerk of the Crown in Chancery to be a true copy of the list as finally revised by the revising officer having force at a particular election, was conclusive evidence of the status and qualification of a petitioner in an election petition upon its being made to appear that the petitioner was registered upon such list as a qualified voter, and not

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disqualified by sec. 42 of 49 Vict. ch. 8, if that question had not been concluded in the negative by the Richelieu case, but while that case remains unreversed we must give effect to it. To a point urged upon behalf of the petitioners that they had respectively voted at the election, and that this fact was sufficient proof of their status as persons having a right to vote, the learned counsel for the appellants argued that such evidence was quite insufficient, and in support of his argument he relied upon certain passages in the judgment in the Richelieu case, among which was the following: "In dealing with a question of evidence, courts do not permit facts susceptible of proof to be established by mere influence from other facts from which they are not necessary consequences," and he contended that the fact of a person voting in the name of a person upon the list of voters qualified to vote at an election was no evidence presumptive or otherwise that the person so voting was the person entitled to vote in that name.

Upon the whole, I think that as the Richelieu case decides, as I understand the judgment, that the best evidence of the status of a petitioner in an election petition to file the petition is a certified copy of the copy which was actually used by the deputy returning officer at the polling division in question, and that such certificate can be given under the provisions of the statute by the Clerk of the Crown in Chancery from the papers in his possession, I think we must construe that case as holding that such a certificate as the Clerk of the Crown in Chancery can truthfully give, viz: that the copy certified by him is a true copy of a paper returned to him by the returning officer as the very list used by the deputy returning officer at the polling district in question, and that such list remains of record in possession of the Clerk of the Crown

in Chancery, is sufficient within the decision of the Richelieu case. The certificates given are, I think, to this effect, and so are admissible as *primâ facie* evidence of their truth; and construing the decision in the Richelieu case as above, I think the status of the petitioners *primâ facie* established, and that the appeals in these cases must be dismissed.

Appeals dismissed with costs.

Winnipeg Case:

Solicitors for the appellant: *Macdonald, Tupper, Phippin & Tupper.*

Solicitor for the respondents: *F. H. Howell.*

Macdonald Case:

Solicitors for the appellant: *Macdonald, Tupper, Phippin & Tupper.*

Solicitor for the respondent: *H. M. Howell.*

1897
*Feb. 16.
*Mar. 24.

CONTROVERTED ELECTION FOR THE ELECTORAL DISTRICT OF THE WEST RIDING OF ASSINIBOIA.

NICHOLAS FLOOD DAVIN, (RESPONDENT) .... APPELLANT;

AND

JOHN McDOUGALL, (PETITIONER) .... RESPONDENT.

ON APPEAL FROM A DECISION OF MR. JUSTICE RICHARDSON.

Appeal—Election petition—Preliminary objection—Delay in filing—Objections struck out—Order in chambers—R. S. C. c. 8, s. 50.

The Supreme Court refused to entertain an appeal from the decision of a judge in chambers granting a motion to have preliminary objections to an election petition struck out for not being filed in time. Such decision was not one on preliminary objections with s. 50 of the Controverted Elections Act, and if it were no judgment on the motion could put an end to the petition.

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

1897

ASSINIBOIA ELECTION CASE.

APPEAL from a decision of Mr. Justice Richardson, in chambers, granting a motion by the petitioner to have preliminary objections to the petition struck out.

An election petition was filed against the return of the appellant in the general election for the House of Commons on June 22nd, 1896. Preliminary objections to the petition were filed with the clerk of the court on August 3rd, the fifth day after service of the petition, at 2.30 p.m. An ordinance of the North-west Territories, Judicature Ordinance no. 6 of 1893, sec. 17, subsec. 1, provides that during the summer vacation, which comprises the months of July and August, the office of the clerk shall be closed at 1 p.m.

A summons was taken out by the petitioner, returnable before Mr. Justice Richardson in chambers, calling upon the appellant to show cause why the objection should not be struck out as not having been filed within five days after service of the petition as required by sec. 12 of the Controverted Elections Act, R. S. C, ch. 9. On return of the summons the learned judge held that the five days had expired at 1 p.m. on August 3rd, and that the objections were not properly filed and that the petition was at issue. An appeal was taken to the Supreme Court from that decision.

McIntyre Q.C. for the appellant, referred on the merits to *Rolker* v. *Fuller* (1); *Bothwell Election Case* (2).

Howell Q.C. and *Chrysler* Q.C. for the respondent. The court has no jurisdiction to entertain this appeal. It is not an appeal from a decision on preliminary objections and no decision on the matter can put an end to the petition. See *Salaman* v. *Warner* (3).

McIntyre in reply cited Powell on Appellate Jurisdiction (4).

(1) 10 U. C. Q. B. 477.
(2) 9 Ont. P. R. 486.
(3) [1891] 1. Q. B. 734.
(4) Pp. 104,371.

SEDGEWICK J.—A petition in this case was duly presented under the Dominion Controverted Elections Act, and was served on the appellant on the 29th of July, 1896. Preliminary objections were presented and filed on Monday the 3rd of August following, but at half past two o'clock in the afternoon. Section 12 of the Act provides that such objections must be presented within five days after service of the petition, and the Judicature Ordinance, no. 6 of 1893, sec. 17, subsec. 1, enacts that the office of the clerk of the court shall on Saturdays and during vacation be closed at one o'clock in the afternoon.

On the 2nd of September the respondent took out a summons calling upon the appellant to show cause why the preliminary objections should not be struck out or otherwise disposed of, subsequently giving notice that on the hearing of the motion he intended to take the ground that the preliminary objections had not been filed within the five days prescribed by the Act, inasmuch as they had been filed after one o'clock on the Monday referred to. Upon the hearing of this motion—a motion to strike from the files, or otherwise dispose of the objections—the learned judge, Mr. Justice Richardson, gave judgment sustaining the contention that the respondent was too late in filing his objections, and that the petition was therefore at issue. In other words, he held that he could not hear the objections upon their merits, and up to the present time there has been no judgment passed in respect to the validity of any of them. It is from this decision that this appeal is taken, and a motion has been made before us to quash on the ground that this court has no jurisdiction to entertain it.

We are all of opinion that this motion must prevail. Section 50 of the Act is as follows:

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ASSINIBOIA ELECTION CASE.
Sedgewick J.

50. An appeal shall lie to the Supreme Court of Canada under this Act by any party to an election petition who is dissatisfied with the decision of the court or a judge:

(*a*) From the judgment, rule, order or decision of any court or judge on any preliminary objection to an election petition, the allowance of which objection has been final and conclusive, and has put an end to such petition, or which objection if it had been allowed would have been final and conclusive, and have put an end to such petition; Provided always that, unless the court or judge appealed from otherwise orders, an appeal in the last mentioned case shall not operate as a stay of proceedings, nor shall it delay the trial of the petition:

(*b*) From the judgment or decision on any question of law or of fact of the judge who has tried such petition. 38 V. c. 11 s. 48 part; 42 V. c. 39 s. 10.

It is only then in two cases that an appeal to this court is provided for, first, from the judgment on a preliminary objection, and secondly, from a judgment of the trial judges upon the trial. But it is not from a judgment upon all preliminary objections that an appeal lies. The objection must be of such a character as, if allowed, would *put an end to the petition.*

For two reasons the objection to our jurisdiction must prevail. First, the judgment appealed from was not a judgment upon a preliminary objection. It was only a judgment upon a motion to set aside a preliminary objection. As I have said, there has as yet been no judgment upon these objections. They may have been well or ill founded. There has been no decision on that, and it is only from such a decision that an appeal lies. I need not elaborate this point further, as much that the learned Chief Justice has just said in dealing with the Marquette case (1) applies equally here.

And secondly, even if this were a judgment upon a preliminary objection, it is not that kind of objection that the statute covers. The judgment upon the motion before the court below did not put an end to

(1) See next page.

the petition. Had the judgment been the other way, and he had decided that the objections were filed in time, that likewise would not have put an end to the petition.

For these reasons we think the appeal should be quashed with costs.

We deliberately refrain from expressing an opinion upon the merits of the judgment appealed from. As we have no jurisdiction the merits are not before us.

Appeal quashed with costs.

Solicitors for the appellant: *Hamilton & Jones.*

Solicitor for the respondent: *H. A. Robson.*

CONTROVERTED ELECTION FOR THE ELECTORAL DISTRICT OF MARQUETTE.

1897
*Feb. 17, 17.
*Mar 24.

WILLIAM G. KING (PETITIONER).........APPELLANT;

AND

WILLIAM J. ROCHE (RESPONDENT)......RESPONDENT.

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

Appeal—Preliminary objections—R. S. C., c. 9, ss. 12 and 50—Order dismissing petition—Affidavit of petitioner.

The appeal given to the Supreme Court of Canada by The Controverted Elections Act (R. S. C., c. 9, s. 50), from a decision on preliminary objections to an election petition can only be taken in respect to objections filed under sec. 12 of the Act.

No appeal lies from a judgment granting a motion to dismiss a petition on the ground that the affidavit of the petitioner was untrue.

APPEAL from a decision of the Court of Queen's Bench for Manitoba, reversing the judgment of a Judge

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

1897
MARQUETTE ELECTION CASE.

in Chambers, and granting a motion to dismiss the petition filed against the return of the respondent.

The petition was filed on the 29th, and served on respondent on the 31st, of July, 1896. Nothing further was done until September 30th, when the petitioner, King, was examined under section 14 of the Controverted Elections Act, and on October 3rd notice was given to petitioner of a motion to strike the petition off the files of the court on the ground that the affidavit presented with the petition was false, and not that required by the Act. It seemed that on the examination the petitioner had admitted that he had no knowledge of the truth or otherwise of the facts sworn to in his affidavit.

The motion was heard before Mr. Justice Killam, who held that the matter should have come up on preliminary objections filed within five days from the date of service of the petition, and he dismissed it. On appeal to the full court his judgment was reversed and the order to strike the petition off the files made. The petitioner then took an appeal to the Supreme Court.

Tupper Q.C. for the respondent, moved to quash the appeal as not coming within section 50 of the Act which is the only section conferring jurisdiction, citing *The Glengarry Election Case* (1); *King's Election Case* (2); *Gloucester Election Case* (3).

Howell Q.C. and *Chrysler* Q.C. for the appellant, *contra*. This was really a preliminary objection, and an order could be made under section 64 of the Act extending the time for filing. See Cunningham on Elections (4); *In re Dufferin* (5); *In re Palmer* (6).

(1) 14 Can. S. C. R. 453.
(2) 8 Can. S. C. R. 192.
(3) 8 Can. L. C. R. 204.
(4) P. 253.
(5) 4 Ont. App. R. 420.
(6) 22 Ch. D. 88.

Judgment was reserved on the motion and the hearing on the merits postponed.

The judgment of the court was delivered by:

THE CHIEF JUSTICE.—This is an appeal from an order of the Court of Queen's Bench of the Province of Manitoba, made on the 28th of December, 1896, whereby the court allowed an appeal from an order of Mr. Justice Killam, and ordered that the petition presented by the present appellant in the matter of this election, controverting the return of the respondent and also proceedings therein, be stayed. The petition was filed on the 29th of July, 1896, and was served on the respondent on the 31st of July. No preliminary objections were filed under section 12 of the Controverted Elections Act, R. S. C., ch. 9, and the petition, therefore, under section 13 of the same Act was at issue on the 6th of August. On the 30th of September, 1896, pursuant to an order made by the learned Chief Justice of Manitoba, under the provisions of section 14 of the Act, the appellant was examined before a special examiner. On the 3rd of October the respondent served on the appellant a notice of motion to "strike" the petition off the files of the court, on the ground that the affidavit presented with the petition pursuant to the requirements of section three of 54 & 55 Vict. ch. 20, "was false and was not such an affidavit as was required by the statute, and that the presentation of the petition was an abuse of the process of the court."

This motion having been heard before Mr. Justice Killam, was by him dismissed with costs, and an order to that effect dated the 20th of October was drawn up which was reversed by the order of the full court, which is the subject of this appeal.

Mr. Justice Killam held that the objection to further proceedings on the petition based on the dis-

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The Chief Justice.

closures contained in the examination of the petitioner was one which could only be taken by preliminary objections under section 12, filed within five days after the service of the petition, and could not be taken by motion. The three learned judges who heard the appeal in *banc* were of opinion that the deposition of the petitioner shewed that his affidavit accompanying the petition was untrue, and that the presentation of the petition was an abuse of the process of the court.

On the appeal coming on to be heard before this court, the learned counsel for the respondent took the preliminary objection, which was also insisted on in the respondent's factum, that this court had no jurisdiction to entertain this appeal, inasmuch as it was not authorized by section 50 of R. S. C., ch. 9.

This section 50, which exclusively confers jurisdiction on this court in the matter of election appeals, is as follows:

An appeal shall lie to the Supreme Court of Canada under this Act by any party to an election petition who is dissatisfied with the decision of the court or a judge.

(*a*) From the judgment, rule, order or decision of any court or judge on any preliminary objection to an election petition, the allowance of which objection has been final and conclusive, and has put an end to such petition, or which objection, if it had been allowed, would have been final or conclusive and have put an end to such petition. Provided always that unless the court or judge appealed from otherwise orders, an appeal in the last mentioned case shall not operate as a stay of proceedings, nor shall it delay the trial of the petition.

(*b*) From the judgment, or decision, on any question of law or of fact of the judge who has tried such petition.

Subsection (*b*) was originally introduced by the first Supreme and Exchequer Court Act, of which it formed the 48th section. In the *Charlevoix Election Case* (1), it was determined that subsection (*b*) conferred no jurisdiction on this court to entertain an appeal from the decision of the court to which the petition had

(1) 2 Can. S. C. R. 319.

been filed, or a judge, on a preliminary objection. Subsequently to this decision, subsection (*a*) was passed as an amendment or addition to the Controverted Elections Act.

The determination of the question now before us on the motion made by the respondent to quash this appeal, must therefore depend on the jurisdiction conferred on this court by subsection (*a*) of section 50.

Can we, having regard to the language of this provision, and to that of subsections 12 and 13, and to former decisions of this court, hold that the order of the Court of Queen's Bench was " a judgment, rule, order or decision " on a preliminary objection, within the meaning of subsection (*a*) ?

We are all of opinion that the "preliminary objection" referred to in this section, means a preliminary objection under section 12. The preliminary objection there defined must within five days after the service of the petition be " presented in writing," and a copy of it must be filed for the petitioner within the same limited period of five days. In the present case none of these requisites were complied with. No preliminary objections were presented in writing within the prescribed time, nor was any copy filed for the petitioner. The petition having been filed on the 29th and served on the 31st of July, it was not until the 3rd of October, some nine weeks after the service that notice of the motion to remove the petition from the files was served. In the meantime the petition was at issue under section 13, and was ripe for trial on the merits. It was therefore manifestly then too late to present preliminary objections under section 12, and the notice of the motion made before Mr. Justice Killam cannot be regarded as such a proceeding.

In the *Gloucester Case* (1) our late brother Fournier said :

(1) 8 Can. S. C. R. 204.

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MARQUETTE ELECTION CASE.

The Chief Justice.

I am also of opinion that an appeal will only lie from a decision on a preliminary objection which must be filed within the time prescribed by the statute, and if not filed within the specified time it cannot be treated as a preliminary objection.

In the same case Mr. Justice Henry said :

I think the preliminary objections referred to are those which are to be filed by the respondent. The question is whether we have jurisdiction in an appeal when those objections have not been adjudicated. Now I take it it must be limited to such preliminary objections.

In the same case I find in my reported judgment the following passage:

I think it is quite clear that under the Controverted Elections Act of 1874, and under the statute of 1879 (Supreme Court Amendment Act) we have only jurisdiction provided the preliminary objection is one of the kind which originally, and before this jurisdiction on appeal was conferred, was authorized by the statute to be filed.

In the *Quebec County Case* (1) Mr. Justice Gwynne said :

The cause and matter of the petition was at issue upon the merits at the expiration of five days from such dismissal of the preliminary objections, and no other preliminary objection in the sense in which that term is used in the statute, or so as to make any decision thereon appealable to this court, could therefore be taken.

In the same case Mr. Justice Henry (2) thus stated his view of the practice:

Preliminary objections are provided by the statute to be tried before a judge, and they are, in my opinion, such as are taken within the prescribed five days.

It therefore appears from the decisions quoted from, as well as from the plain construction of the statute, that the jurisdiction of this court (which in the case of election petitions, as in all other cases, is a limited statutory jurisdiction) is confined to appeals from the decision of the judge who tries the petition, and from the decision of the court or judge upon preliminary objections presented and filed within five days after the service of the petition, pursuant to section 12.

(1) 14 Can. S. C. R. 452. (2) P. 444.

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The Chief Justice.

It follows that in the present case we have no jurisdiction and cannot interfere with the decision appealed against.

In the Lunenburg case (1), which will be decided presently, we have come to a conclusion adverse to that of the Court of Queen's Bench of Manitoba, upon what may be called the merits of the motion to take the petition off the files, and one which also differs from that of Mr. Justice Killam, but in that case we were able to entertain the appeal, for the reason that the objection was raised in due form and within the prescribed time as a preliminary objection.

Any anomaly resulting from the different conclusions in the two cases is the necessary result of the legislation which regulates the jurisdiction of this court.

The appeal must be quashed with costs.

Appeal quashed with costs.

Solicitor for the appellant: *H. M. Howell.*

Solicitor for the respondent: *J. Stewart Tupper.*

(1) See next page.

1897
*Feb. 17.
*Mar. 24.

CONTROVERTED ELECTION FOR THE ELECTORAL DISTRICT OF THE COUNTY OF LUNENBURG.

CHARLES EDWIN KAULBACH, (RESPONDENT)........................ APPELLANT;

AND

JOHN DREW SPERRY (PETITIONER)...RESPONDENT.

ON APPEAL FROM THE DECISION OF MR. JUSTICE HENRY.

Election petition—Preliminary objections—Affidavit of petitioner—Bona fides—Examination of deponent—Form of petition—R. S. C. c. 9 —54 & 55 V. c. 20, s. 3 (D).

By 54 & 55 V. c. 20, sec. 3, amending The Controverted Elections Act (R. S. C. c. 9) an election petition must be accompanied by an affidavit of the petitioner "that he has good reason to believe and verily does believe that the several allegations contained in the said petition are true." The petitioner in this case used the exact words of the Act in his affidavit.

Held, that the respondent to the petition was not entitled on the hearing on preliminary objections to examine him as to the grounds of his belief.

Held further, that it was not necessary that the petition should be annexed to or otherwise identified by the affidavit as in case of an exhibit the references in the affidavit being sufficient to show what petition was referred to.

It is no objection to an election petition that it is too general (as by the act it may be in any prescribed form) if it follows the form that has always been in use in the Province. Moreover any inconvenience from generality may be obviated by particulars.

APPEAL from a decision of Mr. Justice Henry of the Supreme Court of Nova Scotia, dismissing preliminary objections to an election petition filed against the return of the appellant at the general election for the House of Commons on June 23rd, 1896.

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

The petition filed against the return of the respondent was accompanied by an affidavit of the petitioner, as required by the amendment to the Controverted Elections Act, 54 & 55 Vict. ch. 20, sec. 3, that he had reason to believe and did believe that the allegations in said petition were true. The respondent filed preliminary objections, among which were the following:

"3. The petition herein is not in any prescribed form and not in the form prescribed by the Dominion Controverted Elections Act or by any rules of court made under said Act.

"18. Said alleged affidavit does not in any way refer to the petition herein and it does not appear that the petition referred to in said alleged affidavit is the petition herein.

"26. The said John Drew Sperry had not at the time he swore to the said affidavit any reasonable grounds to believe and he did not believe that the material allegations in the said petition were true.

"27. The said petitioner had not any reasonable grounds to believe that the several allegations in the said petition were true and the said affidavit was irrelevant and scandalous and made without any sufficient information or reasonable grounds for belief within the meaning of the statute, and was and is an abuse of the practice and proceedings of this honourable court and an evasion of the said statute and a fraud on the court."

Counsel for the appellant wished to examine the petitioner as to his affidavit which was refused by the judge who heard the preliminary objections, all of which were dismissed, the following judgment being pronounced on objection no. 18:

"The principal contention before me was that the affidavit of the petitioner presented at the time of the

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presentation of the petition should have had the petition annexed to it and should have referred to the petition as so annexed, or should have had it identified as an exhibit and referred to it as such. The practice books and some decisions were referred to, to show that exhibits to affidavits must be verified in either of these ways.

"I am of the opinion that the practice referred to does not govern the present question. According to that practice an exhibit must be proved in a certain way. In order to be proved by an affidavit an exhibit must be so marked and so referred to as to be distinctly identified. The one must be proved, made evidence, by the other, without the aid of anything extrinsic.

"In the present case the affidavit was not used for the purpose of making the petition evidence. It was used for the purpose of complying with the statute which provided that at the time of the presentation of the petition there should be presented therewith a certain affidavit by the petitioner. The references to the petition in the affidavit are ample, if the case is not governed by the practice referred to, to show what petition is referred to. I think it is sufficient that it has been proved that the statute was complied with."

This appeal was then brought from the judgment dismissing the preliminary objections.

W. A. B. Ritchie Q.C. for the appellant referred to *Reg.* v. *Hulme* (1); *Reg.* v. *Holl* (2).

Russell Q.C. and *Congdon* for the respondent.

The judgment of the court was delivered by:

KING J.—This is an appeal from an order of Henry J., dismissing preliminary objections to an election petition.

(1) L. R. 5 Q. B. 377. (2) 7 Q. B. D. 575.

The main point in the appeal arises from the provisions of the Act 54 & 55 Vict. ch. 20, sec. 3, providing for the presentation of an affidavit at the time of the presentation of the petition, and is raised by the 26th and 27th of the preliminary objections.

26. The said John Drew Sperry had not at the time he swore to the said affidavit any reasonable grounds to believe, and he did not believe, that the material allegations in the said petition were true.

27. The said petitioner had not any reasonable grounds to believe that the several allegations in said petition were true, and the said affidavit was irrelevant and scandalous and made without any sufficient information or reasonable grounds for belief within the meaning of the statute, and was and is an abuse of the practice and proceedings of this honourable court, and an evasion of the said statute, and a fraud on the court.

The matter came on for hearing in a summary way before Mr. Justice Henry, and the following extract from the minutes of the learned judge shows what took place respecting the matter of the above recited objections:

Mr. Borden wishes to call or cross-examine petitioner as to his affidavit for the purpose of showing that there were no reasonable grounds for the allegations therein contained. I reserve my decision as to this.

At a later stage of the hearing the learned judge noted his refusal to allow the petitioner to be examined, which of course is to be taken as relating to cross-examination as well.

Subsequently judgment was delivered dealing with the remaining questions, and on the 11th December the order appealed from was made.

Section 3 of 54 & 55 Vict. ch. 20, is in amendment of the legislation relating to the qualification of petitioners, and is as follows:

Section 5 of the Dominion Controverted Elections Act is hereby amended by adding the following paragraph at the end thereof:

At the time of the presentation of the petition there shall also be presented therewith an affidavit by the petitioner that he has good

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LUNENBURG ELECTION CASE.
King J.

reason to believe and verily does believe that the several allegations contained in the said petition are true, and thereafter, should any elector be substituted for the petitioner, then, and in every such case, such elector, before being so substituted, shall make and file an affidavit to the same effect.

What was presented by the petitioner has the formal requisites and the substantial requisites of an affidavit, and no question arises as to its properly expressing the mind and intention of the deponent. What is deposed to is also in conformity with the requirements of the Act:

I have good reason to believe, and verily do believe, that the several allegations contained in the said petition are true.

What the respondent in the proceedings sought to do, according to the minutes of the learned judge, was to show by the examination or cross-examination of the petitioner that there was no reasonable grounds for the allegations; in other words, that there were no reasonable grounds for the petitioner's belief. But the Act has made the deponent the judge as to the reasonableness of the grounds of his belief, and the affidavit does not form any part of the body of proof to be passed upon by the court on the trial of the petition.

It is said that the existing belief to which he is required to depose must be an honest belief. Granted. But the question back of that is as to how the honest belief is to be proved, and whether the election court can inquire into it. The Act treats the petitioner as a person fit to form an opinion on the subject of his beliefs, and as a credible person who will declare his honest belief under oath subject to the responsibilities of such a proceeding, and adopts his act as a qualification *inter alia* for his becoming petitioner.

For wilful and corrupt swearing to what he knows to be untrue he is liable in a court of proper criminal jurisdiction, but his credibility is not to be impeached in the election court in respect of this

statutory affidavit. It may be that many vexatious and unfounded election petitions might be brought in this view of the law. This, however, presupposes a laxity of legal and moral restraint, and in any view may be for the consideration of the legislature.

Cases where the intention of the deponent is shown not to have gone with the apparent affidavit are not now in mind, but there is no suggestion of that here. For example, a petitioner might be insane, or an illiterate petitioner might make oath to a form of affidavit supposing it to be an affidavit in another proceeding. In such case there would be no real affidavit. In the circumstances of this case the proposed examination and the cross-examination seem to have been irrelevant.

Another preliminary objection was that the petition was not in proper form. The objection apparently was that it was too general. But the factum of the appellant admits that it was in a form which had been used in the province of Nova Scotia prior to the passing of the statute 54 & 55 Vict. ch. 20, the 3rd section of which requires the petition to be accompanied by an affidavit of the petitioner.

But that Act effected no change in the form of the petition, which still depends upon R. S. C. ch. 9, sec. 9, to the effect that the petition may be in any prescribed form, but if or in so far as no form is prescribed it need not be in any particular form, etc. The admission of the factum indicates that if any form was prescribed in Nova Scotia such was substantially followed. At all events no variance from prescribed form is alleged, or shown. Inconvenience from the generality of the petition is always practically obviated by the particulars.

The remaining objection raised before us is that the affidavit referred to did not sufficiently identify the

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LUNENBURG ELECTION CASE.
King J.

petition. This point has been adequately and satisfactorily dealt with by the learned judge who heard the objections and his judgment on the point is adopted.

The result is that the appeal is to be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Borden, Ritchie & Chisholm.*

Solicitor for the respondent: *Henry T. Ross.*

CONTROVERTED ELECTION FOR THE ELECTORAL DISTRICT OF BEAUHARNOIS.

JOSEPH GEDÉON HORACE BERGERON (RESPONDENT) .... APPELLANT;

AND

PAUL DESPAROIS (PETITIONER) .... RESPONDENT.

ON APPEAL FROM THE DECISION OF MR. JUSTICE BELANGER.

1897
*Feb. 17, 18.
*Mar. 24.

Election petition—Preliminary objections—Service of petition—Bailiff's return—Cross-examination—Production of copy.

A return by a bailiff that he had served an election petition by leaving true copies, "duly certified," with the sitting member is a sufficient return. It need not state by whom the copies were certified. Arts. 56 and 78, C.C.

Counsel for the person served will not be allowed to cross-examine the bailiff as to the contents of the copies served without producing them or laying a foundation for secondary evidence.

APPEAL from a decision of Mr. Justice Belanger dismissing preliminary objections to the petition against the return of the appellant at the election for the House of Commons held on June 23rd, 1896.

The objection filed was that the petition was not properly served, and on the hearing counsel for the

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

appellant was not allowed to cross-examine the bailiff as to the contents of the copy served without producing the document. The facts are fully set out in the judgment.

Foran Q.C. and *Ferguson* Q.C. for the appellant.

Choquet for the respondent.

THE CHIEF JUSTICE and SEDGEWICK and KING JJ. concurred in the judgment of Mr. Justice Girouard.

GWYNNE J.—With great deference I must say that it appears to me to be much to be regretted that this court has by its judgment in *The Montmagny Case* (1), and in other cases, held that a question as to the regularity of the service of an election petition can be raised by a preliminary objection taken under the 12th section of the Controverted Elections Act, R.S.C. ch. 9. That Act in its fifth section, which is the section authorizing an election petition to be filed and prescribing the persons by whom it may be filed, has in it this enactment:

Provided always that nothing herein contained shall prevent the sitting member from objecting under section twelve of this Act to *any further proceedings on the petition by reason of* the ineligibility or disqualification of the petitioner or from proving under section 42 that the petitioner was not duly elected.

Then the twelfth section here referred to enacts that within five days after the service of the petition and the accompanying notice the respondent may present in writing any preliminary objections or grounds of insufficiency which he has to urge *against the petition or the petitioner* or against any further proceedings thereon, and shall in such case, at the same time file a copy thereof for the petitioner, and the court or judge shall hear the parties upon such objections and grounds, and shall decide the same in a summary manner.

Then by the 50th section an appeal is given to this court from the decision of the judge upon such preliminary objections.

(1) 15 Can. S. C. R. 1.

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Gwynne J.

It has always appeared to me that to make such a point of mere practice and procedure a ground of preliminary objection under the 12th section, is to impute to the legislature an intent not warranted by the language and general purview of the Act. By so doing a totally different character is given to the irregularity, if there be irregularity, in the service of an election petition from what attaches to the like objection in the case of the service of a summons in an ordinary action. In the latter case if the objection is successful the only consequence is the setting aside of the service, the action still remains, while being entertained as a preliminary objection under the statute in the case of an election petition the consequence, as decided in *The Montmagny Case* (1), is the absolute dismissal of the petition and the utter impossibility of its being ever tried upon the merits. Now, the 11th section of the Act prescribes that the election petition shall be served as nearly as possible in the manner in which a writ of summons is served in civil matters, but the second section of the Act enacts that the several provincial courts in which election petitions may be filed, shall respectively have the same powers, jurisdiction and authority with reference to an election petition, and the proceedings thereon, as if such petition were an ordinary cause within its jurisdiction. It cannot, I think, admit of doubt that this enactment invests the provincial courts with complete jurisdiction to adjudicate upon objections calling in question the sufficiency and regularity of the service of an election petition by the mode of proceeding in use in the respective courts in the case of a like objection being taken in an ordinary action pending in such court, and to the same extent fully as in an ordinary suit, and as the judgment upon such a question

(1) 15 Can. S. C. R. 1.

in an ordinary action would not be appealable to this court I can see no reason whatever why such a point of practice in an election petition should be made appealable to this court as it has become by being filed by way of plea in the form of a preliminary objection to an election petition. In an ordinary action after a plea to the merits of the action no objection can be taken calling in question the regularity of the service of a summons, but in an election petition, although by the statute preliminary objections are only presentable after service of the election petition upon the respondent, still he is allowed to plead in writing, filed in court, such an objection, together with others which attack the substance of the petition and the status of the petitioner, and when the objections are brought down to a hearing he may abandon all objections of a substantial character and rest upon the one as to the regularity of the service, as was done in *The Montmagny Case* (1), and in the present. It is difficult, it appears to me, to support this difference in the treatment of a mere point of regularity or irregularity of the service of the document by which proceedings in court are instituted upon any sound principle. In the present case a point of practice which according to the procedure applicable to an ordinary action might have been decided in a week, has already by reason of the delay incident to the appeal given to this court taken seven months to decide. To me I must say it appears to be free from doubt that the legislature never contemplated such a result, and that what may be presented by way of preliminary objections under the Act are only matters of substance calling in question the sufficiency of the petition or the status of the petitioner which are matters of such a nature that being decided in favour of the respond-

(1) 15 Can. S. C. R. 1.

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ent pleading them rightfully put an end to all further proceedings upon the petition.

However consistently with cases decided in this court we must treat this objection as a good ground of preliminary objection.

Upon the 6th of August, 1896, the respondent in the election petition, the now appellant, filed the objection now under consideration, together with others, and at the hearing of the objections rested upon the one now under consideration alone. The objection taken is in the form following:

Fourth, that the said petition was never *regularly* served upon him, the defendant, as required by law.

Now a pleading in this form in any proceeding other than in an election petition and read according to the plain acceptation of the terms used, would be construed to be an admission of service of the petition, but calling in question the regularity of such service, and so construed the burthen of showing the irregularity relied on would be cast upon the party averring it. It is different, however, in an election petition in which case the petitioner is called upon to prove the service to have been regular. The law having been so decided the petitioner produced the return of the bailiff who served the petition which return appeared to be in the form in use in the courts of the province of Quebec in the case of an ordinary action; and the bailiff himself was called who testified that before service he had compared the copy he served on the now appellant with the original petition in the office of the prothonotary. It was objected that the bailiff did not say by whom the accuracy of the copy was certified, and questions put to him upon that point were objected to, the contention being that the defendant who had objected to the regularity of the service should first produce the paper served. Of this opinion was

the learned judge, and as the defendant did not produce that paper he dismissed the preliminary objections. In taking this course the learned judge, in my opinion, acted rightly beyond all question. The evidence of the bailiff was clearly *primâ facie* evidence of the sufficiency of the service, and thereupon it became the duty of the defendant who objected to the service upon the ground of irregularity to show the irregularity upon which he relied, and if that consisted in the absence of a proper certificate to the copy served he could only succeed by producing the copy served.

The appeal must, therefore, be dismissed with costs.

GIROUARD J.—This appeal, as limited at the hearing before us, raises only a question of service of an election petition and other usual papers attached to the same under "The Dominion Controverted Elections Act."

Section 11 of that statute says:

An election petition under this Act, and notice of the date of the presentation thereof, and a copy of the deposit receipt shall be served as nearly as possible in the manner in which a writ of summons is served in civil matters, or in such other manner as is prescribed.

There was no special order as to service in this case, and therefore we must follow the rules of practice in the province of Quebec for the service of a writ of summons in civil matters.

The election petition and other papers were served by a bailiff of the Superior Court for Lower Canada:

En laissant de vraies copies duement certifiées des documents originaux ci-dessus mentionnés, lesquels sont produits en cour, en laissant les dites pièces à lui-même, le dit Joseph Gédéon Horace Bergeron, dans la ville de Beauharnois susdite, en parlant à lui-même en personne dans la dite ville.

The appellant complains that this service was not sufficient as no duly certified copies were ever served upon him.

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By article 79 of the Code of Procedure the truth of a bailiff's return can only be contested by improbation, or *inscription en faux*, unless the court orders otherwise; but by article 159 the return of a bailiff, as regards simple service of summons or of notice, may be contested on motion, and without an *inscription en faux*, unless the court otherwise orders. This motion was duly presented to the court by the appellant, and I am willing to admit "granted," although the word *accordé* on the indorsation of it is not certified either by the judge or the prothonotary of the court, and there is nothing in the transcript of the proceedings to show that any order was passed upon the motion.

The appellant was allowed to proceed with the adduction of oral evidence. At the outset, when the bailiff was under examination, he was met by an objection made by the respondent, the nature of which will appear by the following extract from the minutes of the evidence:

> Q. La copie de la pétition d'élection avec l'affidavit y annexé, que vous dites dans votre rapport avoir laissée au défendeur le premier d'août dernier, était-elle dûment certifiée comme vraie copie?
>
> Objecté comme illégale en autant que la question tend à prouver le contenu d'un document et le certificat d'icelui par témoin et que cette preuve ne peut être faite sans la production des copies.
>
> Objection maintenue.
>
> Le défendeur excipe respectueusement de la décision de la Cour.

The question was repeated in several forms with the same objection and the same ruling of the trial judge.

In his final judgment on the preliminary objections, the learned judge (Bélanger J.), held that the return of the bailiff was sufficient.

It is contended by the appellant that the service was insufficient, and that the court having refused the question there was no evidence of service.

Article 56 of the Code of procedure says:

Service is affected by leaving with the defendant a copy of the writ of summons, and of the declaration if there is one. The copy must be certified either by the prothonotary or by the attorney for the plaintiff, or by the sheriff, when the service is to be made by him.

It is contended by the appellant that the bailiff had no authority to certify that the copies were "duly certified," and that he should have shown in his return by whom they were actually certified, either by the prothonotary, or by the attorney for the petitioner. However, article 78, which specifies what the return by a bailiff must state, merely requires that he should certify that he has served "a copy." Therefore, the respondent argues that the words "duly certified" were superfluous, and that the bailiff's return was perfect. We have no difficulty in arriving at this conclusion, especially as it was admitted by the appellant's counsel, at the hearing before us, that the bailiff's return in this case was in accordance with the usual practice prevailing in the province of Quebec. The well settled jurisprudence of this court has been not to interfere with matters of mere local practice.

It was still open to the appellant to show that the copies left with him were not "copies." He did not, however, produce the documents served upon him, and without examining as to whether oral evidence was admissible without an express order of the court permitting the same without an *inscription en faux*, and without pronouncing upon the point as to whether such order was given or not, we have come to the conclusion of the trial judge that supposing such order was given, verbal evidence could not be permitted until the documents actually served were produced. These documents are presumed to be in the possession of the appellant, and until it is established that they are either destroyed or lost, no other evidence can be allowed, especially on behalf of the party presumably

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in possession of the same. Article 1204 of the Civil Code of Quebec leaves no doubt on this point.

The proof produced must be the best of which the case in its nature is susceptible. Secondary or inferior proof cannot be received, unless it is first shown that the best or primary proof cannot be produced.

We are unanimously of opinion that the appeal should be dismissed and it is dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *J. K. Elliott.*

Solicitor for the respondent: *F. X. Choquet.*

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*Feb. 18, 19.
*Mar. 24

CONTROVERTED ELECTION FOR THE ELECTORAL DISTRICT OF WEST PRINCE (P.E.I.)

EDWARD HACKETT (RESPONDENT.)......APPELLANT;

AND

WILLIAM SHARP LARKIN (PETITIONER).... .... RESPONDENT.

ON APPEAL FROM THE DECISION OF THE CHIEF JUSTICE AND MR. JUSTICE FITZGERALD OF P. E. I.

Controverted Election — Corrupt treating—Agent of candidate—Limited agency—Trivial or un important corrupt act—54 *&* 55 *V.c.* 20, *s.* 19 (*D*) —*Benefit of.*

During an election liquor was given to an elector who at the same time was asked to vote for a particular candidate.

Held, that this was corrupt treating under section 86 of the Dominion Elections Act, R. S. C. c. 8.

If a political association is formed for a place within the electoral district, and it is not shown that there was any restriction on the members to work for their candidate within the limits of that place only, they are his agents throughout the whole district.

Though the only corrupt act proved against a sitting member was of a trivial and unimportant character, and he had at public meetings warned his supporters against the commission of illegal acts, yet as such act was committed by an agent whom he had taken with him to canvass a certain locality, and there were circumstances which should have aroused his suspicions, he should have given a like warning to this agent, and not having done so he was not entitled to the benefit of the amendment to The Controverted Elections Act in 54 & 55 V. c. 20 s. 19.

APPEAL from a decision of the Chief Justice of the Supreme Court of Prince Edward Island, and Mr. Justice Fitzgerald, unseating the appellant for corrupt treating by an agent.

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

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The petition against the return of the appellant contained a number of charges, on all of which he was acquitted except one, which was as follows:

"That William P. Callaghan, of Miminigash, farmer, an agent of the respondent, on the twenty-second day of June last, treated Patrick O'Brien, of Miminigash, in the barn on the premises of the said Patrick O'Brien, to intoxicating liquor for the purpose of corruptly influencing the vote of the said Patrick O'Brien, and in order to secure the return of the said respondent at said election. That the said respondent had a knowledge thereof, and consented and was accessory thereto, and paid, or promised to pay or repay, the said William Callaghan therefor."

The evidence in support of this charge was that appellant took Callaghan with him when he went to canvass a particular locality. They stopped at O'Brien's, and Callaghan took a bottle of whisky out of the waggon, and after going into the woods with two of the O'Briens and remaining some five minutes, he took Patrick into his barn and gave him two or three drinks out of the bottle, at the same time asking him to vote for appellant. It did not appear that the latter saw Callaghan take the bottle out of the waggon, or knew it was there.

The appellant contended that this was not a corrupt treating under the Election Act. He also claimed that the agency of Callaghan was not proved. It appeared that he was a member of the Conservative Association for DeBlois, a place within the electoral district, but it was not shown that the members of the association were restricted, in their work at the election, to the limits of DeBlois, and appellant admitted at the trial that he expected them to do all they could for him.

It was also claimed on behalf of the appellant that if the charge was proved he was entitled to the benefit

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of 54 & 55 Vict. ch. 20, sec. 19, amending the Controverted Elections Act, and providing that:

"Where, upon the trial of an election petition, the court decides that a candidate at such election was guilty, by his agent or agents, of any offence that would render his election void, and the court further finds—

"(*a*) That no corrupt practice was committed at such election by the candidate personally, and that the offences mentioned were committed contrary to the order and without the sanction or connivance of such candidate; and—

(*b*) That such candidate took all reasonable means for preventing the commission of corrupt practices at such election; and—

(*c*) That the offences mentioned were of a trivial, unimportant, and limited character; and—

(*d*) That in all other respects, so far as disclosed by the evidence, the election was free from any corrupt practice on the part of such candidate and of his agents; then the election of such candidate shall not, by reason of the offences mentioned, be void, nor shall the candidate be subject to any incapacity therefor.

The election judges decided against the appellant on all these points and gave judgment voiding the election from which judgment he brought this appeal.

McCarthy Q.C. and *Stewart* Q.C. for the appellant. In holding the act of Callaghan, under charge 8, a corrupt treating sufficient to avoid the election, the judges have strained the law beyond what has ever been done before. See *The Westbury Case* (1); *The Wallingford Case* (2); *The Montcalm Case* (3); *The South Ontario Case* (4).

(1) 1 O'M. & H. 47.
(2) 1 O'M. & H. 59.
(3) 9 Can. S. C. R. 93.
(4) Hodg. El. Cas. 755.

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Callaghan was not proved to be an agent outside of DeBlois. Agency may be limited both as to person and locality. *London Election Case* (1); *The Berthier Case* (2).

At all events the appellant is entitled to the benefit of 54 & 55 Vict. ch. 20, sec. 19.

Peters Q.C., attorney-general of Prince Edward Island, for the respondent. It has been found as a fact that Callaghan was guilty of corrupt treating, and this court will not disturb such finding unless satisfied that it was clearly wrong. *The Berthier Case* (2); *The North Perth Case* (3); *The Welland Case* (4).

As to agency, see Leigh & LeMarchant on Election Law (5).

The appellant is not entitled to the benefit of 54 & 55 Vict. ch. 20, sec. 19, unless he has brought himself strictly within its terms. *The Rochester Case* (6).

The judgment of the court was pronounced by:

THE CHIEF JUSTICE (*oral*).—This is an appeal upon the merits from the decision of two judges of the Supreme Court of Prince Edward Island, the Chief Justice and Fitzgerald J., appointed under the Controverted Elections Act to try the petition filed against the return of the appellant for the House of Commons at the election in June last. The learned judges held that the corrupt act alleged in the eighth charge of the bill of particulars was established, and the appellant was unseated. The decision of the appeal depends almost entirely on matters of fact, and we have thought it unnecessary to prepare a written judgment in disposing of it. I will therefore state, orally, the grounds upon which the judgment of the court is based.

(1) Hodg. El. Cas. 214.
(2) 9 Can. S. C. R. 102.
(3) 20 Can. S. C. R. 331.
(4) 20 Can. S. C. R. 376.
(5) 4 ed. p. 159.
(6) 4 O'M. & H. 160.

Charge no. 8 in the petitioner's bill of particulars is as follows:

That William P. Callaghan of Miminigash, farmer, an agent of the respondent, on the twenty-second day of June last, treated Patrick O'Brien of Miminigash, in the barn on the premises of the said Patrick O'Brien, to intoxicating liquor for the purpose of corruptly influencing the vote of the said Patrick O'Brien, and in order to secure the return of the said respondent at said election. That the said respondent had a knowledge thereof and consented and was accessory thereto, and paid or promised to pay or repay the said William Callaghan therefor.

There was no dispute as to the fact that Callaghan, who accompanied the appellant on the 22nd of June, had treated O'Brien, an elector, and at the same time had asked him to vote for the appellant. The questions which were raised, then, for our decision were: 1. Was the treating a corrupt act? 2 Was Callaghan an agent of the appellant? 3. Was the offence for which the appellant was unseated of a trivial or unimportant character and so within the provisions of 54 & 55 Vict. ch. 20, sec. 19, amending the Controverted Elections Act?

As regards the first question, whether or not there was a corrupt treating, I have no doubt whatever. Callaghan took the voter secretly into a barn and gave him drink out of a bottle of whiskey which he had brought with him. This was not treating of a kind which may very well take place without offence against the Election Act, namely, where an agent, in the course of ordinary hospitality, furnishes liquor or accommodation to an elector. In my opinion, the only object Callaghan could have had was to influence O'Brien's vote and induce him to promise his support to the appellant.

Corrupt treating having been established, it becomes material to consider the second question, namely, that as to agency. It appears that the treating did not take place in the district of DeBlois where there was a

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political association, of which Callaghan was a member (and where consequently, under the authority of *The Haldimand Case* (1) he would be an agent of the appellant) but in an adjoining district, and a very powerful argument, which made a great impression on myself, was addressed to the court by Mr. McCarthy, based on the contention that the agency of Callaghan was limited to the district of DeBlois, for which district only the association of which he was a member, and therefore an agent of the candidate, was constituted.

I quite agree with the principle laid down by Chancellor Spragge in *The London Case* (2) that agency may be limited both as to persons and as to locality, and if it had been proved that the association was confined to election work in the district of DeBlois it might well have been argued that Callaghan was not an agent except within that district. But when we come to look at the evidence we find nothing to show that the work of the association was so restricted. On the contrary, it appears from the distinct admission of the appellant himself, that the members were to work for him wherever they could. He says, on cross-examination by the Attorney General, that the associations organized for him were doing all they could. I take it, therefore, that as it was not shown that there was any restriction on the members of the association to work within the limits of DeBlois, they were agents of the appellants throughout the whole electoral district.

There remains to be considered the only question which raises any difficulty on this appeal, namely, whether or not section 19 of the Act of 1891 applies. I will read the section :

Where upon the trial of an election petition, the court decides that a candidate at such election was guilty, by his agent or agents, of any

(1) 17 Can. S. C. R. 170. (2) Hodgins' Elec. Cas. 214.

offence that would render his election void, and the court further finds—

(*a*) That no corrupt practice was committed at such election by the candidate personally, and that the offences mentioned were committed contrary to the order and without the sanction or connivance of such candidate; and

(*b*) That such candidate took all reasonable means for preventing the commission of corrupt practices at such election; and

(*c*) That the offences mentioned were of a trivial, unimportant and limited character; and

(*d*) That in all other respects so far as disclosed by the evidence, the election was free from any corrupt practice on the part of such candidate and of his agents; then the election of such candidate shall not, by reason of the offences mentioned, be void, nor shall the candidate be subject to any incapacity therefor.

This is not an exact transcript of the corresponding clause of the Imperial Act (46 & 47 Vict. ch. 51, sec. 22), but it is to the same effect, the object of both being to relieve candidates from the consequences of corrupt acts, trivial or unimportant in character, of their agents. But, as Mr. Justice Vaughan Williams held in *The Rochester Case* (1), in order to obtain the benefit of this section a candidate must bring himself strictly within its terms. Now I admit that the offence proved in the present case was of a trivial and unimportant character, and the appellant was acquitted of all the other charges of which the particulars contained a great number. But, it appears to me, that he has failed to prove, in the first place, that Callaghan's corrupt act was contrary to his orders, and in the next place that he took all reasonable means to prevent the commission of corrupt practices at the election. He fails, I think, in this respect; although it is shown that he did announce at public meetings that he wished the election to be carried on properly, and warned his supporters against the commission of illegal acts, yet in my opinion he should have done more than he did

(1) 4 O'M. & H. 160.

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in respect to this particular agent Callaghan whom he took with him to canvass a particular locality. He knew Callaghan was an agent, he knew that he talked with electors, and it must have been obvious to him that he was, to a certain extent, in his (Callaghan's) hands, but it does not appear that he administered any caution. The bottle of whisky was in the buggy, but it was not shown that appellant was aware of the fact. There were circumstances, however, that should have aroused his suspicion. On meeting certain persons who are proved to have been electors, Callaghan went with them into the woods and remained for some minutes, and O'Brien, the treating of whom constituted the corrupt act which unseated the appellant, was taken into his own barn. So without going further than the judges who tried the petition went I think we must say that the appellant must have known that something more than mere canvassing was going on, and should have cautioned Callaghan against the use of any unlawful means of influencing the electors. It is true he says he did not authorize him to canvass, but he knew that he was a member of the association which he expected to work for him, and that implies that he expected Callaghan to do the same. Under these circumstances, and following the English authorities, I do not consider the appellant entitled to the benefit of section 19 of the Act of 1891. The judgment appealed from is, I think, entirely free from error and must be affirmed.

The appeal is dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *William S. Stewart.*

Solicitor for the respondent: *Arthur Peters.*

THOMAS R. JONES (PLAINTIFF).........APPELLANT;

AND

GEORGE McKEAN (DEFENDANT)........RESPONDENT.

1896 *Nov. 3, 4, 1897 *Mar. 24.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

Trustee—Account of trust funds—Abandonment by cestui que trust—Evidence.

The holder of two insurance policies, one in the Providence Washington Ins. Co., and the other in the Delaware Mutual, on which actions were pending, assigned the same to M. as security for advances and authorized him to proceed with the said actions and collect the moneys paid by the insurance companies therein. By a subsequent assignment J. became entitled to the balance of said insurance moneys after M's claim was paid. The actions resulted in the policy of the Providence Washington being paid in full to the solicitor of M., and for a defect in the other policy the plaintiff in the action thereon was non-suited.

In 1886 M. wrote to J. informing him that a suit in equity had been instituted against the Delaware Mutual Ins. Co. and its agent for reformation of the policy and payment of the sum insured and requesting him to give security for costs in said suit,pursuant to a judge's order therefor. J. replied that as he had not been consulted in the matter and considered the success of the suit problematical he would not give security, and forbade M. employing the trust funds in its prosecution. M. wrote again saying " as I understand it, as far as you are concerned you are satisfied to abide by the judgment in the suit at law, and decline any responsibility and abandon any interest in the equity proceedings," to which J. made no reply. The solicitor of M. provided the security and proceeded with the suit which was eventually compromised by the company paying somewhat less than half the amount of the policy.

Before the above letters were written J. had brought suit against M. for an account of the funds received under the assignment and in 1887 more than a year after they were written, a decree was made in said suit referring it to a referee to take an account of

*PRESENT:—Gwynne, Sedgewick, King and Girouard JJ.

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trust funds received, by M. or which might have been received with reasonable diligence, and of all claims and charges thereon prior to the assignment to J., and the acceptance thereof, which decree was affirmed by the full court and by the Supreme Court of Canada. On the taking of said account M. contended that all claim on the Delaware policy had been abandoned by the above correspondence, and objected to any evidence relating thereto. The referee took the evidence and charged M. with the amount received, but on exceptions by M. to his report the same was disallowed.

Held, reversing the judgment of the Supreme Court of New Brunswick, that the sum paid by the Delaware Company was properly allowed by the referee; that the alleged abandonment took place before the making of the decree which it would have affected and should have been so urged; that M. not having taken steps to have it dealt with by the decree could not raise it on the taking of the account; and that, if open to him, the abandonment was not established as the proceedings against the Delaware Company were carried on after it exactly as before, and the money paid by the company must be held to have been received by the solicitor as solicitor of M. and not of the original holder.

Held further, that the referee, in charging M. with interest on money received from the date of receipt of each sum to a fixed date before the suit began, and allowing him the like interest on each disbursement from date of payment to same fixed date had not proceeded upon a wrong principle.

APPEAL from a decision of the Supreme Court of New Brunswick affirming the judgment of the Judge in Equity who allowed defendant's exceptions to a referee's report on taking accounts.

The facts of the case are fully set out in the above head-note and the judgment of the court.

The appeal was, by consent, argued before four judges.

Earle Q.C. and *McLean* for the appellant.

Palmer Q.C. for the respondent.

The judgment of the court was delivered by

GWYNNE J.—One Joseph H. Chapman by a deed duly executed under his hand and seal made upon and bearing date the 28th day of February, 1880, after reciting therein that he was indebted to the above

defendant for various sums advanced by him for Chapman, at the latter's request, and that he was possessed of certain shares of the barque "Pretty Jemima" which was lost at sea on the 6th day of March, 1878, which said shares were at the time of such loss partly insured in the Providence Washington Insurance Company of Providence, and the Deleware Mutual Safety Insurance Company, by policies issued by them to the amount of five thousand dollars each, and that actions were then pending in the Supreme Court of the province of New Brunswick at the suit of him, the said Chapman, against the said respective companies upon the said policies, and further that it was right and proper that the said George McKean should be secured against any loss which he might sustain by reason of his having become or procured bail for the said Chapman in certain suits therein mentioned, or by reason of any advance then already made or thereafter to be made by him for the said Chapman, did in consideration of the premises assign, transfer and set over the said policies of insurance, and all his, the said Chapman's, right, title and interest therein and thereto, and to the moneys thereby secured, and in and to the said suits instituted upon the said policies in the Supreme Court of New Brunswick, unto the above defendant, George McKean, his executors, administrators and assigns, to his and their sole use for ever, and he thereby authorized the said George McKean to continue the said suits in his, the said Chapman's name, to final judgment and execution, and to use his, the said Chapman's, name in any legal proceedings which the said George McKean might be obliged to take in reference to the said policies of insurance, or the moneys insured thereby or for collecting the same or any part thereof, and he, the said Chapman, thereby made, constituted

and appointed the said George McKean and his representatives, his true and lawful attorney and attorneys, irrevocable in his, the said Chapman's, name, to continue the said suits and to sue for and recover the said sums of money insured by the said policies and due acquittances and discharges in his name to give, make, sign and deliver, and the said Chapman did thereby covenant with said George McKean not to release the said suits or either of them, or the said sums of money insured by the said policies or any or either of them. On the 28th April, 1882, the said Chapman in consideration of money due and owing by him to certain persons trading under the name of Belyea and Company, delivered to them an order upon the said George McKean, in the words following:

Please hold to the order of Messrs. Belyea and Company to whom I have assigned it any balance that remains of insurance money per "Pretty Jemima," over and above the amount I owe or may owe to you or to your firm of Carville, McKean & Co., or Francis Carville & Son, without making any further advances to me or on my account.

(Signed) J. H. CHAPMAN.

This order shortly after the making of the same and the delivery thereof to the said Belyea and Company was, by or on behalf of the said company communicated and presented to the above defendant, and to one James Straton who was then acting by the authority of the said George McKean as attorney on the record for the plaintiff in the said suits upon the said policies instituted by the said Chapman, and so as aforesaid assigned by him to the said George McKean, the plaintiff's attorney on the records in said suits when the same were first instituted being then dead, and the said George McKean upon the said order being communicated and presented to him wrote his name across the same, by way of acceptance thereof. Afterwards the said firm of Belyea and Company indorsed and delivered the said order so accepted by the above

defendant to the above plaintiff with the intention of transferring the same and the moneys therein mentioned to the plaintiff, and subsequently upon the 3rd. October, 1882, gave to the plaintiff the assignment or transfer addressed to him in the words following:

29 RED CROSS STREET, LIVERPOOL, 3rd October, 1882.
HON. THOS. R. JONES.

DEAR SIR,—Having indorsed to you the order drawn by J. H. Chapman upon George McKean, Esq., for any balance of insurance moneys in his hands when collected in our favour, we are informed the instrument is not negotiable by indorsement, not being a bill of exchange, and therefore in order to protect your title and to enable you to obtain the amount that may be in Mr. McKean's hands we hereby assign and transfer our interest therein both legal and equitable, and appoint you our attorney in our names, for your own use and benefit to collect the same.

We are, dear sir, yours truly,
(Sgd.) BELYEA & CO.

Copies of the assignment from Chapman to Belyea & Co., and by the latter to the plaintiff, were served upon the defendant McKean and his attorney the said James Straton, but both the said defendant and his said attorney refused to recognize the plaintiff's right to, and to give him, any account of the moneys that had came to their hands from the said policies, or any statement of what amount the defendant claimed to be payable out of the funds assigned to him, prior to any amount being paid to the plaintiff, in consequence whereof the latter commenced an action against the defendant in the Supreme Court of New Brunswick alleging therein his claim upon the said funds in virtue of the said assignment by Chapman to Belyea & Co., and by the latter to the plaintiff, and praying that an account might be taken of the said trust funds and of the charges thereon prior to the plaintiff, and that such amount as might be found in the hands of the defendant after payment of such prior claims might

be ordered to be paid to the plaintiff and for further relief.

In his answer to this suit the defendant answered among divers other things by way of defence, as follows:

> I say further that I have been notified by said Joseph H. Chapman that said order which has been so transferred to said plaintiff was not an absolute assignment, but merely given to secure a sum of money at that time due or to become due from him to said Belyea & Co. That since that time such claim of Belyea & Co., has been satisfied, and that there is now nothing due by him in respect of said order, or any debt to secure which said order was given, but that on the contrary a large sum of money is due by the said Belyea & Co. to the said Joseph H. Chapman and said Joseph H. Chapman has repeatedly told me not to pay any money to the plaintiff, and that he wishes to be made a party to this suit, in order that he may contest the plaintiff's claim, and I say further that being only a trustee for certain purposes, with the notices I have received from the said Joseph H. Chapman I cannot pay over any money on account to said plaintiff except under the order of this honourable court, and I am desirous that the said Joseph H. Chapman may be made a party to this suit in order that he and the plaintiff may between themselves settle what rights the plaintiff has under the said order, and who is entitled to any residue which may remain after the trusts under the said assignment to me have been fulfilled.

It thus appears that the defendant was resisting the plaintiff's claim to have an account taken, or to have any interest in the trust funds assigned to the defendant in the absence of Chapman as a party to the suit. While the defendant was thus resisting the plaintiff's claim in the interest of, and upon the allegations of, Chapman as to the nature of his assignment to Belyea & Co., it does not appear that Chapman himself has ever taken any steps to establish against the plaintiff and Belyea & Co., the contestation so set up by the defendant on his behalf.

Now, whether this contestation of the defendant in the suit instituted against him by the plaintiff was well or ill founded we are not now concerned, for in so far

at least as this suit is concerned it has been absolutely concluded in the negative by the decree which was made in this suit on the 21st., November, 1887, which was appealed to this court and affirmed by the judgment of this court in November, 1891, this court holding that the assignment from Chapman to Belyea & Co. was an absolute assignment, as was also that from Belyea & Co. to the plaintiff, and that Chapman was not a necessary party to the suit.

Now, by the decree of the 21st November, 1887, so affirmed by this court in November, 1891, it was finally adjudged and determined that the plaintiff, Jones, is entitled to an account of the claims and charges on the trust funds received by the defendant prior to the claim of the plaintiff, and the court declared and did order and decree that such amount of the said fund as might be found in the hands of the defendant *after payment of such prior claims* be paid by the defendant to the plaintiff, and it was decreed further that it be referred to the referee in equity to inquire and take an account of the following matters.

First. When the trust funds, if received, were received, and if not, or any part thereof not received, when the same were due and payable and might have been received by the defendant, had he used reasonable diligence in collecting the same.

Second. The amount of the said trust funds received by the defendant, or which but for his neglect or default ought to have been received by him under the trust deed of the 28th., February, 1880.

Third. If the defendant had received any trust funds, where the same have been deposited, and what interest has been received for the same, or if used by the defendant, or with his consent, what interest should be allowed for the same.

Fourth. An account of the claims and charges on the said trust funds prior to the claim of the plaintiff arising at the date of the acceptance by the defendant, some time in May, 1882, of the order of the 28th of February, 1882, set out in the second paragraph of the plaintiff's bill, and for the better taking of the said account, and discovery, all parties are to produce before the said referee on oath all deeds, papers and writings in their or either of their custody and

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power relating thereto, and are to be examined on oath as the said referee shall direct, who in taking the said account is to make to all parties all just allowances.

And the court reserved the consideration of all further directions and the question of costs until after the referee should have made his report.

Now upon the rendering of the judgment of this court in November, 1891, affirming the decree of the Supreme Court of New Brunswick of November, 1887, that decree became a conclusive adjudication in the suit between the plaintiff and the defendant that the plaintiff was entitled to an account from the defendant of all monies received by him, or which but for his wilful default and neglect might have been received by him, from or in respect of both of the policies of insurance assigned by Chapman to the defendant, and to be paid the balance of all monies accruing from the said policies in excess of the prior amounts mentioned in the assignment of the 28th April, 1882, from Chapman to Belyea, whether upon the taking of the account the sums so received should appear to have been received, or the wilful default and neglect by which, if any, any of such should be lost should appear to have been committed, before or after the date of the decree. Both the referee and the defendant were conclusively bound by the decree and the defendant could not be permitted upon the taking of the account directed, to question the plaintiff's right to the full account directed by the decree and to be paid the sums to which he was thereby declared to be entitled. Yet upon the taking of the account the persistent effort of the defendant, or of his solicitor to whom, as the defendant admits, he had wholly confided both the conduct of the suit in which the decree was made, the rendering of the account thereby directed, and the management of the trust funds, was to establish the contention that the plaintiff

so far back as in the month of August, 1886, upwards of 12 months before the decree was made in the suit, had by his conduct surrendered, released or abandoned all interest in the said Delaware policy, and that whatever had subsequently taken place in respect of that policy had been conducted by the defendant's solicitor in the interest of Chapman and for Chapman, who by the judgment of this court in 1891 was held to have no interest in the moneys secured by either of the policies. It was, in fact, with the utmost difficulty that any account could be extracted from the defendant's solicitor, and what was extracted does not appear to be complete, in relation to his and the defendant's dealings with that Delaware policy and the moneys thereby secured. As already observed such contention urged on the defendant's behalf was not open upon the decree under which the referee was acting, and no evidence in support of such contention should have been received by him, but having been received he does not appear to have acted upon it, in which we think he acted quite rightly. If the matter relied upon for the purpose of establishing that the plaintiff had surrendered, released or abandoned, as was contended, all interest in the Delaware policy and the moneys secured thereby was sufficient to establish the truth of the contention, it was matter which, if it had been established in the suit, would have affected the decree and should have been so urged. It was competent for the defendant, as the alleged abandonment took place after the defendant's answer had been filed, to have applied to the court for leave to set up this additional matter by way of defence and to give evidence upon it, and having omitted to do so, whether from neglect or design, and having rested his defence upon the matter set up in his answer and having suffered the decree to be made as it has been made and

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having upon the grounds alleged in his answer contested the plaintiff's right to the benefit of that decree by appeal to this court he must abide by the decree, and render to the plaintiff the full benefit of the rights to which he is thereby declared to be entitled.

The material which the defendant's solicitor relied upon in support of his contention before the referee was of this nature; in the spring of 1885 final judgment was upon appeal pronounced in this court in favour of the plaintiff in the action of *Chapman* v. *The Providence Insurance Co.* for the full amount secured by the policy, and in the case of *Chapman* v. *The Delaware Mutual Insurance Co.* judgment of non-suit was ordered to be entered upon the grounds that the policy on its face required that to be valid it should have been, but was not, countersigned by one Ranney, the company's agent in New Brunswick who, however, had delivered the policy to Chapman as valid. At this time Mr. Straton, the defendant's solicitor in the present suit, was conducting the suits of Chapman against The Insurance Companies as attorney for the plaintiff on the records, but upon behalf of, and in the interest of, and as the solicitor of McKean, the now defendant. In the month of August, 1886, McKean, through Straton as his solicitor, commenced a suit in equity in the Supreme Court of New Brunswick, in the name of Chapman as plaintiff against the Delaware Insurance Company, and their agent Ranney, to compel the latter to countersign the policy, and for consequential relief. Chapman, the nominal plaintiff on the records, having left the province of New Brunswick the Insurance Company applied for and obtained an order for security for costs in that suit, and thereupon McKean, while the suit of the present plaintiff against him was still pending, wherein he was resisting the plaintiff's claim and denying his right to the account claimed by him

or to any interest in the said policies and the moneys secured thereby upon the grounds already stated, signed his name to a letter prepared by his solicitor Straton for his signature, addressed to the plaintiff in the words following:

ST. JOHN, 16th August, 1886.

To HON. T. R. JONES:

SIR,—As assignee and attorney of J. H. Chapman, I have commenced proceedings in equity to compel Henry R. Ranney, as agent of the Delaware Mutual Safety Insurance Company to countersign the policy on the "Pretty Jemima," in the suit in which at law the plaintiff was nonsuited, and for a decree that the company shall pay the amount. In this suit the defendants have appeared and applied for security for costs, and I enclose copy of order of Judge King, which has been served on me, by which proceedings are stayed. As you claim an interest in the subject matter of the suit I deem it my duty to send you the notice, and to apply to you to give the security.

Your truly,

(Sgd.) GEORGE McKEAN.

Now, it is to be borne in mind that at this time the plaintiff had not only asserted a claim to and an interest in the moneys secured by the Delaware policy, as well as in the moneys secured by the Providence Washington insurance policy, which claim and interest the defendant, acting as now appears wholly upon the advice of his solicitor, Mr. Straton, to whom he had confided the whole management of the trust funds, and of the suits instituted for the purpose of recovering the moneys secured by the policies, refused to recognize, but that he, the plaintiff, to enforce his claim so refused to be recognized by the defendant, had commenced a suit in equity against the defendant which was then still pending, and not brought to a hearing until four months later, in which suit the defendant was persisting in resisting the plaintiff's claim to an interest in the said trust funds; it is not therefore at all surprising that the plaintiff should consider the application so made to him to give security for costs in

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the suit in equity commenced by the defendant as a very singular proceeding, or that he should express his surprise in the terms contained in the letter following which he sent to the defendant in reply to his:

ST. JOHN, 25th August, 1886.

GEORGE McKEAN, ESQ:

I am in receipt of yours of the 16th instant, in which you state as assignee and attorney of J. H. Chapman, etc., etc. (copying the letter verbatim). In reply, I beg to state that I have not been consulted as to these proceedings being commenced, or my assent asked thereto, and as I am advised that the success of this suit is highly problematical, I do not consider that you are in a position to call upon me to give security. I further desire you to take notice that I consider your taking these proceedings are at your own risk and expense, and that under the circumstances, *and the course you have adopted* I shall object to any of the trust funds in your hands being appropriated to the prosecution of the suit.

I remain, yours truly,
THOS. R. JONES.

Upon receipt of this letter by the defendant, his solicitor, Mr. Straton, prepared for the defendant to sign, which he did sign and sent to the plaintiff, a letter in the terms following:

27th August 1886.

THE HON. T. R. JONES—

CHAPMAN AGAINST THE DELAWARE CO.:

DEAR SIR,—Yours of the 25th instant received. As I understand it as far as you are concerned you are satisfied to abide by the judgment in the suit at law, and decline any responsibility and abandon any interest in the equity proceedings.

Yours truly,
GEORGE McKEAN.

The plaintiff took no notice of this letter, and made no reply to it. What however the defendant's solicitor Mr. Straton, to whom the defendant had confided the whole management of the trust funds, and of the suits instituted to recover them, did was this: he himself and another person procured by him gave the security for costs required in the equity suit instituted against the

Delaware Insurance Company by Straton as the solicitor of McKean in the name of Chapman as the nominal plaintiff, and thereupon he entered into negotiations with the insurance company and their solicitor for a settlement of the suit which terminated in an agreement made in December, 1886, whereby the insurance company agreed to pay $2,250 in full settlement of the suit and of the policy. In the course of the negotiations it appeared that the solicitor of the insurance company had an old claim against Chapman to the amount of $500 arising out of another vessel called the "J. T. Smith," and he insisted that this sum should be paid out of the $2,250, and for this purpose required that Chapman should be sent for to consent to this payment and to be present at the settlement. Accordingly Mr. Straton sent for Chapman, and procured his attendance, when upon the 24th December, 1886, the settlement was concluded by the solicitor of the insurance company handing Straton his draft upon the insurance company for $2,250, which upon its being indorsed was handed back to the solicitor, who gave his two cheques, the one for $750 and the other for $1,000, payable to Straton or his order, which sums Straton received. It thus appears that Mr. Straton, who ever since his first appointment as solicitor of the plaintiff upon the record in the suits of Chapman against the Insurance Companies in the place of the former solicitor, Mr. Thompson, deceased, has had the sole conduct of these suits, and the exclusive administration of the funds thereby secured and assigned to the defendant upon trust, as the latter's solicitor and confidential agent, and who as such is still responsible to the defendant for the manner in which he has administered the trust so confided in him, and who as solicitor of the defendant instituted the suit in equity in the name of Chapman as plaintiff in the record

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against the Delaware Insurance Company, which suit was settled as aforesaid in December, 1886, received into his own hands out of the $2,250 paid by the insurance company in settlement of that suit the said sum of $1,750, just as he had received all moneys arising from the Providence Washington Insurance Company's policy; and it appeared further in evidence that he also took from Chapman a release of all claim upon such sum, and under the Delaware policy. This instrument was not received in evidence, as nothing contained in it could have any operation as against the plaintiff's right to have the account taken as directed by the decree, but the fact that such a release was taken remains, and it is significant in view of the contention set up and persistently pressed by the defendant's solicitor, who had on the defendant's behalf exclusive administration of the trust fund assigned to the defendant, namely, that the plaintiff by reason of the terms of his said letter of the 25th August, 1886, and by reason of his not answering the defendant's letter of the 27th August, 1886, must be held to have abandoned, surrendered or released all claim to the moneys secured by the Delaware insurance policy, which claim he was insisting upon in his suit in equity then pending against the defendant, which resulted in the decree in his favour in November, 1887, affirmed by this court on appeal in 1891, under which the account was being taken. Now the referee by his report made on the 31st October, 1894, has found that so far back as the month of March, Mr. Straton, the defendant's solicitor, received on account of the moneys secured by the Providence Washington Insurance Company's policy the sum of $1,765.35, and he has charged the defendant with this sum and with interest thereon, at 6 per cent, from the 1st of April, 1885, until the 1st of November, 1894. He also found that Mr.

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Straton upon the 9th of November, 1885, received on account of the same policy the further sum of $5,579.91, and he has charged the defendant with this sum with the like interest thereon from the 9th November, 1885, until the same 1st November, 1894. As against these sums he has allowed by way of credit the sum of $6,905.13 as paid in March, 1885, less the sum of $473.80, making the sum of $6,431.83, together with interest thereon at 6 per cent from the 1st of April, 1885, to the said 1st November, 1894, for the reason following: the $6,905.63 included certain bills of costs of Mr. Thompson, the original solicitor of the plaintiff in the suits of Chapman against The Insurance Companies, in which were included the following items constituting the $473.80, which had already been paid, and were therefore not chargeable against the trust funds, viz.:

Retainer to Mr. Thompson paid by Chapman, in 1878	$ 25 00
Cash also paid to Mr. Thompson by Chapman	100 00
Witnesses' fees	74 40
Costs of the day	74 40
These two sums were paid to Mr. Thompson in his lifetime (as costs of the day) by the insurance companies, or one of them, upon postponement of a trial,	
Finally cash per Chapman	200 00
	$ 473 80

This latter sum was paid by Chapman as counsel fees on the argument of the case in the Supreme Court, that is to say on the appeal of the companies in the case of Chapman against them; these sums the referee deducted from the $6,905.63, and he allowed the balance with the said interest thereon from 1st April,

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1885, to 1st November, 1894, making together $10,-130.13. He also found that the defendant was not entitled to charge the trust fund as against the plaintiff with the sum of $384.34 claimed as due by Chapman to Carville McKean & Co., and £396 18s. 6d. sterling claimed as having been due by Chapman to Francis Carville & Sons, which sums had not been paid by the defendant, and which it had been proved before the referee had been purchased by and were assigned to certain trustees to whom the plaintiff had made an assignment of his effects for the benefit of his creditors, upon whose behalf also, and for whose benefit, the account in this suit was being taken, and as the above sums were, if due, no longer payable to Carville McKean & Co., or to Francis Carville & Sons, but were now payable to the same parties as were interested in the amount which upon the taking of the account should be found to be coming to the plaintiff, these sums could not now be suffered to remain in the hands of the defendant or his solicitor, to the prejudice of the plaintiff whose trustees are entitled to receive them; and in fine, the referee charged the defendant with the said sums of $7,336.26 with interest thereon, as aforesaid, and with the said sum of $1,750, with interest as aforesaid, amounting in the whole to the sum of.........$13,925 19

Less the said sum of..........$ 6,431 83
With interest as aforesaid.. 3,698 30

Amounting to..................$10,130 13

So charging the defendant with the balance, or $3,795.06.

The defendant filed exceptions to the referee's report, which have been upheld by the Supreme Court of New Brunswick, as regards the items following, that is to say:

1st. For charging the said sum of $1,750 paid to Straton in 1886 as the proceeds of the Delaware Insurance Company's policy.

2nd. As to the interest allowed.

3rd. For the disallowance by the referee of the several items constituting the $473.80, and

4th. For not allowing to the defendant the said sums of $384.34 and £396, 18s. 6d., so as aforesaid assigned to and now vested in the plaintiff's assignees in trust for his creditors.

As to the $1,750, we are of opinion that upon the evidence the referee has acted rightly and in conformity with the decree in charging the defendant with that sum, and that indeed conformably with the decree he could not have done otherwise. We are also of opinion that the solicitor of the defendant, who according to the evidence of the latter had the exclusive administration of the funds assigned to the defendant in trust in the dealing with which the defendant himself never interfered, cannot be regarded as having received that sum in any other character than as the solicitor of the defendant entrusted by the defendant with the duty of recovering and administering the trust funds assigned to him. The setting up by the solicitor of the obstructive objections to the taking of the account which were persistently pressed by him, were, we think, vexatious and inconsistent with his duty as a solicitor to whom the recovery and administration of the trust funds was confided by the defendant, and should not have been entertained. As to the interest allowed upon the sums received by the solicitor, the court has held that it has been allowed upon an incorrect principle; that the interest should have been charged upon the receipts until payments therefrom had been made, and that then the payments as made being deducted, the interest should be charged

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on the balance, but the same result, or one equally beneficial to the defendant, was adopted by the referee, namely, by allowing interest upon the receipts from the time of their having been respectively received unto the fixed date of the 1st November, 1894, and interest at the same rate upon the disbursements from the time of their having been respectively disbursed unto the same 1st November, 1894, and then deducting the disbursements with such interest thereon from the receipts with the interest thereon, thus charging the defendant only with interest upon the balance or excess of the receipts over the disbursements. As therefore no good purpose could be served by the suggested alteration in the mode of calculating the interest we think that this exception should not have been allowed. As to the moneys already paid to Mr. Thompson in his lifetime, we are of opinion that they could not properly have been charged against the trust funds; so charging them could only operate for the benefit of Chapman, who had no interest reserved to him in the trust funds, an account of which was directed by the decree, so neither for the same reason could the money paid by Chapman in payment of counsel fees, on the appeal to this court of the insurance companies in the suits of Chapman against them. The exception to the referee's report in respect of those items should therefore have been disallowed.

For the reasons already given, we are also of opinion that the referee's not charging the trust fund, as against the plaintiff, with the sums of $384.34 and £396, 18s. 6d. now vested in the plaintiff's assignees in trust, for whose benefit also, as appears, the account was being taken, is free from all just objection. It never was suggested that the plaintiff's assignees in trust for the benefit of his creditors to whom the above claims were assigned, hold those claims so assigned to them in any

other right or character than as the plaintiff's assignees in trust for the benefit of his creditors, nor that they are not the parties also who as such assignees are interested in the result of the account. The plaintiff has sworn that they are, and the fact was not disputed. If it had been, the fact could no doubt have been settled by calling the assignees, or one of them, but as no such suggestion was ever made it cannot now be entertained for the purpose of enabling the defendant or rather his solicitor still to retain the money. The assignees as owners of the claims assigned to them are no doubt capable of looking after and protecting their own interests, and it is not suggested that they have made any claim on these moneys adverse to the plaintiff, or that they have ever made any objection to the manner in which they have been dealt with by the referee in his report. In fine we are of opinion that all of the defendant's said exceptions to the referee's report should have been disallowed with costs, and that in so far as those exceptions are concerned the referee's report should have been confirmed.

There remains still one point to be considered.

It was argued before us, first that the referee should have charged the defendant with the whole amount of the Delaware Insurance Company's policy upon the contention that there was no evidence of the reasonableness of the compromise, or second that at least he should have charged the defendant with the $500 paid to the solicitor of the insurance company out of the $2,250 paid by the company in settlement of the suit in equity. As to the $2,750 difference between the $2,250 paid by the company and the $5,000 amount of the policy, it can not be said that this sum was lost by the wilful default or neglect of the defendant, nor indeed can it judicially be now said that the compromise was at all improvident.

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It appears that the non-countersigning of the policy which occasioned the non-suit in the suit at law was not the only defence offered by the company to that suit; they offered a defence upon the merits which was also open to them in the suit in equity, and if they should have succeeded therein nothing could have been recovered in respect of the policy, and we are not in a position to say that they could not have succeeded in such defence. Moreover the defendants being a foreign insurance company no longer, as appears, doing business in the Province of New Brunswick it is impossible to say what difficulty by dilatory obstruction might have been occasioned to the recovery even if the suit had been decided in the plaintiff's favour in the courts of this country, so that it certainly cannot be said that the compromise was improvident or lost by wilful default and neglect of the now defendant. As to the $500 part of the $2,250 paid by the company it must be admitted that the evidence failed to establish what was the consideration for that payment or why it should have been deducted out of the moneys paid by the company in settlement of the suit. It was suggested certainly that unless it should have been agreed to be paid out of that amount the $1,750 which Mr. Straton received would not have been received by him, but there was no evidence that the company imposed any such condition. The plaintiff could have himself removed all difficulty upon this point by calling the solicitor of the company who received the $500 to explain the consideration of its being paid to him. But the main objection to the contention of the plaintiff in respect of this item being entertained on this appeal is that it appears that the referee's report was made on the 31st October, 1894, that the defendant filed his exceptions on the 3rd December, 1894. The plaintiff filed no exceptions but

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on the contrary made a motion for confirmation of the referee's report which came on for hearing in the month of March, 1895, together with the defendant's exceptions to the report, and also, as appears, together with the hearing of the cause on the further directions reserved by the decree of 1887. During the argument on this motion the plaintiff asked leave to withdraw his motion to confirm the report and to file exceptions to it. Leave was granted to him to withdraw his motion to confirm the report but the application for leave to except to it was refused, and an order was made to that effect, from which order the plaintiff did not appeal, and we have not before us the material upon which the application so refused was made. The appeal before us is against a decree of the judge in equity made on the 6th May, 1895, which, after reciting the plaintiff's motion to confirm the report, and the defendant's exceptions thereto, and that the plaintiff's counsel had asked and was granted leave to withdraw his motion to confirm the report (saying nothing as to his application to file exceptions) adjudged and decreed that certain of the defendant's exceptions should be allowed, namely those relating to the Delaware policy being those above mentioned, and that others be disallowed, and further in pursuance of the 166th section of the Act passed by the legislature of the Province of New Brunswick, in the 53rd year of Her Majesty's reign entituled "An Act respecting the practice and proceedings of the Supreme Court in equity," that the referee's report be amended as therein stated, whereby it was adjudged as follows, namely:

That the charges on the fund prior to the plaintiff's amount to the sum of $9,677.34, and that the total amount that the defendant received or should have received amounts to the sum of $7,336.25, and that the defendant is not indebted to the plaintiff in any amount.

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whatever, and that the report as amended be absolutely ratified and confirmed by the order, authority and decree of this court to be observed and performed by all parties according to the tenor, effect and true meaning thereof.

And it is further added that there be no costs to either party on the reference to take accounts before the referee, that the defendant's costs of the objections and exceptions to the referee's report be taxed by the clerk and paid by the plaintiff to the defendant or his solicitor. Provided, however, that the said defendant shall not proceed to demand or collect the said costs so awarded to him or any part thereof until the further order of this court or a judge thereof.

This is the judgment and decree which having been confirmed by the Supreme Court of New Brunswick is now before us, and for the reasons already given we are of opinion that the plaintiff's appeal must be allowed with costs in this court and in the appeal to the Supreme Court of New Brunswick, and that the judgment and decree of the judge in equity in New Brunswick in this cause in May, 1895, be reversed, and in substitution therefor that it be adjudged and decreed that the defendant's exceptions to the referee's report be disallowed and the master's report confirmed with costs to the plaintiff, and (assuming as we do the cause as is alleged by the judgment of the Supreme Court of New Brunswick on appeal to have been before the judge in equity as upon further directions also) that the defendant be adjudged and decreed to pay to the plaintiff all costs of suit the consideration of which was reserved for further directions by the original decree made in this suit in 1887, and also all costs attending the taking of the account under the decree before the referee. There was a cross-appeal but it was for costs only. It is however disposed of by the above disposition of the case. There can not be a doubt we think that, in view of the persistent denial by the defendant of the plaintiff's right to any account and to any interest in the fund assigned to

the defendant in trust, and of the unwarranted obstructions offered to the account being taken as directed by the decree, the plaintiff is entitled to have all these costs adjudged to him.

Appeal allowed with costs.

Solicitor for the appellant: *H. H. McLean.*

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

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*Nov. 2.
1897
*May 1.

THE SHIP "FREDERICK GERRING JR." (DEFENDANT) ... APPELLANT;

AND

HER MAJESTY THE QUEEN (PLAINTIFF) ... RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA, ADMIRALTY DISTRICT OF NOVA SCOTIA.

Constitutional law—Convention of 1818—*Treaty, construction of—Statute, construction of—Fisheries—Three mile limit—Foreign fishing vessels—"Fishing"*—59 *Geo. III., c.* 38, *(Imp.)—R. S. C. c.* 94 *& c.* 95.

Where fish had been enclosed in a seine more than three marine miles from the coast of Nova Scotia, and the seine pursed up and secured to a foreign vessel, and the vessel was afterwards seized with the seine still so attached within the three mile limit, her crew being then engaged in the act of baling the fish out of the seine.

Held, (the Chief Justice and Gwynne J. dissenting) affirming the decision of the court below, that the vessel when so seized was "fishing" in violation of the convention of 1818 between Great Britain and the United States of America and of the Imperial Act 59 Geo. III., ch. 38, and the Revised Statutes of Canada, ch. 94, and consequently liable with the cargo, tackle, rigging, apparel, furniture and stores to be condemned and forfeited.

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

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APPEAL from the decision of the Exchequer Court of Canada, Admiralty District of Nova Scotia (1), which decreed that the ship, her cargo, &c., should be forfeited with costs.

The action was brought against the American fishing schooner "Frederick Gerring Jr.," her cargo, tackle, rigging, apparel, furniture and stores for the condemnation and forfeiture of the same, the ship having been arrested for the violation of the treaty or convention of 1818 between Great Britain and the United States of America, and of the statutes 59 Geo. III. (Imp.) ch. 38, intituled "An Act to enable His Majesty to make regulations with respect to the taking and curing of fish on certain parts of the coast of Newfoundland, Labrador, and His Majesty's other possessions in North America, according to a convention made between His Majesty and the United States of America;" and R. S. C. ch. 94, intituled "An Act respecting Fishing by Foreign Vessels, and the Acts in amendment thereof"; upon the hearing before the local judge of the Admiralty District of Nova Scotia a decree was made declaring the forfeiture with costs, and from this decree the owners have taken the present appeal.

The substance of the treaty and of the above mentioned Acts are set out in the report of the decision of the Exchequer Court.

The vessel was seen fishing off Gull Ledge and Liscomb Light on the coast of Nova Scotia on the 25th May, 1896, about half a mile outside of the prohibited line by the captain of the Canadian Fisheries cruiser "Vigilant," her seine had been thrown and was then pursed up and she was going up to her boat which was attached to the seine in which a quantity of fish was enclosed. The "Vigilant" passed on without

(1) 5 Can. Ex. R. 164.

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disturbing her operations as her captain had decided from the bearing he then took that the "Gerring" was beyond the three mile limit. A couple of hours afterwards the "Gerring" was seized by the Canadian steam cruiser "Aberdeen" at a point within three marine miles of the Nova Scotia coast for the offence of fishing within the proscribed limits. At the time of the seizure the crew of the "Gerring" were engaged in baling fish out of the seine and claimed that these fish had been caught when the seine was cast outside of the prohibited line, and that if they were at the time of seizure within the three mile limit, (which they denied), they had drifted across the line after the fish had been taken in the seine, and further, that even if they were within the three mile zone, it was no offence against the treaty or the statutes to continue to bale the fish from the seine into the vessel after she had thus drifted across the prohibited boundary, for the "fishing" and "catching of the fish" had been completed when the seine was successfully thrown, outside.

The trial judge found that the bearing taken showed that the vessel was within the prohibited line when seized, and that the operation of "fishing" or "taking fish" was then still being carried on, the process being incomplete until the fish had been baled into the vessel and saved from the sea, thus being reduced into useful possession.

MacCoy Q.C. for the appellant.

Newcombe Q.C. for the respondent.

THE CHIEF JUSTICE.—For the reasons given by Mr. Justice Gwynne I am of opinion that this appeal should be allowed.

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GWYNNE J.—This appeal must, in my opinion, be allowed with costs. The evidence is conclusive, and indeed it is not disputed, that the ship "Frederick Gerring, jr," on the day upon which she was seized, had laid her seine for the purpose of catching fish in the sea well outside of the line constituting the limit of three marine miles from the coast of Nova Scotia, and that while outside of such limit she had caught a quantity of fish in the seine, and had secured them there by hauling up the seine and tying the ends so as to enclose the fish, pursing the net as it is called, and attaching it with the fish so secured in it to the vessel. All this was done outside of the three mile limit, and while inside of it the persons in charge of the vessel proceeded to bale the fish out of the seine into the hold of the vessel. While engaged in this operation she was seized. There was a question raised as to whether the place where she was seized was in point of fact inside of the three mile limit, but assuming it to have been, there was no doubt that the vessel had drifted to that position while the persons in charge of her were engaged in baling the fish out of the seine into the hold, and unless the being engaged in that operation constitutes "fishing or taking fish within the three marine miles of the coast of Nova Scotia" there is not a particle of evidence that the vessel had been, or was then, "fishing for fish" in Canadian waters within the three marine miles of the coast, or that she was then preparing to fish in such waters. To construe the act of baling fish out of a seine in which they had been caught and secured outside of the three mile limit, into the hold of a vessel, which after the fish had been so caught, and while the parties employed on her were so securing the fish by transferring from the seine to the hold of the vessel, had drifted by force of currents inside of the three mile limit, as

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a violation of the treaty rights of the citizens of the United States, or of the Acts of Parliament passed in relation thereto, would be altogether too hypercritical a construction to put upon the treaty securing such rights and the said Acts of Parliament, and can not, in my opinion, have the sanction of this court, and is not warranted by any of the cases referred to on the argument.

The case of *Young* v. *Hichens* (1) has no bearing upon the present case. The plaintiff there complained in trespass for that the defendant had seized and disturbed a fishing seine and net of the plaintiff thrown into the sea for fish, wherein, as alleged in the declaration, the plaintiff had taken and enclosed, and then held enclosed in his own possession, a large number of fish, and the defendant threw another fishing seine and net within and upon plaintiff's seine, and prevented plaintiff from taking the fish so taken and enclosed out of his seine, as he otherwise could have done. It appeared in evidence that the plaintiff had only thrown his net partially round the fish in question, leaving a space of about seven fathoms open which the plaintiff was about to close up when the disturbance complained of took place. Until this open space should be closed the fish round which the net was only partially drawn were at large in the sea, and so could not be held to have been taken and enclosed and then held enclosed in the plaintiff's possession, as averred in the declaration. As to the fish, therefore, it was held that the plaintiff had them not in his possession, and could not therefore maintain trespass as regarded them, but for the trespass to the seine he recovered twenty shillings.

Now in that case it was not held that if the fish had been *secured* in the seine the action of trespass would

(1) 6 Q. B. 606.

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not have lain; much less can that case be an authority for holding that the fish taken in the seine set by the "Gerring," which with the fish secured in it was hauled up and pursed, as it is called, and attached to the vessel, were not so in possession of the owners of the "Gerring" as to give them an action of trespass against any one who should bring a vessel alongside of the seine and either put the fish therein into such vessel, or cut the seine and let the fish fall into the sea. But the question with which we have to deal is whether or not the officers of the Dominion Government had any right to seize the "Gerring," with or without the fish so secured in the net so hauled up and pursed and attached to the vessel as aforesaid. And this they had no right to do unless the fact of a vessel which had been engaged in fishing in the open sea, and in the seine laid by which in the open sea fish had been caught, which fish while the vessel was still in the open sea were secured by the net being hauled up, the ends tied so as to secure the fish, and so pursed as it is called, had been attached to the vessel, which afterwards by force of the winds or currents was driven or drifted into Canadian waters within the three mile limits, can by the terms of the laws of the Dominion of Canada be held to have subjected the vessel to seizure as a vessel then engaged in fishing for fish in Canadian waters, and in my opinion the laws of the Dominion are open to no such construction.

SEDGEWICK J.—There can be no question as to whether the vessel, at the moment she was seized by the S.S. "Aberdeen," was within three marine miles of the coast of Nova Scotia. The learned Local Judge in Admiralty for the Nova Scotia Admiralty District, before whom the case was tried, and who had before him a number of witnesses as well for the Crown as

for the defence, came to that conclusion, and we must not disturb his finding unless it is manifest that he is wrong. In my view it is manifest that he is right. The direct evidence, the evidence of every witness who made any examination, and who was in a position to testify as to the result of his own actual observation, was in favour of the Crown. The three officers of the seized steamer testified that the "Gerring," when seized, was within the three mile limit. None of the witnesses who formed part of the crew of the seized vessel ventured to assert, except as a matter of opinion unsupported by actual observation, anything to the contrary. Expert evidence, however, was called on behalf of the defence for the purpose of showing that if at three o'clock in the afternoon the seized vessel was outside the three mile limit, it would be impossible for her to be within that limit at the time of the seizure. This evidence was based upon a number of hypotheses which may or may not have been accurate, but its legal effect or tendency was, in my view, to prove, not that the "Gerring" was outside the three mile limit at the time of the seizure, but that she was continuously within it from the time the seine was set down to the time that the seizure was made, and that Captain Mackenzie was mistaken in his opinion as to the exact position, both of his ship and the "Gerring" in the early part of the day. We must, however, take for granted that at the time when the seine was set out the "Gerring" was outside the three mile limit, and for the purpose of this opinion I will assume that to have been the fact.

The main question, therefore, is: Assuming the seine to have been set out and the mackerel encompassed by it outside the territorial limit, and that the vessel with the seine subsequently drifted, or came, no matter how, to a point within the three mile limit, and

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that at such point her crew were found baling the fish from the seine into the vessel, was the "Gerring," or those controlling her, doing an act which would justify her seizure and condemnation?

By the convention of 1818 the United States renounced forever

> any liberty heretofore enjoyed or claimed by the inhabitants thereof, to take, dry or cure fish on or within three marine miles of any of the coasts, bays, creeks, or harbours of His said (Britannic) Majesty's Dominions in America.

By the Imperial statute (1) it was enacted that if any foreign vessel should be found fishing, or to have been fishing, or preparing to fish, within three marine miles of such coasts, bays, creeks or harbours, she should be forfeited, etc. And by our own Act (2) it is enacted that if a foreign ship (unlicensed) has been found fishing, or preparing to fish, or to have been fishing in British waters within three marine miles, etc., she shall be forfeited. The question, therefore, is not strictly whether under the treaty the "Gerring," at the time of the seizure, was "taking" fish, but whether under the Imperial as well as the Canadian statute, she was "fishing." In my view there is not, and it never was intended that there should be, any difference between the two, but strictly speaking it is the statute which governs; and the vital question, therefore, is: Was she "fishing" at the time of the seizure, or was she *not*?

It is, I think, desirable that we should have a clear understanding as to what the crew of the vessel were actually doing at the time of the seizure. It is, I suppose, a matter of common knowledge what constitutes purse seine fishing, but a brief description of it, as I understand it, may not be out of place.

(1) 59 Geo. III., ch. 38. (2) R. S. C. ch. 94, sec. 3.

As to the kind of seine used in this case the evidence is not clear, but it would probably be from 150 to 175 fathoms in length and from 10 to 12 fathoms in depth. It is rectangular in shape. When a school of mackerel has been descried the captain, accompanied by most of the crew, proceeds as quickly as possible in the seine-boat to encircle the school with the seine, while the cook is left to look after the vessel. The seine is paid out by two of the men in the seine-boat. As soon as the first end of it has been thrown overboard two of the crew, who did not get into the seine-boat, row up to the spot in a dory, and seize the buoy attached to the cork-line at the end, which they hold until the seine-boat has made a circle. The seine is kept in proper position by means of sinkers attached to the bottom and of floats attached to the top. When the two ends of the seine are come together it is more or less cylindrical in shape, the fish being surrounded by the cylinder. At the bottom, and running all round it, is a rope, called the purse line, both ends of which are secured by the men in the seine-boat. After both ends of the seine have been brought together, one end of this line is taken by one portion of the crew in the boat and the other end by the remainder. By pulling this rope in opposite directions, the net, which until now is cylindrical in shape, is closed at the bottom, such closing constituting what is known as the "pursing" of the seine, the result being to make it assume the form of a bag or purse, while the school of mackerel, or such portion of it as has been entrapped, are enclosed within it. The fishing vessel is then brought alongside the seine, and the latter still floating in the water, with the fish therein enclosed, is attached to the vessel fore and aft. The area of the enclosure is circumscribed as may be necessary by gathering in the ends of the seine, and thus

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confining the fish to a more limited space in order to render easier the operation of baling them out. In nautical language this process of circumscribing the area of the enclosure is known as "drying up" the seine. The fish are then baled out of the seine on board the vessel. The operation of setting the seine and of pursing it up is over in about ten or twelve minutes. Hours, in the present case at least two, are occupied in the operation of taking the fish from the seine, the time being dependent upon various causes, but mainly, I suppose, upon the quantity of fish in the seine. At no time during any of these operations is the vessel or seine at anchor; the vessel lays to, and the whole drifts at will with the tide or current.

As I understand the argument of the appellant, it is contended that, the fish having been surrounded by the seine, and enclosed therein outside the three mile limit, the act of "fishing" was then complete, and that anything done by the crew of the vessel after the pursing up process could not be called "taking fish," or "fishing" within the meaning of the convention or of the statutes referred to. I do not think it necessary to refer at length to the canons of construction which govern in a case like the present. Penal statutes, of course, must be construed strictly. When one is accused of having violated a statute it is clear that he must unmistakeably be brought within its provisions; there must be no doubt about it. But we must not do violence to ordinary language; we must not take from plain words their ordinary and universal meaning for this purpose. The question is whether this vessel was "fishing," when, for two hours or more, her crew were baling, or scooping out, by means of a dip-net, from the area of water surrounded by the seine, the one hundred and thirty barrels (more or less) of mackerel which they finally secured. The act of fish-

ing is a pursuit consisting, not of a single but of many acts according to the nature of the fishing. It is not the isolated act alone either of surrounding the fish by the net, or by taking them out of the water and obtaining manual custody of them. It is a continuous process beginning from the time when the preliminary preparations are being made for the taking of the fish and extending down to the moment when they are finally reduced to actual and certain possession. That, at least, is the idea of what "fishing," according to the ordinary acceptation of the word, means, and that, I think, is the meaning which we must give to the word in the statutes and treaty. There is here, as I conceive, no need for interpretation, and the fundamental canon is: "Do not interpret where there is no need of interpretation." If when the S.S. "Aberdeen," moving eastward saw the "Gerring," a mile and three-quarters from shore, engaged as I have described, some of her crew baling fish from the water, others assisting to confine the fish into smaller and smaller compass, so as to be more easily secured: others driving the fish within the ambit of the dip-net by splashing with their oars in the water; others sorting and dressing and otherwise treating the fish, the question were asked: "What is the vessel doing?" Would not the inevitable answer be: "She is fishing?" and if any one on board could be found bold enough to affirm that she was not "fishing," that that operation was completed hours before, when the seine was pursed up and the mackerel therein enclosed, would he not be set down as either ignorant of language or as bereft of reason?

Even if the question depended upon the "taking" of the fish, I do not understand that fish are "taken" when they are enclosed in a seine, or encompassed about by it. They are still alive in their native ele-

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ment, possibly with few but still with some chances of escape. As I understand, they are never *all* taken; numbers escape. There is the contingency of the seine breaking, or the fish falling from the dip-net between the seine and the vessel, or of a storm arising and the vessel breaking away from the seine altogether. And there are, doubtless, many other chances of escape. The "fishing" is not over—although there may be a moral certainty that the fish will eventually be secured—until *as a fact they are secured.* If the other view is the sound one, then the hardy fishermen along our multitudinous coast waters and tidal rivers *are* "fishing" when at even-tide they set their nets, but they are *not* "fishing" when in the morning, with nets full to overflowing, the fish not only enmeshed but dead, they bring them on board and stow away their fare. I *am* "fishing" while I am whipping the water with my line, "fishing" also when the salmon rises and takes the fly, but, having hooked him, I am *not* "fishing" when for minutes, or perhaps hours, I play him in the water, weaken him before the final tragedy, and at last land him dead upon the sward. The Negro boys referred to by Froude in his "English in the West Indies" (p. 137), were "fishing" when they were placing the net in the water and surrounding the fish with their improvised contrivance, but when the cord was drawn and the net closed, they were *not* "fishing" while they were hoisting them into the boat and carrying them ashore. And when more than eighteen and a half centuries ago seven men stood out in their little craft from the shores, on the waters of the Gallilean Sea, they went a fishing. They were "fishing," though all night they caught nothing; "fishing" too, when in the morning at the behest of their Master they cast their net at the right side of the ship; but they were *not* "fishing" when with help

from friends they dragged their net all unbroken ashore, filled with a "multitude of fishes."

Neither in my view, as I have already suggested, can it be said that these fish were "taken," if anything depended upon that, until they were actually on board the ship. True, they were encompassed by the net; true, there was, I admit, almost a certainty that they would ultimately be secured, but they were not yet "taken." A city may be besieged, even beleagured, by an invincible host, there may be a strong probability, nay, even an absolute certainty that the siege will be successful, but the city is not yet "taken." Storm and stratagem may yet be necessary before the final overthrow, and not until that catastrophe is the "taking" consummated. It was only after Troy had been besieged for ten weary years that the Greeks succeeded, and then by wile, in taking her. It was only then that "Ilium fuit" became an historic fact.

The treaty itself affords, I think, strong evidence against the position contended for. The United States thereby renounced the liberty to "take, dry or cure" within Canadian waters. The framers of the treaty at least seemed to have thought that taking and drying, or taking and curing, were consecutive acts embracing all the natural operations of the fishing avocation. Were there a number of acts after the taking, and before the curing or the drying—intercalary or intermediate processes, acts that were not "fishing" but that had a relation to fishing, such as the acts of baling, etc., to which I have referred—that might legally be done in domestic waters? They evidently intended (whether or not that intention has been sufficiently expressed) to prohibit in British waters the doing of anything in connection with fish that would make it an article of commerce, while the word "taking" was intended to include all operations between the throwing of the line

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or the casting of the net, and the processes directly necessary to prepare or preserve the fish for human food.

The question as to whether this vessel was "fishing" at the time of the seizure must, I submit, be determined altogether irrespective of the position of the vessel at the time of the seizure; for, wherever she was, she was "fishing" or she was *not* "fishing" within the meaning of the statute. The quality of the act cannot be determined by any consideration of position or location. She was "fishing" or *not* "fishing" in that spot, whether it was three or three hundred miles from land, its relative position *quoad* the shore being immaterial.

Nor is the question to be determined upon any consideration as to legal property or legal possession. It is not necessary to determine at what particular point of time, or at the conclusion of what particular operation, did the fish become the property of the catchers. I may have an exclusive right of fishery, a property right to the fish of a particular stream, but whether I am or am not "fishing" does not and cannot depend upon any question as to my ownership. The statute has no regard to ownership or possession; it is the act of fishing without reference to the ownership of the thing fished for that it prohibits.

Nor does the fact that the master and crew of the "Gerring" may have been ignorant of their whereabouts, may have had no desire or intention of trespassing upon Canadian territory or of violating Canadian law, affect the *legal* question. We are not dealing here with the master or crew. Neither the treaty nor the statute purports to punish them for violating the treaty's provisions. In the eye of the statute the vessel itself is the offender. The statute gives to it a moral consciousness – a personality—a capacity to act

within or without the law, and imposes upon it the liability of forfeiture in the event of transgression. In the enforcement of fiscal law, of statutes passed for the protection of the revenue or of public property, such provisions are as necessary as they are universal, and neither ignorance of law, nor, as a general rule, ignorance of fact, will prevent a forfeiture when the proceeding is against the thing offending, whether it be the smuggled goods or the purloined fish, or the vehicle or vessel, the instrument or abettor of the offence. If I bring dutiable goods into Canada without paying duty, I am liable to penalty although ignorant of the tariff. The goods themselves, endowed by law as they are with faculty and right of speech, cannot plead my ignorance either of law or fact as a bar to forfeiture.

According to my understanding of my own language, according to my idea as to what is the universal meaning of the term "fishing," no one, it seems to me, would describe the acts being done by the "Gerring" at the time of seizure by any other term than that of "fishing;" nor do I feel called upon out of deference to any supposed canon of strict construction—a rule as often honoured in the breach as the observance—to emasculate language, to filch from that word—a word which, with recognized variations, appears to be common to all the Aryan races—all but a fraction of its meaning, confining it to a petty segment of that wide circumference of idea that has belonged to it for centuries.

An additional consideration is not without weight. In order to the success of the appellant, a modified, secondary or circumscribed meaning must be given to that word "fishing." To excuse, much more to justify, a deviation from its primary meaning, there must be overwhelming and absolutely conclusive considerations. But no considerations at all—not even unwar-

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rantable ones—are forthcoming. Why do violence to the mother tongue and shock the intelligence of the ordinary English student, why give aid and comfort to those profane babblers who reiterate the fiction that judicial tribunals are accustomed deliberately to defeat the legislative intent by constructive canons of their own devising, in order to give immunity to a vessel engaged in a business that, according to present light and present scientific knowledge, may be characterized as nefarious, a business, the tendency of which is to annihilate for all time the fish-food supply of this continent, a business, too, which, so far as Canadian waters are concerned has been prohibited and criminalized (1). We Canadians are in a sense the world's trustees. The North American fisheries have been committed to our guardianship, not for ourselves alone, but for posterity, not for Canada alone, but for humanity. They are the most prolific in the world. One can only imagine, he cannot measure, their potentiality of blessing to mankind, and the Canadian Parliament has recognized its obligation to conserve them for the benefit of future generations. That is the declared policy of the Canadian people, and that too is the desire and the proposed policy (so far as I am informed) of the United States Government. Purse seining is inimical to that policy. It means, not a reasonable use of, or participation in, the deep sea fisheries or their natural annual increment, not their preservation, but their annihilation, their absolute destruction for all time; in familiar words, "the killing of the goose that lays the golden egg." The history of the United States fisheries on the Atlantic seaboard proves this, and it was the conviction of it that induced our Parliament, as a partial remedy, to pass the Act of 1891, above referred to. To allow this

(1) See "Fisheries Amendment Act, 1891," 54 & 55 Vict. ch. 43.

vessel to escape would be to that extent to defeat the beneficent preservative policy of the Canadian Parliament as evidenced by the statute, as well as to point out a way by which in many cases its penal consequences might be avoided. Nothing but overmastering considerations would justify that.

There is another ground upon which the judgment appealed from may be supported. Neither the Imperial statute, nor the Canadian statutes up to 1886 appear to cover by way of penalty all the acts prohibited by the convention of 1818. Although they penalize other acts with a view to its enforcement they appear to have dealt only with "fishing" or "preparing to fish." The treaty forbade the drying or curing of fish, and contained a proviso that an American fishing vessel might enter bays and harbours for the purpose of shelter and repairing damages, of purchasing wood and of obtaining water, *but for no other purpose whatever*. The question had arisen as to whether the purchase of bait was a "preparing to fish" within the meaning of the statutes. It had been decided in the affirmative in Nova Scotia in the case of the "J. H. Nickerson," and in the negative in New Brunswick in the case of the "White Fawn," the first decision having been subsequently followed in the Nova Scotia case of the "David J. Adams." In order to set at rest this question the statute law in force in that year was changed by the Act 49 Vict. ch. 114, (1886,) which expressly provided in addition that if a foreign vessel (unlicensed) has entered within three marine miles of any of the coasts, bays, creeks or harbours of Canada for any purpose not provided by treaty or convention, or of any law of the United Kingdom, or of Canada for the time being in force, such vessel should be forfeited. It is worth noting that this statute is in a special sense an enactment of Her Majesty, carrying

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with it all the dignity and prestige of Imperial law. It was an Act, not assented to by the Governor General, but reserved for the signification of Her Majesty's pleasure, and it was subsequently, by Imperial order in council, solemnly and after due consideration approved by Her Majesty.

If, therefore, the "Gerring," at the time of the seizure, was "unlawfully" where she was, she became liable to forfeiture. The Canadian Act, it will be noted, does not in this relation apply to bays and harbours only, but to coasts as well. The convention specifies the circumstances and all the circumstances under which a foreign fishing vessel may enter into our territorial waters, viz., for wood, water, shelter or repairs, *and for no other purpose whatever*. For what purpose was the "Gerring" where she was when seized? Certainly for none of these purposes, but for the sole purpose of securing the fish inclosed by her seine. She was there, therefore, clearly in contravention of the terms of the convention. Is there any law either in the United Kingdom or in Canada which authorized her presence there? There is certainly no Canadian statute law on the subject, and there is now no commercial treaty, other than the convention of 1818, between Great Britain and the United States which gives to American vessels the right to enter Canadian territorial waters for any purpose whatever. According to international usage the only purpose for which the ships of one nation may enter the territorial waters of another nation, at all events during war, is for refuge or asylum. If there is any right beyond this it must be a right secured either by statute or treaty. Up to 1830 the United States had no commercial, as distinguished from fishing, privileges for any of its vessels in the ports of the British North American possessions. In a letter from Mr. Daniel

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Manning, the Secretary of the Treasury of the United States, to the Hon. Perry Belmont, dated February 5th, he says:

I am advised and concede that up to President Jackson's proclamation of October 5th, 1830, set forth on page 817 of the 4th volume of the United States Statutes at large, this Government *had not even commercial privileges for its vessels in Canadian ports.* We had such privileges as colonists, we lost them as colonists, we regained them in 1830 by an arrangement of legislation finally concerted with Great Britain, which was the result of an international understanding that was in effect a treaty, although not technically a treaty negotiated by the President, ratified by the Senate, signed by the parties, and the ratification formally exchanged by them (1).

He says in the same letter:

The treaty of 1818 secured to our fishermen what, up to that time, they did not have as a treaty right, which was, admission to Canadian bays or harbours for the purpose of shelter, and of repairing damages therein, of purchasing wood and of obtaining water, "*and for no other purpose whatever.*" As colonists we had those rights, but as colonists we lost them by just rebellion (2).

By reference to the provisions of the treaties of 1794 and 1815, it will appear that while the subject of commercial intercourse between the United States and the British possessions in Europe is expressly dealt with, the British possessions in America are not provided for. The treaty of 1794, as to commercial privileges, provided that it should

not extend to the admission of vessels of the United States into the seaports, harbours, bays or creeks of His Majesty's said territories in America.

When the convention of 1818 was framed an attempt was made to place the commercial intercourse between the two countries upon a permanent basis, but that attempt proved abortive. It was not until 1830 that the negotiations carried on by President Jackson, through Mr. McLane on the part of the

(1) 49th Congress, 2nd Sess. no. 4087, p. 20.

(2) Ib. p. 19.

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United States, and Lord Aberdeen on the part of Great Britain, resulted in an arrangement which, up to the present, governs the commercial intercourse between the United States and His Majesty's British North American possessions. This is embodied in a proclamation of the President, and in an order in council of the British Government.

The proclamation, after recital, directs that:

British vessels and their cargoes are admitted to an entry in the ports of the United States, from the islands, provinces and colonies of Great Britain, on or near the North American continent, and north or east of the United States (1).

The order in council is in the following terms:

And His Majesty doth further, by the advice aforesaid, and in the pursuance of the powers aforesaid, declare that the ships of and belonging to the United States of America may import from the United States aforesaid, into the British possessions abroad, goods, the produce of those states, *and may export goods from the British possessions* abroad, to be carried to any foreign country whatever (2).

This latter order in council of 1830 was passed under the authority of the Imperial Act of 1825, ch. 114, but a perusal of that Act, as well as of the order in council, will show, I think, without doubt, that there was no intention on the part of Parliament in passing the Act, or of His Majesty in making the order in council, to in any way repeal or modify the treaty of 1818, or the Imperial Act providing for the enforcement of its provisions, and the Imperial Act last referred to, and the order in council above quoted, is the only basis upon which any claim of right on the part of the "Gerring" to do what she did in the territorial waters of Canada can stand. The "Gerring," therefore, was found in British waters for a purpose not authorized by law, and consequently, under the ex-

(1) Congressional Debates, 1830, p. cxci).

(2) Ibid, p. cxciii).

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press provisions of our own statute became liable to forfeiture.

There is another ground, already incidentally referred to, justifying the forfeiture of this vessel, though not of her cargo, and as this is *par excellence* a case of purse seining, it is just as well to deal with and settle the question now. Section 1 of the statute of 1891, above referred to, is as follows:

1. Section fourteen of "The Fisheries Act" is hereby amended by adding thereto the following subsection :

15. The use of purse seines for the catching of fish in any of the waters of Canada is prohibited, under a penalty for each offence of not less than fifty dollars, and not exceeding five hundred dollars, together with the confiscation of the vessel, boat and apparatus used in connection with such catching.

Of course the same controversy may arise as to the meaning of the word "catching" here as has arisen in respect to the words "fishing" and "taking fish," but if I am right as to these latter words, it follows that "catching" includes "baling," and that as this "baling" was done within the territorial waters by the use of the seine the case is within the statute. But the words "in any of the waters of Canada" qualify, according to proper grammatical construction, not the word "catching," but the word "use," and it is the *using* in Canadian waters of a purse seine that is prohibited. There was such a "user" here, and forfeiture is the consequence.

In my judgment the appeal should be dismissed with costs.

KING J.—This is an appeal from a judgment in the Admiralty Court condemning the American fishing schooner "Frederick Gerring, Jr.", for violation of the fishery laws.

According to the testimony of the seizing officer the vessel when seized was about a mile and a half out-

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side of Gull Ledge, on the coast of Nova Scotia. Her crew at the time were engaged in taking mackerel from a purse or bag seine made fast to the vessel.

A couple of hours previously she had been observed by Capt. Mackenzie, of the fishery protection cruiser "Vigilant," in the act of going up to her seine boat after the seine had been thrown and drawn together, or pursed. The vessel and her seine boat were then, in Capt. Mackenzie's opinion, about a half mile outside of the three mile limit. The interval appears to have been wholly spent in taking the fish from the seine. In this operation the sheets are eased off, and headway taken off the vessel to prevent her fouling the seine, or destroying it by too rapid movement through the water; and it was contended for the appellant that it was not possible, in the existing conditions of wind and current, that the vessel could have got inside the limit. This contention assumed the correctness of Capt. Mackenzie's observation respecting the position of the "Gerring" when he saw her, as already stated, and was supported by a substantial body of expert evidence as to the effects of currents, etc. There was, however, evidence of like character the other way, and (what was more material) direct testimony as to cross bearings taken on board the seizing vessel just before the seizure, of certain objects on the land, which, if correct, would show the "Gerring" to have been then, within the limits. It appears, also, that the commander of the "Aberdeen," the seizing vessel, took the reasonable course of endeavouring to show to the master of the "Gerring" the position of his vessel upon his own chart, by bearings taken with his own compass. It is admitted that the seizing officer asked for the compass and chart in order to take the bearings of certain points and indicate them on the chart. There is, however, a difference between the parties as

to what took place when the chart was produced. The commander of the "Aberdeen" says that it was in a condition that rendered it useless for the purpose. The master of the "Gerring" took no bearings, and his opinion as to his vessel's position rests entirely upon the general appearance of the coast to the eye. Capt. Mackenzie's testimony is important, as he places the vessel outside the limits when the seine was thrown. He was not concerned in the seizure, and his observation of the subsequent position of the "Gerring" is entitled to much consideration. During the two hours his vessel appears to have drifted considerably inshore, and he observed the "Aberdeen" steaming up to the "Gerring," and, at that time, noticed that the latter vessel was then inside the three miles limit. It further appears that there is an indraught amongst the islands along the coast, and we all know that amongst things not fully understood is the cause of the variation in strength of coast currents at different seasons.

The direct testimony in the case was quite sufficient to warrant the conclusions of the learned judge as to the position of the vessel.

The remaining question is whether what the vessel did within the three miles limit was a violation of any of the provisions of the fishery laws. It is to be taken as the fact that when she entered Canadian waters the purse seine had been drawn together inclosing the fish in it. The appellant's contention is that, upon this, the act of fishing or taking fish was completed, and that the "Gerring" was afterwards merely taking on board her own property.

Upon this point MacDonald C. J., says:

I must not omit to notice the contention of Mr. MacCoy, that, admitting the seine to have been thrown, and the fish inclosed in it, outside of the three mile limit, it is not an offence against the Act to con-

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tinue to bale the fish from the seine into the vessel after permitting her to drift across the prohibited boundary. I cannot accept his contention that the "fishing" and the "catching of the fish," are completed when the seine is successfully thrown. Further labour is required to save the fish from the sea and reduce the property to useful possession, and until that be completed the act of "fishing" and "catching fish" is not in my opinion completed.

The evidence is somewhat meagre respecting the operation of taking fish by purse seines It appears that the seine is about twenty-eight fathoms in depth, and, when drawn together, about twelve or fourteen fathoms. It is set from a boat rowed rapidly around the school of fish, and then drawn together from below in such a way as to enclose the fish in a kind of bag, the mouth of which is then made fast to the vessel forward and aft, and drawn above the level of the water, and the live fish taken from it by baling. The setting and drawing of the seine is the work of a short time, but the proper handling of the seine afterwards and getting the fish from it is an operation taking considerable time, in this case two hours.

It is a recognized principle of maritime and international law that every nation has jurisdiction over the waters adjacent to its shores to the distance of a marine league. There is, however, in every other nation, the right to navigate such waters for harmless purposes subject to such supervision as may be deemed necessary to prevent abuse. "It seems to me," says the present Master of the Rolls, in *The Queen* v. *Keyn* (1)

that this is in reality a fair representation of the accord or agreement of substantially all the foreign writers on international law, and that they all agree in asserting that, by the consent of all nations, each which is bounded by the open sea has a right over such adjacent sea as a territorial sea, that is to say, as a part of its territory, and that they all mean thereby to assert that it follows, as a consequence of such sea being part of its territory, that each such nation has in general the same right to legislate and enforce its legislation over that part of the sea as it has over

(1) 2 Ex. D. 63 at p. 135.

its land territory. With its own consent, given to all other nations in the same way as they have consented to its right of territory, consent from which neither it nor they can rightly depart without the consent of all, there is for all nations a free right of way to pass over such sea with harmless intent, but such a right does not derogate from the exercise of all its sovereign rights in other respects.

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This, it is true, is from a dissentient opinion, but by a declaratory Act 41 & 42 Vic. ch. 73, the territorial rights thus asserted were declared to have always existed. See also *The Queen* v. *Dudley* (1).

Upon the close of the war of 1812, and in consequence of a difference of opinion between the governments of Great Britain and the United States as to the effect of the war upon the continuance of former treaty rights of American fishermen in the waters of His Majesty's Dominion in British North America, the convention of 1818 was concluded, whereby it was (*inter alia*) agreed that within certain limits (chiefly in and about Newfoundland, Labrador, Magdalen Islands, etc.), the inhabitants of the United States were to have for ever in common with the subjects of His Majesty the liberty to take fish of every kind, and also the limited right to dry and cure fish in certain bays, harbours and creeks. It was then agreed by the United States as follows:

And the United States hereby renounces for ever any liberty heretofore enjoyed or claimed by the inhabitants thereof to take, dry or cure fish on or within three marine miles of any of the coasts, bays, creeks or harbours of His said Majesty's Dominions in America, not included within the above mentioned limits, provided, however, that the American fisherman shall be admitted to enter such bays or harbours for the purpose of shelter or of repairing damages therein, of purchasing wood and of obtaining water, and for no other purpose whatever. But they shall be under such restrictions as may be necessary to prevent them taking, drying or curing fish therein or in any other manner whatever abusing the privileges hereby reserved to them.

(1) 14 Q. B. D. 273.

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Then, as to domestic legislation. The Imperial Act. 59 Geo. 3, c. 38, declared it to be unlawful for any person other than a natural born subject of His Majesty in any foreign ship, etc., to fish for, or to take, dry, or cure any fish of any kind whatsoever within three marine miles of any coasts, bays, creeks or harbours whatever in any part of His Majesty's Dominions in America, not included within the limits specified and described in the first article of such convention, and it is enacted that, if any such foreign ship, etc., or any person on board thereof should be found fishing or to have been fishing or preparing to fish within such prohibited limits, such vessels, etc., should be forfeited, etc., provided, however, (as in terms of the treaty) that it should be lawful for any fishermen of the United States to enter into any such bays or harbours for the purpose of shelter and repairing damages therein, and of purchasing wood or obtaining water and for no other purpose whatever.

The subject has also been dealt with by the Parliament of Canada, and it is enacted by ch. 94 R. S. C. that any fishery officer concerned in the protection of the fishery (amongst other officers) "may go on board of any vessel within any harbour of Canada, or hovering in British waters within three marine miles of any of the coasts, bays, creeks or harbours in Canada, and may bring such vessel into port * * * And if such vessel is foreign, and (*a*) has been found fishing or preparing to fish, or to have been fishing in British waters within the three marine miles of any of the coasts, bays, creeks or harbours of Canada, not included within the above mentioned limits, without a license * * or (*b*), has entered such waters for any purpose not permitted by treaty, or convention, or by any law of the United Kingdom or Canada for the time being in force, such ship, etc., shall be forfeited."

The convention of 1818 deals not merely with the catching of fish, but with the entire subject of the rights of American fishermen to the use of territorial waters and adjacent coasts in the prosecution of their enterprise.

The rights and privileges of American fishermen therein are stated affirmatively and negatively. There is the right to take fish in common with British subjects in certain waters, and to dry and cure fish (wheresoever taken) on certain coasts; and, with regard to the remaining waters and coasts, a renunciation of all claim or liberty to take, dry or cure fish; but, along with this, a certain saving, viz.: to enter bays and harbours for the specified purpose of shelter, repairs, purchasing wood and obtaining water, but for no other purpose whatever.

This seems not only not to permit, but, by necessary implication to exclude, the using of territorial waters (other than those in which the right of fishing is recognized) for a purpose so material to and connected with the actual taking of the fish, as that of making good and effectual the capture of fish brought under certain dominion and control outside of such waters; that is to say, of acquiring absolute property in that which previously may have been the subject of a qualified property, liable to be defeated in various contingencies as, for instance, by the state of the weather, or by the fouling of the seine, or the breaking of it with the weight and pressure of the fish, or by a variety of causes. To enter territorial waters for such a purpose is a substantial use of them for a purpose directly connected with the taking of fish, and not being permitted by treaty or by any statute, Imperial or Canadian, is within the terms of clause (*b*) of ch. 94 Revised Statutes of Canada. It is immaterial, so far as the question of right is concerned, that the vessel may

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have drifted within the limit, for, if appellant's contention is correct, it avails equally where the act is deliberate. The remedy for cases of hardship lies in the pardoning power of the Crown.

Further, as to the meaning of the words "taking fish" and "fishing," in the treaty and statutes; "to fish" is defined in Webster's dictionary as "to be employed in taking fish as by angling or drawing a net." It covers the attempt although the fish may not be present in the waters, and *a fortiori*, it covers all that is involved in the continuous act of acquiring complete and absolute dominion over fish, subject to certain possession and control. It may well be that the "Gerring" people had sufficient control and dominion to have acquired a qualified property in the fish; *Young* v. *Hichens* (1); Pollock & Wright on Possession 37; 2 Kent's Com. 348; but an operation at sea of taking several hundred, or one hundred barrels (as here) of loose and live fish from a bag net, is attended with such obvious chances of some of them at least regaining their natural liberty, that the act of fishing cannot be said to be entirely at an end in a useful sense until the fish are reduced into actual possession. The whole is a continuous act requiring for its successful carrying out that the fish should without delay be taken from the water, and the whole operation may properly have applied to it the terms "fishing" and "taking fish.

I have not arrived at this conclusion without hesitation and doubt, enhanced by the knowledge that the learned Chief Justice and Mr. Justice Gwynne are of a different opinion.

The result, according to my view, is that the appeal should be dismissed.

(1) 6 Q. B. 106.

GIROUARD J.—It is not claimed by the appellants that foreign vessels have the right to fish within the territorial jurisdiction of Canada. They admit that both by the principles of international law and the articles of the Fishery Convention of 1818, American vessels have no right to fish or take fish within the three mile limit of the coasts of Nova Scotia. Their main contention, at the hearing before us, was that when the "Gerring" was seized, the *fishing or taking fish* had been completed in the open sea, and that the mere baling of fish after they had been caught, and lifting them on the deck of the vessel, is not fishing and was no offence.

They quote no authority in support of this proposition, except Webster's definition of the word *fishing*: "An attempt to catch fish, to be employed in taking fish by any means." I have before me the latest edition of Webster, the "International" of 1896, where the word "fishing" is perhaps more definitely defined: "The act, practice, or art, of one who fishes." But neither this nor the other definition decides the point at issue. Was the act of baling the fish out of the seine into the vessel an operation of fishing or taking fish? That is the question which must be decided according to the principles of law. And to do so, we are brought to examine this other question: Is the fish inclosed in the seine the property and in the possession of the fishermen before it is actually transferred to the vessel? Chief Justice Macdonald, who tried this case in the court below, answered this question in the negative. He said:

I must not omit to notice the contention of Mr. MacCoy, that admitting the seine to have been thrown and the fish enclosed in it outside of the three mile limit, it is not an offence against the Act to continue to bale the fish from the seine into the vessel after permitting her to drift across the prohibited boundary. I cannot accept his contention that the "fishing" and the "catching of the fish" was com-

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plete when the seine was successfully thrown. Further labour is required to save the fish from the sea, and reduce the property to useful possession, and until that be completed the act of fishing and "catching" fish is not in my opinion completed, and in the case before us the crew were in the act of baling the fish from the seine into the vessel when the seizure was made (1).

After a careful research in the text books and digests, both English and American, I have been able to find only one English case in point, but it fully supports the views of the learned Chief Justice. I refer to the case of *Young* v. *Hichens* (2), decided in 1844 by the Court of Queen's Bench. The facts are thus summarized in the report of the case:

On the day in question a very large shoal of mackerel came into the bay of St. Ives. The plaintiff's boat, the "Wesley," put out, and shot her seine, not conducting herself at that time, as the defendant alleged, according to the regulations of the fishery. The seine, nearly 140 fathoms long, was drawn in a semicircle completely round the shoal with the exception of a space of seven fathoms according to the plaintiff's witnesses, ten fathoms according to the defendant's, which was not filled up by it. In this opening, according to the plaintiff's witnesses, the fishermen in the plaintiff's boat were splashing with their oars and disturbing the water in such a manner that, as they affirmed, the mackerel within would have been effectually prevented from escaping. At this conjuncture, before the plaintiff could draw his net closer, the "Ellen," the defendant's boat, rowed in through the opening thus made, shot her seine, enclosed the fish, and captured the whole of them.

It was held that the first person could not maintain trespass for taking his fish, his possession not having been complete. Lord Denman C. J. said:

It certainly results from the evidence in this case, that the fish were reduced to a condition in which it was in the highest degree probable that the plaintiff would become possessed of them. But it is equally certain that he had not become possessed. Whether the necessary possession be rightly described by the word "custodia" or "occupatio," I think it is not attained until the plaintiff has brought the animals into his actual power. It may be indeed that the defendant has committed a tortious act in preventing the plaintiff from completing his possession.

(1) 5 Can. Ex. R. 173. (2) 1 D. & M. 592; 6 Q. B. 106.

Patterson J.:

I do not see how we can say this action is maintainable, unless by holding that a person on the point of taking possession of a thing is actually in possession of it.

It is said that this decision does not apply to the present case, as the seine was pursed up, but it cannot be pretended that a seine can be so closed up that no escape is possible for the fish; an open space must be left for the dip-net used in the baling out of the fish. The whole process of pursing and baling is thus described by the owner of the "Gerring."

Q. Have you had experience in pursing seines? A. Yes, for 7 or 8 years.

Q. Describe how it is done? A. You take the seine and set it out of the boat, and when you get a shoal of fish you go alongside the seine with the vessel and make it fast to the vessel forward and aft. You make the jibs fast and guy out the booms and bale out the fish with a long handled dip-net right on the deck of the vessel. * * *

Q. Is it usual for a fishing vessel to lie with her sheets off and her jibs down, when she is taking fish out of the net? A. Yes, that is the way they have to do.

Q. What is the object of it? A. It is on account of the seine. If the jibs were kept up it would tear the seine all to pieces.

Q. Why do you let the sheets off? A. They have to do it. If the sheets were kept in she would go stern foremost if the jibs were down.

Q. The object is to keep her in about the same position? A. Yes.

It is not difficult to understand that owing to various causes—mismanagement, mishaps or mere accidents—the fish may and do in fact escape from the seine after it is pursed up. The seine may break, the fastenings at either end of the vessel may give way, the jibs and sheets may become unmanageable, the fish may jump into the sea over the floating sides of the seine, or from the dip-net, and many other things may happen which would prevent the fishermen from capturing the fish enclosed in the seine. In the eyes of the law, the possibility of such accidents, mishaps and mismanagement renders the property and possession of the fish not complete till it is in the vessel.

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But admitting that the fish enclosed in a seine pursed up is in the possession of the fisherman, upon what ground can it be pretended that the baling of the fish is not an operation of fishing? As remarked by Chief Justice Macdonald, the baling was necessary to reduce the property to useful possession.

The soundness of the decision in *Young* v. *Hichens* (1) has never been questioned either in England or in the United States; it is quoted with approbation in American text books and digests, and more particularly in the American and English Encyclopaedia of Law, v° "Fish and Fisheries," p. 27; Addison on Torts (2); Gould on Waters (3).

Angell, Tide Waters (4), observes:

As the right of fishing in the sea, and in all inland and navigable waters, is *primâ facie* common to all, it follows that an actual appropriation or manucaption must be made of the fish to complete the right of property; and that when the fish are taken they become the exclusive property of the taker, unless voluntarily restored to their native element. Bracton and Fleta both lay it down as the common law that fishes are *animalia quæ in mari nascunter quæ cum capiuntur captoria fiunt.* But the possession of the fish must be complete.

The learned writer then quotes *Young* v. *Hichens* (1).

I have no hesitation in following the decision in *Young* v. *Hichens* (1), as I find it based upon the Roman law, which everywhere is considered as written reason, and in the absence of other regulations has been accepted as law by all modern civilized nations. The Institutes of Justinian *de rerum divisione* (5), (translation of Sandars) say:

12. Wild beasts, birds, fish, that is, all animals which live either in the sea, the air or on the earth, so soon as they are taken by any one, immediately become by the law of nations the property of the captor for natural reason gives to the first occupant that which had no previous owner. And it is immaterial whether a man takes wild beasts or birds upon his own ground, or on that of another. Of

(1) 6 Q. B. 606.
(2) Am. ed 1891, vol. 2, p. 689.
(3) Ed. 1891, sec. 1.
(4) Ed. 1847, p. 137.
(5) Lib. 2, t. 1, LL. 12 and 13.

course any one who enters the ground of another for the sake of hunting or fowling, may be prohibited by the proprietor, if he perceives his intention of entering. Whatever of this kind you take is regarded as your property, so long as it remains in your keeping, but when it has escaped and recovered its natural liberty, it ceases to be yours, and again becomes the property of him who captures it. It is considered to have recovered its natural liberty if it has either escaped out of your sight, or if, although not out of sight, it yet could not be pursued without great difficulty.

13. It has been asked, whether, if you have wounded a wild beast, so that it could be easily taken, it immediately becomes your property. Some have thought that it does become yours directly you wound it, and that it continues to be yours while you continue to pursue it, but that if you cease to pursue it, it then ceases to be yours, and again becomes the property of the first person who captures it. Others have thought that it does not become your property until you have captured it. We confirm this latter opinion because many accidents may happen to prevent your capturing it. D. xli., tit. 1.

Gaius in this passage of the Digest informs us that the former opinion was that of Trebatius.

It cannot be denied that these Roman rules never prevailed in England or on the continent of Europe to their full extent, at least as to wild animals taken or caught on private grounds by a trespasser or a wrongdoer. As Lord Chelmsford, referring to the passage from the Institutes, points out in *Blades* v. *Higgs* in 1865 (1).

With respect only to live animals in a wild and unreclaimed state, there seems to be no difference between the Roman and the common law.

Jurists agree that the word "occupation," "capture," or "custody," used in the Institutes, means bodily possession, *corpore et animo*, although it is contended by some that the fisherman who has secured fish in his seine, or the hunter who has wounded a wild animal, has acquired some qualified rights of ownership over the same, provided the fishing or hunting be continued, but if abandoned he loses every claim or

(1) 11 H. L. Cas. 637.

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right to the animal. In such cases, therefore, fishing or hunting is not terminated till the animal is actually captured.

The best interpreters of the Roman law hold that wild animals are not possessed till they are actually and beyond peradventure in our power.

Domat, says (1):

> Wild beasts, fowls, fishes, and everything that is taken, either in hunting, fowling or fishing, by those who have a right thereto, belong to them as their property by virtue of the seizure which they make of them.

The original text says more:

> Les bêtes sauvages, les oiseaux, les poissons et tout ce que peuvent prendre, ou à la chasse ou à la pêche, ceux qui en ont le droit, leur sont acquis en propre par la *prise qui les met en leurs mains.*

Savigny, *Jus Possessionis*, says (2):

> Wild animals are only possessed so long as some special disposition (*custodia*) exists, which enables us actually to get them into our power. It is not every *custodia*, therefore, which is sufficient; whoever, for instance, keeps wild animals in a park, or fish in a lake, has undoubtedly done something to secure them, but it does not depend on his mere will, but on a variety of accidents, whether he can actually catch them when he wishes; consequently, possession is not here retained; quite otherwise with fish kept in a stew, or animals in a yard, because then they may be caught at any moment.

Puffendorf, says (3):

> With regard to things movable, every one agrees that, in order to appropriate the same by right of first occupation, the possession must be bodily, and that it is necessary that they should be removed from the place where they were found to the place of domicile of the finder, or the place were they are intended to be kept.

And he then explains that it is not essential that this possession should at first be manual:

> That possession may also be acquired with instruments, such as snares, nets, traps, weirs, hooks and the like; * * * provided that these instruments are entirely under our control * * and also that

(1) Liv. 3 tit. 7, 2 par. 7 (Strahan ed.)

(2) Perry's ed. p. 257.

(3) Lib. 4, cap. 6, s. 9.

the animal is so well caught that it cannot possibly escape, at least during the length of time required to put the hand on it.

Heinneccius (1), lays down the same rule, and so far both he and Puffendorf merely repeat what Grotius (2), says on the same subject. Puffendorf finally makes the distinction at sec. 10 :

That if I have mortally wounded or at least seriously disabled an animal, no one can lay any claim to it so long as I pursue it on grounds where I have the right to hunt; but if the wound be not mortal, and the animal can well escape, it still goes to the first occupant.

Barbeyrac criticises Puffendorf, and holds that it is not always necessary that the animal should be wounded or removed from its natural element, and that its mere discovery and pursuit, with the intention to capture it, are sufficient. Pothier (3), observes that in France the latter opinion prevails in practice, *dans l'usage*; but Laurent (4), says that the jurisprudence has been to the contrary. A decision of the Superior Court of Quebec holds that it is sufficient that the animal be wounded and pursued, and quotes the authority of Cujas. *Charlebois* v. *Raymond* (5).

For the purposes of this case, it may be asserted that all the authorities agree in holding that a wild animal caught in a net or trap is not in the full possession or the absolute property of its owner unless finally seized. This feat, therefore, cannot be accomplished till the hunting or fishing is successfully completed.

These principles were recognized in two American cases quoted with approbation by Chancellor Kent. In *Pierson* v. *Post* (6), the Supreme Court of the State of New York held in 1805 that:

Pursuit alone gives no right of property in animals *feræ naturæ*; therefore an action will not lie against a man for killing and taking one pursued by, and in view of, the person who originally found,

(1) Sect. 342.
(2) Lib. 2, cap. 8, sect. 3 and 4.
(3) Propriété, n. 26.
(4) Vol. 8, n. 442.
(5) 12 L. C. Jur. 55.
(6) 3 Caine 175.

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started, chased it, and was on the point of seizing it. Occupancy in wild animals can be acquired only by possession, but such possession does not signify manucaption, though it must be of such a kind as by nets, snares or other means, to so circumvent the creature that he cannot escape.

Tompkins J., delivering the opinion of the court, said:

If we have recourse to the ancient writers upon general principles of law, the judgment below is obviously erroneous. Justinian's Institutes (1), and Fleta (2), adopt the principle, that pursuit alone vests no property or right in the huntsman; and that even pursuit, accompanied with wounding, is equally ineffectual for that purpose, unless the animal be actually taken. The same principle is recognized by Bracton (3).

Puffendorf (4) defines occupancy of beasts *feræ naturæ*, to be the actual corporal possession of them, and Bynkershock is cited as coinciding in this definition. It is indeed with hesitation that Puffendorf affirms that a wild beast mortally wounded, or greatly maimed, cannot be fairly intercepted by another, whilst the pursuit of the person inflicting the wound continues. The foregoing authorities are decisive to show that mere pursuit gave Post no legal right to the fox, but that he became the property of Pierson, who intercepted and killed him.

It therefore only remains to inquire whether there are any contrary principles, or authorities, to be found in other books, which ought to induce a different decision. Most of the cases which have occurred in England, relating to property in wild animals, have either been discussed and decided upon the principles of their positive statute regulations, or have arisen between the huntsman and the owner of the land upon which beasts *feræ naturæ* have been apprehended, the former claiming them by title of occupancy, and the latter *ratione soli*. Little satisfactory aid can, therefore, be derived from the English reporters.

Barbeyrac, in his notes on Puffendorf, does not accede to the definition of occupancy by the latter, but, on the contrary, affirms that actual bodily seizure is not, in all cases, necessary to constitute possession of wild animals. He does not, however, describe the acts which, according to his ideas, will amount to an appropriation of such animals to private use, so as to exclude the claims of all other persons, by title of occupancy, to the same animals; and he is far from averring that pursuit alone is sufficient for that purpose. To a certain extent,

(1) Lib. 2, tit. 1, s. 13.
(2) Lib. 3, c. 2 p. 175.
(3) Lib. 2, c. 1, p. 8.
(4) Lib. 4, c. 6, ss. 2 and 10.

and as far as Barbeyrac appears to me to go, his objections to Puffendorf's definition of occupancy are reasonable and correct. That is to say, that actual bodily seizure is not indispensable to acquire right to, or possession of, wild beasts; but that, on the contrary, the mortal wounding of such beasts, by one not abandoning his pursuit, may, with the utmost propriety, be deemed possession of him since, thereby, the pursuer manifests an unequivocal intention of appropriating the animal to his individual use, has deprived him of his natural liberty, and brought him within his certain control. So also, encompassing and securing such animals with nets and toils, or otherwise intercepting them in such a manner as to deprive them of their natural liberty, and render escape impossible, may justly be deemed to give possession of them to those persons who, by their industry and labour, have used such means of apprehending them. Barbeyrac seems to have adopted, and had in view in his notes, the more accurate opinion of Grotius (1), with respect to occupancy. That celebrated author (2), speaking of occupancy, proceeds thus: "*Requiritur autem corporalis quædam possessio ad dominium adipiscendum; atque ideo vulnerasse non sufficit.*" But in the following section he explains and qualifies this definition of occupancy: "*Sed possessio illa potest non solis manibus, sed instrumentis, ut decipulis, ratibus, laqueis dum duo adsint; primum ut ipsa instrumenta sint in nostra potestate, deinde ut fera, ita inclusa sit, ut exire inde nequeat.*" This qualification embraces the full extent of Barbeyrac's objection to Puffendorf's definition, and allows as great a latitude to acquiring property by occupancy, as can reasonably be inferred from the words or ideas expressed by Barbeyrac in his notes. The case now under consideration is one of mere pursuit, and presents no circumstances or acts which can bring it within the definition of occupancy by Puffendorf, or Grotius, or the ideas of Barbeyrac upon that subject.

Pierson v. *Post* (3) was reaffirmed in 1822 by the same court in *Buster* v. *NewKirk* (4).

Per Curiam. The principles decided in the case of *Pierson* v. *Post* (3) are applicable here. The authorities cited in that case establish the position that property can be acquired in animals *feræ naturæ*, by *occupancy* only; and that, in order to constitute such an occupancy, it is sufficient if the animal is deprived of his natural liberty, by wounding, or otherwise, so that he is brought within the power and control of the pursuer. In the present case, the deer, though wounded, ran

(1) This is a mistake. Puffendorf reproduces in this respect the opinion of Grotius.

(2) Lib. 2, c. 8, s. 3, p. 309.

(3) 3 Caine 175.

(4) 20 Johns. 74.

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six miles; and the defendant in error had abandoned the pursuit that day, and the deer was not deprived of his natural liberty, so as to be in the power or under the control of N. He, therefore, cannot be said to have had a property in the animal, so as to maintain the action. The judgment must be reversed.

Having arrived at the conclusion that the baling of the fish is an operation of fishing, or taking fish, it is not necessary for me to express any opinion upon two important questions which were raised by the Crown, namely, whether the recent Dominion statute prohibiting purse seining, applies to this case, and whether the convention of 1818 prohibits American fishermen from entering within three miles of the *coasts* of the Dominion—others than bays and harbours—for any purpose not authorized by the convention, and particularly for the purpose of baling fish caught in the open sea, if such an act cannot be considered as fishing, or taking fish.

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

Appeal dismissed with costs.

Solicitors for the appellant: *MacCoy, MacCoy & Grant.*

Solicitor for the respondent: *W. B. A. Ritchie.*

1897
*Mar 2.
*May 1.

WILLIAM B. LAMBE, *ès qualité* (PETITIONER FOR FOLLE ENCHÈRE.) .... APPELLANT;

AND

CHARLES N. ARMSTRONG (ADJUDICATAIRE). .... RESPONDENT.

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

Sale by sheriff—Folle enchère—Resale for false bidding—690 *et seq. C. C. P.—Questions of practice—Appeal—Art.* 688 *C. C. P.—Privileges and hypothecs — Sheriff's deed—Registration of—Absolute nullity—Rectification of slight errors in judgment—Duty of appellate court.*

The Supreme Court of Canada will take into consideration questions of practice when they involve substantial rights or the decision appealed from may cause grave injustice.

Part of lands seized by the sheriff had been withdrawn before sale but on proceedings for *folle enchère* it was ordered that the property described in the *procès verbal* of seizure should be resold, no reference being made to the part withdrawn. On appeal, the Court of Queen's Bench reversed the order on the ground that it directed a resale of property which had not been sold and further because an apparently regular sheriff's deed of the lands actually sold had been duly registered, and had not been annulled by the order for re-sale, or prior to the proceedings for *folle enchère*.

Held, that the Court of Queen's Bench should not have set aside the order, but should have reformed it by rectifying the error.

Held, further, that the sheriff's deed having been issued improperly and without authority should be treated as an absolute nullity notwithstanding that it had been registered and appeared upon its face to have been regularly issued, and it was not necessary to have it annulled before taking proceedings for *folle enchère*.

APPEAL from the decision of the Court of Queen's Bench for Lower Canada (appeal side) reversing the judgment of the Superior Court, District of Montreal,

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

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which had granted the appellant's motion for a *folle enchère*, and ordered a re-sale of the property seized by the sheriff.

A statement of the facts and questions at issue on this appeal appear in the judgment reported.

Macmaster Q.C. and *Stephens* Q.C. for the appellant. The issue raised upon this appeal seems at first to involve mere questions of local procedure, which may be objected to as proper grounds for consideration by this court. Appellate courts have constantly allowed appeals based upon questions of practice when parties might thereby be deprived of remedy or made to suffer great injustice. This is a case of that nature.

It is clear that the slip in drafting the order for resale was excusable and occurred through the absence from the record in the office of the court of the notice to the sheriff withdrawing a very insignificant portion of the road-bed of the railway seized. The order was for a *resale*, which could only include what had actually been sold before by the same sheriff under the same process. The maxim *de minimis non curat lex* applies with striking force, but the Court of Queen's Bench reversed the order on technicalities, where there was no mistake either of law or of practice sufficient to vitiate it. The proper course was simply to have reformed the order by the rectification of a mere *lapsus calami* of an officer of the court. The objection taken could not be of interest to the respondent, but on the contrary might have the effect of giving him an actual benefit by making title to the uninterrupted right of way.

The sheriff's deed was illegally issued without authority, because the judges' order did not dispense with the necessity of taking the security imperatively required by art. 688, C. C. P. as amended by R. S. Q. art. 5941. It was based upon proceedings which had been

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all set aside as irregular and was wholly unwarranted and an absolute nullity. The registration could have no effect but to cloud the title until rectified by suit in the usual way.

Precise description of the lands to be resold is not required in any event. *Vincent* v. *Roy* (1); *Délisle* v. *Sauche* (2). A suggestion to the sheriff sufficiently indicating that he was to sell again what he had sold before is all that is necessary; the order was sufficient for all practical purposes.

Morgan for the respondent. The appellant is merely acting in an official capacity and makes the excuse of being an opposant *afin de conserver* to force himself into the record as if he were a creditor and not simply a third party. (Arts. 511, 691 C. C. P.) His course is premature and irregular and he is not qualified to demand the resale. *Fraser* v. *Garant* (3). As a condition precedent to the present proceedings the sheriff's deed should have been annulled and its registration set aside. (Arts 2148, 2154 C. C.) Until such declaration of nullity the deed is a complete answer to the motion for *folle enchère*.

This appeal being only to settle matters of procedure and questions arising in most unique circumstances of practice, ought not to be entertained by this court. The appellant having disregarded the universal practice of describing in particular terms all lands to be sold, must abide the consequences of his departure from well settled rules of practice and procedure.

The order is full of irregularities. Besides ordering the resale of the lot withdrawn and which never had been sold and could not possibly be resold under such an order, it fails to mention that over $1,200 were actually paid in cash to the sheriff, and that the *adju-*

(1) M. L. R. 2 S. C. 34. (2) 26 L. C. Jur. 162.
(3) 4 Q. L. R. 224.

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dicataire deposited first mortgage bonds for the balance of the price. It is invalid for its many omissions and irregularities; (art. 690 C. C. P.); and it is absurd that the respondent should be held *contraignable par corps* under an order so very informal and incomplete.

The judgment of the court was delivered by:

GIROUARD J.—This appeal raises only a question of procedure in the court below, and consequently the respondent contended that we should not interfere with the judgment appealed from. But questions of practice cannot be ignored by this court when their decision involves the substantial rights of the litigants, or sanctions a grave injustice. We believe that this is one of those cases.

On the 2nd of June, 1894, the property of The Great Eastern Railway Company, consisting of the line of railway and all its appurtenances, was sold by the sheriff at the suit of Mr. Raymond Préfontaine for $20,000. The line comprised a large number of lots of land situate in several parishes of the district of Richelieu, and among others part of lot 1217 of the parish of St. Thomas de Pierreville.

Before the sale the plaintiff ordered the sheriff in writing to withdraw said lot from the sale. The balance of the property seized was duly adjudicated to the respondent. He did not, however, pay the amount of his adjudication, but deposited an amount sufficient to satisfy the school taxes and the expenses of the sheriff. The latter, therefore, returned to the court that the sum of $19,168.85 was still unpaid and in the hands of the respondent. Under the pretence that he was the sole hypothecary or privileged creditor of the company he adopted, with the consent of the plaintiff and defendant and other then apparent interested parties, various proceedings for the purpose

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of obtaining a judgment of distribution in his favour, and in fact did obtain that judgment. It is not necessary to take any further notice of those proceedings, as they were subsequently set aside at the suit of the appellant by a judgment of the Superior Court, which was confirmed in review, and the sheriff was ordered

to return the moneys arising from the said sale in to court, and that the same be distributed according to law,

and so far that judgment is *chose jugée* between the parties, as no appeal was taken from it. Thereupon, the sheriff made a supplementary report that the money was still in the hands of the respondent, as hypothecary creditor of the railway company, and that he held no security from him for the amount. Neither the certificate of the registry office, nor any other paper, shows that the respondent was even an ordinary creditor. His counsel alleges in several papers that he is

opposant afin de conserver * * *et* le seul créancier privilegié de la compagnie défenderesse, tel qu'il appert aux documents produits,

but these documents were never produced, at least they are not to be found in the printed case; the opposition *afin de conserver*, if ever filed, is not before us.

No mention was made by the sheriff that he had previously delivered a deed of sale to the respondent, which acknowledges that the respondent had paid the full amount of his adjudication, first by paying him $1,102.37 in cash, and $18,897.63, as representing so much of the mortgage debentures of the company.

The appellant, being *opposant afin de conserver*, in his quality of collector of provincial revenue for the province of Quebec, alleged that he was a creditor for $2,250 and claimed a privilege for $900 of that sum, and finally moved for *folle enchère* against the respondent under art. 690, and following of the Code of Procedure. The respondent did not contest the claim of the appellant, but allowed the motion for *folle enchère* to go by

default, although duly served upon him, and contented himself with filing of record a copy of the sheriff's deed of sale, accompanied by a list or *inventaire des productions de l'adjudicataire*, which mentions only the said deed. It may be stated here that the said deed does not comprise lot no. 1217.

The Superior Court (Doherty J.), after having heard the appellant only, no mention being made of the respondent, granted the motion for *folle enchère*,

and doth order the issue of a writ of *venditioni exponas* in order that the property described in the *procès verbal* of seizure herein may be resold at the *folle enchère* of said Armstrong, *adjudicataire*, and that the said *adjudicataire* may be held by *contrainte par corps* to the payment of any loss resulting from the resale and the costs of these presents.

The Court of Appeal reversed the judgment for the following reasons:

Attendu que le jugement rendu en cette cause par la Cour Supérieure, le 26 septembre 1895, ordonne la vente à la folle enchère de l'appelant de la propriété décrite au procès verbal de la saisie qui en a été faite et qu'il appert que l'un des immeubles désigné au dit procès verbal, savoir : le numéro 1217 du cadastre de la paroisse de St. Thomas de Pierreville, a été distrait de la dite saisie et n'a jamais été vendu ni acheté par l'appelant :

Considérant de plus que l'appelant oppose à la demande de l'intimé le titre en apparence régulier que le shérif lui a donné comme adjudicataire de la propriété par lui acquise, lequel, paraît avoir été dûment enregistré et que l'intimé qui a fait annuler les procédures adoptées pour l'obtenir n'a pas demandé ni obtenu l'annulation préalable du dit acte :

Considérant qu'il y a erreur dans le jugement rendu par la Cour Supérieure, etc.

We have no hesitation in holding that the judgment of the Superior Court was right and should be restored: but it should be corrected so as to exclude lot 1217. It was clearly a mistake easily explained, as the paper withdrawing that lot from the seizure and sale was only left with the sheriff, and was not filed of record in the court, at least at the time it was signed; in fact it is hard to know when it was filed, as even the sheriff's return makes no mention of the same.

The respondent has no interest to raise this point, for if this lot be sold it will benefit himself and diminish his liability as *adjudicataire*, without being in any manner responsible for the validity of the proceeding.

As to the sheriff's deed of sale, which has been registered, I look upon it as a mere waste paper, which should be entirely ignored as it was not filed in support of any pleading or proceeding, and as having been issued improperly, illegally or without authority. It was an easy matter for the respondent to obtain, or at least to move for, leave to contest in writing the application for a resale under art. 692 of the Code. This leave seems to have been granted as he was allowed five days to answer, but failed to do so, and even to appear at the hearing before the court.

The respondent has admitted before us the nullity of the sheriff's sale, but he contended that, at least by his motion for *folle enchère*, the appellant should also have prayed that it be annulled. It is too late for him to urge this ground in appeal. We believe, moreover, that in view of the fact that the sheriff's deed was merely thrown into the case and that the appellant had no notice of it, the court should ignore the same. To permit litigants in default, as this respondent certainly is, thus to take advantage of the irregularities and misdoings of the officers of the court, would be simply to hinder the administration of justice and destroy the usefulness of courts of law. We have, therefore, no hesitation in reversing the judgment of the Court of Appeals and restoring the judgment of the Superior Court, with the rectification of the mistake above mentioned, with costs against the respondent before all the courts.

Appeal allowed with costs.

Solicitor for the appellant: *C. H. Stephens.*

Solicitor for the respondent: *E. A. D. Morgan.*

1897
*May 8.
*May 12.

THE CITIZENS' LIGHT AND POWER COMPANY (DEFENDANT) } APPELLANT;

AND

PARMELIA PARENT (PLAINTIFF)......RESPONDENT.

ON APPEAL FROM THE SUPERIOR COURT FOR LOWER CANADA SITTING IN REVIEW AT MONTREAL.

Appeal from Court of Review—Appeal to Privy Council—Appealable amount—54 & 55 V. (D.) c. 25, s. 3, s.s. 3 & 4—C. S. L. C. c. 77, s. 25—Arts. 1115, 1178 C. C. P.—R. S. Q. art. 2311.

In appeals to the Supreme Court of Canada from the Court of Review (which, by 54 & 55 Vict. ch. 25, s. 3, s.s. 3, must be appealable to the Judicial Committee of the Privy Council,) the amount by which the right of appeal is to be determined is that demanded, and not that recovered, if they are different. *Dufresne* v. *Guévremont* (26 Can. S. C. R. 216) followed.

MOTION to quash an appeal from the decision of the Superior Court, sitting in review at Montreal, affirming the judgment of the Superior Court, district of Montreal, which condemned the appellants to pay $2,000, with interest and costs to the respondent.

The respondent sued for $5,000 damages for the death of her late husband which, it was alleged, was caused through the appellant's negligence, but recovered only $2,000 with interest and costs by the judgment in the Superior Court. On an appeal taken by the appellant, the Court of Review affirmed the decision of the trial court with costs. The appeal to the Court of Queen's Bench having been taken away by the amendment to article 1115 of the Code of Civil Procedure (54 Vict. (Q.) ch. 48, sec. 2), the defendant appealed directly to the Supreme Court of Canada, under the provisions of 54 & 55 Vict. (D.) ch. 25, s. 3, s.s. 3.

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

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Charbonneau for the respondent, moved to quash the appeal on the ground of want of jurisdiction, and cited *Couture* v. *Bouchard* (1); *Turcotte* v. *Dansereau* (2); *Laberge* v. *The Equitable Life Assurance Society* (3); *Allan* v. *Pratt* (4).

R. C. Smith for the appellant contra. The decision in *Dufresne* v. *Guévremont* (5) applies here. The amount of the *demande* rules where the appeal is dependent upon the amount in dispute.

TASCHEREAU J.- This is an appeal from the Court of Review, which, it is conceded, lies to this court, under 54 & 55 Vict., ch. 25 (D), only where an appeal lies in the case from the Court of Review to the Privy Council. The amount claimed by the declaration is $5,000, and the judgment of the Superior Court, confirmed in review, is for $2,000. The appeal is by the defendant.

The respondent moves to quash the appeal on the ground that the judgment being only for $2,000, (and not £500 sterling), the case is not appealable to the Privy Council. That contention cannot prevail. It is settled by this court in *Dufresne* v. *Guévremont* (5), that whenever the right to appeal to the Privy Council is dependent upon the amount in dispute, such amount must be understood to be that demanded, and not that recovered, if they are different. In that case the amount given by the judgment appealed from and in controversy on the appeal was sufficient to make the case appealable, but the amount demanded by the declaration was not, and we held that as it is the amount demanded that ruled there was no appeal. Here, the amount given by the judgment appealed

(1) 21 Can. S. C. R. 281.
(2) 26 Can. S. C. R. 578.
(3) 24 Can. S. C. R. 59.
(4) 13 App. Cas. 780.
(5) 26 Can. S. C. R. 216.

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from and in controversy on the appeal is not sufficient to make it appealable, but the amount demanded is, and it being the amount demanded that rules the case is appealable. Now here, the amount demanded is over £500 sterling. The case is therefore appealable. We are bound by our previous decision on the point. The motion must be dismissed with costs.

GWYNNE J.—The point raised upon the motion to quash the appeal in this case having been expressly decided by the unanimous judgment of the learned judges of this court who heard the case of *Dufresne* v. *Guévremont* (1) it is not necessary that I should state the reasons upon which, but for that judgment, I should feel obliged to arrive at a contrary conclusion in the present case further than this, that I should be of opinion that the legislature of the late Province of Canada never contemplated by sec. 25 of ch. 77 of the Consolidated Statutes of Lower Canada which is intituled "An Act respecting the Court of Queen's Bench," and was passed for the purpose of defining the jurisdiction original and appellate of that court, assuming to prescribe any mode by which it should be determined in any case whether the amount in dispute was sufficient to give such jurisdiction to Her Majesty in Her Privy Council to entertain an appeal from the judgment of a court in Lower Canada. So likewise I should have been of opinion that we are not justified in ignoring the judgment rendered in the case of *Allan* v. *Pratt* (2) upon the suggestion that that judgment was rendered without due consideration of the sec. 25 of said ch. 77, or without the atttention of the Privy Council having been drawn to it, or that we are justified in entertaining the opinion that the judgment in that case would have been different from

(1) 26 Can. S. C. R. 216. (2) 13 App. Cas. 780.

what it is if due consideration had been given by Her Majesty in Her Privy Council to the limitation which it is assumed that section imposed upon the jurisdiction of the Privy Council.

Dufresne v. *Guévremont* (1) must be conclusive upon the point in this court, and in cases like the present parties who may not be satisfied with that judgment must be remitted to raise the question as they may be advised before Her Majesty in Her Privy Council.

SEDGEWICK, KING and GIROUARD JJ. concurred in the reasons given by Mr. Justice Taschereau.

Motion refused with costs.

Solicitors for the appellant: *Smith & MacKay.*

Solicitors for the respondent: *Charbonneau & Pelletier.*

THOMAS RAPHAEL, *ès qualité* (PLAINTIFF) .... APPELLANT;

1897 *May 12.

AND

DAVID MACLAREN AND OTHERS (DEFENDANTS) .... RESPONDENTS.

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

Appeal — Jurisdiction—Appealable amount—Future rights—Alimentary allowance—"Other matters and things"—R. S. C. c. 135, *s.* 29 *(b)*— 56 *V. (D.) c.* 29.

The classes of matters which are made appealable to the Supreme Court of Canada under the provisions of section 29, subsec. *b* of "*The Supreme and Exchequer Courts Act,*" as amended by 56 Vict. ch. 29, do not include future rights which are merely pecuniary in their nature and do not affect rights to or in real property or rights analagous to interests in real property. *Rodier* v. *Lapierre* (21 Can. S. C. R. 69) and *O'Dell* v. *Gregory* (24 Can. S. C. R. 661) followed.

(1) 26 Can. S. C. R. 216.

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MOTION before Mr. Cassels, the Registrar in Chambers, to allow security for costs in appeal.

The matters in issue upon the appeal sought from the judgment of the Court of Queen's Bench are sufficiently set out in the Registrar's judgment.

McDougall Q.C. for the motion.

Aylen Q.C. contra.

THE REGISTRAR.—The late James Maclaren, by his will, clause 16 thereof, bequeathed to his sons David and Alexander Maclaren, $30,000,—

to be held and invested by them in trust, and in such manner as they may deem advisable, for the benefit of my daughter, Louisa Maclaren (who, some few years ago, married one Thomas Raphael against my will and advice, and who does not find the necessary means to support his family), and the interest or revenue thereof to be paid by them to her half yearly on her own receipt, for her support and maintenance, and free from all marital or other control or liability whatsoever, and exempt from all seizure or attachment. The said capital to be paid, by my executors and trustees, to my two sons David and Alexander Maclaren, after the expiry of three years after my decease unless my executors and trustees think it to the advantage of my estate to pay the amount over sooner, but until the expiry of three years my executors and trustees shall pay to the said Louisa Maclaren the sum of fifteen hundred dollars per annum in half yearly payments as interest on the said principal sum of thirty thousand dollars, and such said capital sum, upon the decease of my said daughter, shall go and belong to her lawful children surviving her, share and share alike, but none of the principal to be paid to the said children until they are of the age of thirty years. They may, however, after the death of their mother, receive the interest of the same until they are thirty years of age, share and share alike.

I also release and discharge my said daughter, Louisa Maclaren, from all her liability to me, a statement of which may be seen in my books.

By a codicil the testator modified this clause of his will, as follows:

I increase the legacy of thirty thousand dollars, made by me in paragraph sixteen of my said will, to be held by my sons, David and Alexander, in trust for my daughter, Louisa, to the sum of seventy

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thousand dollars, and the annual interest of fifteen hundred dollars to her therein, to three thousand five hundred dollars, and I ordain that my said two sons shall have the right and power, in their discretion, not to pay the said interest to my said daughter, but may apply the same for her benefit and support, and the benefit, support and education of her children, as they may deem best, * * it being my desire and will, that the husband of my said daughter, Thomas Raphael, shall not, either directly or indirectly, have any power or control over the benefits and legacies made by me to my said daughter Louisa, or any benefit, directly or indirectly, therefrom. I also ordain that my said two sons may pay the share of the capital of the said legacy to my daughter Louisa, to her lawful children, before they respectively attain the age of thirty years, as provided by my said will. I also ordain that the survivor of my said two sons may alone act as trustee in the matter of said legacy, to my daughter Louisa, or in any other legacies in which they are constituted trustees by my said will.

The testator died on the 10th of February, 1892.

For the following three years interest was paid by the executors on the $70,000 at the rate of 5 p. c. to Mrs. Raphael. On the 10th of February, 1895, the executors paid over the $70,000 to the trustees who replaced the money in the hands of the executors as a temporary investment at 5 p. c.

On the 8th April, 1895, Mrs. Raphael died leaving three minor children.

On the 21st May, 1895, the sum of $70,000 together with $949.32 for accrued interest, was repaid by the executors to the trustees, who deposited it in the Savings Department of the Bank of Ottawa at three and a half per cent. On the 20th December, 1895, the trustees invested the $70,000 with accrued interest, amounting to $102.07 in trust debentures of the City of Ottawa of the face value of $69,493, paying 3·87 per cent. These debentures bring in 4 per cent.

In the meantime, on the 13th June, 1895, the plaintiff, Raphael, was appointed tutor to his three minor children, and on the 4th January, 1896, accepted their mother's succession on their behalf.

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On the 9th December, 1895, Raphael, as tutor to his children, sued the trustees for $1,750, being for one half yearly payment due 10th August, 1895, of the yearly interest on the $70,000, and also for interest on said sum of $1,750, from the said last mentioned day.

The conclusion of his declaration is as follows:

Wherefore the plaintiff, in his quality of tutor to the said three minor children, issue of his marriage with Dame Louisa Maclaren aforesaid, prays that defendants be jointly and severally condemned to pay and satisfy unto him the sum of seventeen hundred and fifty dollars, current money of Canada, with interest since the tenth day of August last past, and costs *distraits* to the undersigned.

The defendants pleaded in substance as follows:

(*a*) That plaintiff could not claim from them the interest accrued upon the said trust funds, save what might be necessary for the maintenance, support and education of his said children.

(*b*) That they invested the trust funds as best they could, and could not obtain better than a fraction under four per cent thereon, which in any event would be the only amount plaintiff would be entitled to claim.

(*c*) That, out of such interest sums, they should only be held to pay to plaintiff such amount as might be deemed sufficient for the support and education of the children, upon monthly or other statements of the moneys required furnished by the tutor plaintiff.

The Superior Court sitting in the District of Ottawa rendered judgment on the 5th day of June, 1896, declaring that the trustees were bound by the terms of the will and codicil to procure five per cent a year on the sum bequeathed to them in trust; that, however, they were not bound to pay over the whole of the revenue but only as much as was sufficient to support and educate the children according to their position in life; and that an annual sum of $1,800 was sufficient for that purpose, and condemning the trustees to pay

to the tutor the sum of $900 for the half year which had ended on the 10th August, 1895.

Both parties inscribed in review and the Court of Review rendered judgment on the 27th day of November, 1896, declaring that on the death of their mother, the minor children, issue of the marriage of the late Louisa Maclaren with Thomas Raphael, became the proprietors of the capital sum of $70,000; that their father as tutor was entitled to receive from the trustees the sum of $1,750 for a half yearly payment of the interest, virtually deciding that the trustees were bound to procure five per cent a year, and condemning them to pay such sum of $1,750 to the tutor for the half yearly instalment due on the 10th day of August, 1895.

The defendants thereupon appealed to the Court of Queen's Bench, which court, on the 24th February, 1897, rendered judgment as follows, after reciting the facts above set forth:

Considering that by the terms of the will and codicil the executors of the late James Maclaren were bound to pay interest at the rate of five per cent a year on the sum of $70,000 bequeathed by him for his daughter Louisa Maclaren and her children, during the three years that the amount of such bequest was to remain in their hands, but that no obligation was imposed on the trustees to pay such a rate of interest to the beneficiaries whether they could find or not an investment which would yield it, and that they were only subject to the ordinary rules respecting the investment of trust funds, and are only responsible to the beneficiaries for the income derived from the investments and received by them;

Considering that the provision contained in the codicil authorizing the trustees not to pay the interest to the testator's daughter, but to apply it for her benefit and support, and the benefit, support and education of her children, only applied to his daughter and not to her children, who are the absolute owners of the capital; and that the condition that the testator's son-in-law, Thomas Raphael, should not derive any benefit, either directly or indirectly, from the bequest applies to him personally, and not to him in his quality of tutor to his children;

Considering that although the acceptance of their mother's succession by the minor children was only made by their tutor on the 4th day of January, 1896, between the date of the service of the action and the date of its return, it has a retroactive effect to the day of her death and that no exception was taken by the trustees in their pleas to the circumstance of the acceptance having been made after the institution of the action;

Considering that the tutor, the respondent in this cause, was entitled to demand and had a right to receive the income derived from the principal of the trust for the half year which ended on the 10th day of August, 1896, from the trustees, the appellants in this cause;

Considering that the appellants received on the 21st day of May, 1895, from the executors of the late James Maclaren the sum of $949.32 for interest on the principal sum of $70,000, and that the interest at the rate of three and a half per cent a year on the deposit made by them in the Savings Department of the Bank of Ottawa amounted on the 10th day of August, 1895, to the sum of $551.07, forming together $1,500.39, and that such amount on that day became payable to the beneficiaries;

Considering that the appellants could and should only have invested the principal of the trust and that they had no right to invest the income which was payable to the beneficiaries, and notably the above mentioned sum of $1,500.39, and that the fact of their having invested it does not relieve them from their liability to account for and to pay the same to the tutor of the minor beneficiaries;

Considering on the one hand that the appellants are not bound to procure a revenue equal to five per cent a year on the principal of the trust, and that the amount for which they are accountable is $1,500.39 and not $1,750, and on the other hand that the respondent is entitled to receive the whole of the revenue and not such portion only thereof as may be necessary for the maintenance, support and education of the minors, and that there is therefore error in both judgments;

Doth maintain the appeal with costs, and doth set aside and annul the judgment appealed from of the Court of Review rendered at Montreal on the 27th day of November, 1896, and proceeding to pronounce the judgment which should have been rendered, doth set aside and annul the judgment of the Superior Court, rendered at Hull, in the District of Ottawa, on the 5th day of June, 1896, and doth condemn the appellants in their capacity of trustees to pay to the respondent, in his capacity of tutor, the sum of $1,500.39 for the income accrued from the 10th day of February, 1895, to the 10th day of August, 1895, on the trust funds, with interest thereon from the

2nd day of January, 1896, date of the service of process, and his costs in the Superior Court, and on his inscription in review, of which costs distraction is granted to Mtre. J. M. MacDougall, his attorney, but doth condemn the respondent to pay to the appellants the costs of their inscription in review, and the court on motion of Mtre. Henry Aylen, attorney for appellants, doth grant him distraction of costs.

The plaintiff has now applied for the approval of a bond which he proposes to give as security for the costs of an appeal to the Supreme Court of Canada, pursuant to sec. 46 of the Supreme and Exchequer Courts Act.

It was agreed between counsel that the bond offered should be considered satisfactory, if jurisdiction to entertain the appeal were held to exist.

It was also admitted by counsel that the amount claimed by the declaration was under $2,000. Indeed, by a successful appeal to this court, it is apparent that the plaintiff would recover only the difference between $1,500.09, and $1,750. But the plaintiff contends that the controversy comes within the words of subsec. (*b*) of sec. 29 of the Supreme and Exchequer Courts Act, as amended by sec. 1 of 56 Vict. ch. 29, passed on the 1st April, 1893, and relates "to a matter where the rights in future might be bound," a matter within the meaning of the words "other matters or things" in that subsection.

If apparent that the direct result of granting the plaintiff's contentions would be to enable him to recover, in this action, the comparatively small sum of $250, it is equally apparent that the effect of the judgment on the rights of the children acting through their tutor, is, or at any rate may be, very serious. It should be noted that the word used in subsec. (*b*) is "might," not "are," or "will be," "where the rights in future *might* be bound."

Now the controversy in this action does seem to relate to a matter where the rights in future might be

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bound. The judgment rendered on the controversy appears to settle the point that the trustees are bound by the terms of the trust to pay over to the tutor, during a long minority, only the actual income received from the investment of the fund, which is now, and may be for the whole period, less than $3,500 per annum.

On this application there is no question raised as to the correctness of the judgment sought to be appealed from. The question is: What is the nature of the controversy between the parties, and does such controversy come within the words of sec. 29?

Then, admitting that future rights might be affected, are they future rights within the meaning of subsection (*b*)?

Can this case be distinguished from *Gilbert* v. *Gilman* (1); *Dominion Salvage & Wrecking Co.* v. *Brown* (2); and more particularly from *Rodier* v. *Lapierre* (3).

It is contended that there is an important difference between *Rodier* v. *Lapierre* (3), and this case, inasmuch as *Rodier* v. *Lapierre* (3), dealt with the right to recover a fixed and undisputed amount; if entitled to recover at all, there was no question as to the amount which the plaintiff was and would in the future be entitled to. In this case, the dispute is as to the extent of the amount the trustees are liable for, and the judgment will fix not only the amount directly in controversy in the immediate action, but the rights of the parties *inter se*, during the continuance of the whole trust.

In that case the plaintiff alleged that she was entitled to receive $100 monthly out of the revenues of the estate of her father under his will, which monthly allowance had been increased to $300 by an Act of the Legislature of Quebec, and she claimed from the respondent, as testamentary executrix, the additional $200 for the month of February, 1891.

(1) 16 Can. S. C. R. 189.
(2) 20 Can. S. C. R. 203.
(3) 21 Can. S. C. R. 69.

The appellant argued, [I quote from the judgment of the court delivered by Mr. Justice Taschereau,] that her appeal could be entertained on the ground that as the judgment dismissing her action, if allowed to stand, would be *res judicata* between her and the respondent, and a bar for ever of her claim, her appeal came within the words "where the rights in future might be bound" of sec. 29 of the Supreme Court Act.

Is not this exactly the contention of the plaintiff in this case? If the judgment stands it will be *res judicata* as to the amount which the tutor will be entitled to receive from the trustees.

The learned judge then proceeds as follows:

But that contention cannot prevail. We have in numerous cases determined that these words of the statute are governed by the preceding words of the clause "fee of office, duty, rent, revenue or any sum of money payable to Her Majesty, or any title to lands or tenements, annual rents, or such like matters or things."

The words "annual rents" cannot support the appeal. They mean ground rents *(rentes foncières)*, and not an annuity or any other like charges or obligations.

Neither can the appeal be entertained on the ground that the appellant's claim, being for a monthly allowance of $200, should be considered as being for an amount exceeding $2,000. The only amount actually in controversy in the present case is $200. The consequences of the judgment and its effect on the appellant's future rights in the matter cannot render the case appealable as being a case of $2,000.

This judgment seems to me to dispose of the case under consideration, unless the alteration in the subsection made by 56 Vict. ch. 29, in changing the words "or such like matters or things," into "and other matters or things," would lead us to conclude that *Rodier* v. *Lapierre* (1), would have been differently decided under the amendment.

Prior to the amendment, subsection (*b*) of section 29 was construed as applying to real rights, or rights at least analogous to real rights and having some connection with the ownership or enjoyment of land.

Now no case decided since the amendment has gone so far as to say that future rights which are pecuniary

(1) 21 Can. S. C. R. 69.

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in their nature, rights to money as distinguished from rights to or in land, or analogous to such rights, come within the subsection. Two cases, *Chamberland* v. *Fortier* (1), and *Stevenson* v *City of Montreal* (2), have, it is true, held that the effect of the amendment was to widen the scope of the enactment, but in both these cases the rights in question were, if not real rights, analogous to real rights.

In *O'Dell* v. *Gregory* (3), the effect of the amendment was considered, and it appears to me that the judgment of the Right Honourable the Chief Justice in that case, must be deemed conclusive against the appellant here. He says:

The first part of the subsection relates to appeals in the case of claims by the Crown. It is out of the question to say that this appeal involves any title to land, or to any annual rent. There only remains the words "and other matters or things where the rights in the future might be bound." I cannot hold that this confers jurisdiction. The other matters or things referred to must, on the ordinary rule of construction *noscitur a sociis,* be construed to mean matters and things *ejusdem generis* with those specifically mentioned. Then these are "title to lands and tenements and annual rents." We must therefore interpret the words, "other matters and things" as meaning rights of property analogous to title to lands and annual rents, and not personal rights however important.

* * * * * * * * *

It is sufficient, however, for the present purpose to say that the appeal does not come within any of the provisions of section 29, inasmuch as the action does not involve an amount equal to $2,000, nor does it relate to any matters or things in the nature of vested property rights which alone and not personal rights are intended by section 29, subsection *(b)* to be made the test of the right to appeal.

The application must be refused with costs.

KING J. on appeal from the Registrar, confirmed his decision.

Motion refused with costs.

Solicitor for the appellant: *J. M. McDougall.*

Solicitor for the respondent: *Henry Aylen.*

(1) 23 Can. S. C. R. 371
(2) 27 Can. S. C. R. 187.
(3) 24 Can. S. C. R. 661.

LA VILLE DE CHICOUTIMI (PLAINTIFF) .... APPELLANT;

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*Feb. 25.
*May 1.

AND

JEREMIE LÉGARÉ (DEFENDANT) ...... RESPONDENT.

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

Municipal corporation—Waterworks—Extension of works—Repairs—By-law—Resolution—Agreement in writing—Injunction—Highways and streets—R. S. Q. art. 4485—*Art.* 1033*a C. C. P.*

By a resolution of the Council of the Town of Chicoutimi, on 9th October, 1890, based upon an application previously made by him, L. obtained permission to construct waterworks in the town and to lay the necessary pipes in the streets wherever he thought proper, taking his water supply from the river Chicoutimi at whatever point might be convenient for his purposes, upon condition that the works should be commenced within a certain time and completed in the year 1892. He constructed a system of waterworks and had it in operation within the time prescribed, but the system proving insufficient a company was formed in 1895 under the provisions of R. S. Q., art. 4485, and given authority by by-law to furnish a proper water supply to the town, whereupon L. attempted to perfect his system, to alter the position of the pipes, to construct a reservoir and to make new excavations in the streets for these purposes without receiving any further authority from the council.

Held, reversing the judgment appealed from, (Gwynne J. dissenting), that these were not merely necessary repairs but new works, actually part of the system required to be completed during the year 1892 and which after that date could not be proceeded with except upon further permission obtained in the usual manner from the council of the town.

Held further, that the resolution and the application upon which it was founded constituted a "contract in writing" and a "written agreement" within the meaning of article 1033*a* of the Code of

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

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Civil Procedure of Lower Canada, and violation of its conditions was a sufficient ground for injunction to restrain the construction of the new works.

APPEAL from a decision of the Court of Queen's Bench for Lower Canada (appeal side) (1) reversing the judgment of the Superior Court, District of Chicoutimi, and dissolving the injunction which restrained the defendant from carrying on certain works on the streets of the Town of Chicoutimi and which had been made absolute by such judgment below.

A sufficient statement of the case appears from the head note and from the judgments reported.

Geoffrion Q.C. and *Belleau* Q.C. for the appellant. The appellants did not enter into any contract with the respondent; they only gave him permission to use the streets of the town for the construction of his aqueduct, not for any benefit that the corporation could derive from such construction. The respondent assumed no obligation towards the corporation or the public, nor did he receive any privilege or franchise. His was a purely private enterprise, under no control from municipal authority. He owes no duty to the corporation and the corporation owes none to him.

In any case, if the corporation is bound by the resolution of 9th October, 1890, the respondent cannot claim more than was given him by that resolution. The works were to be finished in 1892. The council did not pledge the future but restricted respondent to whatever works would be executed at the end of 1892 as a condition of the permission given, and he could execute, after 1892, no other works but necessary repairs. No completions or extensions could be constructed without new authority; he was to be satisfied with the works as completed in 1892.

(1) Q. R. 5 Q. B. 542.

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Stuart Q.C. for the respondent. The resolution authorizing the respondent to construct his aqueduct in the streets of Chicoutimi was *intra vires* and binding. The works complained of were not additions but were repairs necessary for the preservation of the aqueduct and caused no obstruction or nuisance.

With respect to the point taken that power of laying an aqueduct can only be exercised by by-law and not by resolution, the answer seems to be that the town has not purported either to itself establish an aqueduct, with the incidents of taxation, tariffs, etc., nor to transfer such powers to the respondent, but has simply authorized the use of the streets. See 42 & 43 Vict., (Q.) ch. 51, sec. 22. There is in law no essential difference between by-laws and resolutions, except in respect of the publication and notices. The public have had full notice by the performance of the works authorized, and the written application and resolution taken together constitute a valid contract binding on the parties. *Lequin* v. *Meigs* (1); In re *Day* and *The Town Council of Guelph* (2); *Tylee* v. *Municipality of Waterloo* (3); *Fisher* v. *Municipality of Vaughan* (4); Angell on Highways 2 ed. § 25.

The appellant has no interest in the lands upon which the respondent was constructing the works complained of as they had never been dedicated to public uses. *Mingerand* v. *Légaré* (5); *Guy* v. *The City of Montreal* (6); *Fortin* v. *Truchon* (7); *St. Martin* v. *Cantin* (8).

GWYNNE J.—This is an action instituted in the Superior Court of the Province of Quebec, in the

(1) 16 L. C. Jur. 153.
(2) 15 U. C. Q. B. 126.
(3) 9 U. C. Q. B. 590.
(4) 10 U. C. Q. B. 492.
(5) 6 Q. L. R. 120.
(6) 3 Legal News, 402.
(7) 15 Q. L. R. 1[illegible].
(8) 2 Legal News, 14.

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district of Chicoutimi, by the appellants as petitioners on a petition for a writ of injunction to be issued under the provisions of sections 1033 *et seq.* C. C. P.

The petitioners alleged in their petition that there were in the town of Chicoutimi divers streets of which the petitioners were in legal possession for the use of the public, especially a street extending from Taché street to a place situate between numbers 736, 737 and 738 of the official cadastre of the town and extending to the bank of the River Chicoutimi, passing over numbers 772 and 774;

That for several days the respondent had caused and was still causing and intended still further to cause divers excavations and other works to be made in the streets of the said town, especially in the aforesaid street and in the streets called "Caron," "Belleau" and "Taché," of such a nature as to obstruct and damage the said streets to the great injury and nuisance of the public in general without the permission of the petitioners;

That it was urgently necessary that a writ of injunction should be instantly ordered to issue before more considerable works should be executed, and that if not instantly issued the town and the public would suffer great injury. The conclusions of the petition were for a writ of injunction to issue enjoining the defendant to cease and to suspend all works, excavations, etc., in the said streets, and that by final judgment to be rendered upon the said petition the injunction should be made perpetual.

The Superior Court in the District of Chicoutimi granted an interim injunction in accordance with the prayer of the petition, whereupon the defendant pleaded to the merits by peremptory exception among other pleas as follows:

That at an ordinary session of the council of the petitioners held upon the 9th day of October, 1890, a resolution was adopted by the said council granting permission to the defendant to construct an aqueduct in the town of Chicoutimi, and to place pipes in the streets of the said town at such places as he should judge to be most beneficial according to certain conditions which appear in the said resolution; that conformably to this resolution the defendant constructed an aqueduct in the town in the year 1891, and in every respect in so doing complied with the said resolution, which the council of the petitioners has never revoked nor annulled;

That in executing repairs to his aqueduct which the petitioners wish to prevent the defendant making, he does not exceed the powers granted to him by the said resolution, and that in executing the works aforesaid he does not cause any injury whatever to the petitioners;

That the petition is filed maliciously and for the purpose of ruining the defendant by depriving him of the enjoyment of his aqueduct;

That the council of the petitioners, knowing that it had given permission to the defendant to construct an aqueduct in the town, and that the said aqueduct was in operation in the said town, subsequently, that is to say, in the year 1895, granted to a rival company the privilege of supplying water to the ratepayers of of the town in whose interest the petitioners wish now to take away the rights granted to the defendant; and finally that the defendant does not cause any damage to the streets of the petitioners.

To this defence the plaintiff replied among other things as follows:

1. That no valid permission was granted by the council of the town to the defendant.

2. That the defendant constructed his aqueduct without right and without any permission from the town.

3. That the council had no right to grant such permission by resolution as it did, and *that the said resolution is void and ultra vires.*

4. That the resolution granting such pretended permission is null on its face. (There are stated objections to the resolution founded upon alleged non-compliance by the council itself with sections 4295 and 4304, R. S. Q.)

5. That the defendant has not fulfilled any of the obligations that he had agreed to fulfil by his petition to the council, and especially that he has not finished his works in the year 1892 as he had undertaken to do, and that they are not yet completed.

6. That his aqueduct works badly and does not work in all the wards of the town that he had agreed upon; and finally,

7. That the aqueduct is really a nuisance and an obstruction to the town of Chicoutimi.

Issue having been joined on the above pleadings, the Superior Court rendered judgment in favour of the petitioners and thereby made permanent the interim injunction which had been granted.

This judgment has been reversed by the Court of Queen's Bench in the district of Quebec in appeal, whereby rendering the judgment which the Superior Court should have rendered, the Court of Appeal has maintained the pleadings of the then appellant, the now respondent, and rejects the petitioners' demand for an injunction for the *considerants* following:

1. That the resolution authorizing the appellant (the now respondent) to use the streets of the town of Chicoutimi to construct there an aqueduct, was *intra vires* of the town council.

2. Considering that the works authorized by the said resolution have been done during the years 1891 and 1892, in the sight of and

with the knowledge of the municipal councillors and of the ratepayers of the town without any objection in fact made, and considering that the appellant (the now respondent), has ever since distributed water the town.

3. Considering that the works of which complaint is made do not constitute an addition to the aqueduct of the appellant (the now respondent), but were necessary to its preservation and to the exercise of the rights acquired in virtue of the said resolution and of its execution.

4. *Considering that the appellant* (the now respondent) *has not done any injury to the respondent* (the now appellant), *and has done no damage in executing the works which are the subject of the litigation, but on the contrary the works benefit a portion of the ratepayers.*

5. Considering that it has not been established that the appellant (the now respondent), has employed any unlawful means or committed any nuisance ; and

6. *Considering that in the circumstances of the case, the petitioners had not the right to demand the suppression of the works by injunction.*

Without adopting all of the reasons for the judgment of the Court of Queen's Bench in appeal, but those only which are given in the 4th and 6th of the above *considerants*, and for another reason not specified in the judgment, but which I think sufficiently appears in the case, the appeal must, in my opinion, be dismissed upon the authority of the *Attorney General* v. *The Sheffield Gas Consumers Co.* (1), and the principles upon which the judgment in that case proceeded.

The case presented on the record by the petitioners in the present case is plainly one in which the Municipal Corporation of the Town of Chicoutimi seek redress by writ of injunction wholly upon the ground that the acts of the defendant which are sought to be restrained constitute a public nuisance, an obstruction to the detriment of the general public in certain of the streets in the town which are in the possession of and under the control of the municipal corporation.

It might be and I think would be a question calling for further inquiry whether some of the places where

(1) 3 DeG. M. & G. 304 ; 17 Jur. 677.

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the nuisances and obstructions are alleged to have been committed are really, in point of fact, in streets in possession of and under the control of the corporation if the determination of that question was essential to the determination of the present case, but as I think it is not I assume for the purpose of this appeal that all the places where the nuisances and obstructions complained of as having been, or being, or being intended to be, committed, were in streets under the control of the municipality.

In the *City of Vancouver* v. *Canadian Pacific Railway Co.* (1) where the complaint was in respect of acts charged as instituting a public nuisance, we held, in a case where the soil and freehold in the streets were by statute vested in the municipal corporation, that the corporation, that is to say, the inhabitants of the city in their corporate capacity, had no greater or other right of action to complain of a public nuisance committed in the streets than any individual member of the public having occasion to use the streets, and that in such a case of nuisance the public right must be maintained, defended and protected by the Attorney General for the Crown. Now in the *Attorney General* v. *The Sheffield Gas Consumers Co.* (2), the proceeding was by information and bill, at the suit of the Attorney General representing the public interests and of a company called "The Sheffield United Gas Light Company" who complained that their private rights were prejudiced by the acts of the defendants which were complained of.

It was there held that an application for an injunction founded upon a trivial or temporary injury whether in the nature of a public nuisance or of a private trespass could not be entertained by the courts.

(1) 23 Can. S. C. R. 1.

(2) 3 DeG., M. & G. 304.

Here we have to deal only with the interest of the public in a case of alleged public nuisance. Dealing with this part of the case in the *Attorney General* v. *The Sheffield Gas Co.* (1), Lord Justice Turner says:

Looking at the principles on which this court interferes there cannot be any sound distinction between the case of a private and the case of a public nuisance. *It is not on the ground of any criminal offence committed or for the purpose of giving a better remedy in such cases that this court is, or can be called upon to interfere,* but it is on the ground of injury to property that the jurisdiction of this court may rest, and taking it to be on the ground of injury to property the only distinction which seems to me to exist between a public and a private nuisance is this, that in the case of the one it is injury to individual property, and in the other to the property of the public at large. The same principle therefore must guide the interference of the court in both cases, and that principle is this—whether the extent of the damage and of the injury be such as that the law will not afford an adequate and sufficient remedy, and that principle applies to the present case.

The learned judge then taking up the alleged injury to the public, represented in that case by the Attorney General, proceeds thus:

The injury to the public arises from their interest in the streets of Sheffield, and it is said that these streets will be materially impeded by the laying down of the pipes of this company, and by the continual taking up of those pipes which will be necessary for repairing them when once they have been laid down. As to the laying down of the pipes that is a case of mere temporary inconvenience, for when the pipes are laid down the work which has been done is entirely completed, it is done once for all, and if this court is to interfere on the ground that it will be an inconvenience arising from the laying down of those pipes which will occasion a temporary obstruction for two or three days, I am a loss to see how the interference of this court could be withheld in the case (which has been put in the course of the argument) of boards erected in the public streets where houses are under repair, or in the case of making cellars in the public streets, or in the case of obstructing the pavement of the public streets by depositing goods on them. All these are nuisances in a greater or less degree, and if the court is to interfere on the ground that the pavement of the streets of Sheffield will be taken up for two days for the purpose of laying down pipes, the court, it seems to me, will be equally bound to interfere in the cases to which I have referred.

(1) 17 Jur. 677.

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And with reference to what has been said as to the continual taking up of the pavement which would be consequent on these pipes being laid down, it is true that there may be and probably will be, some inconvenience resulting from that, but it is an inconvenience which will not affect the general body of the inhabitants of Sheffield; it is an inconvenience which occurs from time to time to a much less degree than is anticipated by the parties, and which will be temporary, applying only to a particular part of the town, not affecting the general body of the inhabitants to any extent which will render it inconvenient.

Again he says:

It is evident, from the defendants, that there are many of the parties inhabitants of Sheffield who would be and are, no doubt willing and desirous that these pipes should be laid down before their houses, although others might be desirous that it should not be done. It cannot therefore be brought in as a common injury to all. Now something has been said of the danger of the public peace which may arise from the non-interference of this court, but I think that this court cannot suppose that there is an inadequacy of the civil power to preserve the public peace.

And the learned Lord Justice concludes by pronouncing that in his judgment *the case failed in so far as the public was concerned*, and being of the same opinion as to the private demand of the Sheffield United Gas Light Company, he came to the conclusion that both the information and the bill should be dismissed. Lord Chancelllor Cranworth entirely concurred in the judgment of Lord Justice Turner upon the question whether or not such a probability of substantial injury to the rights of the public passing along the streets of Sheffield, or the inhabitants using those streets, had been made out as to make it a reasonable exercise of jurisdiction for the court to interfere to restrain them, he was of opinion that no such case had been made out. "Is," he says,

"the evil of such a nature as to justify the court in interfering? What is the evil? It is said that the defendants are about to tear up the streets to an extent, *one representing seventy, the other one hundred miles.* It may be that before they complete their works they will

have taken up the paving over seventy miles, but they will never have up above twenty yards at the same time, and they will never have that up, they say, for above two days.

Then again he says:

One must look at the quantum of evil at each particular place and each particular moment of time to see if this injunction could be sustained on the ground that there is continuity in the sense of going from one place to another to extend over one or the next two years. I do not see that that is a ground for interfering.

Then upon the question whether the act of the defendants which was the subject of complaint, namely, taking up the pavement, was lawful or unlawful, he says:

If it is unlawful I think it is too small a degree of unlawfulness to warrant this court's interference by injunction,

and in conclusion he says that if he thought the question of the right to an injunction turned upon the question of the lawfulness or unlawfulness of the acts of the defendants in taking up the pavement in the streets he would probably *have wished the matter to stand over until the trial of the indictment*, but adds:

not thinking so but thinking the evil, if any, which does exist is of such a very transient nature that in no one spot, or to no one individual can it be said to be more than a passing and almost imaginary evil, I am of opinion that no case is made out for restraining these parties,

and he concluded by concurring with Lord Justice Turner that *both bill and information* ought to be dismissed. Every word in this judgment is applicable to the present case which in so far as the rights of the public in the case of an alleged public nuisance are concerned, is identical with the *Attorney General* v. *The Sheffield Gas Co.* (1), save only in this, that in that case the public were represented by the Attorney General, the proper officer of the Crown in that behalf, while in the present case they are not. The jurisdiction of the courts in the Province of Quebec proceeding by writ of injunction was introduced into that province

(1) 17 Jur. 677.

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by R. S. Q., art. 1033*a*, *et seq.*, and there is nothing in these sections which would justify a different judgment from that warranted by the law of England in a like case. The second paragraph of that section has no bearing whatever upon the case of a public nuisance of the nature of the obstruction of a public highway to the prejudice of the rights of the public to the use and enjoyment thereof. It relates wholly to private property and corresponds with the law of England from which no doubt it is taken, and which for the protection of such property interferes when, and only when, absolutely necessary by reason of there being, if there be, no adequate remedy open in law to give relief. The petitioners in the present case make no claim whatever for relief founded upon this subsection. They make no pretension to any right to interfere except upon the contention that the streets in the town are placed for the public benefit and for the public use under the control of the municipality subject to the obligation to keep them in repair. Their contention is expressly that art. 4458 and the following articles of R. S. Q. confer no more extensive powers than were originally conferred by the Imperial statutes 36 and 39 Geo. III, upon the Quarter Sessions and Justices of the Peace, and they appeal to the art. 4616 whereby

the right to use as public highways all roads, streets and public highways within the limits of any city or town in this province

is vested in the respective municipal corporations subject to the obligation to keep them in proper repair, as the article which defines the right of the corporation as affects the streets in the municipality.

Now we have seen by the judgment in the *Attorney General* v. *The Sheffield Gas Co.* (1), that by the law of England the writ of injunction cannot be used for the purpose of abating or preventing the commission of a criminal offence of the nature of a public nuisance by

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the obstruction of a public highway. In so far as relates to the pipes which had been already laid down by the respondent when the appellants filed their petition for an injunction the language of Lord Justice Turner above quoted is peculiarly applicable wherein he says

as to laying down the pipes that is a case of temporary inconvenience, for when the pipes are laid down, the work which has been done is entirely completed.

* * * * * * * * *

Moreover, it is apparent in the present case that no injury to the public has arisen, nor is it suggested that any such could arise by reason merely of the fact of those pipes being suffered to remain in the ground without more. What the true grievance complained of is, that if the work contemplated by the defendant should be completed it would enable water to be conveyed through the pipes to the prejudice, not of the general public interference with whose rights is alleged in the record to be the sole foundation of the application for an injunction, but to the prejudice merely of *the private interests* of the waterworks company to whom the municipal corporation have by by-law granted recently the privilege of laying pipes in the streets for the purpose of supplying the ratepayers of the town with water, in which company, as is alleged, the mayor and other members of the municipal council which has instituted the present proceeding are the principal shareholders, in whose interests and not in the public interest, the application is said to be made. Now whether this interest of the mayor and others of the council be so or be not, there is sufficient evidence upon the record to warrant the conclusion that this proceeding was instituted, not in the interest of the general public, or for the abatement of any real public nuisance by way of obstruction in the use of the streets by the public by reason

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of the works complained of, but in reality in the private interest of the said waterworks company, and by reason of the detriment which might accrue to that company in the event of the respondent completing his contemplated works so as to enable water to be passed through his pipes when laid. Now if the respondent should be indicted as for a public nuisance in respect of the respondent's works so far as executed by the pipes already laid down, and if the jury trying such indictment should be of opinion that this was the motive for the institution of the prosecution, and if they should be of opinion that no real inconvenience to the general public had been caused by the pipes so laid down, or if they should be of opinion (notwithstanding that the corporation may be right in their contention that the resolution of October, 1890, was and is absolutely void and *ultra vires* by reason as is contended of the municipal council not having complied, as they ought to have done with the clause of the Act, (the non-compliance with which made the resolution void and *ultra vires*) that the respondent in doing what is now complained of was acting upon the assumption that the municipal council had complied with all the requirements necessary to make their resolution valid, I cannot say that the jury might not in any of such cases reasonably and very probably acquit the respondent of the offence charged in the indictment; and certainly there is nothing alleged on the record, or adduced in evidence which would justify a court of justice in depriving the respondent of his constitutional right of having the question of his guilt or innocence of such offence, if an indictment should be found, tried by a jury of his country.

Independently of this remedy by indictment for a public nuisance committed in the public streets, it

cannot be doubted that the municipal corporation have ample power, if they think fit, to take up the pipes already laid down in the streets if the act of the defendant in placing them there be, as is alleged by the petitioners, absolutely without any right or authority whatever, and that they have such possession of the streets by force of the sections of the statute which places them under the control of the municipal corporation as gives to the municipal authorities most ample power to avail themselves of the provisions of section 53 of the Criminal Code, 55 & 56 Vict. ch. 29, and so to prevent the committal of any trespass whatever by any person in the public streets, and so to compel the respondent to take what steps he should be advised to assert title to do the acts under the resolution of 1890, as to which, however, I express no opinion, as I think it unnecessary for the determination of the present case. Now, the case of the petitioners being that every thing already done by the respondent has been done, and every thing still being done and intended to be done by him in the premises is without the license and permission of the municipality, and without any right, power or authority in law whatsoever, it is apparent upon the case as presented by the petitioners themselves that they have most ample powers without any intervention by the court by way of injunction to obtain all that is necessary to redress a nuisance already committed in the public streets under their control, and to prevent any being committed.

The application for a writ of injunction in a case such as the present is alleged by the petitioners to be, is not only without precedent, but wholly unnecessary, and vexatious, as instituted professedly in the interest of the general public, but in reality in the interest of a private company who alone could be prejudiced by the acts of the respondent. For these reasons,

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which include those mentioned in the 4th and 6th *considérants* of the Court of Queen's Bench in Appeal, I am of opinion that this appeal should be dismissed with costs.

The judgment of the majority of the court was delivered by:

GIROUARD J.—Le 9 octobre 1890, le Conseil de la ville de Chicoutimi adoptait la résolution suivante en réponse à la requête de l'intimé pour permission de construire un aqueduc dans la ville de Chicoutimi :—

> Proposé par F. S. Caron, secondé par Johnny Fortin et résolu : que ce conseil de la ville de Chicoutimi donne la permission à M. Jérémie Légaré, constructeur d'aqueduc, de construire un aqueduc dans la ville de Chicoutimi, de poser ses tuyaux dans les rues de la dite ville aux endroits qu'il jugera les plus avantageux, de prendre l'eau dans la rivière Chicoutimi à l'endroit qu'il lui conviendra, mais à la condition qu'il commencera les travaux le plus tard le premier juillet mil huit cent quatre-vingt-onze, et les terminera en mil huit cent quatre-vingt-douze.

Cette résolution forme la convention entre les parties, en supposant qu'elle soit légale et *intra vires*.

Légaré construisit son aqueduc dans les délais prescrits ; il était même en opération avant la fin de l'année 1892. Mais on s'aperçut bientôt qu'il était loin de donner satisfaction au public. Il manquait d'eau durant les mois de sécheresse ; faute d'une pression suffisante, il n'était d'aucune utilité dans les cas d'incendie, et enfin il ne servait que deux quartiers de la ville, l'ouest et le centre, laissant sans eau le quartier est, le plus important de la ville.

Aussi, dès l'année 1895, une compagnie fut formée par les citoyens, au capital de $50,000, dans le but de fournir, sous le contrôle de l'autorité municipale, toute l'eau dont la ville avait besoin. Le plan soumis par cette compagnie, qui s'appela "*La Cie municipale des eaux de Chicoutimi*", fut approuvé le 14 mai 1895 par

le conseil de ville, qui passa un règlement à cet effet, conformément aux dispositions de l'article 4485 et suivants des Statuts Revisés de Québec.

Légaré, se voyant en présence d'une compagnie rivale puissante, ne tarda pas à se mettre en frais de perfectionner son aqueduc; mais il se vit de suite en face d'embarras nouveaux, vu que les cessionnaires de certains propriétaires qui lui avaient permis verbalement de mettre son principal conduit de la rivière Chicoutimi sur leurs terrains lui refusèrent la continuation de la servitude et coupèrent même son conduit. Il fallut le placer ailleurs, et faire un nouveau tracé, et en même temps il se prépara à perfectionner son aqueduc en construisant un réservoir près de la rue Taché. Des nouvelles excavations sur les rues de la ville, entr'autres sur cette rue et une autre voie publique, appelée "*Cran Chaud*," devinrent nécessaires, et il les commença, sans demander de permission nouvelle.

La ville de Chicoutimi demanda contre Légaré un bref d'injonction, qui fut accordé et maintenu par la cour Supérieure du district, pour trois raisons. 1° L'assemblée du Conseil du 9 octobre 1890 a été irrégulièrement convoquée; 2° Le Conseil ne pouvait accorder à Légaré le privilège qu'il demandait que par règlement conformément aux articles 4485 et suivants des Statuts Revisés et non par une simple résolution; 3° Enfin les nouveaux travaux n'étaient pas de simples réparations, mais de nouveaux travaux et même une extension et une véritable addition, qui auraient dû être faits en 1892. Ce dernier moyen est motivé comme suit:—

"Considérant, d'ailleurs, qu'en supposant que la résolution susdite et le dit consentement tacite eussent été valables et légaux, cette résolution qui imposait comme condition que l'aqueduc fût terminé en mil huit cent quatre-vingt-douze et ce consentement tacite qui ne s'appliquait qu'aux travaux alors faits auraient bien autorisé le défen-

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deur à faire à son aqueduc les réparations ordinaires et nécessaires, mais ne l'auraient certainement pas autorisé à changer, comme il l'a fait, le point de départ et le tracé de son aqueduc et à enlever ses travaux d'une rue pour les poser dans une autre rue, ou même dans un autre endroit de la même rue, sans le consentement et l'autorisation du conseil. "

La cour d'Appel a renversé ce jugement. Je crois qu'elle a fait erreur. Sans me prononcer sur les deux premiers moyens, les nouveaux travaux, même s'ils n'étaient pas une extension, n'étaient certainement pas de simples réparations ; ils faisaient partie des travaux que la résolution du 9 octobre 1890 avaient en vue et ils auraient dû être faits et terminés en 1892. Il fallait une nouvelle permission du Conseil pour les faire après cette date. Il me semble enfin que les nouveaux travaux dans la ville de Chicoutimi, et en particulier ceux sur la rue Taché et le "*Cran-Chaud*", étaient une extension et une addition à l'aqueduc. Il ne s'agit pas de savoir si l'intimé a commis une nuisance sur les rues de la ville, mais simplement s'il s'est conformé en tous points aux termes de la résolution du Conseil qui forme la convention entre les parties. Par la section 5991, par. 1033*a*, il y a lieu à l'émission du bref d'injonction enjoignant de suspendre toute construction, " lorsqu'une personne fait une chose en violation d'un contrat écrit ou d'une convention écrite. "

Je suis donc d'avis d'infirmer le jugement de la cour d'Appel avec dépens, et de rétablir celui de la cour Supérieure, mais uniquement pour le motif signalé plus haut.

Appeal allowed with costs.

Solicitor for the appellant: *L. Alain.*

Solicitor for the respondent: *P. V. Savard.*

CELINA ROBIN *et vir* (DEFENDANTS)...APPELLANTS;

AND

JOSEPH OLYMPE JEROME DUGUAY (PLAINTIFF)................. } RESPONDENT.

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*Feb. 27.
*May 1.

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

Will—Construction of—Donation—Substitution—Partition, per stirpes or per capita—Usufruct—Alimentary allowance—Accretion between legatees.

The late Joseph Rochon made his will in 1852 by which he devised to his two sisters the usufruct of all his estate and the property therein to their children, naming Pierre Dupras, his uncle, as his testamentary executor, and directing that his estate should be realized and the proceeds invested according to the executor's judgment, adding to these directions the words "enfin placer la masse liquide de ma succession à intérêt ou autrement, de la manière qu'il croira le plus avantageux, pour en fournir les revenus à mes dites sœurs et conserver le fonds pour leurs enfants," and providing that these legacies should be considered as an alimentary allowance and should be non-transferable and exempt from seizure. By a codicil in 1890 he appointed a nephew as his testamentary executor in the place of the uncle, who had died, and declared :—"Il sera de plus l'administrateur de mes dits biens jusqu'au décès de mes deux sœurs usufruitières, nommées dans mon dit testament, et jusqu'au partage définitif de mes biens entre mes héritiers propriétaires, et il aura les pouvoirs qu'avait le dit Pierre Dupras dans mon dit testament."

Held, Gwynne J. dissenting, that the testamentary dispositions thus made did not create a substitution, but constituted merely a devise of the usufruct by the testator to his two sisters and of the estate, (subject to the usufruct), to their children, which took effect at the death of the testator.

Held also, that the charge of preserving the estate—"conserver le fonds"—imposed upon the testamentary executor could not be construed as imposing the same obligation upon the sisters who were

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excluded from the administration, or as having, by that term, given them the property subject to the charge that they should hand it over to the children at their decease, or as being a modification of the preceding clause of the will by which the property was devised to the children directly, subject to the usufruct.

Held further, that the property thus devised was subject to partition between the children *per capita* and not *per stirpes.*

APPEAL from the judgment of the Court of Queen's Bench for Lower Canada (appeal side) (1) reversing the decision of the Superior Court which had maintained the plaintiff's action.

The facts and questions at issue sufficiently appear from the head note and judgments reported. It may be added, however, that when the usufruct became extinct one of testator's sisters left nine children, one of whom is the respondent, and the other sister left but one child, the appellant.

Robidoux Q.C. for the appellant. A fiduciary substitution was created by the will in favour of both the sisters' children. (Arts. 925, 928 C.C.) The succession must be divided *per stirpes* and not *per capita.* Even if, instead of a substitution, a usufruct had been created, the result would be the same. *Desève* v. *Desève* (2); *Chester* v. *Galt* (3); *Roy* v. *Gauvin* (4); Thevenot-Dessaule, 63. The charge to deliver the property bequeathed to the children of the two sisters, joint legatees, is expressed plainly in the will, by the term "*conserver*" in the sentence "*et conserver le fonds pour leurs enfants.*"

Three conditions are required for the existence of a substitution: 1o. two donations; 2o. *tractus temporis;* 3o. *ordo successionis.* The two donations exist, first to his sisters, secondly, to their children. The *tractus temporis* is also found, for the will charges his sisters to

(1) Q. R. 5 Q. B. 277.
(2) de Bellefeuille Code Civil, 3 ed. p. 200.
(3) 26 L. C. Jur. 138.
(4) 14 R. L. 270.

deliver over to their children the property bequeathed. The children were not seized at the testator's death. The *ordo successionis* is equally evident; the children received from their mothers and are legatees, in virtue of a second gratification. The testator charges his sisters to deliver over the property to *their* children generally, not merely to children born at the time of his death.

No accretion took place, because none of the legatees died before the testator. There can be no accretion once the succession is opened.

The property bequeathed is to serve as an alimentary allowance. There is no accretion, in cases of legacies made to serve as alimentary allowance. 1 Pothier, p. 455, par. 149, art. 868 C. C.

According to the terms of the will, no reciprocal substitution was intended. Thévenot-d'Essaulle, nos. 408 et 409. The requisites of reciprocal substitution are wanting, and we cannot presume reciprocal substitutions. Thévenot-d'Essaulle (1). *Phillips* v. *Bain* (2). The words "*partage définitif*" imply two partages, *i. e.*, a provisional partage first and then a final one.

The word "*leurs*" in cases of substitutions, applied to the children, substitutes of several legatees, is to be construed as determining amongst the substitutes, a partition *per stirpes* and not *per capita*. See Thévenot-d'Essaulle, nos. 1003 & 1004, and *Dumont* v. *Dumont* (3).

The theory of partition, *per stirpes*, prevails, unless the contrary intention is clear. It must be presumed that the testator wished the order of successions to be followed, as nothing appears to the contrary. In any case, whether the will created a substitution or a usufruct, the appellant as sole representative of her

(1) Mathieu's ed. pars. 415 & 416. (2) M. L. R. 2 S. C. 300.
(3) 7 L. C. Jur. 12.

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deceased mother (one of the testator's sisters), is entitled to the ownership of one-half of all the property bequeathed and enjoyed by her mother during her lifetime. See art. 433 C. C.

A. Geoffrion for the respondent. The will creates merely a usufruct, and not a substitution, and even if it did create a substitution, the partition must, nevertheless, be made *per capita*, not *per stirpes*. In both his will and codicil, the testator used the words "usufruct," "usufructuary" which creates this presumption, and it is supported by the fact that there is no *tractus temporis*.

The gift is not of the usufruct to his sisters, and, after their death, the ownership to their children, but the children take the ownership together, and consequently by equal shares at the same time as their mothers take the usufruct. See art. 868 C. C. Again, the word "*conserver*" is not at all characteristic of a substitution. On the contrary, it is the very word used by the Civil Code (1), in defining usufruct. Moreover, the obligation to keep the property for the children is not imposed upon the usufructuaries but upon the executor. Hence it is not a substitution but a trust imposed upon the latter in favour of the children, who are the owners.

There is reciprocal substitution between the sisters of the testator; (art. 868 C. C.); and the testator has treated his two sisters and their children equally and as one mass (not as two independent roots), making one legacy and not two independent ones. This affords further presumption that the partition should be *per capita*. Moreover, the legacy to the children is made jointly. There is therefore also accretion between them. (Art. 868 C. C.) There could not be accretion between them if the partition was *per stirpes*;

(1) Art. 443.

but only accretion between the members of each *stirpes*.

Finally the testator bequeathes his property to the children as "*incessible*" and "*insaisissable à titre d'aliments.*" He considers that he is giving them the necessaries of life. It must therefore be presumed that as the legacy was not to enrich them but only to give them what they needed, the property is intended to be divided among them equally. *Joseph* v. *Castonguay* (1).

GWYNNE J. (dissenting).—This case turns wholly upon the construction of a clause in the will of one Joseph Rochon whereby he gave and bequeathed to his two sisters Exulpère and Rosalie Rochon, the usufruct of all his property and the ownership thereof to their children. He then appointed Pierre Dupras his executor whom he authorized to realize the whole of his estate, and to invest the clear capital at interest in such a manner as he should think most advantageous and to give the revenue thereof to his said sisters, and to keep the capital for their children. He added that the above legacies were given. The executor named in the will having died the testator appointed another in his place by a codicil wherein he declared and directed that such person

shall be moreover the administrator of my aforesaid property until the death of my two sisters, the usufructuaries named in my said will, and until the final partition of my said property between my heirs in ownership, and he shall have the powers which the said Pierre Dupras had in my said will.

The sole question upon this will is whether the children of the testator's sisters took the ownership of the property devised to them *per stirpes* or *per capita*. If *per stirpes* the appellant is entitled to prevail, if *per capita* the respondent.

(1) 3 L. C. Jur. 141.

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I am of opinion that the appeal should be allowed. The true construction of the will appears to me clearly to be that the executor held the property devised in trust for the testator's two sisters and their children respectively in equal moieties for their respective children as to the ownership in the capital, and for the sisters during their respective lives as to the revenues. Upon the death of one of testator's sisters, in the lifetime of the other, the children of the one so dying became entitled in possession to one moiety of the capital out of which their mother's life income issued—the devise to the testator's sisters and "their children," the former for life as to the income, and the latter as to the capital must be construed "their respective children" upon the authority of *Arrow* v. *Mellish* (1); *Wills* v. *Wills* (2); and *in re Hutchinson's Trusts* (3).

I think there can be no doubt that this is the construction which should be put upon the will, and I am therefore of opinion that the appeal should be allowed with costs and the judgment of the Superior Court restored.

The judgment of the majority of the court was delivered by:

GIROUARD J.—Cette cause soulève une question de substitution. Le 12 octobre 1852, Joseph Rochon fit son testament par lequel il dispose de la masse de sa succession comme suit:—

Je donne et lègue à mes deux sœurs germaines, Exulpère et Rosalie Rochon, l'usufruit de tous mes biens généralement quelconques, et la propriété d'iceux à leurs enfants.

Je nomme Pierre Dupras, mon oncle, mon exécuteur testamentaire, lequel j'autorise à réaliser mes biens, retirer mes crédits, payer mes dettes, vendre mes biens, à termes, le tout comme il le jugera à pro-

(1) 1 DeG. & S., 255.
(2) L. R. 20 Eq. 342.
(3) 21 Ch. D. 811.

pos ; enfin placer la masse liquide de ma succcession à intérêt ou autrement, de la manière qu'il croira le plus avantageux, pour en fournir les revenus à mes dites sœurs usufruitières et conserver les fonds pour leurs enfants. * * * * * *

J'assigne les legs ci-dessus à mes légataires, à titre d'aliments, ainsi les biens légués seront incessibles et insaisissables.

Par un codicile en date du 12 avril 1890, le testateur déclara :—

4° Je nomme pour exécuter mon testament, au lieu et place de Pierre Dupras qui l'était dans mon dit testament et qui est décédé, la personne de Maxime Dupras, mon neveu, cultivateur, de St-Henri de Mascouche. Il sera de plus l'administrateur de mes dits biens, jusqu'au décès de mes deux sœurs usufruitières nommées dans mon dit testament et jusqu'au partage définitif de mes héritiers propriétaires, et il aura les pouvoirs qu'avait le dit Pierre Dupras dans mon dit testament.

Le testateur et ses deux sœurs, Exulpère et Rosalie étant décédés, il s'agit de savoir si le partage des biens légués doit se faire entre les enfants par souches ou par têtes ; en d'autres termes, si le testament contient une substitution ou tout simplement donation d'usufruit à ses deux sœurs et de la propriété à leurs enfants La cour Supérieure a décidé qu'il y avait substitution, et que le partage devait se faire par souches et non par têtes. La majorité de la cour d'Appel, composée de Bossé, Blanchet, Hall et Würtele JJ. a décidé le contraire, le juge en chef, Lacoste, dissident. Le jugement de la cour est ainsi motivé :— (1)

Considérant que cette disposition ne comporte pas une substitution, ou deux libéralités successives prenant effet l'une après l'autre, mais constitue seulement un legs d'usufruit par le testateur à ses sœurs et un legs de propriété (sujet à cet usufruit) à leurs enfants, qui tous deux ont pris effet à son décès, et qu'en chargeant son exécuteur testamentaire de conserver le fonds pour les enfants, devoir qui lui était déjà prescrit par la loi, le testateur ne peut pas être présumé avoir imposé la même obligation à ses sœurs exclues de l'administration des dits biens et leur en avoir ainsi remis et donné la propriété à la charge de la rendre elles-mêmes à leurs enfants, à leur décès, et ne

(1) Q. R. 5 Q. B. 291.

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peut être interprété comme étant une modification de la clause précédente de son testament, par laquelle il lègue directement aux enfants la propriété des dits biens, etc.

Ce motif est développé par M. le juge Blanchet dans une opinion claire et concise, à laquelle je n'hésite pas à donner mon adhésion. J'entends, cependant, faire mes réserves au sujet des décisions dans *Morasse* v. *Baby* (1), et *Guyon* v. *Chagnon* (2), qu'il cite. Je suis donc d'avis de confirmer le jugement dont est appel, avec dépens.

Appeal dismissed with costs.

Solicitor for the appellants: *J. E. Robidoux.*

Solicitors for the respondents: *Geoffrion, Dorion & Allan.*

(1) 7 Q. L. R. 162. (2) 32 L. C. Jur. 271

WILLIAM A. TEMPLE AND OTHERS (DEFENDANTS) .... } APPELLANTS;

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*Feb. 23.
*May 1.

AND

THE ATTORNEY GENERAL OF NOVA SCOTIA AND ROBERT D. EVANS (PLAINTIFFS) .... } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Mines and minerals—Lease of mining areas—Rental agreement—Payment of rent—Forfeiture—R. S. N. S. 5 ser. c. 7—52 V. c. 23 (N.S.)

By R. S. N. S. 5 ser. ch. 7, the lessee of mining areas in Nova Scotia was obliged to perform a certain amount of work thereon each year on pain of forfeiture of his lease which, however, could only be effected through certain formalities. By an amendment in 1889 (52 Vic. ch. 23), the lessee is permitted to pay in advance an annual rental in lieu of work, and by subsec. *(c)* the owner of any leased area may, by duplicate agreement in writing with the Commissioner of Mines, avail himself of the provisions of such annual payment and "such advance payments shall be construed to commence from the nearest recurring anniversary of the date of the lease." By sec. 7 all leases are to contain the provisions of the Act respecting payment of rental and its refund in certain cases, and by sec. 8 said sec. 7 was to come into force in two months after the passing of the Act.

Before the Act of 1889 was passed a lease was issued to E. dated June 10th, 1889, for twenty-one years from May 21st, 1889. On June 1st, 1891, a rental agreement under the amending Act was executed under which E. paid the rent for his mining areas for three years, the last payment being in May, 1893. On May 22nd, 1894, the commissioner declared the lease forfeited for non-payment of rent for the following year and issued a prospecting license to T. for the same areas. E. tendered the year's rent on June 9th, 1894, and an action was afterwards taken by the Attorney General, on relation of E., to set aside said license as having been illegally and improvidently granted.

Held, affirming the judgment of the Supreme Court of Nova Scotia in such action, that the phrase "nearest recurring anniversary of the

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date of the lease" in subsec. (*c*) of sec. 1, Act of 1889, is equivalent to "next or next ensuing anniversary," and the lease being dated on June 10th no rent for 1894 was due on May 22nd of that year at which date the lease was declared forfeited, and E.'s tender on June 9th was in time. *Attorney General* v. *Sheraton* (28 N. S. Rep. 492) approved and followed.

Held, further, that though the amending Act provided for forfeiture without prior formalities of a lease in case of non-payment of rent, such provision did not apply to leases existing when the Act was passed in cases where the holders executed the agreement to pay rent thereunder in lieu of work. The forfeiture of E.'s lease was, therefore, void for want of the formalities prescribed by the original Act.

APPEAL from a decision of the Supreme Court of Nova Scotia affirming the judgment at the trial in favour of the Crown.

The facts of the case and statutes governing it are sufficiently set out in the above head-note, and in the judgment of Mr. Justice Sedgewick.

W. B. A. Ritchie Q.C. and *Congdon* for the appellants referred to *Gilman* v. *Crowly* (1); *Attorney General* v. *The Ironmongers Co.* (2); and *Farnsworth* v. *Minnesota and Pacific Railroad Co.* (3).

Russell Q.C. and *Covert* for the respondents.

THE CHIEF JUSTICE.—I am of opinion, concurring in that respect in the judgment of Mr. Justice Townshend, that the words "date of the lease," in subsection *c* are to have their primary meaning, namely, the date of the instrument by which the demise or grant was made; this being so, the 10th of June is to be taken as the date referred to by the statute, and therefore the tender on the 9th of June, 1894, was a good tender in due time which prevented forfeiture.

For this reason the appeal should be dismissed, and the first judgment upheld.

(1) 7 Ir. C. L. 557.
(2) 2 Beav. 313.
(3) 92 U. S. R. 49.

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GWYNNE J.—I concur in the judgment of Mr. Justice Sedgewick.

SEDGEWICK J.—On the 21st of May, 1889, the relator, Robert D. Evans, applied to the Commissioner of Public Works and Mines for the province of Nova Scotia for a lease of twenty-six gold mining areas at Montague, county of Halifax. A lease in the form prescribed by chapter 7 of the Revised Statutes of Nova Scotia, 5th series, was subsequently drawn up and was executed by the Commissioner of Mines on the 10th day of June, on which day the instrument was dated. On June 1st, 1891, the instrument, called by all the parties a rental agreement, was executed between the lessee Evans and the Commissioner of Works and Mines purporting to be in pursuance of the statute which had been passed on the 17th of April, 1889. Under this instrument the lessee paid rent for three years. On May 22nd, 1894, the Commissioner of Mines declared the lease forfeited for non-payment of rent under the rental agreement, and on the same day issued a prospecting license to the appellant Temple, of the same areas. In July, 1894, the prospecting license was transferred to the appellant Annand, who in the following month obtained a lease from the mines office of a portion of the areas and subsequently sold it to the appellant Logan.

Previous to the passing of chapter 23 of the Acts of 1889, the administration of the mines of the province was governed by chapter 7 of the Revised Statutes, 5th series. When a person desired to obtain a lease of mining areas he applied to the Commissioner of Public Works and Mines therefor, paying at the same time the statutory price. In the event of there being no dispute as to the person entitled, a lease in the form prescribed by the statute was issued in the usual

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course. Neither the statute nor the lease required that any money should be paid by way of rental for the leased premises after the first payment, but the lessee, in order to prevent a forfeiture, was obliged to do a certain amount of work each year upon the areas leased. In the event of failure to perform this work, and to make due returns, the lease was liable to be forfeited, but the forfeiture could take place only after certain provisions by way of notice and investigation were complied with. There had to be at least 30 days notice of a hearing before the commissioner who was required to investigate and decide as to whether or not, as a matter of fact, the lease had been forfeited by reason of non-performance of work on the part of the lessee. The object of the amending Act of 1889 was mainly twofold. 1st. To give to the lessee the option of paying an annual rental for the areas leased instead of compelling him to do work upon the ground; and secondly, to enable the Commissioner of Mines to declare as forfeited without notice, preliminary proceedings, or an investigation of any kind, any areas in respect of which the annual rental had not been paid.

The lease in question was issued after the passing of this Act, but it did not contain these new provisions in regard to rental and forfeiture, section 7 having provided that "all leases of mines of gold and of gold and silver, and of mines other than mines of gold and gold and silver, shall contain the provisions respecting the payment of rental and its refund under certain conditions, as provided herein;" and section 8 providing that "the preceding section of this Act (section 7) shall come in force two months after the date of the passage of this Act." It is, I think, admitted by all parties that by reason of these two sections the lease in question herein must be dealt

with as if it had been issued prior to the passing of the amending Act; and the principal question, although there are others, is as to the last subsection of section 1, which is as follows:

It shall be lawful for the owner of any leased area, by duplicate agreement in writing with the commissioner, to avail himself of the provisions of this Act so far as relates to the annual payment in advance and the refund thereof, and such advance payments shall be construed to commence from the nearest recurring anniversary of the date of the lease.

As I have said, on the 1st of June, 1891, the rental agreement was entered into by which it was provided that the lease in question should become subject to the provisions of section 1, of ch. 23 of the Acts of 1889, including the subsection just set out, the lessee agreeing to pay the annual rental of 50 cents per area payable as therein provided.

The action to set aside the lease under which the appellants claim as having been illegally and improvidently granted, was brought by the Attorney General upon the relation of the original lessee. At the trial, Mr. Justice Townshend, the trial judge, decided in favour of the Crown. Upon appeal this judgment was unanimously sustained. We are of opinion that the judgment of the court below should be affirmed, upon several grounds.

(1.) We are of opinion that the phrase "nearest recurring anniversary of the date of the lease" in subsection (*c*), is equivalent to the phrase "next, or next ensuing anniversary," as was unanimously held by the Supreme Court of Nova Scotia in the case of *The Attorney General* v. *Sheraton*, (1) and in our view the judgment of Mr. Justice Graham in that case is unanswerable, and it would be useless to repeat what

(1) 28 N. S. Rep. 492.

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he has so well said in regard to the proper construction of that phrase. If that judgment be right then at the time of the declaration of the forfeiture on the 21st of May, 1894, no rent was due, there having been three payments of rent, the first on the 21st of May, 1891, which under the construction as above would be applicable as rent from the 21st of May, 1892, the next ensuing anniversary of the date of the lease, so that the declaration of forfeiture and the issue thereunder of licenses or leases by reason of such alleged forfeiture would be altogether invalid.

(2.) But there is, in my view, an equally strong reason why the alleged declaration of forfeiture was invalid. I do not think that subsection (*c*) imposes any additional burden in the matter of forfeiture upon a lessee who desires to avail himself of its benefits. It is clear under subsection (*a*) that in the case of a lease issued after the Act came into force forfeiture accrues without any further proceedings in the event of the annual rental not being paid, but it seems to me equally clear that that result does not happen in the case of then existing lease-holders who subsequently might enter into an agreement for the payment of an annual rental in order to escape the obligation of performing a specified amount of work upon the ground. Nowhere is it provided that in that case mere non-payment of the annual rental *ipso facto* works a forfeiture. It seems equally clear to me that the provision prescribed by the above Act in regard to forfeiture must in such a case be complied with. No such proceedings having been taken in this case the forfeiture is void.

(3.) There is yet another ground upon which, in my view, the judgment of the court below may be supported. I have above set out sections 7 and 8 of the amending Act. Section 1 of the Act had authorized a

change in the tenure on the part of lessees of mines. Section 7 had provided that these provisions should be especially incorporated in the leases subsequently issued, and then section 8 prescribes that that provision should not come into force for two months. Bearing in mind that we must give, where we possibly can, some meaning to every expression of legislative intent, and that it is only in case of absolute need where we are permitted to treat statutory expressions as absolutely meaningless, we must endeavour to give a meaning, if possible, to section 8. The appellants contend that section 1 of the Act took effect upon the passing of the Act, and that all leases issued within the two months shall have the same effect as if they contained in terms the provisions of subsection (*a*), (*b*) and (*c*). In other words, as to leases issued within the two months those not containing these provisions should have the same effect as if they had been issued after the two months with such provisions. If that is the proper construction of section 8, it is, so far as I can see, without meaning. I think it has a meaning. There were at the time, doubtless, numbers ef unexecuted instruments in different parts of the country, some in England, others, many of them, in the United States, and the object of the legislature was, I think, to give a reasonable time for all of these inchoate instruments to be completed and brought back to the commissioner's office for registry, and the intent, although perhaps inartificially expressed, was to provide that the Act should not at all apply to these leases, two months being sufficient time to notify the world of the change in the law.

I do not think it necessary to discuss the question raised during the argument as to the date of the lease. In the view that we have taken it is not necessary to decide that point, nor to refer to the question inci-

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dental to it as to the rights of the Attorney General as the *dominus litis* of these proceedings.

In my view the judgment below should be affirmed with costs.

KING and GIROUARD JJ. concurred.

Appeal dismissed with costs.

Solicitor for the appellant Temple: *Fred. T. Congdon.*

Solicitor for the appellant Annand: *Hector McInnes.*

Solicitor for the respondents: *W. H. Covert.*

CREAM, *et al.* *v.* DAVIDSON.

1897
*Feb. 26.
*May 1.

Testamentary succession—Balance due by tutor—Executors—Account, action for—Action for provisional possession—Parties to action.

APPEAL from a decision of the Court of Queen's Bench for Lower Canada (appeal side) (1), which reversed the judgment of the Superior Court, district of Quebec, and dismissed the appellant's action and incidental demand.

After hearing counsel for both parties the court reserved judgment and on a subsequent day dismissed the appeal but gave no written reasons.

Appeal dismissed with costs.

Stuart Q.C. for the appellant.

Cook Q.C. and *Davidson* for the respondent.

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

(1) Q. R. 6 Q. B. 34.

1897
*Mar. 1.
*May 1.

LOUIS *alias* WILFRID DUROCHER (PLAINTIFF) .... APPELLANT;

AND

LOUIS DUROCHER (DEFENDANT)........RESPONDENT.

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

Evidence—Judicial admissions—Nullified instruments—Cadastre—Plans and official books of reference—Compromise—" Transaction "—Estoppel —Arts. 311 *and* 1243-1245 *C. C.—Arts.* 221-225 *C. C. P.*

A will, in favour of the husband of the testatrix, was set aside in an action by the heir at law and declared by the judgment to be *un acte faux*, and therefore to be null and of no effect. In a subsequent petitory action between the same parties :

Held, Girouard J. dissenting, that the judgment declaring the will *faux* was not evidence of admission of the title of the heir at law by reason of anything the devisee had done in respect of the will, first, because, the will having been annulled was for all purposes unavailable, and, secondly, because the declaration of *faux*, contained in the judgment, did not show any such admission.

The constructive admission of a fact resulting from a default to answer interrogatories upon articulated facts recorded under art. 225 C. C. P., cannot be invoked as a judicial admission in a subsequent action of a different nature between the same parties.

Statements entered upon cadastral plans and official books of reference made by public officials and filed in the lands registration offices, in virtue of the provisions of the Civil Code of Lower Canada, do not in any way bind persons who were not cognizant thereof at the time the entries were made.

Where a deed entered into by the parties to a suit in order to effect a compromise of family disputes and prevent litigation failed to attain its end, and was annulled and set aside by order of the court as being in contravention of Article 311 of the Civil Code of Lower Canada, no allegation contained in the deed so annulled could subsist even as an admission.

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

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APPEAL from the judgment of the Court of Queen's Bench for Lower Canada (appeal side) (1) reversing the judgment of the Court of Review at Montreal (2), and restoring the decision of the Superior Court, district of Montreal (2), which dismissed the plaintiff's action with costs.

The plaintiff brought a petitory action against his father and former tutor, the present respondent, to recover from him his share, as an heir at law of his mother, in certain real property in Montreal alleged to have formed part of her estate. The evidence shewed that there was apparently no existing title to the land, and no title deeds on file in the registry office. The plaintiff's mother was entered as proprietor of the lots in question on the official plan and book of reference deposited in the registry office, under the provisions of the Civil Code in 1871, the only other entries affecting the property being two notices of renewal of registration of judgments against a supposed former owner. The defendant denied that his deceased wife, plaintiff's mother, ever had any title and claimed that the lots had been purchased by him thirty years previously with his own money and had ever since then remained in his possession as owner, that he was assessed for the property on the city valuation rolls and had paid the taxes on them ever since 1868.

The mother died on 24th November, 1874, and shortly afterwards the respondent caused to be probated an alleged will said to have been made by the deceased, very irregular in form and bearing upon its face evidence of having been made by the respondent himself. By this will all the property of the testatrix, including the lands in question in this cause, were devised to her husband, the respondent.

(1) Q. R. 5 Q. B. 458. (2) Q. R. 9 S. C. 443.

On 19th May, 1875, respondent was appointed tutor to his three children.

On 28th February, 1889, the appellant and respondent became parties to a deed in which it was declared that the appellant had a right as heir of his deceased mother to certain properties, including that now in dispute, which were then clear of all incumbrances and that his father, the respondent, had rendered full and satisfactory accounts of his administration as tutor. The deed then recited that the parties desired to put an end to all trouble, preserve amicable relations within the family and avoid litigation and, in consideration of the premises and a payment of $800 by the respondent, the appellant sold, granted and transferred all his rights and claims in and to the property as heir or otherwise to the respondent.

In an action brought by appellant in 1893 to set aside this deed defendant failed to appear, and it was annulled by the Superior Court as being a settlement between a minor, become of age, and his tutor, relating to his administration, without the rendering of accounts in detail and delivery of vouchers as required by art. 311 C. C.

In January, 1894, an action was brought by appellant in the Superior Court, at Montreal, in which it was alleged that the pretended will was made by respondent himself; that the alleged testatrix could not write; and praying that said will should be declared to be a forged or simulated document which had never been either dictated or signed by the pretended testatrix, and the respondent again made default.

Interrogatories on articulated facts were served upon the respondent in the latter case, amongst which were the following:

"Interrogatoire 4ième—N'est-il pas vrai que le prétendu testament de la dite Dame Alphonsine Brunet,

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portant la date du onzième jour de novembre, mil huit cent soixante-quatorze et relaté en la déclaration en cette cause, n'a jamais été ni dicté ni signé par la dite Dame Alphonsine Brunet qui ne savait pas signer ?

"Interrogatoire 5ième—N'est-il pas vrai que le dit testament a été dicté par le défendeur ?

"Interrogatoire 6ième—N'est-il pas vrai qu'après la mort de la dite Dame Alphonsine Brunet, le défendeur a tenté de faire faire par un notaire, à Montréal, un autre testament que celui-ci dont il s'agit en cette cause ?"

The respondent did not answer these interrogatories and they were declared in consequence *pro confessis*, as provided by the Code of Civil Procedure (1), and a judgment was entered in the case which declared :—

" Que le dit prétendu testament du onze mai, mil huit cent soixante et quatorze, est un acte faux et est en conséquence nul et de nul effet."

These facts were set forth in the declaration in the present case and the instruments above referred to were produced and relied upon by the plaintiff as evidence of admissions made by the respondent of the validity of the plaintiff's claims and as creating strong presumptions in his favour and against the title of respondent.

Robidoux Q.C. for the appellant. There is no record of title. Neither party can produce title deeds. The possession of respondent has not been exclusively for himself, but is of uncertain and doubtful character. See Beaudry-Lacantinerie Traité des Biens, no. 251, 252.

We find the proof of appellant's part ownership in the fact that the respondent, by means of a forged will, attempted to have the property bequeathed to him

(1) Art. 225.

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by his wife. Why should he have recourse to this forgery if he had already been owner? The forged will also clearly admits the wife's ownership. Proof of ownership by Alphonsine Brunet is also found in the deed of sale of the 27th February, 1889. Of the three immoveable properties which belonged to Alphonsine Brunet's children, lot 22 is the only one claimed by respondent. He admits that they are co-proprietors of the two other properties mentioned in the will. We have there the appellant's declaration, made in presence of the respondent, and signed by him, that the appellant has a title as an heir of his deceased mother, and that he sells all his rights to respondent in the property she died possessed of amongst which is the property in question. And further on in the same deed of sale we find words permitting the respondent, his heirs and representatives, to enter upon and possess the lot in question.

In the judgment which annulled the deed of sale we find the equivalent of a title in favour of appellant. By the rescission of the deed of sale they were both replaced, as to the property sold, in the same position as they were before the sale, the appellant, by the effect of that rescission, again becoming owner, and from the day of the judgment annulling the sale he could have made a valid sale to a purchaser in good faith.

The entry of the lot 22 on the book of reference, in the name of Alphonsine Brunet, constituted in her favour the presumption that she was the owner of the lot. Dal. Jurisp. Gen. Sup. Rep. " Propriété," no. 326. Presumptions must follow from such mention on the cadastre. *Martel* v. *Bory* (1); *Auclair* v. *Jamet* (2); *Ragon* v. *Beaujard* (3). A deed may be cancelled, the obligation itself may be set aside, and still the recital

(1) Dal. '88, 2, 66. (2) Dal. '92, 2, 483.
(3) Dal. '92, 1, 512.

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in the deed makes complete proof of the facts mentioned therein, if the recital have a direct reference to the obligation itself. (Art. 1210 C. C.) Judicial admissions preserve their effect even after the instrument has been annulled. Admissions made in a compromise are effective, although the compromise may be a nullity (1). See Sewell, C.J. in *Vallières* v. *Roy* (2), "what is formally and distinctly admitted by an exception is evidence, though the exception be dismissed;" and also Fuzier-Herman (3). See also Duc de Poix., p. 44, 2, 227. 2 Solon, Nullités, p. 8, no. 11 and following. 1 Aubry et Rau. p. 123. 1 Rolland de Villargues, "Acte" no. 148. *In re, de Grandval* (4); *Beauveau* v. *Landanges* (5); 5 Larombière, art. 1319, no. 9.

The admissions made in the deed of sale that the appellant is entitled to inherit from his mother; that he sells his interests in the lot no. 22, in his quality of heir; that he is in possession of the lot; that the respondent will take possession from the day of the sale, are clearly admissions which have a direct reference to the sale, and the dispositions of art. 1210 must be applied. The only appearance of "transaction" in the deed of sale would apply to the account to be rendered by the respondent as tutor to the appellant. There is no doubt expressed as to his rights. This sale is made *avec garanties*;—warranty is only given by a party who is a proprietor, and who has a title.

This court cannot come to the help of respondent. His record leaves him charged with forging the will of his wife, procuring two witnesses who perjured themselves when the will was proved, and with having entrapped his son in a deed, in which he had

(1) Pand. Fr. Rep. "Aveu," No. 209, 210, 211.
(2) 2 Rev. de Leg. 335.
(3) Rep. "Aveu," No. 378.
(4) S. V. 47, 2, 142.
(5) S. V. 48, I, 363.

him to falsely declare that he had been rendered an account and by this means to spoilate him of all he owned.

A. Geoffrion for the respondent. The deed set up against the respondent was an agreement to quiet differences and claims disputed and doubtful, it was a "transaction," and respondent had no interest to object to or deny what was entered there by those who drafted it. Now that it has failed to quiet these disputes, it cannot be contended that anything was then judicially admitted. Respondent is not estopped from contradicting what it alleges now that he has an interest in doing so; he had no such object at the time. Moreover this deed when annulled ceased to exist for all purposes and has, since it became a nullity, no effect as an admission or as creating a presumption in any manner. See Fuzier-Herman (1).

As to the will, the admissions are to the effect that respondent was actually owner of the disputed lots before the death of the testatrix and she only bequeaths other property belonging to her. It was an instrument declaratory of their individual rights executed between the husband and wife contrary to the provisions of the code forbidding contracts between consorts. The constructive confession of facts by default to answer interrogatories, is not a direct admission; it is merely an incident in the suit and available in the particular suit only in which the default is recorded. The will was a nullity *ab initio* and was never relied upon in respect to the title now in question. It was set aside only on grounds of informality, at any rate, and is now a nullity and of no more effect than the annulled deed.

The cadastral entry is evidently a mistake made by the officer who prepared it; it is not an instrument to

(1) Rep. "Aveu" no. 378.

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which respondent was a party in any manner and he cannot be bound by anything entered either on the plan or book of reference in his absence and without his consent or approbation. The cadastre spoken of in the French cases cited is an entirely different affair from that in use in Quebec, consequently those decisions have no application in the present case.

THE CHIEF JUSTICE.—In my opinion this appeal fails, and that for the reasons given in the notes of Sir Alexandre Lacoste to which I adhere in every respect. The action is a petitory one brought by a son against his father. It was for the plaintiff to prove his title, which in my judgment he has failed to do. I cannot see that any constructive admission by reason of default in answering *faits et articles* in the action to set aside the will makes proof as an admission in the present action. Nor can I agree with Mr. Justice Bossé that the judgment in that action declaring the will *faux* proves that the respondent admitted the plaintiff's title by reason of anything he did in respect of the will, first, because the will having been annulled is for all purposes unavailable, and secondly, because the declaration of *faux* contained in the judgment does not show any admission on the part of the respondent.

As regards the notarial deed of the 27th February, 1889, this was set aside as being in contravention of article 311 C. C., which declares null every agreement relating to the question of a tutorship which is not preceded by the rendering of an account by the tutor accompanied with the vouchers.

Mr. Justice Bossé places much reliance on this deed as containing an admission on the part of the respondent by reason of his having signed this "acte," by which the appellant assumes to cede to the respondent

tous ses droits d'hérédité qu'il a et peut avoir en sa dite qualité d'héritier de la dite Alphonsine Brunet sa mère dans et sur les lots de terre dont elle avait la possession lors de son décès.

On the other hand, the learned Chief Justice Sir Alexandre Lacoste, from the enunciations of the deed contained in the following words,

en conséquence, pour mettre fin à tous troubles, éviter des procès qui sont toujours ruineux dans ces cas, et pour l'héritier et pour le rendant compte, pour conserver l'amitié paternelle, et sa protection et les bons conseils comme homme probe,

holds that the deed was not a veritable sale but a mere transaction, and that having been annulled by the judgment, nothing contained in it can subsist even as an admission.

In the first place I do not consider that the mere signing the deed even if it had not been set aside would have constituted an admission by the respondent of the truth of allegations introduced into it, not as made by the respondent himself, but by the notary whose *acte* it was, of statements made by the appellant exclusively. There is no such technical doctrine as that which prevails in the law of England as estoppel by deed to be found in the French law, and it is to be hoped that no such doctrine will ever be admitted into it. I agree, however, with Chief Justice Lacoste that the deed having been annulled has become a nullity, void, and inexisting for all purposes, just as much as if there had never been such a deed. Then the object of the deed was, as the Chief Justice holds, merely to effectuate a compromise of family disputes and to prevent litigation, and it would be unjust, now that it has failed to attain its end, for that purpose to twist its recitals into an admission by the respondent of the very claim which he had always denied and disputed, and which it was the object of the parties by the deed itself to settle amicably. I see no admis-

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sion in the deed. As to the cadastre, that in no way bound the respondent, inasmuch as it was the act of a third party of which he is not shown to have been cognizant. The cadastre here is, I find, a very different thing from a cadastre in France.

The appeal must be dismissed with costs.

GWYNNE J.—I am of opinion that this appeal should be dismissed, for the reasons given by the learned Chief Justice Sir Alexander Lacoste, in the Court of Appeal, and for the reasons given in the judgment of the Superior Court of the province of Quebec. The now appellant, who was plaintiff in that court, gave no evidence sufficient in law to establish his contention that his mother was seized of the property which is the subject of the action and which the plaintiff claimed as her heir.

SEDGEWICK and KING JJ. agreed that the appeal should be dismissed.

GIROUARD J.—Il s'agit ici d'une action pétitoire intentée par le fils, comme héritier de sa mère séparée de biens, contre son père. La Cour Supérieure (Davidson J.), décida contre le fils. La Cour de Revision, (Tait, Jetté et Gill JJ.) renversa ce jugement à l'unanimité. La Cour d'Appel, à son tour, rétablit le jugement de la cour Supérieure, Bossé et Blanchet JJ. dissidents. C'est de ce jugement que le demandeur appelle. Il a en sa faveur le sentiment des trois juges en Revision et de deux juges en Appel, tandis que le défendeur a trois juges en Appel et le juge de première instance.

Les faits de la cause ressortent du jugement de la Cour de Revision, que je serais disposé de confirmer pour les motifs qui y sont énoncés—motifs que Mr. le

juge Bossé a développé dans les notes de son dissentiment; mais je suis seul de cet avis.

Appeal dismissed with costs.

Solicitors for the appellant: *Robidoux, Chènevert & Robillard.*

Solicitors for the respondent: *Geoffrion, Dorion & Allan.*

1897
*Feb. 24.
*May 1.

THE MANUFACTURERS ACCIDENT INSURANCE COMPANY (DEFENDANT) .... APPELLANT;

AND

MINNIE PUDSEY (PLAINTIFF).............RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Accident insurance—Renewal of policy—Payment of premium—Promissory note—Instructions to agent—Agent's authority—Finding of jury.

A policy issued by the Man. Acc. Ins. Co. in favour of P. contained a provision that it might be renewed from year to year on payment of the annual premium. One condition of the policy was that it was not to take effect unless the premium was paid prior to any accident on account of which a claim should be made and another that a renewal receipt, to be valid, must be printed in office form, signed by the managing director and countersigned by the agent. P. having been killed in a railway accident payment on the policy was refused on the ground that it had expired and not been renewed. In an action by the widow for the insurance it was shown that the local agent of the city had requested P. to renew and had received from him a promissory note for $15 (the premium being $16) which the father of the assured swore the agent agreed to take for the balance of the premium after being paid the remainder in cash. He also swore that the agent gave P. a paper purporting to be a receipt and gave secondary evidence of its contents. The agent's evidence was that while the note was taken for a portion of the premium it was agreed between him and P. that there was to be no insurance until it was paid, and that he gave no renewal receipt and was paid no cash. Some four years before this the said agent and all agents of the company had received instructions from the head office not to take notes for premiums as had been the practice theretofore.

The note was never paid but remained in possession of the agent the company knowing nothing of it. The jury gave no general verdict but found in answer to questions that a sum was paid in

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

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cash and the note given and accepted as payment of the balance of the premium, and that the paper given to P. by the agent, as sworn to by P.'s father, was the ordinary renewal receipt of the company. Upon these findings judgment was entered against the company.

Held, affirming the judgment of the Supreme Court of Nova Scotia, Gwynne J. dissenting, that the fair conclusion from the evidence was, that as the agent had been employed to complete the contract and had been entrusted with the renewal receipt P. might fairly expect that he was authorized to take a premium note having no knowledge of any limitation of his authority and the policy not forbidding it; and that notwithstanding there was no general verdict, and the specific question had not been passed upon by the jury, such inference could be drawn by the court according to the practice in Nova Scotia.

Held further, that there was evidence upon which reasonable men might find as the jury did; that an inference might fairly be drawn from the facts that the transaction amounted to payment of the premium and it was to be assumed that the act was within the scope of the agent's employment; the fact that the agent was disobeying instructions did not prevent the inference though it might be considered in determining whether or not such inference should be drawn; and that a new trial should not be granted to enable the company to corroborate the testimony of the agent that he had no renewal receipt in his possession except one produced at the trial as the company might have supposed that the plaintiff would seek to show that such receipt had been obtained and were not taken by surprise.

APPEAL from a decision of the Supreme Court of Nova Scotia affirming the judgment for the plaintiff at the trial.

The material facts are sufficiently set out in the above head-note and more fully in the judgment of the majority of the court delivered by Mr. Justice King.

Wallace Nesbitt for the appellant.

The policy had expired and no contract for insurance existed when the insured was killed. See *Acey* v. *Fernie* (1); *British Industry Life Assur. Co.* v. *Ward* (2); *Tiernan* v. *The People's Ins. Co.* (3).

(1) 7 M. & W. 151.
(2) 17 C. B. 644.
(3) 26 O. R. 596; 23 Ont. App. R. 342.

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The agent had no authority to take a note for the premium. *Western Assur. Co.* v. *Provincial Ins. Co.* (1).

W. B. A. Ritchie Q.C. for the respondent.

The judgment of the majority of the court was delivered by:

KING J.—This is an action on a policy claimed to have been effected by Obadiah Pudsey, deceased, and the question in controversy is whether the insurance was in fact effected.

Pudsey had been insured in the appellant company for the twelve months ending on 24th September, 1893. The policy provided that it might be renewed for like periods from year to year by payment of the annual premium of sixteen dollars.

One of the conditions indorsed on the policy was that it was not to take effect unless the premium was paid prior to any accident on account of which the claim should be made.

Another was that no renewal receipt should be valid unless printed in office form and signed by the managing director and countersigned by the agent.

Nothing was stated in the policy or conditions respecting the payment of premiums, whether in cash or by premium notes, and of course, therefore, nothing as to the effect of non-payment of premium notes at maturity.

Prior to November, 1889, the company was in the habit of taking premium notes, but at that time they informed their agents by circular that they had resolved to discontinue the practice, and directed them to conduct the business thereafter on the cash system, and refused to accept notes for premiums for accident insurance.

(1) 5 Ont. App. R. 190.

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One Paton was at the period in question agent and manager of the company for the Maritime Provinces. He was also agent for the Manufacturers Life Insurance Company, a company having, as it is stated, substantially the same management. In the business of this latter company premium notes were continued to be taken, and the circular referred to seems to point to a distinction intended to be made in the mode of conducting the accident and life business.

The insurance effected as above expired on the 24th September, 1893. On the 26th Mr. Paton sought out Pudsey, who was a locomotive engineer on the Windsor and Annapolis Railway, to get him to renew his insurance.

What took place is differently stated by the different witnesses. It is proved, however, and not disputed, that Pudsey signed and delivered to Paton a promissory note for fifteen dollars payable on October 10th. This note was on one of the printed forms supplied by the Manufacturers Life Insurance Company to Paton, and in accordance with its form was made payable to that company, or order. It does not appear that the attention of Pudsey was drawn to the difference in the companies.

Paton, who was called as a witness on behalf of each party, says that the note was taken as a portion of the renewal premium, but that it was agreed between him and Pudsey that there was to be no insurance till the note was paid, and he says he gave no renewal receipt and received no payment of cash in addition to the note.

On the other hand the father of Pudsey, who was present at the time, although not, it appears, within hearing of all that took place, says that his son gave Mr. Paton a bank note, and that the latter said he would take his note for the balance. He also says

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that Paton gave to Obadiah Pudsey a paper purporting to be a receipt of some kind, which the jury have found to be the ordinary renewal receipt of the company.

The jury have also found that a sum of money was paid in cash, and that the note was given and taken as payment of the balance of the premium.

The note never was paid, nor was it delivered up to Pudsey, but remained in possession of Mr. Paton. The company knew nothing of it.

In January, 1894, Pudsey was killed in a railway accident.

Upon the findings as above, judgment was entered for the plaintiff by the learned Chief Justice of Nova Scotia, before whom the case was tried, and the judgment was afterwards sustained by the other judges with exception of Meagher J. who dissented.

The contention of the appellants is that Paton did not purport to bind the company (or in other words to renew the insurance), and that, if he did, he acted without authority; and further that if there was any proper evidence of such authority, it should have been passed upon by the jury.

The most material question for us is that as to Paton's authority to do what the jury found that he did, viz., to take the note in payment of the premium and deliver the company's renewal receipt to Pudsey.

The express instructions of November, 1889, to accept only cash for accident premiums were in force at the time in question, for Paton says that these instructions had never been varied. It is not alleged that Pudsey knew anything of them.

The question therefore is whether it was within the scope of Paton's employment to take a premium note as in payment.

His authority to receive premiums and to give renewal receipts, and so to complete the contract, is clear. He says that every renewal receipt comes to him from the head office at Toronto, and that he renews policies after they have lapsed by giving renewal receipts.

He further says:

I personally may take part of the money and a note for the rest. I charge myself with the full amount of the premium and the note becomes my personal property. When I take part cash I take a note for the balance of the premium.

This shews at least that he was accustomed to complete the transaction.

The possession of blank policies and renewal receipts signed by the president and other principal officers is some evidence of a general agency to complete the contract. *Carroll* v. *Charter Oak Ins. Co.* (1). May on Insurance 2 ed. p. 139.

The authority of a general agent is, however, restricted to the range of his employment and to the acts and representations which a prudent and ordinarily sagacious and experienced person (with no reason to suspect otherwise) might expect him to do or to be authorized to make in respect of the particular business entrusted to him.

It would not be expected that an insurance agent would be authorized to receive a chattel in payment of a premium, or to discharge his own indebtedness to the assured through it, for this would be travelling out of the usual course of business.

But there is nothing in the course of business (or in the nature of the contract) to make it unreasonable to take a premium note.

In marine insurance it is very common. In the case of the Manufacturers Life it is shown to be the practice; and the evidence further shows that it was the practice

(1) 40 Barb, N.Y., 292.

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of the appellant company to take premium notes up to November, 1889.

In the United States it has been held that where the agent is authorized to accept the payment of premiums he may, in his discretion, accept a note or cheque instead of the money, where the policy is silent in the matter. *Taylor* v. *Merchants Fire Ins. Co.* (1).

The fair conclusion would therefore seem to be that as this agent had been employed to complete the contract and had been entrusted with the renewal receipts, a prudent and ordinarily sagacious and experienced person might fairly expect that he was authorized to take a premium note, there being nothing in the policy to the contrary, and the assured having no knowledge of any limitation of the agent's authority. If this is so, the result would be that Mr. Paton was a person held out by the company as having authority to take a note for the premium and complete the contract by delivering the renewal receipt.

Then as to the objection that, there being no general verdict, the specific question should have been passed upon by the jury, the observations of Mr. Justice Graham upon the practice acts of Nova Scotia seem to be conclusive.

The remaining questions are as to the findings of fact by the jury. Is there evidence upon which reasonable men might find as they did? First, as to whether the note was taken in payment of the premium. The agent's account, it will be remembered, is that it was taken upon condition that, if paid at maturity, a renewal receipt would then issue, but that in the meantime, there was to be no insurance. The jury have not adopted this account of the transaction and of course credibility is particularly a question for them. What remains? Payment of a sum of money, and the

(1) 9 How. 390.

giving of a negotiable note for the balance of the premium, and the retention of the note by the agent after its non-payment at maturity.

Suppose there were no question of the agent's authority to take a premium note, might not an inference fairly be drawn from the above facts that the transaction amounted to payment? And, in the consideration of this part of the case, it is to be assumed, in accordance with what has been already said, that the act was within the scope of the agent's employment. The mere fact that the agent was going contrary to instructions does not prevent the inference, although it is a circumstance fairly to be considered in determining whether such inference ought in fact to be drawn.

If there had been no accident during the twelve months of the alleged continuance of the insurance, and the company as the real payees had acquired title by indorsement, and brought action to recover the amount of the note, it would seem as if there was nothing in the facts as proved (apart of course from the account by Paton discredited by the jury) which would prevent recovery.

The remaining point is a more doubtful one, viz., as to the receipt. All that is proved with regard to it is that it was a receipt for sixteen dollars, and that it was signed by the president and acting manager of the company, and countersigned by the agent in the same way that ordinary renewal receipts are so signed and countersigned. It is also proved that the agent had such renewal receipts in his possession, and it does not appear that there was anything else to which it might correspond.

There are not wanting circumstances which make against giving full weight (not to say credit), to the elder Pudsey's testimony, but this frequently happens

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in jury and all other trials, while upon the whole the evidence is accredited.

Having regard to the finding already commented upon, viz., that the note was taken as in payment of premium, perhaps no serious fault can be found with the further finding that the receipt was an acknowledgment of such fact of payment. And the receipt being upon the company's form, and formally signed by the principal officers of the company, and it not appearing that there was any other kind of form in use by the agent, it was a not unreasonable conclusion that it was the ordinary renewal receipt.

All that has been said rests, of course, upon the assumption, which we are not bound to make, that the account given by the witnesses relied on by the plaintiff is substantially correct. It is sought to get a new trial in order, by the testimony of witnesses from the head office, to corroborate the testimony of Mr. Paton as to his having no renewal receipts for this policy in his possession except the one produced by him at the trial. This is put upon the ground of surprise, and it is said that it was not alleged formally by the plaintiff that a renewal receipt had been obtained. But it seems as though the defendant in the action might well have supposed that the plaintiff would seek to show that a renewal receipt had been obtained, because without such receipt the plaintiff could not very well get on with his action.

Upon the whole, therefore, there is no good reason for disturbing the judgment, and the appeal should be dismissed.

GWYNNE J.—The plaintiff in her statement of claim alleges that on the 24th September, 1892, her husband Obadiah Pudsey, since deceased, effected a policy of insurance with the defendant company whereby they

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agreed with him that in case by reason of external violent and accidental means occurring during the continuance of the said policy, the said Obadiah should die within three months after the occurring of such accident the defendant company would pay to Minnie Pudsey, the present plaintiff, the sum of one thousand dollars; that the policy was by its terms in force for the period of twelve months ending at noon on the 24th September, 1893, subject to renewal for like periods from year to year by payment of the annual premium, and that at the expiration of the said twelve months the said policy was renewed for the further period of twelve months by the defendants accepting the promissory note of the said Obadiah Pudsey for fifteen dollars and one dollar in cash in payment of the renewal premium for the period of twelve months from the 24th September, 1893. That on the 14th May, 1894, and during the continuance of the said policy the said Obadiah Pudsey was killed by violent external and accidental means within the terms of the policy. To this statement of claim the defendants pleaded twenty-three pleas setting up in varying forms the one substantial defence, namely, that the defendants never did accept or receive the promissory note and cash referred to in the said statement of claim, or any note or cash in payment of premium on renewal of said policy, or at all, and that in point of fact the said policy was never renewed by the said defendant company, but became and was cancelled on the 24th September, 1893, before the happening of the accident. The plaintiff joined issue on the defendant's pleas, and thereupon proceeded to trial. At the trial the plaintiff produced the policy pleaded in the statement of claim. It contained in the body of it the following clause:

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This policy is in force for twelve months ending at noon on the 24th day of September, 1893, and may be renewed for like periods from year to year by payment of the annual premium.

And upon the back of the policy, among certain conditions and stipulations indorsed thereon, and which are by the policy declared to be read and taken as part of the policy, and not alterable or waiveable by agents, is the following:

The directors shall not be bound to send any notice of the renewal premium becoming due, and shall be at liberty should they see fit at any time to decline to renew the policy, and also may at any time cancel the policy by repaying to the insured the premium less the *pro rata* share thereof due to the company for the time it has been in force.

No renewal receipt is valid unless it is printed in office form and signed by the managing director and countersigned by the agent.

The plaintiff thereupon called as witness on her behalf J. B. Paton, who testified that he was agent in Halifax of the defendant company, and also of another company called the Manufacturers Life Insurance Company, and the policy declared on in the plaintiff's statement of claim having been put in his hands, he stated that it had passed through his office at Halifax. He produced a promissory note which he stated he had gotten from Obadiah Pudsey, deceased. This note was dated Kentville, N.S., September 28th, 1893, and was in a printed form, not of the defendant company but of the Manufacturers Life Insurance Company, as follows:

On Oct'r 10th after date I promise to pay to the *Manufacturers Life Insurance* Company or order at the sum of fifteen dollars.

(Signed) O. B. PUDSEY.

He said that this note was signed by Pudsey in the waiting room of the station at Kentville, he said further that he did not receive any money from Pudsey at the time of his signing the note. He said that on the day of the date of the note, viz., the 28th Septem-

ber, 1893, he was at the station and made inquiry for Pudsey, and subsequently saw him and took the note. At this time he said the policy had lapsed and that he so informed Pudsey, who said that he would like to renew but had not the cash, but said that he could pay the cash in a short time, that thereupon Paton told him that if he would pay the note at the time stated he, Paton, would hold the renewal receipt until it was paid, and upon the strength of that he took the note and that Pudsey had told him that if the note were placed in the bank at Kentville that it would be paid on presentation. He produced the form of a renewal receipt which he said was in his possession at the time he took the note from Pudsey; it is in the company's printed form which was apparently transmitted from the head office of the company at Toronto to the agent for the purpose of being countersigned by the agent and handed to the insured in the event of his renewing the policy within the year while it was in force by payment of the premium on renewal and which, the policy not having been renewed, remained in the hands of Paton after the expiration of the policy on the 24th September, 1893. The receipt is filed as exhibit C and is as follows:

RENEWAL RECEIPT.

MANUFACTURERS ACCIDENT INSURANCE COMPANY.

Head Office, Toronto.

$1,000. Full deposit with the Dominion Government.

Authorized Capital, $1,000,000.

Received from O. Pudsey, Esq., of Kentville, the sum of sixteen dollars being the amount due for renewal of Policy No. 8653, up to noon of the 24th September, 1894.

Countersigned on this day of 189
Agent.

(Sgd.) GEO. GOODERHAM, *President.*
JNO. F. ELLIS, *Managing Director.*

N.B.—Premium receipts are not valid except they are signed by the President and Managing Director of the company and countersigned by an agent of the company.

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The witness said that neither this nor any other renewal receipt was ever delivered to Pudsey, he added that Pudsey never paid the note. Witness produced a letter of instructions to agents which he received from the head office on the 16th November, 1889, these instructions he said have never since been varied. This letter bore date the 1st November, 1889, and informed him that at a meeting of the executive committee of the company the following resolution was passed, viz.: "that thereafter no notes be taken for accident premiums." The letter was addressed to the agents of the company who were directed to conduct the business of the company on the cash system only, and to refuse to accept notes for accident premiums. He added that when he took the note from Pudsey he told him that the policy had expired and that there was no insurance then in force, and that there would be none until the renewal receipt should be delivered, that he made no entry of the note in the books of the company, and never informed them of its having been made, and that they knew nothing whatever about the note.

This is the whole substance of the evidence given on the examination in chief, the cross-examination and re-examination of this witness who produced the note and knew all the circumstances attending the making of it, and was the most competent person to testify in respect thereof, and who was produced by the plaintiff as a credible and reliable witness upon the matters in issue. Upon this evidence having been given accepting it as credible and reliable, and it was not disputed by the defendants in any particular, it must, I think, be admitted that it was not only utterly insufficient to support, but that it absolutely disproved, the material allegation in the plaintiff's statement of claim, and which was denied by the de-

fendants, namely, that the policy sued upon had ever been renewed by the defendant company by the payment to them by Pudsey of the renewal premium necessary to be paid to them for that purpose. The plaintiff herself went into the box and testified that the policy when it was effected was given to her by her husband, and that it had thenceforth remained in her possession until it was handed by her to her solicitor for the purposes of this action. She said further that her husband generally carried his receipts in his vest pocket; that she had made search for a renewal receipt the night before the day on which she was giving her evidence, in all his clothes, in all his pockets, and also in a trunk where he kept papers, and in fact in every other place where she thought it likely such a paper would be, but that she had found none.

Now here it may be observed that the fact of her not having found any such renewal receipt was in perfect accord with the evidence which had been given by the previous witness who had sworn that none such had ever been given to the deceased.

The next witness called was John Pudsey, the father of the deceased. Before referring to the matter deposed to by him, it is to be observed that he was called for the sole purpose of contradicting the evidence given by the plaintiff's first witness Paton upon a matter peculiarly within that witness's knowledge, and of thus establishing, contrary to the evidence of Paton, that a renewal receipt had been given by Paton to the deceased, which the deceased's father had himself read, and the precise terms of which he professed perfectly to recollect, although, strange to say, it had not been alleged in the statement of claim that any renewal receipt had ever been given to the deceased, nor had it been suggested that any ever had until this

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witness who was called after Paton had produced as an exhibit in court the form of the receipt which had been forwarded to him to be countersigned by him and when so countersigned delivered to the deceased in the event of his renewing the policy by payment of the renewal premium within the terms of the policy in that behalf, but which receipt never had been countersigned by Paton and delivered to the deceased, for the reasons which Paton had already explained in his evidence. In the notes which we have of the evidence taken at the trial, it is true that when this witness Pudsey commenced to give his evidence the defendant's counsel objected to the evidence being taken but the ground and nature of the objection taken does not appear, which certainly seems singular when we read the evidence taken down from the lips of the witness, and see how manifestly objectionable the admission of such evidence was under the circumstances. All that we see on the case before us is that on the motion made on behalf of the defendants in the Supreme Court of Nova Scotia to set aside the findings of the jury upon the questions submitted to them and to enter judgment for the defendants the following grounds of objection are stated.

1. Because there is no evidence to support said finding.

2. Because on the evidence the findings ought to have been in the negative.

3. Because said findings and each of them are against the weight of the evidence.

4. Because of improper admission of evidence.

5. Because there was no evidence for the jury and the case ought to have been withdrawn from the jury.

6. Because the judge who tried the cause improperly admitted evidence of conversations with an agent of the company who had no authority to bind the company.

7. Because the judge who tried the cause admitted secondary evidence of contents of a receipt without any proof that the original was lost.

The objection could certainly have been put in more plain terms, for what was in fact done was that after it had been testified upon the evidence of a witness called by the plaintiff and examined upon matters peculiarly within his knowledge that no renewal receipt had ever been given to the deceased, the plaintiff was permitted to examine another witness for the purpose of proving by him that the evidence of the previous witness was false for that the witness contradicting him had seen a renewal receipt in the deceased's hands and had read it and could precisely state its contents, which evidence he was permitted to give, and the result was that the evidence of these two conflicting witnesses of the plaintiff was submitted to the jury as if the case was one of conflicting evidence between witnesses, the one of the plaintiff and the other of the defendant, between whom it was the province of the jury to determine which was telling the truth and which what was false. The evidence so given by this witness is in substance as follows :

On the last day of September or first of October, 1893, he, his son the deceased, and the witness Paton were at the station in Kentville; while witness was standing in the doorway, his son came in, and he and Paton shook hands. He then said that Paton asked his son if he was going to renew his insurance; that his son replied that he would but that he had not money enough to pay all the renewal; that he and Paton spoke together for a moment, and his son took a bank note out of his pocket which he gave to Paton saying it was all the money he had; that Paton said he would take his note for the balance, that his son replied all right, and that he and Paton then went into the railway office and witness passed on to the wicket where he could see into the railway office; that Paton

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was writing at a little desk, and when he got through writing he stepped aside and signed some paper; that witness's son then passed out of the office into the waiting room and handed witness a paper partly written and partly printed which he read and then handed back to his son; that this paper was headed "Manufacturers Accident Insurance Company," on the left hand there was "an arm with a hammer in it" enclosed in a circle, and in the body was a receipt from Obadiah Pudsey for $16 (sixteen dollars); that it was signed by three names, two on the right hand corner, and one on the left; that the name on the left hand corner was "J. B. Paton, agent, Halifax;" that at the bottom was "John F. Ellis" and "G. W. Gooderham," one of whom was designated manager, and the other, he thought, superintendent. He said that he did not hear what passed between his son and Paton in the railway office; then he said on cross-examination that on the day upon which he was giving his evidence the plaintiff's counsel had shown him a paper which looked like the paper his son had shown him; that it was like both in shape and appearance, that he did not read this paper, for that almost as soon as he looked at it when handed it by the plaintiff's attorney a gentleman came into the room and took it into court; then he said that he thought he had made a mistake in what he had said as to the description attached to the names on the right hand; that he thought the first name on the right hand was described "President," and the second, "General Manager and Superintendent." This latter description accords with the paper which had been produced by Paton and filed as exhibit C, which plainly was the document handed by the plaintiff's solicitor to the witness before he went into the witness box to give his evidence. The witness finally said that on the paper shown to

him by his son at the railway station there was a date which as near as he could recollect was October 10th or 11th, 1893. Now it is to be borne in mind that up to the time of this evidence having been given in court it does not appear that it had ever been suggested that any renewal receipt had been given to the deceased, or that the witness or any other person had ever said that one had been seen in the possession of the deceased, and it is further to be borne in mind, as already observed, that the statement made by the witness, the father of the deceased, in his evidence, was not made until both the promissory note dated the 28th September, 1893, and the paper produced by Paton and filed as exhibit C, had been filed in court; and it is further worthy of observation that while the witness swears that the paper which his son had shown him in the railway office, and which he then read, had on the left hand enclosed in a circle, "an arm with a hammer in it," and that in the body of it was a "receipt from Obadiah Pudsey for $16 (sixteen dollars)" with the names, "John F. Ellis," and "G. W. Gooderham," subscribed in the right corner, the one as "General Manager," and the other as "Superintendent," *or* the one as "President," and the other as "General Manager," or "Superintendent," and that the paper shown to him on the morning of his giving his evidence by the plaintiff's attorney, which could have been no other than the exhibit "C" produced by Paton, and filed in the cause, resembled both in shape and appearance the paper which he said he had seen in his son's hands and had read, yet "the arm with a hammer in it" is not upon this exhibit "C" at all, but is upon the paper filed as exhibit "B" which obviously the witness never saw in the hands of his son for it is the note of the date of the 28th September, 1893, which is on a printed form of note

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belonging not to the defendant company at all who do not take notes for renewal premiums, but belonging to the Manufacturers Life Assurance Company in whose name as payees the note is made and of which company also Paton was agent, and upon this document there is no such heading as the witness swore was upon the paper shown to him by his son or any heading, but there is the date of October the 10th, the day upon which the sum of fifteen dollars mentioned in the note is made payable, which date or that of the 11th of October the witness swore was on the paper which his son showed him in the railway office.

It is apparent from this evidence that whatever paper, if any, his son had shown the witness in the railway office it was not the promissory note signed by his son and filed as exhibit B, and yet this document alone and not the exhibit "C" had on it two marks viz: "the arm with the hammer in it," and the date October 10th, 1893, both of which the witness swore were on the paper which his son had shown him and which he read. Then again the exhibit "C" which the witness swore resembled in shape and appearance the paper shown to him by his son, while it had on it neither of these two distinctive marks, and though it has on it the names "John F. Ellis" and "Geo. Gooderham" subscribed, the former as "Managing Director" and the latter as "President," has not on it the name of Paton as agent, without which (as is expressly declared by the policy) a receipt, although having the other names upon it, is absolutely valueless. It is plain therefore that if ever the witness saw a receipt in the form of exhibit "C" having subscribed thereto the name "J. B. Paton, agent, Halifax," the company must have sent from their head office, Toronto, to Paton, at Halifax, two receipts both signed by "Geo. Gooderham" and "John F. Ellis" for Pudsey's

renewal premium. For what purpose two such receipts should he sent no suggestion is offered. It can well be conceived that the defendants, in the absence of any previous allegation that the deceased had ever had in his possession any renewal except signed by the officers of the defendant company, should have been taken by surprise by such evidence and that they should not have been prepared to show at Halifax, so far from their head office, that the only receipt sent from the head office to Paton of the nature spoken of was the exhibit "C" produced by Paton and filed in evidence.

Under all the above circumstances it appears to me to be difficult to conceive how any intelligent jurors who duly appreciated the duties of their office could have overlooked these facts and have answered the questions submitted to them as they have, even if there were no objection to the reception of the evidence of the witness Pudsey. It appears to me a heavy draft upon credulity to conceive that the evidence of that witness stands upon any other foundation than that it was conceived and devised by reason of the witness having seen the exhibits "B" and "C" which Paton had produced and filed in court, without having distinguished, with sufficient care, between them and what appeared upon them respectively so as to give to his evidence the similitude of truth when subjected to careful scrutiny. The tendering of such evidence if indeed the plaintiff had ever heard anything of it until it was delivered by the witness in court could have been only for the purpose of appealing upon it to the jury to discredit as unworthy of belief the evidence of Paton whom the plaintiff had put into the witness box as a credible witness, and who was the only person through whom the policy if renewed by the defendants had been

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renewed, which question constituted the sole material issue in the cause. The defendants only now ask that the findings of the jury shall be set aside and a new trial ordered; that relief, to prevent a miscarriage of justice must, in my opinion, be granted. When the real facts of the case relied upon by the plaintiff for the purpose of establishing that the policy was renewed by the defendants shall be established upon unimpeachable evidence it will be time enough to determine whether those facts constitute a renewal binding in law upon the defendants. If the plaintiff can succeed in establishing her cause of action as alleged without the evidence of Paton he ought not to be put into the box as a witness for the plaintiff, and if she cannot succeed without calling him her action must fail upon his evidence as given. As there has, I think, been a miscarriage in the case as tried the appeal must, in my opinion, be allowed with costs and a rule be ordered to be issued in the court below for a new trial and without costs.

Appeal dismissed with costs.

Solicitor for the appellant: *H. A. Lovitt.*

Solicitors for the respondent: *Wade & Paton.*

HER MAJESTY THE QUEEN (PLAINTIFF) .... APPELLANT;

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*May 1.

AND

THE CANADA SUGAR REFINING COMPANY (DEFENDANT) .... RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Revenue—Customs duties—Imported goods—Importation into Canada—Tariff Act—Construction—Retrospective legislation—R. S. C. c. 32—57 *&* 58 *V. c.* 33 *(D)*—58 & 59 *V.* c. 23 *(D).*

By 57 & 58 Vict. ch. 33, sec. 4, duties are to be levied upon certain specified goods "when such goods are imported into Canada."

Held, reversing the judgment of the Exchequer Court, King and Girouard JJ. dissenting, that the importation as defined by sec. 150 of the Customs Act, (R. S. C. ch. 32) is not complete until the vessel containing the goods arrives at the port at which they are to be landed.

Section 4 of the Tariff Act, 1895, (58 & 59 Vict. ch. 23) provided that "this Act shall be held to have come into force on the 3rd of May in the present year, 1895." It was not assented to until July.

Held, that goods imported into Canada on May 4th, 1895, were subject to duty under said Act.

APPEAL from a decision of the Exchequer Court of Canada (1), in favour of the defendant.

The proceeding in this case was by the Crown on information of the Attorney General of Canada to recover an amount claimed to be due for duties on a cargo of sugar imported by the defendant company. The duty could only be levied, if at all, under the Tariff Act of 1895, which, by its terms, was to be held to be in force on May 3rd of that year. The vessel

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

(1) 5 Ex. C. R. 177.

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containing the sugar arrived at Montreal, where the goods were to be landed, on May 4th, having in April entered the port of North Sydney where the master reported according to the provisions of sec. 25 of the Customs Act, R. S. C. ch. 32.

By the Tariff Act in force at the time the duties were to be levied when the goods were imported into Canada, and by sec. 150 of the Customs Act such importation is to be deemed completed from the time when the vessel containing the goods came within the limits of the port at which they ought to be reported. The defendant company claimed that the latter provision referred to the report to be made under sec. 25 of the Customs Act, and that the vessel having been reported at North Sydney in April, the goods were not subject to duty under the Act which came into force on May 3rd. The Exchequer Court held this view and gave judgment against the Crown accordingly.

The defendant contended also, that the provision in the Tariff Act, 1894, bringing it into force on May 3rd, though it was not passed until July, did not apply to this importation. This contention was not dealt with by the Exchequer Court where it was not necessary to decide the point as the goods were held non-dutiable in any event.

The statutes bearing on the matter in dispute are set out in the judgment of His Lordship the Chief Justice.

Fitzpatrick Q.C. Solicitor General of Canada, and *Newcombe* Q.C. Deputy Minister of Justice, for the appellant, referred to *United States* v. *Arnold* (1); *Kohne* v. *Insurance Co. of North America* (2); *Wilson* v. *Robertson* (3).

Osler Q.C. and *Gormully* Q.C. for the respondent, cited Maxwell on Statutes (4); Hammill on Customs Laws, pp. 24-5.

(1) 1 Gallison 348.
(2) 1 Wash. Cir. C. 158.
(3) 4 E. & B. 923.
(4) 3 ed. p. 298.

THE CHIEF JUSTICE.—This is an appeal from the judgment of the Court of Exchequer holding the respondents not liable to duties upon a cargo of raw sugar imported by the respondents in 1895. The proceeding in which the judgment was pronounced was an information by the Attorney General of the Dominion, and it sought to recover duties according to the tariff of 1895 upon 6,587,439 pounds of sugar.

The questions arising are two. First, as to whether the importation of these sugars was completed before the tariff of 1895 came into force. Secondly, as to the effect of the entry and subsequent delivery of the sugar to the respondents as free of duty by the officers of Customs at Montreal.

The sugar was shipped on board the steamer "Cynthiana," at Antwerp. The port of destination of the ship was Montreal. In the course of the voyage, however, the "Cynthiana" entered the port of North Sydney, in Cape Breton, which was not her port of destination, and in compliance with the requirements of section 25 of the Customs Act (R.S.C. ch. 32) there made to the collector of the port of North Sydney, a report in writing embodying the particulars specified in that section.

If this entry at North Sydney constituted an importation of the goods into Canada, then inasmuch as the amended Tariff Act under which the duties are claimed by the Crown, did not come into force until the 3rd of May, 1895, no duties were payable. The vessel, without discharging any portion of her cargo at North Sydney cleared from that port on the 29th April, 1895, for Montreal, her original port of destination, where she arrived on the afternoon of the 4th of May.

It does not appear for what purpose the ship went into North Sydney; there is nothing to show whether she called there for coal, for repairs, or in distress, but

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it is beyond question that it was not her port of destination, that port being Montreal.

The amended Tariff Act, 58 & 59 Vict. ch. 23, entitled, "An Act to amend the Customs Tariff, 1894," did not receive the Royal assent until the 22nd of July, 1895, but it contained a clause (according to the usual course adopted in the Dominion tariff legislation) giving retroactive effect to its provisions, as if it had been passed on the 3rd of May, 1895, on which day the resolutions on which the Act was founded were introduced.

The principal statutory provisions applicable to the questions in controversy are as follows: By section 4 of the Customs Tariff, 1894 (57 & 58 Vict. ch. 33), of which the Act of 1895 was an amendment, it is enacted as follows:

4. Subject to the provisions of this Act, and to the requirements of the Customs Act, chapter thirty-two of the Revised Statutes, as amended, there shall be levied, collected and paid upon all goods enumerated, or referred to as not enumerated, in schedule A to this Act, the several rates of duties of customs set forth and described in the said schedule and set opposite to each item respectively or charged thereon as not enumerated, when such goods are imported into Canada or taken out of warehouse for consumption therein.

The Tariff Act does not contain any definition of what shall constitute "importation."

The Customs Act (R. S. C. ch. 32) contains, however, the following clause (sec. 150):

Whenever, on the levying of any duty, or for any other purpose, it becomes necessary to determine the precise time of the importation or exportation of any goods, or of the arrival or departure of any vessel, such importation, if made by sea, coastwise, or by inland navigation in any decked vessel, shall be deemed to have been completed from the time the vessel in which such goods were imported came within the limits of the port at which they ought to be reported, and if made by land, or by inland navigation in any undecked vessel, then from the time such goods were brought within the limits of Canada; and the exportation of any goods shall be deemed to have been commenced from the time of the legal shipment of such goods for expor-

tation, after due entry outwards, in any decked vessel, or from the time the goods were carried beyond the limits of Canada, if the exportation is by land or in any undecked vessel; and the time of the arrival of any vessel shall be deemed to be the time at which the report of such vessel was, is or ought to have been made, and the time of the departure of any vessel to be the time of the last clearance of such vessel on the voyage on which she departed.

By section 25 of the same Act (The Customs Act):

The master of every vessel coming from any port or place out of Canada, or coastwise and entering any port in Canada, whether laden or in ballast, shall go without delay, when such vessel is anchored or moored, to the Customs House for the port or place of entry where he arrives, and there make a report in writing to the collector or other proper officer, of the arrival and voyage of such vessel, stating her name, country, and tonnage, the port of registry, the name of the master, the country of the owners, the number and names of the passengers, if any, the number of the crew, and whether the vessel is laden or in ballast, and if laden, the marks and numbers of every package and parcel of goods on board, and where the same was laden, and the particulars of any goods stowed loose, and where and to whom consigned, and where any and what goods, if any, have been laden or unladen or bulk has been broken during the voyage, what part of the cargo and the number and names of the passengers which are intended to be landed at that port, and what and whom at any other port in Canada, and what part of the cargo, if any, is intended to be exported in the same vessel, and what surplus stores remain on board, as far as any of such particulars are or can be known to him.

The respondents contend that the report in section 25 being one which the master was bound to make on his arrival at North Sydney, there was then an arrival (though not at the port of destination) and a consequent importation at that port under section 150 of the Customs Act.

I unhesitatingly dissent from this contention. Section 31 of the Customs Act alone affords a conclusive answer to such contention. That section provides that:

If any goods are brought in any decked vessel, from any place out of Canada to any port of entry therein, and not landed, but it is intended to convey such goods to some other port in Canada in the

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same vessel there to be landed, the duty shall not be paid or the entry completed at the first port, but at the port where the goods are to be landed, and to which they shall be conveyed accordingly under such regulations and with such security or precautions for compliance with the requirements of this Act, as the Governor General in Council from time to time directs.

And this is reinforced by section 4 of the Customs Tariff which says that:

Subject to the provisions of this Act and the requirements of the Customs Act, duties shall be collected, levied and paid upon goods when imported into Canada.

It is thus clear beyond argument that upon these goods destined for Montreal and laden upon a ship bound for that port, duties were not payable at North Sydney, but under section 31 were to be paid where the goods were to be landed, and where in fact they were landed, namely at Montreal. The collector at North Sydney could not legally have received the duties there. Then as section 4 of the Customs Tariff requires that the duties are to be levied when the goods are imported into Canada. and as under section 31 those duties in a case like the present where a vessel touches at a port of entry other than her port of destination, are to be paid at the latter port, by reading these two sections together we find it to be the intention of the legislature that the port at which the duties are to be paid is to be considered the place of importation, thus making it plain that the words of section 150 of the Customs Act " come within the limits of the port at which they ought to be reported " means " reported " for the purpose of levying the duties thereon.

The construction adopted by the court below would have the effect of making the duties payable by a vessel touching for any cause, at a port in Canada other than the port of destination of the cargo, payable at such port of call, which is directly contrary to section

31, or of making the importation precede the time at which the duties are payable, which is contrary to section 4 of the Customs Tariff. So that as the duties are to be paid when the goods are imported, and not before, the importation cannot precede the time at which the duties are payable; the obligation to pay the duties and the importing must be contemporaneous, and a construction which would make the importation precede the payment of duties is precluded.

Numerous American authorities, cases decided in the United States Courts, establish what is generally understood to be the place of importation for fiscal purposes. In the *United States* v. *Arnold* (1) Mr. Justice Story says "there must be arrival at the port of entry to make the right to duties attach. An importation has in many cases been held to mean 'a voluntary bringing into port of goods with an intent to land or discharge them.'" This case went to the Supreme Court on appeal and was there affirmed (2).

The following authorities are to the same effect: *Perot* v. *United States* (3); *Prince* v. *United States* (4); *United States* v. *Vowell* (5); *Meredith* v. *United States* (6); *Kolme* v. *The Insurance Co. of North America* (7); Elmes, Law of the Customs (8).

These American authorities are of course not of direct application in the construction of our Canadian statutes, but they serve to shew what eminent judges and courts have considered to be the proper and primary signification of the terms "imported" and "importation" and are therefore of force when we find the statutes which we have to deal with leading us to the same interpretation.

(1) 1 Gallison 353.
(2) 9 Cranch 104.
(3) 1 Peters C. C. Repts. p. 256.
(4) 2 Gallison 208.
(5) 5 Cranch 372.
(6) 13 Peters 486.
(7) 1 Washington C. C. 166.
(8) Ed. 1887, 134.

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The 4th section of the Act of 1895, "An Act to amend the Customs Tariff, 1894," expressly makes it retroactive to the 3rd of May, 1895; the words are: "This Act shall be held to have come into force on the 3rd of May in the present year 1895." There is therefore no principle upon which to avoid giving effect to this enactment which Parliament had of course full powers to enact. The authorities cited by Mr. Osler were cases in which the language was not express but it was sought by implication to make statutes retrospective, which will not of course be done when the language is clear.

We must, therefore, treat the statute as though it had passed on the 3rd of May. If the Act had been assented to on that date there cannot be a doubt that the illegal and unauthorized act of a subordinate officer of the Custom House at Montreal in accepting on the 2nd of May, before the arrival of the "Cynthiana" at Montreal, an entry of these sugars as free goods would not have had the effect of relieving the respondents from the payment of the duties when she actually arrived on the 4th of May. The collector was then perfectly right when in the performance of what he properly considered to be his duty he cancelled the entry.

The appeal must be allowed, and judgment entered for the Crown for the amount of the duties claimed.

GWYNNE J.—We must read the statute 58 & 59 Vict. ch. 23, under which, in connection with R. S. C. ch. 32, the question on this appeal arises, as if it had been passed on the 3rd May, 1895, and the sole question is whether goods shipped at Antwerp upon a vessel which cleared from that port for the port of Montreal, such goods being consigned to merchants in Montreal where the vessel arrived only on the 4th May, 1895,

were or were not liable to the duties imposed upon such goods by the above statute 58 & 59 Vict. ch. 23.

By sec. 4 of 57 & 58 Vict. ch. 33, it is enacted that subject to the requirements of R. S. C. ch. 32, duties shall be levied on all goods subject to duty,

when such goods are imported into Canada, or taken out of warehouses, for consumption therein.

Until importation is complete no duty is leviable, but upon importation the goods chargeable with duty become liable thereto.

By sec. 34 of R. S. C. ch. 33, it is enacted that *every importer* of goods by sea, or from any place out of Canada, shall within three days after the arrival of the *importing vessel make due entry* inwards of such goods and land the same.

Section 35 prescribes how such entry is to be made by the importer.

Section 36 enacts that unless the goods so entered are to be warehoused, as provided in the Act, *the importer* shall pay duty on the goods so entered.

Then section 150 enacts that:

Whenever on the levying of any duty, it becomes necessary to determine the precise time of importation of any goods, such importation if made by sea shall be deemed to have been completed from the time the vessel in which such goods were imported came within the limits of the port at which they ought to be reported.

The language of this sec. 150 is as explicit as to the meaning of the words "importation" and "imported," as if they had been explained in an interpretation clause, and the effect is that importation of goods by sea into Canada is not effected until the vessel in which they are imported comes within the limits of the port *at which they ought to be reported,* that is to say the port to which they are consigned, and where they are intended to be landed, and where they must be entered at the Custom House by the

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importer under the provisions of sections 21, 34, 35, 36 and 37.

But it is contended by the respondents that the port "at which they ought to be reported," is by sec. 25, the port of entry in Canada into which a vessel first enters, although not cleared for that port from the port from which she was cleared on commencing her voyage.

That section as it appears to me relates to ports of entry for which the vessel has been cleared, and not to a port into which a vessel cleared for another port has for any cause entered. Secs. 30 & 31 seem to me to support this view, and sec. 162 provides for a vessel putting into a port of entry other than that for which she had cleared upon her voyage, by reason of damage sustained by stress of weather. Then again, there is nothing in the 25th section of the Act, or in any other section, indicating any intention of the legislature to provide for such a contingency as a vessel voluntarily entering a port in Canada different from that for which she had cleared on commencing her voyage. But whether the section be or be not limited to ports of entry for which vessels were by their clearance papers bound on their voyage, the report by that section required to be made is not at all the report referred to in sec. 150. The report to be made under sec. 25 is to be made by the master alone. The report under sec. 150 is of the goods imported which cannot be made by the master, but must be made by the importer under the secs. 21, 34 to 37, which sections could not be complied with if in the present case the goods in question should be deemed to have been imported into Canada when the vessel upon which they were shipped consigned to Montreal entered the port of North Sydney.

I am of opinion, therefore, that the appeal must be allowed with costs, and judgment be ordered to be entered in the action for the Crown.

SEDGEWICK J.—I am of opinion that the appeal should be allowed.

KING J.—Though with very great doubt I am inclined to think the judgment of the Exchequer Court right.

GIROUARD J.—I am of the opinion that the judgment appealed from should be confirmed, for the reasons given by Mr. Justice Burbidge, and the appeal dismissed with costs.

Appeal allowed with costs.

Solicitor for the appellant: *E. L. Newcombe.*

Solicitors for the respondent: *Gormully & Orde.*

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*May 1.

LA BANQUE D'HOCHELAGA (INTERVENANT) .... APPELLANT;

AND

THE WATEROUS ENGINE WORKS COMPANY (OPPOSANT) .... RESPONDENT.

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

Vendor and purchaser—Unpaid vendor—Conditional sale—Suspensive condition—Moveables incorporated with freehold—Immoveables by destination—Hypothecary charges—Arts. 375 *et seq. C. C.*

A suspensive condition in an agreement for the sale of moveables, whereby, until the whole of the price shall have been paid, the property in the thing sold is reserved to the vendor, is a valid condition.

In order to give moveable property the character of immoveables by destination, it is necessary that the person incorporating the moveables with the immoveable should be, at the time, owner both of the moveables and of the real property with which they are so incorporated. *Lainé* v. *Béland* (26 Can. S. C. R. 419), and *Filiatrault* v. *Goldie* (Q. R. 2 Q. B. 368), distinguished.

Decision of the Court of Queen's Bench affirmed, Girouard J. dissenting.

APPEAL from the judgment of the Court of Queen's Bench for Lower Canada (appeal side) (1), reversing the judgment of the Superior Court, District of Joliette, and maintaining the respondent's opposition *à fin de distraire* which the judgment of the court below had dismissed.

A statement of the case appears in the judgment of His Lordship the Chief Justice.

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

(1) Q. R. 5 Q. B. 125.

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Béique Q.C. and *Robertson* for the appellant. This case is identical with *Lainé* v. *Béland* (1), and cases there relied upon.

The agreement constituted a sale upon credit with a resolutory condition. *Leonard* v. *Boisvert* (2); *Brown* v. *Lemieux* (3); *Paquin* v. *Laverdière* (4); *Bellamy* v. *Burcher* (5). The unpaid vendor can only claim his goods whilst they remain in the possession of the vendee and clear of subsequent charges. *Faure* v. *Alathène* (6); *Courroux* v. *Bouquet-Dupin* (7); Arts. 1478, 1536, 1543 & 1550 C. C.

The purchasers were entitled to immobilize the machinery and they did so by building it into the mill upon a stone foundation, embedded in mortar and cement and attached by bolts and rivets both to the foundations and the roof of the mill. It then became part of the realty and liable for all charges thereon. It was destined to become moveable when it was sold. See *Périer* v. *Veyrassat* (8); *Mariaunaux* v. *Perrier* (9); *Fiévet et al.* v. *Bonduelle et al.* (10); Arts. 379, 416, C. C. The recent decision in *Hobson* v. *Gorringe* (11) is directly in point; "*possession vaut titre.*" We refer also to 3 Laurent, nos. 460-462; 5 Laurent, nos. 435-437, 461, 462; 24 Laurent, no. 367; 3 Aubry & Rau, no. 294; 4 Aubry & Rau, no. 356, 400; Baudry-Lacantinerie, Dr. Civ. no 1220; 9 Dem. 208, 209; Rolland de Villard, vo. "Resolution," p. 23.

Lafleur and *Laflamme* for the respondent. The goods are not of a class specified to be immoveable by nature, (art. 376 C. C.); 1 Dem. des Biens, nos. 291, 292;

(1) 26 Can. S. C. R. 419.
(2) Q. R. 10 S. C. 343.
(3) 3 R. L. 361.
(4) 12 Legal News, 2.
(5) Pand. Fr. '96, 1,151.
(6) S. V. '88, 2, 78.
(7) Dal. '52, 1, 297.
(8) S. V. '36, 1, 177.
(9) S. V. '65, 2, 111.
(10) S. V. '76, 1, 208.
(11) [1897] 1 Ch. 182.

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Longueuil v. *Crevier* (1); *Boyd* v. *Wilson* (2); *Budden* v. *Knight* (3); *Chevalier* v. *Beauchemin* (4); S. V. '83, 1382; Aubry & Rau, 2o; 1 Beaudry-Lacantinerie, no. 1229. The creditor cannot secure more by his lien than the debtor had the right to affect; *Filiatrault* v. *Goldie* (5); *Renaud* v. *Proulx* (6); *Union Bank* v. *Nutbrown* (7). No person can give to a moveable which he does not own the character of an immoveable; *Staron* v. *Compagnie des Moteurs à gaz et al.* (8); 4 Huc, no. 20; 5 Laurent, no. 482; Dal. vo. "Biens," nos. 128-132; 8 Fusier-Herman, "Biens," no. 215. There is quite a distinction between this case and *Lainé* v. *Béland* (9). The immoveable character of machinery so affixed disappears when the land and the machinery belong to different owners. There are also distinctions between this case and *Leonard* v. *Boisvert* (10) for here the usual consequences of a sale are suspended; no title vested in the purchaser till the full price had been paid. The Code (art. 13) does not forbid such conditions; *Richard* v. *Le Curé et Marguilliers etc. de Québec* (11). There never was any intention here to immobolize, but the contrary is apparent, *Wyatt* v. *Lewis & Kennebec Railway Co.* (12). The maxim "*possesssion vaut titre*" has been narrowed down by our jurisprudence to a presumption merely which can be rebutted as has been done in this case. There has been no promise of sale and the provisional delivery of possession pending payment of the full price has no effect in changing the ownership; *Grange* v. *McLennan* (13); *Lucas* v. *Bernard* (14); *Gray* v. *Hôpital du Sacré*

(1) 14 R. L. 110.
(2) 3 Dor. Q. B. 273; 18 R. L. 65.
(3) 3 Q. L. R. 273.
(4) 17 R. L. 642.
(5) Q. R. 2 Q. B. 368.
(6) 2 L. C. L. J. 126.
(7) 10 Q. L. R. 287.
(8) S. V. '90, 2, 113.
(9) 26 Can. S. C. R. 419.
(10) Q. R. 10 S. C. 343.
(11) 5 L. C. R. 3.
(12) 6 Q. L. R. 213.
(13) 9 Can. S. C. R. 385.
(14) Q. R. 5 S. C. 529.

Cœur (1); *Desautels* v. *Parker* (2). The machinery is separable from the mill and can at any time be removed without deteriorating what actually belongs to the realty, leaving it an empty mill, just as it was before the machinery was placed in it. We refer as additional authorities to *Spencer* v. *Lavigne* (3); *Goldie* v. *Rascony* (4); *Canadian Subscription* Co. v. *Donnelly* (5); *Perkins* v. *Campbell Printing Press Manufacturing Co.* (6); 24 Laurent "Vente," nos. 4, 54; Marcadé C. N., art. 1583, no. 2; 15 Laurent, no. 92; 4 Aubry & Rau, 71; Guillouard, no. 6.

THE CHIEF JUSTICE.—The sheriff of the district of Joliette having, under a writ of *Fieri Facias de bonis et de terris* issued in an action brought by Edouard Migué against Francis Kelly, seized certain immoveables as being the property of the defendant in the action, the present respondents filed and served upon the sheriff an opposition by which they opposed the publication, sale and adjudication of the following property, to wit:

All the working machinery of the mills situated and built upon lot no. 578 on the official plan and book of reference of the cadastre of the town of Joliette for registration purposes, and all the saw-mills thereupon situated, as well as all the working machinery in front of the said mills, and all the machines, engines, boilers, tools, utensils and accessories attached or dependent thereto whatsoever.

The appellants having intervened and contested the opposition, the parties went to proof.

From the pleadings and depositions the following facts appeared. The immoveable in question was originally the property of Dame Honorine Grenier,

(1) 13 Q. L. R. 85.
(2) Q. R. 6 S. C. 419.
(3) 15 Q. L. R. 101.
(4) 32 L. C. Jur. 308.
(5) 19 R. L. 578.
(6) 19 R. L. 587.

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widow of Andrew Kelly. On the 20th of November, 1884, Mrs. Kelly, by a notarial deed of that date, sold and ceded this property to Francis Kelly and William Copping. This deed was duly enregistered the 27th of June, 1885. The price in consideration of which this sale was made was the sum of $7,000. As security for the payment of this price the vendor, by the deed of sale, expressly reserved a privilege or hypothec of *bailleur de fond* on the property sold, and the purchasers by the same deed expressly hypothecated the property for the same purpose in favour of the vendor. On the 31st December, 1895, there being then due to Mrs. Kelly on account of the purchase money and interest accrued thereon $8,456.80, the appellants paid off the same and obtained a subrogation to the hypothec and privilege which she held under the deed of sale as security for the purchase money. The appellants subsequently sued the firm of Kelly Brothers (in whom the title to the land had become vested) for the amount of their hypothec, and on the 18th March, 1896, recovered judgment for the sum of $9,203.72.

The respondents found their opposition on the following facts which were duly proved. The respondents are manufacturers of saw-mills and mill machinery and carry on their business and have their works at Brantford, in the province of Ontario. On the 10th of March, 1888, the firm of Kelly & Brother agreed to purchase the machinery in question from the respondents for the price of $7,000, and the contract, embodied in a written agreement of that date, was entered into. This agreement was as follows:

Notes to be in all cases given before removing machinery from works or station.

$7,000.00. BRANTFORD, March 10th, 1888.

TO THE WATEROUS ENGINE WORKS CO. (Limited).

You will please manufacture for us, and deliver F. O. B. cars at Brantford, on or about the 15th day of April, 1888, or as soon

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thereafter as finished and a car can be obtained, one of your saw-mills as per specification attached and signed by us.

For the above we agree to pay you the sum of seven thousand dollars as follows: $500 cash on signing order, $500 when goods are ready to ship, and for the balance we will sign and deliver before shipment, promissory notes as follows, $3,000 on 4th September, and $3,000 on 4th December, 1888, with interest at 7 per cent per annum from date of shipment.

Delivery as above is to constitute fulfilment of this contract by W. E. W. Co.

This order is taken subject to approval of W. E. W. Co., at head office, Brantford, and may be cancelled by them at any time, even if accepted and goods shipped. Any arrangements made or implied to erect machinery mentioned in this order is to be on conditions enumerated on last page of price list. It is agreed the W. E. W. Co. are not to be held responsible for delay caused by fire, disturbance among employees, or other causes that could not be foreseen or prevented by reasonable diligence.

TERMS AND CONDITIONS OF THIS SALE.

The title to the above mentioned machinery is to remain in the Waterous Engine Works Co. (Limited) till purchase money, all repairs thereon, and any other indebtedness to the said company incurred during the currency of notes given for purchase money, are paid, and in default of payment in full, vendors, or their officers or agents, may resume possession and remove the same after default, or at any time they are of the opinion that the security is or was or has become unsatisfactory, or if in their opinion it is necessary to do so to secure the said debt or protect themselves from loss, either of the original sum or interest or any repairs thereon, or attorneys or agents' costs incurred in collecting said notes or accounts by non-payment when due, or making seizure and vending said machinery in case of default. You may insure the above mentioned machinery in any good company for two-thirds of the time payments and charge premium to me.

This contract with its terms and conditions has been read over to me, and are thoroughly understood by me. I understand no money is to be paid agents except on your written order, and I will not hold you responsible for statements of agents or others not enumerated on this order.

It is specially agreed that in case of default all amounts unpaid immediately become due.

KELLY & BRO.,
Joliette, P. Q.

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Kelly & Brother affixed the machinery in their saw-mill and used it for some years. Subsequently the execution already mentioned was issued against the goods and lands of Francis Kelly, and under it the sheriff seized the saw-mill property and also the machinery, against the sale and adjudication of which the respondents have formed the present opposition. At the date of the seizure and opposition a part of the price had been paid but there remained still due to the respondents a balance of the purchase money and interest amounting to $4,881.

Upon this state of facts the Superior Court gave judgment for the appellants. This judgment was, however, unanimously reversed by the Court of Appeals, the judges present being the Chief Justice, and Bossé, Blanchet, Hall and Würtele, Justices. The reasons upon which the latter court based their judgment are set forth in the *considérants* of the judgment itself, and are also fully developed in the notes of Mr. Justice Würtele which accompanied the judgment. The opinion of Mr. Justice Würtele is preceded by a very full statement of the facts (1), which I may refer to as containing a history of the title to the immoveable upon which the machinery was set up, which is not, however, material to the questions now arising for decision.

Two questions have arisen and been argued in this appeal which may be defined in the words of Mr. Justice Würtele as follows :

1st. Is the stipulation contained in the contract of the 10th March, 1888, by which the ownership of the machinery was retained by the respondents until the payment of the whole price, lawful and valid, and did the ownership remain vested in the respondents after the machinery was delivered to Kelly Brothers ?

(1) Q. R. 5 Q. B. 128-130.

2nd. Was the machinery immobilized by being placed by Kelly Brothers in the building which they had constructed to be used as a saw-mill to the detriment of the right of property which by the agreement of the 10th of March, 1888, the respondents had stipulated should be retained and remain vested in them until the price was fully paid?

As to the first question, it is to be observed that what the respondents contend is that no property passed under the contract of the 10th of March, 1888, and that according to the clauses of that agreement none was to pass until the price was fully paid which it never has been. What the respondents are, therefore, insisting upon, is not any right to a resolution of the sale under a resolutory condition, either express or implied by law, nor to a privilege in respect of the purchase money for which they agreed to sell, but upon a suspensive condition by which the property in the machinery was retained to the vendors until payment. Had this condition not been expressly stipulated the property would no doubt have passed to Kelly Brothers upon the conclusion of the contract. It having, however, been expressly agreed that this ordinary legal consequence of a sale should not take effect in the present instance, the only point for decision on the first question propounded is: Was such a condition legal?

The contract of sale may by English law be modified in any way the parties may agree, and in particular it is open to them to suspend the operation of the general effect of the contract in respect of the vesting of the property in the vendee, and to provide that it shall not pass until the price is fully paid. It has, however, been assumed, and I accept it as a settled point in the case, that the law of the province of Quebec is to furnish the rule of decision in the present case. No

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proof of the law of Ontario was made and the court had a right, therefore, to assume that it was identical with the law of Quebec upon the point involved, as indeed it is. Then it cannot for a moment be pretended that there was anything illegal in this stipulation that the vendor should retain the property. Mr. Justice Würtele fully explains the principles of the French law on this head, and the authorities he refers to and the extracts he has given from Laurent and Aubry & Rau, beyond all question state the law correctly. To these authorities, that of many other authors might be added. As regards the jurisprudence we have first the case of *Filiatrault* v. *Goldie* (1). There in the case of a sale of moveables the contract contained a provision identical with that in the present case, that the property should not pass to the purchaser until the price was entirely paid. It was held by the Court of Queen's Bench in a very clear and able judgment pronounced by Sir Alexander Lacoste, Chief Justice, that the provision in question was a good suspensive condition and one which would have entitled the vendor, had he tendered and offered to repay the portion of the price he had received, to judgment in an action of revendication. I also refer on this head to a case reported in Sirey (2), *Staron* v. *Comp. des Moteurs à gaz*, decided by the Court of Appeal at Lyons on the 10th August, 1888, (which I shall have occasion to refer to hereafter as it is exactly in point upon both the questions involved in the present case) where it was expressly decided that a sale under a condition suspensive such as that in the case before us, whereby the property is reserved to the seller until the whole of the price is paid is valid. To the report of this case in Sirey is appended a very full and clear note by M. Appleton, in which the whole doctrine and jurisprudence is examined and the

(1) Q. R. 2 Q. B. 368. (2) S.V. 90, 2, 113.

correctness of the *arrêt* of the court of Lyons most satisfactorily demonstrated (1), and Sirey (2), may be also cited as authorities to the same effect. I, therefore, conclude that the judgment of the Court of Appeal upon the first point propounded was entirely correct.

Coming to the second question: Was the machinery in question immobilized by the act of Kelly Brothers, the purchasers, in affixing it in their saw-mill in such a way that it became their property, and as such liable to be seized and sold for the satisfaction of judgments against them? I find the reasoning of the Court of Appeal even more decisively supported by the authorities than that on the first point. On this head the law of France is identical with that of the Quebec Code, so that there can be no question as to the applicability of the authority of the French authors and the decisions of the French courts.

In the first place the Court of Appeal were clearly authorized by the express words of article 379 in holding that this machinery, supposing it to have been the property of Kelly Brothers, would have been immoveable by destination under article 379, and not immovable by nature under articles 376 and 377. The second paragraph of article 379, " Les ustensiles nécessaires à l'exploitation des forges, papeteries et autres usines," would in that case have undoubtedly included this engine and machinery affixed in the saw-mill.

This was the conclusion of both the courts below, and it has not been seriously argued that the property in question was immoveable by nature. Had these fixtures been detached from the building, as they easily could have been, they would have had an independent existence as moveables which is the proper test to be applied in distinguishing immoveables by destination from immoveables by nature.

(1) S.V. 88, 1, 87. Cassation. (2) S.V. 89, 2, 115.

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Then what are the essentials, compliance with which the law requires in order that moveable property may be constituted immoveable by destination? I cannot answer this question better than by citing a passage from Huc (1), where that author says:

> Pour pouvoir donner à un objet mobilier le caractère d'immeuble par destination il faut être à la fois propriétaire du fonds et propriétaire du meuble à immobiliser.

If this is a correct statement of the law there can be no doubt as to the absolute correctness of the conclusion arrived at by the Court of Queen's Bench. Kelly Brothers, upon the hypothesis that the judgment of the court upon the first point was a sound conclusion, as I have endeavoured to demonstrate that it was, were never the owners of the engine and machinery, and thererefore, could not make them immoveables by destination. Baudry-Lacantinerie & Chauveau (2), are to the same effect, in enumerating the essential requisites to the constitution of a moveable an immoveable by destination. They say:

> 4° Que le propriétaire du fonds soit en même temps propriétaire de l'objet placé sur le fonds. Si un propriétaire placait sur son fonds des meubles à lui remis en dépôt, ou à titre de gage, de prêt, sa volonté ne suffirait pas à produire l'immobilisation et n'arrêterait en aucune façon la revendication des tiers, propriétaires des objects mobiliers.

The arrêt already quoted from Sirey (3), is here again precisely in point; two questions were there decided, both identical with the two points which have been adjudicated by the Court of Queen's Bench in the present case. An engine worked by gas, *moteur à gaz*, had been furnished by the defendants to certain manufacturers, who having affixed it in their factory, subsequently hypothecated the factory in favour of the plaintiff in the action. The hypothecary deed expressly

(1) Commentaire du Code Civil, Paris 1893, Tome 4, p. 27, no. 20.

(2) Traité de Droit Civil Des Biens Paris 1896, no. 59.

(3) *Staron* v. *Comp. des Moteurs à gaz*, S.V. 90, 2, 113.

included the engine in question. The engine had been delivered to the intending purchaser just as in the present case, under a stipulation that the property was to remain vested in the vendors until the price had been fully paid. The action was instituted by the mortgagee against the company, who had agreed to sell the engine under the suspensive condition mentioned, to have it declared that the machine had been included in his hypothec as being an immoveable by destination.

The tribunal of first instance having decided in favour of the company that judgment was confirmed by the arrêt of the Court of Appeal. The court say:

> Attendu qu'il est certain d'après les documents produits que le moteur à gaz dont il s'agit de déterminer le caractère au point de vue de la distinction des biens, a été fourni aux Sieurs Guinard en mars 1881 ; qu'il a été placé dans leur usine, et qu'il s'y trouvait le 23 février 1884, comme faisant partie, en apparence tout au moins, des ustensiles nécessaires à l'exploitation de cette usine, qu'il devait donc être considéré comme une de ces choses mobilières de leur nature qui se confondent parfois avec les fonds où elles sont apportées et qui deviennent immeubles par destination, si les conditions exigées pour que cette destination puisse leur être donnée se trouvent accomplies. Attendu que la première de ces conditions est d'être à la fois propriétaire du fonds et de l'objet à immobiliser lui-même, que le locataire ne rend pas plus immeuble une chose mobilière à lui appartenant et qu'il apporte dans un bâtiment qui n'est pas le sien, que le propriétaire d'une usine ne rend immeuble une chose mobilière de sa nature, non employée à la construction et dont il n'est possesseur qu'à titre précaire.

This concise statement of the reasons in the judgment itself, is upon this second branch of the case, as well as upon the first, developed by the note of Professor Appleton already referred to, appended to the report.

The case of *Lainé* v. *Béland* (1), has been much relied on by the appellants. That case is, however, in no way inconsistent with the judgment of the

(1) 26 Can.S. C. R. 419.

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Court of Queen's Bench. There could be no doubt that the boiler there in question was an immoveable by destination; it had been affixed to the soil, whilst both it and the immoveable to which it was annexed were in the common ownership of Nelson & Company, and there never had been any actual physical severance. The question there was an entirely different one. It was considered that what was insisted on by the appellants there as a constructive severance, namely, a sale of the boiler as a separate moveable to persons under whom the plaintiff in the action for revendication claimed, did not affect a remobilization against an hypothecary creditor whose hypothec had been duly registered. In truth that was rather a question on the registry law of the province of Quebec than such a question as is here presented. I only mention this as sufficiently distinguishing the case without saying whether I considered Mr. Justice Blanchet right or not. For myself, I decided the appeal on the same grounds as those relied on by the learned Chief Justice of the Queen's Bench, namely, that the plaintiffs in the action had failed to prove their title.

I may add that I entirely agree with Mr. Justice Würtele in that part of his judgment in which he points out why the principle on which the defendant in the case of *Filiatrault* v. *Goldie* (1) succeeded, is wholly inapplicable here. It was there held that the plaintiff, the vendor, ought to have tendered to the purchaser the portion of the price paid on account. The respondents are not here seeking to recover the possession of the property sold, they are merely opposing a sale by the sheriff which would defeat their rights altogether. *Filiatrault* v. *Goldie* (1) is, therefore, of no application on this point.

(1) Q. R. 2 Q. B. 368.

There is a strong reason for adopting *a fortiori*, the rule of law sanctioned by the French authorities cited, in the consideration that in France the rule *possession vaut titre* prevails, whilst in the law as formulated in the Civil Code of the province of Quebec that maxim has no place.

The appeal must be dismissed with costs.

GWYNNE J.—The sole question, as it appears to me, which is involved in this appeal is the construction of art. 379 of the Civil Code of the province of Quebec. The question is: How can moveable things or chattels become immoveable, or real property, by destination? And the answer which the article gives is: By being incorporated by the owner with his own real property. The language of the article is: "Moveable things which a proprietor" (or in other words an owner) "has placed on his real property for a permanency, or which he has incorporated therewith, are immoveable by their destination so long as they remain there." The plain construction of that article, both according to its letter and its spirit, is that the person capable of converting chattel property into realty by destination must be owner both of the chattel to be converted into realty, and of the realty into which, by incorporation therewith, the chattel is converted. The words, "moveable things which a proprietor" taken alone without any of the words subsequently used in the article, according to their natural grammatical construction, plainly indicate *the person* capable of doing what the subsequent part of the article authorizes—that is to say, of converting chattel property into realty, and the subsequent language in the article only designates the mode by which such proprietor can effect his purpose, and *the person* so indicated can be no other than the owner of the chattel to be converted.

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Now how is the conversion to be effected? Plainly by the proprietor or owner already mentioned dealing with the chattel in some manner, and so the article adds, "has placed on *his* real property or which *he*" (that is to say the proprietor or owner already mentioned in the first five words of the article in connection with the words "moveable things") "has incorporated therewith," that is to say, with *his* real property; the ownership of the real property is designated by the pronoun "*his*," and the ownership of the goods by the words "moveable things," which, a "proprietor," or an owner, or the owner, or any owner, for there is substantially no difference between these expressions in this connection, so that the person acting to effect the conversion of a chattel into realty must be the owner of the chattel and of the real property with which the chattel is to become incorporated by destination. And this is in precise accord with the spirit of the article, for it is contrary to natural justice and to reason that an owner of real property by incorporating with such real property a chattel which is the property of a stranger, can give such chattel the character of realty so long as he shall keep the chattel so incorporated with his realty. The article uses no language to which such an unreasonable construction involving such manifest injustice can be given. As, then, it appears that the owners of the real property to which the machinery has been by them annexed were not proprietors of the machinery so annexed, but that the property therein is still vested in the respondents, the conversion of the machinery into the real property has never been effected so as to come within the article, and consequently the machinery did not pass under the mortgage of the realty in virtue of which alone the appellants claim, and the appeal must, in my opinion, be dismissed.

SEDGEWICK and KING JJ. concurred in the opinion that the appeal should be dismissed with costs.

GIROUARD J. (dissenting)—I am bound to admit that, as to one fact, this case is not analogous to *Lainé* v. *Béland* (1), for in the latter case the incorporation had been originally made by the proprietor of both the immoveable and the moveable property, whereas in this case the incorporation was done by the proprietor of the immoveable property, with the express consent of the proprietor of the moveable effects. In the two cases, however, the contract is the same, and as to the principle of law involved the cases are similar. Speaking for myself and also for my brothers Taschereau, Sedgewick and King, who agreed "for the reasons stated in the judgment pronounced," I said in *Lainé* v. *Béland* (1), in support of the judgment of the Court of Appeals:

La majorité des juges de la cour d'appel n'a pas songé à rechercher la nature du contrat du 7 avril 1893 ; à leurs yeux, sans doute, et je crois qu'ils avaient raison, il importait peu que les appelants fussent vendeurs ou *simples locateurs* ; *ils avaient consenti à l'incorporation des machines à l'immeuble ;* ils les avaient vendues pendant qu'elles étaient ainsi incorporées ; elles étaient donc devenues immeubles et frappées des hypothèques de l'intimé.

L'honorable juge en chef et M. le juge Bossé expriment l'opinion, dans leurs notes, que ces objets mobiliers peuvent être considérés immeubles par nature ; mais le texte du jugement déclare simplement qu'ils étaient incorporés à l'immeuble et en faisaient partie intégrante sans s'expliquer sur la nature de leur immobilisation. Je crois qu'ils sont devenus immeubles par le seul fait de l'incorporation qu'en firent les propriétaires du fonds, et qu'ils sont immeubles par destination "tant qu'ils y restent," aux termes de l'article 379 du Code Civil. Cet article déclare que :

"Les objets mobiliers que le propriétaire a placés sur son fonds à perpétuelle demeure, *ou qu'il y a incorporés*, sont immeubles par destination, tant qu'ils y restent. Ainsi sont immeubles sous ces restrictions les objets suivants, et autres semblables : 1. Les pressoirs, chaudières,

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alambics, cuves et tonnes ; 2. Les ustensiles nécessaires à l'exploitation des forges, papeteries et autres usines."

Il est incontestable, et le fait me paraît admis par l'appelant et tous les juges, qu'il y a eu de fait incorporation des machines à l'immeuble, et que cette incorporation a été faite *par le propriétaire du fonds. Voilà tout ce que l'article 379 de notre Code prescrit, il n'exige même pas que l'incorporation ait été faite à perpétuelle demeure. Il ne fait aucune mention du vendeur non payé, ou avec la condition résolutoire, pas même de locateur ou de tout autre propriétaire des objets mobiliers qui aurait consenti à leur incorporation.*

And again on page 429 :

Voilà d'ailleurs la doctrine que cette cour a consacrée à l'égard du vendeur non payé dans un jugement élaboré et rempli d'autorités, rendu en 1890 dans les causes de *Wallbridge* v. *Farwell*, et *Ontario Car Foundry Co.* v. *Farwell* (1), qui jusqu'ici a cependant échappé à l'attention des parties. Cette cour décida que le créancier hypothécaire doit être préféré au vendeur non payé, et je crois que cette décision s'applique au vendeur avec condition résolutoire, *et même au locateur*, car le droit de revendiquer du vendeur non payé implique la résolution du contrat comme dans le cas du vendeur avec condition résolutoire ou du locateur, avec cette seule différence, que dans le premier cas, la résolution résulte de la loi, tandis que dans l'autre elle résulte du contrat.

In the present case the Court of Appeal took no notice of its former decision in *Lainé* v. *Béland* (2). The Court of Review, per Pagnuelo J., in *Leonard* v. *Boisvert* (3), has recently expressed the opinion that the two decisions are contradictory, and gave its preference to *Lainé* v. *Béland* (2). The decision of this court, dismissing this appeal, would widen the chaos of the jurisprudence in this very important matter.

Apart from this consideration, have the respondents established that, at the time of the incorporation, they were the proprietors of the machinery ? It is admitted that the contract under which they claim this right was not signed at the date it bears, a fact which was, however, taken for granted by the Court of Appeal ; it was signed some time afterwards, but how long after,

(1) 18 Can. S. C. R. 1.
(2) Q. R. 4 Q. B. 354.
(3) Q. R. 10 S. C. 343.

whether before or after the incorporation, does not clearly appear from the evidence. It was incumbent upon them to prove this fact beyond doubt, for the presumption of law is that the possessor is the proprietor of moveable property, or even improvements or constructions on the land. (Arts. 415, 2194 and 2268 C. C.) To remove this legal presumption, they were bound to prove that, at the time the machinery was incorporated, it was their property under the contract. Mr. Waterous, the manager of the company, respondents, says that he cannot tell if the machinery had been placed in the mill when the contract was signed; and Kelly, the purchaser, says likewise that he cannot say when he signed the contract. And it must not be forgotten that a contract perfect in itself had been signed by both parties, containing no reservation whatever, long before the machinery was delivered.

But this question of fact is not the important point at issue. Admitting that the contract relied upon by the respondents had been signed on the day it bears date, namely, on the 10th March, 1888, or at least before the delivery of the machinery and its incorporation with the building, can they revendicate the same as against an hypothecary creditor?

The Quebec Code, art. 379 says:

> Moveable things which a proprietor has placed on his real property for a permanency, or which he has incorporated therewith, are immoveable by their destination so long as they remain there.

The French version says:

> Les objects mobiliers que le propriétaire a placés sur son fonds, etc.

Therefore the only condition the Quebec law requires for incorporation, is that it should be done by the proprietor of the immoveable property, and for the very good reason that he is the best judge as to whether

(1) See Cass. 20 Dec. 1875, S. V. 76, 1, 208.

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the incorporation would improve his estate or not; it matters not, however, whether the incorporation is to be permanent or only temporary; it will last so long as the moveable property is there.

There is marked difference between the French Code and the Quebec Code upon the subject. Article 524 of the French Code says:

Les objets que le propriétaire d'un fonds y a placés pour le service et l'exploitation de ce fonds, sont immeubles par destination, etc.

Nothing is said of the mere incorporation by the proprietor for a limited time. It is contended by some commentators that the French Code contemplates only permanent incorporations.

The French Code immediately adds:

Ainsi sont immeubles par destination, quand ils ont été placés par le propriétaire pour le service et l'exploitation du fonds, etc.

Here a doubt may be left open as to the meaning of the word "proprietor." Does it mean the proprietor of the immoveable property, or the proprietor of the moveable property, or both? I must confess that, in the second paragraph as in the first one, the French Code refers only to the proprietor of the immoveable property. The Quebec Code is not, however, open to any doubt; "Thus," it declares, "within these restrictions, the following and other like objects are immoveable," etc. No reference is again made to the proprietor, and the point remains as determined by the first paragraph of the article. Therefore, the French authorities are not applicable in the province of Quebec. Their opinion is based upon the principle of the French Code, that immobilization by destination can take place only when the moveable things have been placed on the immoveable property, "pour le service et l'exploitation de ce fonds," or as explained by many writers and decisions, for a permanency *à perpétuelle demeure*, whereas, under the Quebec Code,

it can also be effected by their mere incorporation "therewith," with or without the intention of a permanency, "so long as they remain there."

The only question under the Quebec Code is whether there was *incorporation by the proprietor of the immoveable property*. In this case, the incorporation was so complete that, without the machinery incorporated, the immoveable property would cease to exist as a saw-mill. So when a manufacturer, or any other person, has leased or lent to the proprietor of a mill, for a certain time, the whole or part of a machinery required to run the same, it becomes immoveable by destination as to hypothecary creditors, if the proprietor of the immoveable property incorporates it therewith, either for a permanency or not, so long as it will remain there. We have so decided in *Lainé* v. *Béland* (1), and if we had not done so we should so decide in the present case.

Even in France, the jurisprudence and the text writers are far from being unanimous. A very interesting dissertation by DeVilleneuve will be found in Sirey, Recueil (2), in support of the contention of the appellants. The following decisions may also be quoted in their favour: Rej. 9 Dec. 1835 (3); Rennes, 31 Août, 1864 (4); Cass. 20 Déc., 1875 (5); Amiens, 12 Mars, 1884; Cass. 16 Juin, 1885 (6); Bourges, 26 Déc., 1887 (7); Cass. 11 Janvier, 1887 (8); Cass. 17 Juillet, 1895 (9).

The question in this cause is not whether the contract entered into was valid between the parties. This is not, and cannot be, disputed. The point is whether the machinery was immoveable by destination, at least so far as hypothecary creditors are concerned.

(1) 26 Can. S. C. R. 419.
(2) 36, 1, 181-186.
(3) S. V. 36, 1, 182.
(4) S. V. 65, 2, 14.
(5) S. V. 75, 1, 208.
(6) S. V. 88, 1, 87.
(7) S. V. 88, 2, 78.
(8) S. V. 87, 1, 154.
(9) Pand. Fr. 96, 1, 151.

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Mr. Justice Wurtele, who apparently expressed the views of the Court of Appeal, does not refer to article 379 of the Quebec Code, but merely repeats the definition by the French writers of the immobilization by destination, arguing, as they do, from a very different text of law. He says, and this is the only part of his opinion which requires notice:

Moveable things which are attached to a building or to the soil, to remain there *permanently as an accessory*, and which are fastened with iron and nails or in such a way that they cannot be removed without breakage or destroying or deteriorating the building or property to which they are attached, become immoveable by destination. But in order to be so immobilized, it is necessary that they be placed in the building or on the land by its proprietor and also that they belong to him (1).

Baudry-Lacantinerie does not express any opinion of his own; he merely reproduces, without comment, the decision of the Court of Lyons of the 10th of August, 1888 (2), and so does Huc, in his recent commentary (3). No article of the French Code is quoted, and no argument is offered. We are simply told that the law is so because that court has so decided. And likewise the judgment of the Court of Lyons is not based upon any article of the French Code, or any high judicial authority; it merely states, referring to the conditions required to constitute immobilization by destination:

Attendu que la première de ces conditions est d'être à la fois propriétaire du fonds et de l'objet à immobiliser lui-même; que le locataire ne rend pas plus immeuble une chose mobilière à lui appartenant, et qu'il apporte dans un bâtiment qui n'est pas le sien, que le propriétaire d'une usine ne rend immeuble une chose mobilière de sa nature, non employée à la construction et dont il n'est possesseur qu'à titre précaire.

The reasoning of this *arrêt* is evidently bad. The French Code (4), says in express terms that immobi-

(1) 1 Baudry-Lacantinerie, no. 1220.

(2) S. V. 90, 2, 113.

(3) Vol. 4, p. 27.

(4) C. N. art. 524.

lization by destination must be made by the proprietor of the land, but is silent as to the proprietor of the moveable effects immobilized. It is not, therefore, surprising that nearly all the commentators are likewise silent upon that point. For the same reason, it is not astonishing to notice that the reporter of the Lyons decision observes that the point is controverted, and quotes many decisions even of the Court of Cassation, where the very opposite doctrine was maintained.

Let us suppose, for argument's sake, that the French and Quebec Codes are alike; where is the authority to guide us in this conflict of legal opinions? For my own part, I do not feel inclined to adopt in preference the theories of writers, however learned and popular they may be, when contradicted by a long array of decisions, and not supported by clear and sound arguments. It is not my intention to review the French decisions on the subject, as I contend that our Code is different from the French Code; it is sufficient to refer to them. I hope I will be excused for calling attention to the two last *arrêts* of the Cour de Cassation quoted above, the first rendered on the 11th of January, 1887, (1); and the second on the 17th of July, 1895. (2)

In the first case, the manufacturer had supplied the machinery under the following stipulation:

Les appareils d'installation resteront la propriété de la société, sau ou suivant les conditions prévues à l'article 8 ci-après,

which article provided that the proprietor of the mill might become proprietor of the machinery on payment of certain sums of money payable at fixed periods. It was further agreed that until full payment the latter was mere tenant of the machinery and was bound to pay a certain rent. It was held:

Attendu qu'il n'est point contesté que les appareils fournis par la Société francaise *la Diffusion* aient été placés dans l'usine de Montfourny

(1) Pand. Fr. 88, 1, 290. (2) Pand. Fr. 96, 1, 151.

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pour le service et l'exploitation de la dite usine, et soient ainsi devenus immeuble par destination ; Attendu que l'action en résolution des ventes de meubles, comme le privilège établi par l'art. 2102 s. 4, C. civ., ne peut être exercé au préjudice des créanciers ayant hypothèque sur l'immeuble dont les meubles vendus sont devenus les accessoires ; qu'en effet cet exercice serait contraire à l'art 524 C. civ. et à tout le système hypothécaire ; qu'il suit de là qu'en repoussant la demande de la Société francaise *la Diffusion*, l'arrêt attaqué n'a violé ou faussement appliqué aucun des articles cités, et a fait, au contraire, une juste application des principles en la matière.

In a foot note the reporter says :

(6) En ce sens : Cass., 9 juin 1847. Rivière, Code civ. ann., sur l'art. 2102 note K.—Rennes, 31 août 1864, S. V. 65, 2, 111, P. 65, 490.—Comp. Cass., 9 décembre 1835, S. V. 36, 1, 177.—Rivière. Jurispr. de la Cour de cassation, n. 558, et suiv.—Cependant la question est controversée, mais plus généralement résolue dans le sens ci-dessus. (V. Table gén., Devill. et Gillo, v°. Priviléges, n. 115 et suiv. ; Rép. gén. Pal., et Suppl. eod. verbo, 360 et suiv. ; Marcadé, t. VI, sur l'art. 1654, n. 2 ; Massé et Vergé, sur Zachariae, t. V, p. 143, 791, note 27; Aubry et Rau, t. III, p. 409, s. 284, Art. 4, p. 400, s. 356 ; Pont, Priv. et hyp. n. 156).

The second *arrêt* is more remarkable as the contest was not with a hypothecary creditor, but with ordinary creditors. It was held :

Les tribunaux ont le droit d'apprécier souverainement le véritable caractère des conventions, sans s'arrêter à la qualification qui leur a été donnée par les parties.

En matière de liquidation judiciaire ou de faillite, il peut être déclaré qu'un acte qualifié bail, constatant la location de certains meubles trouvés en la possession du failli, avec réserve de la propriété jusqu'au paiement intégral de loyers stipulés, est fictif et contient en réalité une vente ferme et à crédit, qui n'est pas opposable aux autres créanciers de la faillite. (C. Com. Art. 550.)

Some allusion has been made to the recent decision of the Court of Review sitting in Montreal, in *Leonard* v. *Boisvert* (1). It was stated at the hearing that only Mr. Justice Pagnuelo criticised the decision of the Court of Appeal in this case. True, Mr. Justice Jetté and Mr. Justice Doherty made some reservation as to some remarks of Mr. Justice Pagnuelo bearing upon

(1) Q. R. 10 S. C. 343.

another branch of the case; but, upon the point as to whether the moveable effects were immoveable by destination, the judges were unanimous, although the incorporation had been made by one who at the time had sold the immoveable property subject to a *faculté de réméré*. Mr. Justice Pagnuelo, after having recited the contract, said:

Le contrat de vente (that is of the machinery) n'est donc ni suspendu, ni résolu. L'objet de la clause ne serait que de conserver aux vendeurs un privilège sur la chose pour le paiement du prix, privilège exorbitant du droit commun quant aux tiers (Art. 2,000 C. C.)

Nous sommes unanimes sur ce point. et ce sera le motif donné pour infirmer le jugement.

Mr. Justice Jetté, speaking for himself and Mr. Justice Doherty, said:

Pour la majorité de la cour, l'hon. juge Doherty et moi, il ne se présente, dans l'espèce, qu'une simple question d'appréciation du contrat fait entre le demandeur et le défendeur, Adolphe Boisvert. Ce contrat, suivant nous, n'était pas suffisant pour conserver au demandeur la propriété des engins et machines vendues, jusqu'au paiement du prix. C'est là, par conséquent, le seul point que décide le jugement de cette cour, et M. le juge Doherty et moi, desirons faire les réserves les plus absolues quant aux autres questions discutées par notre honorable collègue M. le juge Pagnuelo.

The contract in this case is stated in the head note of the report and in the opinion of Mr. Justice Pagnuelo as follows:

It is distinctly understood and agreed that the property in the goods so to be furnished by you (Leonard) to me (Boisvert), is not to pass to me until you are fully paid the price for same, and that the notes so to be given are to be held by you as collateral security in respect of such purchase money. If default be made in the payment of said notes, or if the said goods are attempted to be disposed of by me, or are seized in execution in respect of any debt due by me, then you are at liberty to take possession of the goods and re-sell the same by public auction or private sale, crediting me with the proceeds only, less all expenses.

The ground of the judgment is as follows:

Considering that the effect of said stipulation was at most to give plaintiffs a personal right against said Boisvert to enforce their claim

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for the price of said effects, by bringing said goods to sale without resorting to judicial proceedings, and that said stipulation had not the effect of making the passing to said Boisvert of the property in the effects sold, subject to the payment in full of the price thereof as a suspensive condition and preventing the passing of said property to Boisvert until said price was paid, etc.

Taking for granted that Boisvert was proprietor of the mill within the meaning of article 379 C. C., this decision is undoubtedly correct, and is in accord with *Lainé* v. *Béland* (1), and the Quebec Code. Under that Code, as already observed, permanency or *perpétuelle demeure* is not necessary to constitute immobilization by destination; it may also result from the mere incorporation with the immoveable property by its proprietor. The erroneous notion of immobilization by destination under the Quebec Code was the cause of the error in the judgment of the Court of Appeal. It also explains why, in Quebec, Baudry-Lacantinerie, or any other French authority, does not apply even to cases of immobilization by means of a permanency, or *à perpétuelle demeure*, because article 379 of the Quebec Code shows that the immobilization of moveable things in all cases takes place as a matter of fact, "so long as they remain there," irrespective of the intention of the proprietor of the immoveable property or of his rights to the moveable things, so far at least as third parties are concerned; provided of course, I am willing to concede for the purposes of this case, the incorporation is made with the consent express or implied of the proprietor of the moveable effects.

True, art. 1027 of the Quebec Code enacts that sales are perfect not only between contracting parties, but also as to third parties, by mere consent, but they are

subject, in contracts for the transfer of immoveable property, to the special provisions contained in this Code for the registration of titles to and claims upon such property.

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Of course, the rights of the respondents were perfect, so long as their machinery remained moveable property, but the moment it became immoveable by destination or otherwise, their rights became subject to the special provisions of the Code respecting immoveable property, as the Court of Appeal and this court decided in *Lainé* v. *Béland* (1).

Some arguments have been advanced that the proprietors of the mill could not grant or create greater rights than they had. We have also answered this objection in *Lainé* v. *Béland* (1). In the latter case, the proprietor of the mill was not proprietor of the machinery, yet we held that the hypothec extended to it as being immoveable by destination. In *Thibaudeau* v. *Mailley. Re Steele* (2), the Court of Appeal, composed of Dorion C.J., Ramsay, Tessier, Cross and Baby JJ., went so far as to hold that, when the incorporation of the machinery has been made by a mere tenant of the immoveable property who subsequently became proprietor thereof, the sale of the machinery by the tenant while mere tenant, conveyed nothing as against a creditor who had obtained a hypothec after the tenant, became proprietor of the land.

This decision was undoubtedly correct. As Laurent, vol. 30, no. 233, points out:

> Vainement l'acheteur dirait-il que la vente seule mobilise les immeubles par destination ; cela est vrai entre les parties, cela n'est pas vrai à l'égard du créancier hypothécaire qui a un droit réel dans la chose, droit qu'il conserve tant que la chose est attachée au fonds.

If the machinery had been incorporated without the consent or the knowledge of its proprietor, some serious argument might be offered that it did not take place, although I do not wish to express any opinion upon this point. In this case, we have the formal acquiescence of the proprietor of the machinery to its

(1) 26 Can. S. C. R. 419.
(2) 17 R. L. 299.

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incorporation; it was even done by him, and so we have the proof that the incorporation was made by both the proprietor of the real property and the owner of the moveable effects. Therefore, the respondents must have known that by doing so, it became part of the real estate *par destination*, and subject to mortgages, liens and alienations generally.

The respondents are estopped from invoking their contract in this respect. They are supposed to know the laws of Quebec as to immoveables by destination and hypothecs. Their contract protected them so long as the machinery was moveable property, but not so when it had ceased to be. Estoppel is not peculiar to the English system of laws; it is known in Quebec by the name of *acquiescement.*

It is said that the presumption of acquiescence is rebutted by the very terms of the contract. The contract is, however, perfectly silent as to the incorporation *by the respondents* of the machinery with the building. Likewise are the specifications attached to the contract, or any other specifications subsequently agreed to. The evidence does not show that it was at first intended that the machinery was to be placed by the respondents. Beer, their millwright, sent several months after the sale to place the machinery, states that the placing had been partly done before he arrived at Joliette.

If we decide that, in a case like the present one, hypothecary creditors have no lien upon the machinery which has been incorporated with the mill, we destroy the whole economy of Quebec real estate system. Even a purchaser in good faith, who has carefully examined the premises and the books of the registry office, will be exposed sooner or later to find that the most valuable part of the estate he intended to acquire is gone. Such was not the intention of the legislature and is not the law.

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We must not overlook article 2017 of the Civil Code:

Hypothec is indivisible and subsists in entirety upon all the immoveables made liable, upon each of them and upon every portion thereof. Hypothec extends over *all subsequent improvements* or increase by alluvion of the property hypothecated.

The Code does not distinguish as to the party who makes these improvements, yet we are now told that the hypothec does not extend over improvements made before or after it was created, which are not the property of the proprietor of the immoveable. We have decided otherwise in *Lainé* v. *Béland* (1).

The Code has provided for only one exception to the rule that a hypothec extends to all the improvements, and that is when the third party is a *tiers détenteur* or in possession of the immoveable as proprietor; and then he cannot remove the improvements he has made while such proprietor; he has merely "a right to retain the property," until he is reimbursed. Art. 418. *Expressio unius exclusio est alterius.*

It must be noted that one of the mortgages held by the appellants was created in 1884, long before the sale by the respondents.

If the decision of the Court of Appeal be allowed to stand as law, bondholders, secured by mortgages on railways or mills and factories in the province of Quebec, have no security upon the rolling stock or machinery which might have been supplied under contracts and circumstances similar to those alleged by the respondents. If the law be so, parties, dealing with proprietors of mills, factories and railways, must make an inquiry into the actual position, as a matter of fact, of the machinery, rolling stock and other accessories, and satisfy themselves that they are the property of the proprietor of the land, an inquiry which is far from being a safe guide, as the present case proves. Two deeds or memoranda of sale were made, one with a reservation as to the ownership of the

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things sold till full payment was made, and the other without any such reservation. The mortgage creditor or even the vendee, upon production of the latter document, might naturally consider himself perfectly secured, but he will soon, and unfortunately too late, discover that another deed with a suspensive clause was signed sometime afterwards, at least before the moveable effects were placed. Can such a state of affairs be authorized by law? I answer no, without hesitation, at least so far as hypothecary creditors are concerned, which is the only point before us.

To hold that the respondents continued to remain proprietors, is to introduce a system far more dangerous than that of chattel mortgages, for at least there some publication is necessary and the public can protect itself, but here no protection is possible.

Courts of justice should hesitate before giving to a clear and complete text of law an interpretation so pregnant with disastrous consequences to the community. Article 379 is not open to such unreasonable construction; quite the reverse. It merely requires that the incorporation be made by the proprietor of the immoveable property, whether for a permanency or a term, and is entirely silent as to the proprietor of the moveable things incorporated; and I think that it is the duty of courts of justice to apply the law as they find it.

For these reasons, and without expressing any opinion as to the rights of chirographary creditors in a case like the present one, I have come to the conclusion that *Lainé* v. *Béland* (1) decides this case, and that the appeal ought to be allowed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Béique, Lafontaine, Turgeon & Robertson.*

Solicitors for the respondent: *Greenshields, Greenshields, Laflamme & Glass.*

(1) 26 Can. S. C. R. 419.

PHILIP JAMESON (PLAINTIFF)...........APPELLANT;

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*Mar. 8, 9.
*May 1.

AND

THE LONDON AND CANADIAN LOAN AND AGENCY COMPANY (DEFENDANT)............................... } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Mortgage—Leasehold premises—Terms of mortgage—Assignment or sub-lease.

A lease of real estate for twenty-one years with a covenant for a like term or terms was mortgaged by the lessee. The mortgage after reciting the terms of the lease proceeded to convey to the mortgagee the indenture and the benefit of all covenants and agreements therein, the leased property by description and "all and singular the engines and boilers which now are or shall at any time hereafter be brought and placed upon or affixed to the said premises, all of which said engines and boilers are hereby declared to be and form part of the said leasehold premises hereby granted and mortgaged or intended so to be and form part of the term hereby granted and mortgaged;" the habendum of the mortgage was: "To have and to hold unto the said mortgagee, their successors and assigns for the residue yet to come and unexpired of the term of years created by the said lease less one day thereof and all renewals, etc."

Held, reversing the judgment of the court of appeal, that the premises of the said mortgage above referred to contained an express assignment of the whole term, and the *habendum*, if intended to reserve a portion to the mortgagor, was repugnant to the said premises and therefore void; that the words "leasehold premises" were quite sufficient to carry the whole term, the word "premises" not meaning lands or property but referring to the recital which described the lease as one for a term of twenty-one years.

Held further, that the habendum did not reserve a reversion to the mortgagor; that the reversion of a day generally without stating it to be the last day of the term is insufficient to give the instrument the character of a sub-lease.

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

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APPEAL from a decision of the Court of Appeal for Ontario (1), reversing the judgment of the Common Pleas Division in favour of the plaintiff.

The appellant Jameson having leased certain premises in Toronto to one Armstrong for a term of twenty-one years, with a covenant for renewal, Armstrong mortgaged the lease to the respondents and the sole question is whether such mortgage operated as an assignment of the whole term or a sub-lease. The material portions of the mortgage are set out in the judgment of the court.

The Divisional Court held the mortgage to be an assignment. The Court of Appeal reversed this judgment, being of opinion that there was a reversion of part of the term to the mortgagor.

Armour Q.C. and *Irving* for the appellant. The grant of the "leasehold premises" in the mortgage refers to the recital and is sufficient to pass the whole term. *Germaine* v. *Orchard* (2); *Goodtitle* v. *Gibbs* (3); *Roddington* v. *Robinson* (4.)

The habendum contains no reservation. Reserving a day generally is not sufficient. It should be the last day. *Doe Meyers* v. *Marsh* (5); *Smith* v. *Cooke* (6).

Arnoldi Q.C. for the respondent cited *Burton* v. *Barclay* (7); *Barthel* v. *Scotten* (8).

The judgment of the court was delivered by:

THE CHIEF JUSTICE.—On the 1st of January, 1889, the appellant executed an indenture of lease of certain land and buildings in the city of Toronto whereby he demised the same to one James Rogers Armstrong for a term of twenty-one years, reserving an annual rent

(1) 23 Ont. App. R. 602.
(2) Shower's Parl. Cas. 252.
(3) 5 B. & C. 709.
(4) L. R. 10 Ex. 270.
(5) 9 U. C. Q. B. 242.
(6) [1891] A. C. 297.
(7) 7 Bing. 745.
(8) 24 Can. S. C. R. 367.

of $1,400. The lease contained the usual covenants, a covenant on the part of the lessee not to assign or sub-let without license, and a covenant for renewal. This latter covenant which is very material to the question raised by the appeal, was in the following words:

The said lessor for himself, his heirs, executors, administrators and assigns, covenants and agrees with the said lessee, his executors, admintrators and assigns, in the manner following: That the said lessee, his executors, administrators or assigns, duly and regularly paying the said rent and performing all and every the covenants, provisoes and agreements herein contained on his part to be paid and performed, the said lessor, his heirs, executors, administrators or assigns, will at the expiration of the term hereby granted, or any renewal or renewals thereof, grant to the said lessee, his executors, administrators or assigns, a renewal lease of the said hereby demised premises for a further term of twenty-one years, such renewal lease to contain the same covenants, provisoes and conditions as are contained in these presents, and at a certain rent payable (except as to the amount thereof) as before provided, the amount of such rent on every renewal of the said term (if it cannot be agreed upon), to be ascertained by three arbitrators.

On the 22nd of March, 1889, James Rogers Armstrong, the lessee in the before mentioned lease, executed a mortgage in favour of the respondents of the lease and leasehold premises to secure the payment of the sum of $4,000 lent and advanced by the respondents to the mortgagor. This mortgage (as well as a subsequent mortgage by way of further charge identical in terms with the first and to which further reference need not be made) was by indenture made between Armstrong and the respondents. The respondents contend that according to the proper construction, it took effect by way of sub-lease (reserving a reversion to the mortgagor. On the other hand the appellant, the lessor, contends that it operated as an assignment of the whole term, and that the respondents as assignees are consequently liable upon the covenants to pay rent. Mr. Justice Robertson, before

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whom the action was tried, was of the opinion that the instrument operated by way of assignment, and pronounced judgment for the appellant accordingly. The Court of Appeal reversed the judgment, the learned Chief Justice of Ontario doubting but not dissenting.

The solution of the question raised depends entirely on the construction of the mortgage deed already referred to.

The material parts of this deed to be considered, for the purpose of determining its character as a sub-lease or an assignment, are the recital, the part of the deed called by conveyancers the premises, and the *habendum.* I, therefore, set forth these several clauses *in extenso.* The recital is as follows:

Whereas by indenture of lease bearing date the first day of January, 1889, and made between Philip Jameson, of the said city of Toronto, merchant, as lessor, and the said mortgagor as lessee, the said Philip Jameson demised unto the said mortgagor, his executors, administrators and assigns, the lands hereinafter mentioned for the term of twenty-one years from the first day of January, 1889, subject to the rents, covenants and conditions therein reserved and contained and with the rights of renewai therein contained.

The premises are in these words:

Now, therefore, this indenture witnesseth that in consideration of four thousand dollars of lawful money of Canada now paid by the said mortgagees to the said mortgagor (the receipt of which is hereby acknowledged), the said mortgagor doth grant and mortgage unto the said mortgagees, their successors and assigns for ever, all and singular the said indenture of lease and the benefit of all covenants and agreements therein contained, and all that certain parcel or tract of land and premises situate lying and being in the city of Toronto, in the county of York, being composed of lots numbers five and six on the south side of Queen street according to registered plan 14, together with all and singular the engines and boilers which now are or shall at any time hereafter be brought upon and placed upon or affixed to the said premises, all of which said engines and boilers are hereby declared to be and form part of the said leasehold premises hereby granted and mortgaged or intended so to be and be and form part of the term hereby granted and mortgaged.

The *habendum* which immediately follows the premises, is thus expressed:

To have and to hold unto the said mortgagees, their successors and assigns for the residue yet to come and unexpired of the term of years created by the said lease, less one day thereof, and all renewals and substituted estates and rights of renewal and other interest of him the said mortgagor or which he may hereafter acquire therein. Together with all the outhouses, outbuildings, easements and appurtenances thereto belonging or now in anywise used or enjoyed in connection with the said premises by the said mortgagor.

I am of opinion that the first judgment was right, and that the decision of the Court of Appeal cannot be supported. The contention of the respondent was that the premises did not contain an express assignment, but merely an assignment by implication, and that therefore there was no repugnancy between the premises and the *habendum*, that consequently the latter clause governed, and that by its terms there was a clear reservation of a reversion to the mortgagor, the result being that the instrument operated as a mortgage by way of sub-lease, and not as an assignment. There can be no doubt that if the premises of the deed did contain an express assignment of the whole term, the *habendum*, construing it as reserving a reversion to the mortgagor, would be repugnant and void. In order, however, to arrive at this conclusion we must find that there is in the premises an explicitly declared intention to assign the whole term. The Court of Appeal considered that the words were to be construed as an assignment in the first place of the indenture, by which the lease was effected as a document of title merely, and of some certain and undefined interest in the parcels described, and that there was no assignment of the term. I cannot agree in this conclusion. The words "leasehold premises," in my opinion, are quite sufficient to carry the whole term. We must attribute to the word "premises,"

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in this formal instrument its proper, legal and technical signification, and not read it as synonomous with "lands" or "property," as it is, I admit, commonly used in popular language. Then what do these words mean? The word "premises" clearly has reference to the recital in which the lease is described as a lease for a term of 21 years. The words "leasehold premises," must, therefore, be read as referring to and including this term, and this part of the deed must be held to contain an express assignment of the whole term with which an *habendum* so limited as to leave a reversion in the mortgagor would be inconsistent, and, therefore, void for repugnancy. The case of *Germaine* v. *Orchard*, in the House of Lords, reported in the 3rd (p. 222) vol. of Salkeld, and in Showers Parliamentary Cases (p. 252), is an express authority directly in point and undistinguishable from the present case. It is true *Germaine* v. *Orchard* is an old case, but it has, so far as I can find, never been called in question, but has been recognized in modern decisions, and also very lately by such authoritative writers on conveyancing as Mr. Challis (1), and Sir Howard Elphinstone (2). It is also cited by Preston (3), as a governing authority. Therefore, assuming the construction that the respondent asks us to place upon the *habendum* to be correct, it would be void for the reasons stated.

This, however, is not the only reason why I find it impossible to uphold the judgment under appeal. The *habendum* itself does not reserve a reversion to the mortgagor. If we read it as doing so, we make it inconsistent with itself and therefore void. See per Robinson C. J., *Doe Meyers* v. *Marsh* (4); *Touchstone* (5).

(1) Real Property 2 ed. p. 377.
(2) Interpretation of Deeds, p. 220
(3) Conveyancing, vol. 2, p. 125.
(4) 9 U. C. Q. B. 242.
(5) P. 114.

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If we are to construe the words "less one day thereof," as meaning the last day of the term, as we necessarily must do if we are to give effect to the respondent's proposition that there was a reservation of a reversion, we bring these words into direct conflict with other terms of the *habendum* and thus introduce that repugnancy which must be fatal to it. This is apparent in two respects. The *habendum* expressly includes "all renewals and substituted estates and rights of renewal, and other interests of him the said mortgagor, which he may hereafter acquire therein."

Now in the first place, if we turn to the renewal clause in the lease above set forth, we find that no right of renewal is to arise until the expiration of the lease, so that if we are to consider the last day of the term as reserved to the mortgagor the right of renewal, as between the lessor and the lessee and those claiming under the latter, would be in the lessee himself and not in his mortgagees. This shows conclusively, in my opinion, that it was intended by this part of the *habendum* that the mortgagees should have the whole term in them including the last day, an interpretation essential to qualify them to exercise the right of renewal. This is strengthened by the second and other argument drawn from the words "and other interests of him the said mortgagor" which are utterly inconsistent with the retention by the latter of a reversion. In order to avoid this repugnancy we must, therefore, construe the reservation of a day generally (without saying the last day of the term), as meaning the first day after the execution of the mortgage. Preston (1), as high an authority as any which could be quoted on such a point, has this passage:

In order that an instrument may operate as an under-lease, a reversion must be retained by the former owner and consequently the

(1) 2 Conv. p. 125.

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under-lease must be for a period less in point of time than the term or estate of the lessor, or when the grant is for the residue of the term of the grantor, there must be an exception of the last day or the last hour, or of some other period of the term. This exception as well as a grant made for part only of the period during which the estate of the grantor is to continue, will leave a reversion in the grantor. It is material that the instrument shall reserve the last portion of the estate for an instrument may, it should seem, operate as an assignment notwithstanding it reserves a portion of the estate, being the first part of it as in the case of an assignment to hold from a day to come or from an event to happen unless it is to happen after the death of a person by express limitation.

Thus it will be seen that even as regards an *habendum* which contains no terms inconsistent with a day generally reserved being construed as the last day of the term Preston considers such a general reservation insufficient to give the character of a sub-lease. Then *a fortiori* must this be so if to construe such a general reservation would make the *habendum* itself irreconcilable with the express provisions to be found (as in the present case) in the *habendum* clause itself.

Again the same writer (Preston) says (1):

After the under-lease is made by a term for years the grantor has in point of estate not merely and simply the residue of the time of his original term; he has the same measure of time, duration of interest and estate as he had prior to the under-lease subject only to that lease. The sole effect of the under-lease is to confer a right to the possession or other beneficial enjoyment during the term granted by the under-lease; and the lessor in the under-lease retains by way of seigniory or reversion his original ownership, subject only to the right conferred by the under-lease.

This is undoubtedly a correct definition of the estates and relative rights in the term of a lessee and under-lessee. Then how can it possibly be said that an *habendum* which grants, as the present *habendum* does, all the interests of the lessee as well as those he may subsequently acquire, is susceptible, consistently

(1) Conv. vol. 2, p. 125.

with Preston's definition, of being construed as creating not an assignment, but a mere under-lease.

The appeal must be allowed with costs and the judgment of Mr. Justice Robertson restored.

Appeal allowed with costs.

Solicitors for the appellant: *Kilmer & Irving.*

Solicitors for the respondent: *Howland, Arnoldi & Bristol.*

1897
*Mar. 16, 17.
*May 1.

ALBERT E. C. MAY (PLAINTIFF)........APPELLANT;

AND

GEORGE LOGIE (DEFENDANT)...........RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Will—Sheriff's deed—Evidence—Proof of heirship—Rejection of evidence—New trial—Champerty—Maintenance.

A will purporting to convey all the testator's estate to his wife was attacked for uncertainty by persons claiming under alleged heirs-at-law of the testator and through conveyances from them to persons abroad. The courts below held that the will was valid.

Held, affirming such decisions, that as the evidence of the relationship of the alleged grantors to the deceased was only hearsay and the best evidence had not been adduced; that as the heirship at law was dependent upon the alleged heir having survived his father and it was not established and the court would not presume that his father died before him; and that as the persons claiming under the will had no information as to the identity of the parties in interest who were represented in the transactions by men of straw, one of whom was alleged to be a trustee, and there was no evidence as to the nature of his trust and there was strong suspicion of the existence of champerty or maintenance on the part of the persons attacking the will, the latter had failed to establish the title of the persons under whom they claimed and the appeal should be dismissed.

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

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MAY
v.
LOGIE.

APPEAL from the decision of the Court of Appeal for Ontario (1), which affirmed the judgment of the Chancery Division of the High Court of Justice (2), dismissing the plaintiff's action with costs.

The appellant brought his action claiming title to certain lands under the heirs-at-law of William Pidgen, deceased, and to have an alleged will and sheriff's deed upon which the respondent's title depended, set aside.

The will is as follows:—"I, William Pidgen, of the Township of Etobicoke, in the County of York, Yeoman, do declare this to be my last will and testament revoking all others by me heretofore made. It is my will that as to all my estate both real and personal, whether in possession expectancy or otherwise which I may die possessed of, my wife Elizabeth, and I hereby appoint my said wife Elizabeth, to be executrix of this my will," and is in the testator's own handwriting.

The plaintiff contended that the will was void for uncertainty and that the deed from the sheriff was illegally and irregularly issued. The courts below held that the will was valid and gave the lands in fee simple to the testator's wife under whom the respondents claim their title to the lands in question.

Donovan for the appellant.

Shepley Q.C. for the respondent.

The judgment of the court was delivered by:

THE CHIEF JUSTICE.—I am of opinion that this appeal must be dismissed. In the first place the appellant failed to give proper evidence establishing the title of the persons under whom he claims as heirs at law of William Pidgen, deceased. The only proof

(1) 23 Ont. App. R. 785. (2) 27 O. R. 501.

of the relationship of the persons who were the grantors in the alleged conveyance of the 20th June, 1894, to Walter J. Kilner, to be found in the record, is that contained in the deposition of the witness William Pidgen. This young man who was only twenty years old when he left England in 1890, assumes to give the history of his father's family; but he discloses in his evidence that what he knew of it he only learned from other persons, in other words, that his evidence was mere hearsay consisting of statements which his father, who was still living, had made to him. Thus for instance, on re-examination by the counsel for the plaintiff, he is asked "Is it possible that one of the brothers or sisters named by my learned friend, left any children?" And this question being objected to, the following evidence is given.

Q. If they had any children would you have heard of it? A. Yes.

Q. Did you ever hear that they had no children? A. I heard my father say that all that were left were the ones that I mentioned.

Q. You heard that they did not leave any children? A. Yes.

Q. And that those persons you have named were the only survivors of William Pidgen? A. Yes, the ones I have mentioned were the only ones that were related to him.

This, as the respondent in his factum insists, is of course not the proper way to prove pedigree which includes heirship or descent. In such cases it is true that hearsay evidence of a peculiar kind is admissible, but this is limited to declarations made by a person who is proved, by evidence *aliunde* his own statements, to be a relation of the parties of whose existence or death he spoke, and who is himself deceased, for nothing can be better established than that such declarant, if living, must himself be called as a witness, and that his declarations are in that case inadmissible. There could be no possible difficulty in examining Thomas Pidgen, the father of the witness, in England, under a commission before which, in the

present state of the law, he might have been compelled by process to appear. This principle of the law of evidence is so elementary that it scarcely requires any reference to authority. Taylor (1) and Greenleaf (2) may, however, be referred to as stating this rule of evidence which prevails in America as well as in England.

Another defect in the proof of descent is this. When William Pidgen died in 1878 the law of Ontario on the subject of the descent of real property was regulated by the Act of 1852, and under that Act, William Pidgen having died without issue, his heir at law was his father, if living. The age of William Pidgen is nowhere stated, and even if it were, we cannot presume that his father died before him. There is, therefore, really nothing to shew that the persons mentioned in the deposition of the witness William Pidgen, ever had any interest whatever in these lands. The respondent has taken the objection to the sufficiency of the proof of heirship upon the first point very precisely in his factum, and I can see no answer to it. It constitutes therefore, by itself, a sufficient answer to this appeal and as such must prevail.

I could not, however, assent to a judgment for the appellant even if I thought the plaintiff had proved his title, and that all the defences pleaded had failed. In such case, I should have been of opinion that the respondent was entitled to a new trial on the ground that evidence had been improperly rejected.

I think for several reasons the defendant was entitled to be informed who the party in interest, represented in the somewhat unusual transactions respecting this property by such men of straw as Kilner and May, really was. The defendant was entitled to know with whom he was really and actually contending, in order that he might be able in future to protect himself from further litigation by the parties having the beneficial

(1) 9th ed. p. 413-427. (2) Ed. 1896, vol. 1, p. 104 *et seq.*

interest. He was also entitled to know the terms of the trust under which Kilner held the land in order that he might be assured that the conveyance from Kilner to May was not in breach of trust, for if it were such, and so not binding on the beneficiary, a judgment in this action either way would not be conclusive on the *cestui que trust*, and not being conclusive, would leave the defendant exposed to future litigation by the beneficial owner.

Then for another reason evidence which was rejected ought to have been received. The acquisition of this land under the purchase from the alleged heirs at law was a very exceptional, not to say a suspicious, transaction, which in my opinion the defendant was entitled to have thoroughly probed on cross-examination, by way of testing the sufficiency of the plaintiff's proof of title, if for no other reason. Aside from this, however, altogether, there was on the record a defence distinctly pleaded setting up the illegality of the transfer of title from Kilner to May, by reason of champerty or maintenance. I am not at all sure that, as it is, on the evidence of Kilner and May taken in conjunction with that of Merritt A. Brown, this defence was not established, but I do not proceed on that ground, in dismissing the appeal. I am, however, clear that the defendant was entitled to have answers to many of the questions which were put by his counsel which were overruled. I refer particularly to questions put to the witnesses Kilner, May, Brown and especially to the witness Donovan, who was also counsel for the plaintiff at the trial.

The appeal must be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *Joseph A. Donovan.*

Solicitors for the respondent: *William Mortimer Clark & Gray.*

1897
*Mar. 13, 15.
*May 1.

BENJAMIN ROGERS (PLAINTIFF) ....APPELLANT;

AND

THE TORONTO PUBLIC SCHOOL BOARD (DEFENDANT)..................... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Negligence—Unsafe premises—Risk voluntarily incurred.

An employee of a company which had contracted to deliver coal at a school building went voluntarily to inspect the place where the coal was to be put on the evening preceding the day upon which arrangements had been made for the delivery, and was accidentally injured by falling into a furnace pit in the basement on his way to the coal-bins. He did not apply to the School Board or the caretaker in charge of the premises before making his visit.

Held, that in thus voluntarily visiting the premises for his own purposes and without notice to the occupants, he assumed all risks of danger from the condition of the premises and could not recover damages.

APPEAL from the judgment of the Court of Appeal for Ontario (1), which reversed the judgment entered upon the verdict rendered in the trial court for the plaintiff for $5,700 damages and costs.

A statement of the circumstances and questions at issue in this case will be found in the judgment of the court now reported.

McCarthy Q.C. for the appellant.

Robinson Q.C. and *Hodgins* for the respondent.

The judgment of the court was delivered by:

KING J.—This appeal is from a judgment of the Court of Appeal for Ontario setting aside a judgment

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

(1) 23 Ont. App. R. 597.

recovered in the Court of Queen's Bench and dismissing the action.

The action was originally brought by one Benjamin Rogers, since deceased, to recover damages for an injury sustained by falling into a furnace pit in the basement of Ryerson school building, in the city of Toronto. During pendency of the action the plaintiff died, and his widow and executrix was substituted as plaintiff under the provisions of R. S. O. ch. 110, sec. 9.

Rogers was yardmaster for the firm of Elias Rogers & Co., coal merchants, at Toronto, who had a contract with defendants for supplying all the coal for the school for the year beginning June, 1894. It was provided by the contract that the coal was to be delivered at such times and places, and in such manner and quantities, as might be directed by the supply committee and in terms of the tender, whereby it was stipulated that it was to be stored in the basement or wood-shed of the schools, under the inspection of an inspector or inspectors appointed by the supply committee, and to be subject to the approval of said committee.

The defendants notified the contractors that they would accept delivery of the coal for the Ryerson school on the 17th July. It was part of Rogers' duty to supervise this work on his employers' behalf. Their business was large, and he had to lay out the daily work of the carters and labourers, and, in doing this, it was advantageous to examine the places in which the coal was to be stored. Accordingly, he went to the Ryerson school building on the 16th July, between 7.30 and 8 p.m., to see (as he says) "what was the condition of the place for the delivery of the coal, and whether he would have to send an extra man up or not." During the day the defendants sent one Lindsay to notify the caretaker of the school that the delivery would be going on the next day. When

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Lindsay got to the caretaker's he found that his arm was broken, and Crawford, the caretaker, asked Lindsay to telephone to Mr. Bishop, the superintendent of buildings, to see if he could send a man to receive the coal as he was not in a fit state to receive it. Lindsay did so, and was himself appointed in Crawford's place to receive the coal.

The defendants were not advised beforehand of Rogers' visit to the school building. What took place when he got there is stated without material variation by Rogers, Mrs. Crawford, and by one Rooney, who had been employed a year or two before for a few weeks to act as caretaker during Crawford's illness, but who was not then in the employment of the board, and had called merely to see Crawford on account of his injury.

When Rogers reached the premises he went to the cottage of the caretaker and inquired of a woman whom he supposed to be, and who was, Mrs. Crawford as to where Crawford was. His wife said that he had broken his arm and was in bed. Rogers said that he had coal to deliver the next day, and that he had come to see where it was to go in. Mrs. Crawford pointed to three windows in the basement of the school building, and Rogers then said that he would like to see where it was to be stored. Rooney then came forward and volunteered to go with him.

The plaintiff's account is as follows:

I walked over to the caretaker's house, and the caretaker's wife, I took it to be, was standing at the door, and I asked for the caretaker, and she explained that he had broken his arm, and that he was in bed; just at that time I stated my business.

Q. Tell us what you said. A. I said I had called to see where the coal was to be delivered, and then this young man came out.

Q. What did she say? A. She said nothing, only that her husband was in bed with a broken arm. I do not remember that she said anything else; and then this young man came out of the door at the time and he says "I will go with you" and so he went with me.

Rooney says that to the best of his opinion he did not get the key from any one, and that the door was open.

At the foot of the stairs leading down into the basement there is a partition, and through it a door opening inwards. Directly opposite this doorway was an unfenced furnace pit, the space between which and the door, when opened, was quite narrow. Rogers knew nothing of the pit, and, as it was quite dusky, did not perceive it, and was not warned of it, and without any negligence on his part fell into it and was seriously injured.

The Chief Justice of the Queen's Bench directed the jury that if the plaintiff went to the school-house in and about the reasonable performance of the contract which his employers had for the delivery of the coal and storing it in the basement, then he would be there by the implied invitation of the School Board, and the law in regard to an invitation of that kind applies.

The obligation of an occupier of premises to one whom he expressly or impliedly invites to come before them for the purposes in which the occupier has an interest is to take, by himself and servants, reasonable care that the person so coming shall not be exposed to unusual danger. The premises are to be in a reasonably safe condition, or, if otherwise, notice is to be given of their condition. The rules of law as to the responsibility of a principal for the negligence of a servant extend to the performance of his obligation. Circumstances giving rise, ordinarily, to the obligation would have existed if Rogers had gone upon the premises on the 17th in performance of the contract. It is unnecessary to say how it might have been if Crawford had known of Rogers' visit on the 16th, and had admitted him to the premises, or permitted him to enter. But Crawford, although upon the premises, knew nothing of Rogers being at the house until after the accident.

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The building was not one that was open to the public, and so far as regards the performance of the coal contract, it had been declared, in effect, that it would be open to the contractors for such purpose only from the 17th of July. The right of the defendant to enter it would then depend upon getting other permission to do so.

The evidence is insufficient to show that Mrs. Crawford was recognized by the board as acting caretaker. It was but that day that Crawford had notified them of his injury, and requested the appointment of another to take delivery of the coal. It also appears that on a former occasion of his illness a temporary caretaker had been appointed. Without some evidence tending to show authority to Mrs. Crawford, or recognition of her agency, the permission (if such it was) of Mrs. Crawford to plaintiff to enter the building was an unauthorized act not binding the defendants. The defence is substantial, for it may well be conceived that the caretaker would not have permitted the entering of the basement at such a late hour without precautions being taken for safety.

The reasonable conclusion is that, with knowledge that he had not the permission of the caretaker, Rogers took the chance of going into the basement at a time when the light of day had almost disappeared, under the guidance of a volunteer who unfortunately was not as cautious as he ought to have been.

With these views the judgment below ought to be affirmed and the appeal dismissed.

Appeal dismissed with costs.

Solicitors for the appellant: *McCarthy, Osler, Hoskin & Creelman.*

Solicitors for the respondent: *McMurrich, Coatsworth & Hodgins.*

THE CONSUMERS GAS COMPANY OF TORONTO (PLAINTIFF).......... APPELLANT; 1897 *Mar. 15, 16. *May 1.

AND

THE CITY OF TORONTO (DEFENDANT)..RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Assessment and taxation—Exemptions—Real property—Chattels—Fixtures—Gas pipes—Highway—Title to portion—Legislative grant of soil —11 V. c. 14 (Can.)—55 V. c. 48 (O)—"Ontario Assessment Act, 1892."

Gas pipes which are the property of a private corporation laid under the highways of a city are real estate within the meaning of the "Ontario Assessment Act of 1892" and liable to assessment as such, as they do not fall within the exemptions mentioned in the sixth section of that Act.

The enactments effected by the first and thirteenth clauses of the company's Act of incorporation (11 Vict. ch. 14), operated as a legislative grant to the company of so much of the land of the streets, squares and public places of the city as might be found necessary to be taken and held for the purposes of the company and for the convenient use of the gas works, and when the openings, where pipes may be laid are made at the places designated by the city surveyor, as provided in said charter, and they are placed there, the soil they occupy is land taken and held by the company under the provisions of the said Act of incorporation.

The proper method of assessment of the pipes so laid and fixed in the soil of the streets, squares and public places in a city ought to be separately in the respective wards of the city in which they may be actually laid, as in the case of real estate.

APPEAL from the judgment of the Court of Appeal for Ontario (1), affirming the decision of the Queen's Bench Division (2), which dismissed the plaintiff's action with costs.

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

(1) 23 Ont. App. R. 551. (2) 26 O. R. 722.

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THE CONSUMERS GAS CO. OF TORONTO *v.* THE CITY OF TORONTO.

The action was brought to test the validity of the assessment for taxes of the appellant's mains and pipes laid under the surface of the public places, roads and tramways, of the city of Toronto, and used to supply gas to consumers. The questions were raised by suit to recover $7,940, amount of taxes paid by appellants under protest upon such assessment for the year 1894.

The parties to the action agreed upon a special case which was in effect as follows:—

The appellant has the right to lay mains and pipes upon and under the streets and highways of the city of Toronto, as provided by its Act of incorporation and the Acts amending the same, and thereby to convey gas manufactured by it at its works situate in ward 2 of the said city, to the consumers upon properties fronting or abutting upon the various streets and highways of the said city, and the said company, pursuant to such powers, did lay such mains and pipes from its works, which mains and pipes were in the year 1893 of at least the value of $500,000.

During the year 1893 the Board of Assessors of the city of Toronto assessed the said company, for 1894, in the Assessment Roll, for said ward 2, as shewn in the Assessment Roll, and in the sum of $653,000, (increased by County Judge to $717,590,) set out under the column headed "Value of Buildings" was included the sum of $500,000 in respect of the said mains and pipes so laid as aforesaid, some of which are situated in each of the six wards of the city of Toronto.

The company appealed against the assessment to the Court of Revision, which confirmed the same, and the company then appealed to the proper County Judge against the decision of the Court of Revision.

On the hearing of the last mentioned appeal it was admitted by the said company that the assessment upon its building was $64,500 less than their true value,

and it consented to the assessment being increased by that sum. The County Judge was then asked to consider, and consider only, the question of whether the mains and pipes belonging to the said company and laid in the city streets, and attached to the said plant and buildings, were exempt from taxation, and after hearing the arguments for the company, and for the defendant, the County Judge decided that the said mains and pipes were assessable, and confirmed the assessment, but at the request of the said company specially showed that the mains and pipes were assessed at $500,000, and amended the Roll accordingly.

The rate of taxation for the year 1894 was fixed at sixteen mills in the dollar, and the company, on 10th July, 1894, after demand and under protest, paid $7,940, being the taxes upon the said assessment of $500,000 upon the said mains and pipes after allowing a discount of $60, on the last instalment of said taxes.

The said company invests the principal part of its means in gas works, within the meaning of subsection 2 of section 34 of the Assessment Act.

The special case so agreed upon provided that if the court should be of opinion that the assessment of the mains and pipes was illegal, then judgment should be entered for the plaintiff for $7,940, with interest and costs, or if the court should be of opinion that the assessment was in part illegal, by reason of all of the mains and pipes being assessed in ward 2 or otherwise, then it is to be referred to the County Judge to ascertain the value of the mains not assessable under such assessment, and to fix what part of said taxes should be returned to the plaintiff, based upon the reduced assessment so ascertained by him, the portion of said $7,940 so fixed to be payable to the company, with interest; costs in such case to be in the discretion

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of the County Court Judge; or in case the court should be of opinion that the assessment was legal, then the action was to be dismissed with costs.

McCarthy Q.C. and *Miller* Q.C. for the appellant. Our courts have held that rails laid on the streets are not assessable as real estate; *Toronto Street Railway Co.* v. *Fleming* (1); and gas pipes are in the same position. See also *Hay* v. *Edinburgh Water Co.* (2); *Chelsea Waterworks Co.* v. *Bowley* (3).

The assessment was only valid, in any case, as to ward 2. *Rex* v. *Brighton Gas Co.* (4).

Robinson Q.C. and *Fullerton* Q.C. for the respondent referred to *Metropolitan Railway Co.* v. *Fowler* (5).

THE CHIEF JUSTICE.—I have read the judgment of Mr. Justice Gwynne, and entirely concur in it, so far as it goes.

Apart altogether from the enactment contained in the Act incorporating the appellant company relied on by Mr. Justice Gwynne, I am, however, of opinion that the judgment of the Chancellor, except so much of it as relates to the mode of assessment, was right and ought for the reasons given by him, to be affirmed.

By section 6 of the Ontario Assessment Act of 1892, it is enacted that:

All municipal, local or direct taxes or rates shall, where no other express provision has been made in this respect, be levied equally upon the whole ratable property real and personal of the municipality, or other locality according to the assessed value of such property, and not upon one or more kinds of property in particular, or in different proportions.

Section 7 of the same Act is as follows:

(1) 35 U.C.Q.B. 264; 37 U.C.Q.B. 116.

(2) 12 Court of Sess. Cas. 2 ser. 1240; 1 Macq. H. L. 682.

(3) 17 Q. B. 358.

(4) 5 B. & C. 466.

(5) [1893] A. C. 416.

All property in this province shall be liable to taxation, subject to the following exemptions.

None of these exemptions have any bearing on the present case.

Section 9 enacts that:

All real property situate within, but owned out of the province, shall be liable to assessment in the same manner and subject to the like exemptions as other real property under the provisions of this Act.

By the interpretation clause, section 2, the following definitions are given:

Land, real property and real estate respectively shall include all buildings or other things erected upon or affixed to the land, and all machinery or other things so fixed to any building as to form in law part of the realty, and all trees or underwood growing upon the land and land covered with water, and all mines, minerals, quarries, and fossils in and under the same except mines belonging to Her Majesty.

I am of opinion that the gas pipes of the appellants laid under the streets of the city were under this Act real property belonging to them, and as such liable to assessment. I regard the case of *The Metropolitan Railway Company* v. *Fowler* (1), as conclusively showing that these pipes are not to be considered as chattels placed beneath the public streets and highways, in the exercise of a mere easement, but being affixed to the land, as actual real property within the meaning of the interpretation clause. No matter in whom the fee in the soil of the surface of the streets was vested, so much of the subsoil as is occupied by the appellant's pipes must be held to constitute part of the land, unless we are altogether to disregard the decision of the House of Lords in the case cited.

As is clearly and forcibly stated in the judgment of Lord Watson, the pipes must be considered as much land as the highway itself. I can see no difference between the case of pipes thus placed on the highway,

(1) [1893] A. C. 416.

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and pipes or mains placed or affixed under the surface of land, the property of which might be in a private owner. The Court of Appeal were no doubt embarrassed by their previous decision in the case of *Fleming* v. *The Street Railway Company* (1).

The Chancellor attempted to distinguish that case from the present, but I confess I do not think it is susceptible of distinction. I was a party to that decision, but I do not hesitate to say that I now think the rails were "things affixed to the land," and as such liable to assessment as real property, and that that case was consequently wrongly determined. I agree with Mr. Justice Gwynne that the assessment ought to have been made as in the case of real estate and land generally, in the separate wards of the city. Therefore, the mode of assessment adopted was illegal and in accordance with clause 15 of the special case it must be referred to the county judge to ascertain the amount to be returned to the appellants. And it will be for the County Judge to make such order as may seem to him proper as to the costs, not merely in the first instance, but in the Court of Appeal and in this court.

GWYNNE J.—The appellants are a gas company in the city of Toronto incorporated by Act of the provincial legislature and by that Act are authorized to lay mains and pipes upon and under the streets and highways of the city. They have been assessed for the year 1894 in the sum of $500,000 for "mains under public streets or roads" and $217,950 for buildings and plant.

The question before us is solely as to the validity of the assessment as to the mains and pipes and comes up on a special case, and the question is whether that assessment is or is not valid under the Ontario Con-

(1) 37 U. C. Q. B. 116.

solidated Assessment Act of 1892 (55 Vict. ch. 48), as coming within the terms "land" and "real property" made liable to the assessment by that Act.

The question appears to me to be determined by the appellant's Act of incorporation, 11 Vict. ch. 14. The 1st section of that Act conferred upon the company power to purchase, take and hold lands, tenements and other real property for the purposes of the said company and for the erection and construction and convenient use of the gas works of the company.

Then by section 13 the company is empowered to break up, dig and trench so much and so many of the streets, squares and public places of the city as may at any time be necessary for laying down the mains and pipes to conduct the gas from the works of the company to the consumers thereof or for taking up, renewing, altering or repairing the same when the said company shall deem it expedient, doing no unnecessary damage, etc., and making the said openings in such parts of the said streets as the City Surveyor under the direction of the Council shall permit and point out. Now, this 13th section operates, I think, clearly as a legislative grant to the company of so much of the land of the said streets and below the surface as it shall find necessary to take and hold under section 1 *for the purposes of the company* and for the convenient use of the gas works, and when the places are designated by the corporation where the mains may be laid, and they are placed there, the land occupied by such mains is land taken and held by the company for the necessary purposes of the company and the convenient use of the gas works, and is therefore liable to assessment as land under the provisions of the assessment Act relating to land and real property.

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Gwynne J.

The appellant, however, claims exemption under section 7, subsection 6 of that Act, which exempts from taxation every public road and way or public square—whether the public streets wherein the mains are laid are vested in the Crown or in the municipality of the city for the public use is of no importance, for in neither case would they in the absence of this subsection be subject to taxation by the city who is bound to maintain them for the use of the public; so that this subsection would seem to have no application except to streets, roads or squares the soil and freehold of which is vested in some private person or corporation, and which would be liable to be assessed against the owner but for the exemption contained in this subsection.

The property in question being assessable as land must be assessed in the several wards of the city and the case therefore must be referred back to the County Judge in the terms of the special case.

SEDGEWICK, KING and GIROUARD JJ. concurred in the opinion of the Chief Justice.

Appeal dismissed with costs.

Solicitors for the appellant: *Mulock, Miller, Crowther & Montgomery.*

Solicitor for the respondent: *Thomas Caswell.*

IN THE MATTER OF

1897
*Mar. 17.
*May 1.

THE CRIMINAL CODE, 1892, SECTIONS 275–276, RELATING TO BIGAMY.

SPECIAL CASE REFERRED BY THE GOVERNOR GENERAL IN COUNCIL.

Constitutional law—Criminal Code ss. 275, 276*—Bigamy—Canadian subject marrying abroad—Jurisdiction of Parliament.*

Secs. 275 and 276 of the Criminal Code, 1892, respecting the offence of bigamy, are *intra vires* of the Parliament of Canada. Strong C.J. *contra.*

SPECIAL CASE referred by the Governor General in Council to the Supreme Court of Canada for hearing and consideration.

His Excellency, in virtue of the provisions of the Supreme and Exchequer Courts Act, as amended by the Act 54 & 55 Victoria, Chapter 25, intituled "An Act respecting the Supreme and Exchequer Courts," and by and with the advice of the Queen's Privy Council for Canada, is pleased to refer, and does hereby refer, the following questions touching the constitutionality of legislation of the Parliament of Canada, to the Supreme Court of Canada for hearing and consideration, namely:—

1. Had the Parliament of Canada authority to enact sections 275 and 276 of the Criminal Code, 1892?

2. If the said sections or either of them are *ultra vires* in part only, then (a) what portions of the said sections are *ultra vires;* (b) to what extent are the said sections, or either of them, *ultra vires?*

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

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In Re CRIMINAL CODE SECTIONS RELATING TO BIGAMY.

Sections 275 and 276 of the Criminal Code, 1892, are as follows :—

"275. Bigamy is—

"(*a*.) The act of a person who, being married, goes through a form of marriage with any other person in any part of the world; or

"(*b*.) The act of a person who goes through a form of marriage in any part of the world with any person whom he or she knows to be married; or

"(*c*.) The act of a person who goes through a form of marriage with more than one person simultaneously or on the same day. R.S.C., c. 37, s. 10.

"2. A 'form of marriage' is any form either recognized as a valid form by the law of the place where it is gone through, or, though not so recognized, is such that a marriage celebrated there in that form is recognized as binding by the law of the place where the offender is tried. Every form shall, for the purpose of this section, be valid, notwithstanding any act or default of the person charged with bigamy, if it is otherwise a valid form. The fact that the parties would, if unmarried, have been incompetent to contract marriage shall be no defence upon a prosecution for bigamy.

"3. No one commits bigamy by going through a form of marriage—

"(*a*.) If he or she in good faith, and on reasonable grounds, believes his wife or her husband to be dead; or

"(*b*.) If his wife or her husband has been continually absent for seven years then last past and he or she is not proved to have known that his wife or her husband was alive at any time during those seven years; or

"(*c*.) If he or she has been divorced from the bond of the first marriage; or

"(*d.*) If the former marriage has been declared void by a court of competent jurisdiction. R.S.C., c. 161, s. 4.

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"4. No person shall be liable to be convicted of bigamy in respect of having gone through a form of marriage in a place not in Canada, unless such a person, being a British subject resident in Canada, leaves Canada with intent to go through such form of marriage.

"276. Every one who commits bigamy is guilty of an indictable offence and liable to seven years' imprisonment.

"2. Every one who commits this offence after a previous conviction for a like offence shall be liable to fourteen years' imprisonment. R.S.C., c. 161, s. 4."

These enactments had been held *intra vires* by the Chancery Division of the High Court of Justice for Ontario, in *Reg* v. *Brierly* (1), Chancellor Boyd, Ferguson and Robertson JJ. constituting the court. In that case the bigamous marriage had been contracted outside of Canada, but the facts were within the saving clause of subsection 4 of section 275. Afterwards in the case of *Reg.* v. *Plowman* (2), the question was raised in the Queen's Bench Division of the High Court of Justice of Ontario as to the validity of a conviction for bigamy where the facts were substantially the same as in *Reg.* v. *Brierly* (1). The court, consisting of Armour C. J., and Falconbridge J., held the above sections *ultra vires* in so far as they constituted the acts of the defendant, as stated, an offence, and that the case was covered by the authority of *Macleod* v. *Attorney General for New South Wales* (3).

Newcombe Q.C., Deputy Minister of Justice, for the Government of Canada. Similar legislation by the Parliament of the United Kingdom would be valid;

(1) 14 O. R. 525.

(2) 25 O. R. 656.

(3) [1891] A. C. 455.

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In re Tivnan (1); *The Queen* v. *Keyn* (2); and the Parliament of Canada has like authority by sec. 91 of the British North America Act. *Hodge* v. *The Queen* (3); *Riel* v. *The Queen* (4); *Valin* v. *Langlois* (5).

Macleod v. *Attorney General of New South Wales* (6) is distinguishable. In that case the prisoner had no domicile in New South Wales when the offence was committed. And see *Fielding* v. *Thomas* (7).

No counsel appeared to oppose the validity of the said sections.

THE CHIEF JUSTICE.—This reference comes before the court under an Order in Council bearing date the 25th day of April, 1896, and which is in the terms following:

His Excellency, in virtue of the provisions of the Supreme and Exchequer Courts Act, as amended by the Act 54 & 55 Victoria, Chapter 25, intituled "An Act respecting the Supreme and Exchequer Courts," and by and with the advice of the Queen's Privy Council for Canada, is pleased to refer, and does hereby refer, the following questions touching the constitutionality of legislation of the Parliament of Canada, to the Supreme Court of Canada for hearing and consideration, namely:—

1. Had the Parliament of Canada authority to enact section 275 and 276 of the Criminal Code, 1892?

2. If the said sections or either of them are *ultra vires* in part only, then (a) what portions of the said sections are *ultra vires*; (b) to what extent are the said sections, or either of them, *ultra vires*?

Sections 275 and 276 of the Criminal Code, 1892, are as follow:

275. Bigamy is—

(*a*.) The act of a person who, being married, goes through a form of marriage with any other person in any part of the world; or

(*b*.) The act of a person who goes through a form of marriage in any part of the world with any person whom he or she knows to be married; or

(1) 5 B. & S. 679.
(2) 2 Ex. D. 152.
(3) 9 App. Cas. 117.
(4) 10 App. Cas. 675.
(5) 3 Can S.C.R. 1.
(6) [1891] A. C. 445.
(7) [1896] A. C. 600.

(*c.*) The act of a person who goes through a form of marriage with more than one person simultaneously or on the same day. R.S.C., c. 37, s. 10.

2. A "form of marriage" is any form either recognized as a valid form by the law of the place where it is gone through, or, though not so recognized, is such that a marriage celebrated there in that form is recognized as binding by the law of the place where the offender is tried. Every form shall, for the purpose of this section, be valid, notwithstanding any act or default of the person charged with bigamy, if it is otherwise a valid form. The fact that the parties would, if unmarried, have been incompetent to contract marriage shall be no defence upon a prosecution for bigamy.

3. No one commits bigamy by going through a form of marriage—

(*a.*) If he or she in good faith, and on reasonable grounds, believes his wife or her husband to be dead; or

(*b.*) If his wife or her husband has been continually absent for seven years then last past and he or she is not proved to have known that his wife or her husband was alive at any time during those seven years; or

(*c.*) If he or she has been divorced from the bond of the first marriage; or

(*d.*) If the former marriage has been declared void by a court of competent jurisdiction. R.S.C., c. 161, s. 4.

4. No person shall be liable to be convicted of bigamy in respect of having gone through a form of marriage in a place not in Canada, unless such a person, being a British subject resident in Canada, leaves Canada with intent to go through such form of marriage.

276. Every one who commits bigamy is guilty of an indictable offence and liable to seven years' imprisonment.

2. Every one who commits this offence after a previous conviction for a like offence shall be liable to fourteen years' imprisonment. R.S.C., c. 161, s. 4.

I am of opinion that paragraphs (*a*) and (*b*) of subsection one of section 275, so far as they apply to persons who, being already married, may go through a form of marriage with any other person, and to persons who may go through a form of marriage with a person whom he or she knows to be married, elsewhere than in Canada, are *primâ facie ultra vires* of the Parliament of the Dominion. And, I am further of opinion that the limitation imposed by subsection 4

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of section 275, that in order that a person may be convicted of bigamy in respect of having gone through a form of marriage, in a place not in Canada, such person must be a British subject, resident in Canada, and must have left Canada with intent to go through such form of marriage, has not the effect of so qualifying paragraphs (*a*) and (*b*) of subsection 1, as to bring the substantive enactment contained in (*a*) and (*b*) within the powers of Parliament.

The legal construction of these provisions is clear. The offence is made to consist in a marriage anywhere without the Dominion of Canada, and although the condition is imposed that the party must have left Canada with the intent of celebrating such a pretended marriage, yet the so leaving Canada is not the offence constituted by the Code, but the criminal act is the marriage without the territorial jurisdiction of Parliament. I cannot read the provisions in question as equivalent to a declaration that it shall be a criminal offence to leave Canada with intent to go through the form of a bigamous marriage contract with the condition superadded that such a marriage shall afterwards be celebrated, thus making the essence of the offence to consist in leaving the Dominion with the criminal intent, for such leaving the Dominion is not by itself declared to be any criminal offence. The criminal offence is the marriage, coupled with the intent in leaving the country to carry such marriage into effect. To transpose or invert the plain words of the enactment so as to make the substantive and principal act the leaving the Dominion with the intent, coupled with the condition that such intent shall be subsequently effectuated, is to make that a crime which the legislature has not contemplated.

So far as anything essential to constitute the offence is required to be done out of Canada, it is in my opinion

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entirely beyond the legislative powers conferred on the Dominion by the British North America Act.

By section 91 subsection 27 of that Act, power is conferred on the Dominion to legislate on the subject of the criminal law. It is to this power exclusively that the authority of Parliament to enact the Criminal Code must be referred. It is a principle as well of constitutional as of international law, universally recognized, that the power of legislation in constituting offences and enacting punishments and penalties for such offences is *primâ facie* local, limited to the territory over which the legislature has jurisdiction, and does not extend to offences committed beyond its confines. As the Lord Chancellor says in giving the judgment of the Judicial Committee in the case of *Macleod* v. *The Attorney General of New South Wales* (1), the rule of law is expressed in the maxim: *Extra territorium jus dicenti impune non paretur.*

In *Jefferys* v. *Boosey* (2), Baron Parke, in advising the House of Lords, says:

> The legislature has no power over any persons except its own subjects, that is, persons natural born subjects, or resident, or whilst they are within the limits of the kingdom. The legislature can impose no duties except on them, and when legislating for the benefit of persons must, *primâ facie,* be considered to mean the benefit of those who owe obedience to our laws, and whose interests the legislature is under a correlative obligation to protect.

I may say here that the legislation in question in the case of *Jefferys* v. *Boosey* (2), was beneficial, and not criminal legislation.

In the case of *Macleod* v. *The Attorney General for New South Wales* (1), already referred to, the question under appeal involved the legality of a conviction of the appellant for bigamy for having married without the limits of the colony, whilst a first wife by a legal

(1) [1891] A. C. 458. (2) 4 H. L. Cas. 926.

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marriage was alive. The conviction had taken place under a Colonial Act which provides that—

Whosoever being married marries another person during the life of the former husband or wife, wheresoever such second marriage takes place, shall be liable to penal servitude for seven years.

The appeal was decided, not on the ground that the actual legislation, as it was finally interpreted, was beyond the powers of the legislature, but on the construction of the words "whosoever" and "wheresoever." It was held that inasmuch as the legislature had no power to make a bigamous marriage contracted beyond its jurisdiction an offence, that consideration made it necessary, in the opinion of the Judicial Committee, to construe the words "whosoever being married," as meaning—

Whosoever being married, and who is amenable at the time of the offence committed to the jurisdiction of the colony of New South Wales.

And to restrict the words "wheresoever" as meaning—

Wheresoever in this colony the offence is created.

The Lord Chancellor in adopting this construction reasons thus:

There is no limit of person according to one construction of "whosoever," and the word "wheresoever" is equally universal in its application. Therefore, if their Lordships construe the statute as it stands and upon the bare words, any person married to any other person, who marries a second time anywhere in the habitable globe, is amenable to the criminal jurisdiction of New South Wales, if he can be caught in that colony. That seems to their Lordships to be an impossible construction of the statute. The colony can have no such jurisdiction, and their Lordships do not desire to attribute to the Colonial Legislature an effort to enlarge their jurisdiction to such an extent as would be inconsistent with the powers committed to a colony, and indeed inconsistent with the most familiar principles of international law.

Then, it is said in the same judgment as regards the constitutional question which would have arisen if

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the construction which was adopted had not been admissible:

Their Lordships think it right to add that they are of opinion that if the wider construction had been applicable to the statute, and it was supposed that it was intended thereby to comprehend cases so wide as those insisted on at the bar, it would have been beyond the jurisdiction of the colony to enact such a law. Their jurisdiction is confined within their own territories, and the maxim which has been more than once quoted *extra territorium jus dicenti impune non paretur* would be applicable in this case. * * * * * All crime is local. The jurisdiction over the crime belongs to the country where the crime is committed, and except over her own subjects, Her Majesty and the Imperial Legislature have no power whatever.

In the case of *Shields* v. *Peak* (1), decided in 1883, the same line of reasoning was adopted as conclusive in favour of a construction of the penal clause in an insolvency Act, which, without limitation in point of locality, made it an offence punishable with fine and imprisonment for an insolvent person to obtain credit. It was held that the statute did not apply to an act committed in England to which the statute would have applied if it had had extra-territorial force. In my judgment in that case I stated the reasons which led me to a conclusion in all respects the same as that arrived at in the case in the Privy Council, and cited several authorities, including some of those now referred to, in support of my decision. Mr. Justice Henry and Mr. Justice Taschereau also arrived at the same conclusion, and for the same reasons. I adhere in all respects to what was said in *Shields* v. *Peak* (1), on the subject now under consideration.

It follows from the authorities stated that standing alone paragraphs (*b*) and (*c*) of subsection 1 of section 275 would be *ultra vires* so far as they apply to the offence of bigamy committed by all persons without any qualification or condition of British allegiance, in any part of the world.

(1) 8 Can. S. C. R. 579.

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Subsection 4 of the same section 275, however requires that in order to the constitution of the offence certain other conditions must concur. First, it is required that the accused person must, in order that he may be indicted for a marriage celebrated without the jurisdiction, have left Canada with intent "to go through such form of marriage." The bare intent by itself does not, according to the statute, constitute any offence. The crime must be a compound one, consisting in the going through the form of marriage without the jurisdiction, coupled with leaving the Dominion with that intent. Therefore, so far as this proviso goes, the objection pointed out in *Macleod* v. *The Attorney General* (1), that the legislature cannot make an act committed without the jurisdiction criminal, is just as much applicable to the present legislation as to that before the Privy Council in the case cited, as the celebration of the marriage abroad is a necessary ingredient in the crime.

There are, however, two other qualifications; the party indicted must be resident in Canada, and must also be a British subject.

First, as to residence in Canada. It is to be observed that what is required is not domicile, but mere residence within the Dominion. Residence is of course a very different thing from domicile; a subject of a foreign state may well be resident in Canada without having a domicile there; of course such a foreign resident is, so long as he is within the Dominion, as much subject to its laws as if he were a subject, but, upon well established principles of international law, one whose national character is that of a foreign subject or citizen, is not affected, as regards his acts or conduct outside the territorial jurisdiction of the country in which he may happen to be resident, by the criminal legislation of the latter state. Thus, according to the

(1) [1891] A. C. 455.

rules prevailing in the system of international law universally adopted by all civilized nations, a resident of a foreign country—by which I mean a country other than that to which he owes allegiance—cannot be criminally prosecuted for an act committed whilst absent from his residence, in another country, either in that of his own nationality or any other. Such extra-territorial legislation, though it might bind courts and judges amenable to the domestic law, would not be considered by foreign nations as having any extra-territorial force, and therefore all presumptions must be made against an intention on the part of the legislature to enact laws in contravention of this principle.

This is indeed recognized by the framers of the Code, for the fourth subsection does not make residence the only condition required to make a party amenable for the ex-territorial act, but conjoins it with another, namely, that in order to come within the enactment the party must be a British subject. This introduces a question of constitutional law common to the whole Empire, one which it was not necessary to decide in *Macleod* v. *The Attorney General* (1), and which is not directly touched upon in the observations which the Lord Chancellor added to the reasons of the Judicial Committee for its actual decision in that case.

This question may, therefore, be thus stated: Has the legislature of a dependency of the Crown of the United Kingdom the power which is undoubtedly possessed by the Parliament of the Empire, of so regulating the conduct of British subjects, resident within its local jurisdiction, as to constitute an act, committed without that local jurisdiction, a criminal offence?

The legislative authority of the Parliament of the United Kingdom to control the personal conduct of the Queen's subjects, irrespective of their locality,

(1) [1891] A. C. 455.

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depends altogether upon their allegiance, not upon their residence or domicile, and they remain subject to such legislation so long as they retain their national character as British subjects. Numerous instances of such personal legislation are to be found in the statute-book, such as the statutes of Henry the 8th and George the 4th, and that of the present reign, as regards murder committed by British subjects abroad, also the statute 43 George 3rd, ch. 11, section 6, relating to manslaughter by the same class of persons under like conditions, and enactments making piracy, slave trading and breaches of the Foreign Enlistment Acts criminal, though the offence may be committed on the high seas (even in a foreign vessel) or within the limits of a foreign territory. Such offences are, however, unless jurisdiction is specially conferred on colonial courts, indictable only in England.

As, however, the general rule already mentioned requires the presumption to be made in all cases that criminal legislation is intended to be local, it is essential to the constitution by statute, of personal, ex-territorial, criminal offences of the class mentioned, that they should even in England be made law by express enactment, as otherwise the presumption referred to will operate to restrain the statute by interpretation to the local jurisdiction. This being established as an elementary principle of the constitution by authorities so clear and indubitable that no one treating this question without prejudice can venture to deny it, we are brought to the ulterior question as to whether colonies or dependencies of the Crown, whose constitutions emanate from the Imperial Parliament, also possess this power of so legislating as to make British subjects resident within their jurisdiction criminally amenable for acts committed without their territorial limits. As the Imperial Parliament is a

sovereign legislature I do not for a moment dispute the proposition that it may confer upon a colonial legislature powers in this respect co-equal with its own, by granting it authority to enact the personal liability of all British subjects resident within its jurisdiction, or indeed of all British subjects generally, for crimes committed without the jurisdiction. The question to be dealt with here is not as to the power of Parliament in this respect, but as to whether such authority has actually been conferred.

The powers of the Canadian Parliament to legislate in matters of criminal law are, as has been said, to be found in the British North America Act. It is absurd to say that the recital in the preamble of that Act that the provinces had expressed their desire to be federally united into one Dominion under the Crown of the United Kingdom of Great Britain and Ireland, with a constitution similar in principle to that of the United Kingdom, can have any influence upon the question of legislative jurisdiction involved in the case laid before us. In the first place this is a mere recital in the preamble, not carried out in any enacting clause, and next the words "similar in principle," even if there had been such an enacting clause would have been wholly insufficient to confer upon the Dominion Legislature, called into existence by the Act, the full and absolute sovereign powers of the Imperial Parliament. This is so apparent that it requires no demonstration.

The answer to the question to be resolved must therefore depend altogether on the construction to be placed upon the language of the 91st section, subsection 27.

The criminal law, except the constitution of the courts of criminal jurisdiction, but including the procedure in criminal matters.

Was it intended by this to confer the power to legislate regarding criminal responsibility for the acts of all

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British subjects, or of all British subjects resident in Canada, though committed without the territory of the Dominion?

I am clearly of opinion that no such power was conferred.

No distinction can be made as regards this question of parliamentary jurisdiction between the Dominion and the smallest colony of the Empire whose constitution and powers of criminal legislation depend on a constitution conferred by the Parliament of the United Kingdom. Notwithstanding the great geographical extent of the Dominion, the number of its population and its importance relatively to other colonies and dependencies, powers of this kind must be interpreted in the same way for all alike. Therefore, if under this grant of power to enact criminal laws, the legislature of Canada can declare the acts of British subjects in a foreign country to be criminal and penal, any colony which possesses general powers of criminal legislation may do the same, subject only to its enactment not being repugnant to an Imperial Act of Parliament and so coming within the Act 28 & 29 Victoria, chapter 93.

That such a consequence could possibly follow a grant of the authority to legislate in criminal matters, expressed in the general and vague terms of section 91 of the British North America Act, is, in my judgment, entirely inadmissible.

It is out of the question to say that the legislature of a dependency created by an Imperial statute has sovereign powers of legislation in all personal and extra-territorial matters relating to British subjects resident within its limits irrespective of express grant. In the case of the national character of residents of alien origin it has no such power. Personal allegiance is a matter which has always been and always must be, in the absence of the statutory delegation of its powers,

dealt with by the Imperial Parliament. The acquisition of British nationality is a matter upon which the Imperial Parliament has the exclusive right of legislation, although the effect of alienage upon the local tenure of land may well be dealt with by a colonial legislature. I think it clear beyond question, therefore, that the power of legislation conferred, as regards criminal law, by section 91 is confined to local offences committed within the Dominion, and does not warrant personal jurisdiction as to matters outside it.

In interpreting an ordinary criminal law constituting a new statutory offence, upon the authorities referred to, English courts have always held that local jurisdiction was alone intended. In order that such a statute might operate upon the acts or conduct of British subjects without the Queen's dominions, an intention to create such personal liability must be actually expressed. If therefore the creation of a penal offence is by settled rules of interpretation to be restricted as regards locality, it would seem that on the same principles a grant of power to legislate on the subject of criminal law, to be exercised by a dependent legislature, should also be so construed. Indeed the argument in favour of the limitation is far stronger in the latter case than in the former, inasmuch as reasons of good policy, national safety and convenience all concur in favour of retaining all matters of legislation which may in any way tend to conflict with the rights or claims of foreign nations in the hands of the Imperial Government; and everything done within the jurisdiction of a foreign government must to some extent be a concern of that government which may give rise to international reclamations upon the Imperial Government.

The statute is no doubt less extensive in its terms than the New South Wales Act would have been if it

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had received the construction put upon it by the colonial court. I fail, however, to find anything either in that part of the judgment of the Judicial Committee which embodies the *ratio decidendi*, or in the additional observations of the Lord Chancellor, which gives any countenance to the suggestion that the law there in question would have been held *intra vires* if it had been confined to British subjects resident in the colony. On the contrary I think the following extract implies that the right of extra-territorial criminal legislation would, if the question had directly arisen under a statute identical with this, have been held to have been *ultra vires*. The Lord Chancellor says:

> All crime is local. The jurisdiction over the crime belongs to the country where the crime is committed, and except over her own subjects, Her Majesty and the Imperial Legislature have no power whatever.

In Forsyth's book on Constitutional Law (1), a case is mentioned which was submitted to the law officers of the Crown, then Sir Robert Phillimore, Sir Fitzroy Kelly and Sir Hugh Cairns, as to the power of the Indian Legislative Council to enact a law making Indian native subjects of the Crown liable to indictment and punishment for certain offences committed beyond British jurisdiction.

The two great lawyers last named considered the legislation was *ultra vires*, whilst Sir R. Phillimore was of the contrary opinion. This opinion, though not of the same weight as a judicial decision, is still, considering the high professional reputation of the great law officers who subscribed it, of considerable authority and more than counterbalances anything which may be derived from the uncertain and indeterminate opinion of Sir J. Harding, Sir Alexander

(1) P. 17.

Cockburn and Sir Richard Bethell, given by the same author (1), where they say:

We conceive that the Colonial Legislature cannot legally exercise its jurisdiction beyond its territorial limits—three miles from the shore—or at the utmost can only do this over persons domiciled in the colony who may offend against its ordinances beyond their limits but not over other persons.

Apart altogether from the hesitation to express any definite opinion as to ex-territorial Acts, the very reference to the term "domicile" in connection with the subject in question shows that this opinion was not fully considered.

"Domicile," so far as I have been able to discover, apart from local residence on the one hand and national allegiance on the other, has nothing to do with criminal law; its effects are altogether of either an international or civil character; its introduction into a question of English constitutional law seems to be confined to this opinion. Without pretending to give anything like a full definition of the consequences and legal effects of domicile, I may say that it is generally confined to questions of civil status, marriage, divorce, contract, civil wrongs, descent, testamentary power and civil jurisdiction, and I have never heard or read that it can be invoked in a question of public constitutional law.

In Hall's International Law (2), a case is referred to which is not without bearing on the present question. The author says in a note:

It may be worth while to cite an illustrative instance of improper exercise of jurisdiction. An English sailor on board an American vessel stabbed the mate. On the arrival of the vessel at Calcutta the sailor was handed over to the police for safe-keeping. The commission of the crime having been thus brought to the notice of the authorities, they put the sailor on his trial under an Indian statute giving the courts of the Empire jurisdiction over crimes committed

(1) Forsyth, p. 24.

(2) 3rd ed. at p. 202.

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by British subjects on the high seas, even though such crimes should be committed on board a foreign vessel. The Government of the United States complained of this assumption of jurisdiction to the British Government, and the latter expressed its regret that the action of the authorities at Calcutta should have been governed by a view of the law which in the opinion of Her Majesty's Government cannot be supported, as a foreign merchant vessel on the high seas is in the position for legal purposes of foreign territory. This case would appear to have depended upon the incompetency of the Indian legislature to enact the law in question.

Had the offence created by the act been confined to leaving the Dominion with intent to go through a bigamous marriage in a foreign country, in which case an act committed in a foreign state or without the jurisdiction, would not have been essential to the completion of the offence, which would in that case have been wholly local, it would in my opinion have been within the jurisdiction of the Dominion Parliament, but as I have shown above, in the legislation before us the criminal act is the marriage without the jurisdiction preceded by the act of leaving the Dominion with intent to celebrate it.

In addition to those already cited, I refer to the following authorities which appear to have more or less bearing on the questions submitted. Halleck's International Law (1); Walker's Science of International Law (2); Wharton's Digest of International Law (3); Story's Conflict of Laws (4); Wharton's Conflict of Laws (5).

My answer to the question propounded must, therefore, agreeing with the judgment of the Ontario Queen's Bench Division in the case of *The Queen* v. *Plowman* (6), be that so much of section 275 of the Criminal Code as is contained in paragraphs (*a*) and

(1) 3 ed. by Baker, vol. 1, p. 207.
(2) P. 231 *et seq.*
(3) Sec. 33 a.
(4) 8 ed. sec. 620 *et seq.*
(5) 2 ed. sec. 823 *et seq.*
(6) 25 O. R. 656.

(*b*) of subsection 1 standing by themselves is *ultra vires* and void, and that those provisions are not validated by anything contained in subsection 4 of section 275.

GWYNNE J.—The sole question which arises upon this reference is, whether or not the Dominion Parliament had jurisdiction to enact the provisions contained in sections 275 and 276 of the Criminal Code. What the sections in substance purport to enact is that, any person who being married and being a British subject resident in Canada leaves Canada with intent to go through a form of marriage in a place out of Canada shall be guilty of an indictable offence to which the Act gives the appropriate name of Bigamy, and upon conviction shall be liable to the punishment by section 276 attached to such offence. Now when we reflect that Her Majesty the Queen permitted her loyal subjects resident in the old provinces in British North America to devise a scheme for federally erecting these provinces into a wholly new creation, and to frame a constitution for such new creation to which the name of The Dominion of Canada has been given, a name theretofore unknown among the dependencies of the British Empire; and when we reflect that the constitution so framed after having been adopted by the legislatures of the provinces proposed to be so united, was in every clause thoroughly discussed and considered by and between delegates, at Her Majesty's gracious suggestion appointed by Her Majesty's Governments in the said provinces, and Her Majesty's Government in the United Kingdom; and that when so discussed and considered the terms were finally agreed upon as in the nature of a treaty before ever the constitution so agreed upon was presented by Her

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Majesty's Government to the Parliament of the United Kingdom for the purpose of legislative adoption; and when we see in the constitution so agreed upon that it is expressly declared, that such constitution is similar in principle to that of the United Kingdom, and further, that one object of the new creation, the constitution of which was so framed and agreed upon, was to promote the interests of the British Empire, and when we see that it is also therein expressly declared that our gracious Sovereign shall constitute, as she does in the Parliament of the United Kingdom, an integral component part of the Parliament of Canada, which, it is declared shall consist of The Queen, an Upper House styled a Senate and a House of Commons, I cannot fail to see the manifest intention of the framers of our constitution to have been to give to Her Majesty's subjects constituting the people of Canada, a political status infinitely superior to that of a colony—a national existence in fact as an integral portion of the British Empire—having a constitution similar in principle to that of the United Kingdom and a Parliament (of which our gracious Sovereign is a component part as she is of the Parliament of the United Kingdom) with sovereign jurisdiction over all matters placed by the constitution under their control.

Now among these matters so placed under the *sovereign* control of the Parliament we find "Criminal Law," and "Marriage and Divorce." I confess, it appears to me, that the whole of the proceedings adopted for the purpose of framing the constitution of this Dominion must be designated a sham and a farce—that the object and intent of the framers of that constitution would be completely frustrated, and the hopes of Her Majesty's loyal Canadian subjects who have regarded this new creation of the Dominion of Canada as a mode of introduction, as it were, into

the family of nations of a new born offspring of the British Empire, to be followed by a like introduction of others, and as a most important step taken towards the accomplishment of Imperial federation, will be utterly disappointed if the Parliament of this great Dominion now extending from ocean to ocean, and embracing within its limits half a continent, and having under its sovereign control all matters relating to marriage and divorce, and criminal law, especially, and to the peace, order and good government of Canada, generally, should be held not to have jurisdiction to exercise that control in the terms of sections 275 and 276 of the Criminal Code.

Bordering as Canada does upon several foreign States, in many of which the laws relating to marriage and divorce are loose, demoralizing and degrading to the marriage state, such legislation as is contained in the above sections of the Criminal Code seem to be absolutely essential to the peace, order and good government of Canada, and in particular to the maintenance within the Dominion of the purity and sanctity of the marriage state, and for my part I cannot entertain a doubt that the Parliament of Canada—that is to say, that Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada —can pass an Act as effectual to affect Her Majesty's subjects who being married and resident in Canada go through a form of marriage out of Canada, having left Canada with the intent of going through such form of marriage, fully to the same extent as an Act in like terms passed by the Parliament of the United Kingdom could affect Her Majesty's subjects resident in the United Kingdom, who being married should go through a form of marriage outside of the United Kingdom having left any part thereof for the purpose of so doing. If the courts of justice should hold other-

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wise they would, in my opinion, inflict a deadly stab upon the constitution of the Dominion.

SEDGEWICK J.—I am of opinion that the sections of the Criminal Code, 1892, referred to in the reference herein, are wholly *intra vires* of the Parliament of Canada, for the reasons stated by my brother King in his written judgment, reserving my right to consider hereafter the question whether any Act of the Parliament of Canada can be held to be *ultra vires* unless in terms repugnant to an Act of the Imperial Parliament or in conflict with the federal provisions of the Constitutional Act, that Act having expressly conferred upon this Dominion a "constitution similar in principle to that of the United Kingdom."

KING J.—The question is as to the validity of these clauses in their application to the case where the form of the alleged bigamous marriage is gone through outside of Canada. Unfortunately, the matter is before us *ex parte*.

When the law making power has drawn its lines around a defined combination of act and intent declaring a punishment therefor, it has created a specific crime. It may give the crime a name or not. Bishop, Criminal Law, sec. 776.

Sec. 275, after stating that bigamy is (*inter alia*) the act of a person who being married goes through a form of marriage with any other person in any part of the world, or the act of a person who goes through the form of a marriage in any part of the world with any person whom he or she knows to be married, declares (by subsec. 4), that "no person shall be liable to be convicted of bigamy in respect of having gone through a form of marriage in a place not in Canada unless such person being a British subject resident in Canada

leaves Canada with intent to go through such form of marriage."

Sec. 276 imposes the punishment.

What is made punishable here, in the case of a form of marriage gone through abroad, is the combination of act and intent involved in having the intent in Canada to do a certain act outside of Canada, and leaving Canada for the purpose of carrying out such intent, and then actually carrying it out. The whole is a compound act, no part of which is an offence without the rest, and each part is an essential ingredient of it.

I assume as axiomatic that it would be valid to enjoin a British subject resident in Canada from leaving the country without a license, or with any particular intent, and to make the doing so an indictable offence. If it be said that this is the same question under another form, as the act of leaving a place is not complete until it is actually left, the answer is that, if so, it shews that the completion of an act outside of Canada does not prevent legislative jurisdiction in reference to the entire act, because it seems really beyond controversy that such an obligation might validly be imposed. But, as the leaving a place happens *eo instanti*, on the passing beyond the dividing line, the act may probably be regarded as an act done in the country which is left.

Then, does it differ in principle if the act of leaving the country with the particular intent is made an offence only if the intent is afterwards carried out, or (which, in a question of things and not of words, is substantially the same) if the combination of fact and intent involved in the whole is regarded, and if what is made the offence is the leaving this country with an intent to do something, and the doing of it afterwards?

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If any reasonable construction can be placed upon an act to avoid invalidity, it is proper to do so.

In Bishop on Criminal Law it is said (sec. 116), that:

> If a material part of any crime is committed upon our soil, though it is the lighter part, legislation with us may properly provide for the punishment of the whole of it here.

In *Macleod* v. *Attorney General of New South Wales* (1), the alleged offence was one that was wholly committed in the foreign country. Further, the enactment in question there was one which, upon the construction unsuccessfully contended for, would have extended as well to the case of foreigners, and to British subjects who were not in the colony at any time before the passing of the Act or commission of the offence, and who in no view could be regarded as amenable to colonial jurisdiction. This was held to be beyond the power of the colonial legislature, and the language of the Act was held to be used

> subject to the well known and well considered limitation that the legislature were only legislating for those who were actually within their jurisdiction, and within the limits of the colony.

But it must be recognized that their Lordships did not merely treat it as a matter of construction:

> Their Lordships think it right to add that they are of opinion that if the wider construction had been applied to the statute, and it was supposed that it was intended thereby to comprehend cases so wide as those insisted on at the bar, it would have been beyond the jurisdiction of the colony to enact such a law. Their jurisdiction is confined within their own territories.

The report of the argument does not show what cases were insisted on at the bar as being comprehended by the Act. The following passage, however, from the judgment shows that, in order to sustain the indictment, a power to impose extra territorial obligations on persons not British subjects, or in any way amenable to colonial jurisdiction, was required.

(1) [1891] A. C. 455.

It appears to their Lordships that the effect of giving the wider interpretation to this statute *necessary to sustain this indictment* would be to comprehend a great deal more than Her Majesty's subjects, more than any person who may be within the jurisdiction of the colony by any means whatsoever.

Mr. Newcombe draws attention to the fact, appearing from the report of the case below, that the person there charged was at the time of the commission of the alleged offence (and probably at the time of the passing of the Colonial Act) a person not domiciled in the colony at all.

As to the propositions that crime is local, and that the jurisdiction over the crime belongs to the country where the crime is committed, these are not intended to be absolute and exclusive, as every state admittedly has a right to impose duties upon its own subjects in a foreign country, a right often exercised by the Imperial Parliament. And further, in the case before us, the crime is not wholly committed in the foreign country, as an act requisite to constitute it must be done in this country. Besides, the act forbidden may or may not be an offence in the other country.

It does not seem reasonable that a British subject who should change his domicile to different colonies should continue to be followed by the criminal law of each colony in which he was successively domiciled; but on the other hand it seems reasonable and in accordance with considerations of public convenience, and not, as it seems to me, covered by authority to the contrary, that, where a material part of a prohibited act is committed in this country, a British subject domiciled here, and only temporarily absent, might well continue to owe to Her Majesty in relation to her government of Canada an obligation to refrain from the completion of the prohibited conduct whilst absent without any *animus manendi.*

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To the extent that the Act covers such cases, I am inclined to think it valid.

GIROUARD J.—I am of opinion that the Parliament of Canada had authority to enact articles 275 and 276 of the Criminal Code, for the reasons given by Chancellor Boyd in *Reg.* v. *Brierly* (1). Dealing with similar enactments, which had been in force in Canada since 1841, (4 & 5 Vict. c. 27, s. 22; Ca. Cons. Stat. ch. 91, ss. 29, 30; 32 & 33 Vict. ch. 20, s. 58; R. S. C. ch. 161, s. 4), the learned judge held that the Canadian Parliament, when acting within the limits prescribed by the Constitutional Act, has and was intended to have plenary powers of legislation, as ample as those of the Imperial Parliament. Among the numerous authorities quoted in his exhaustive judgment, is a decision rendered by two eminent judges of the province of Quebec, Rolland and Aylwin JJ., in *Reg.* v. *McQuiggan* (2). Justices Ferguson and Robertson agreed with him, the former also embodying his views in an elaborate opinion. Since these decisions have been rendered, a different conclusion was arrived at in *Reg.* v. *Plowman* (3). Chief Justice Armour said:

> The Imperial Parliament could enact that it should be a crime for a British subject to go through a form or ceremony of marriage abroad, but it has not done so. The Dominion Parliament, being a subordinate legislature, has no such power; and that is the effect of the case of *Macleod* v. *Attorney General for New South Wales* (4), which covers this case. The second marriage is the offence, and the Dominion Parliament has no power to legislate about such an offence committed in a foreign country.

Falconbridge J. concurred.

It seems to me that *Macleod* v. *Attorney General for New South Wales* (4), is distinguishable from the one

(1) [1887] 14 O. R. 525.
(2) [1852] 2 L. C. R. 340.
(3) [1894] 25 O. R. 656.
(4) [1891] A. C. 455.

contemplated in the Canadian Code. Article 275 of the Code, par 4, says:

No person shall be liable to be convicted of bigamy in respect of having gone through a form of marriage in a place not in Canada, unless such a person, being a British subject resident in Canada, leaves Canada with intent to go through such form of marriage.

So far as I can gather from the quotation of the New South Wales statute made by the judicial committee, that statute does not contain any such qualification. Section 54 enacts that:

Whosoever being married, marries another person during the life of the former husband or wife, *wheresoever* such second marriage takes place, shall be liable to penal servitude for seven years.

Their Lordships remarked that:

If they construe that statute as it stands, and upon the bare words, any person married to any other person, who marries a second time anywhere in the habitable globe, is amenable to the criminal jurisdiction of New South Wales, if he can be caught in that colony. That seems to their Lordships to be an impossible construction of the statute; the colony can have no such jurisdiction.

The decision of the judicial committee appears to have turned upon the construction of the words "whosoever" and "wheresoever." *Wheresoever* said their Lordships, "therefore may be read, wheresoever *in this colony* the offence is committed."

The concluding remarks of the judgment rather support the constitutionality of colonial legislation like the Canadian Code. Quoting Lord Wensleydale in *Jefferys* v. *Boosey* (1), they remark:

The legislature has no power over any persons except its own subjects, that is, persons natural-born subjects or residents, or whilst they are within the limits of the kingdom. The legislature can impose no duties except on them, and when legislating for the benefit of persons, must, *primâ facie*, be considered to mean the benefit of those who owe obedience to our laws, and whose interests the legislature is under a correlative obligation to protect. All crime is local. The jurisdiction over the crime belongs to the country where the crime is committed, and, except over her own subjects, Her Majesty and the Imperial Legislature have no power whatever.

(1) 4 H. L. Cas. 926.

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Chief Justice Armour observes that the Imperial Parliament has not yet enacted such a law as the one under consideration. It seems to me that a still more comprehensive statute has been passed by the British Parliament, in the early part of the present century. Section 22 of 9 Geo. IV, ch. 31, re-enacted in 24 & 25 Vict. ch. 100, s. 57, after declaring bigamy to be a felony "whether the second marriage shall have taken place in England or *elsewhere*," declares:

Provided always that nothing herein contained shall extend to any second marriage, contracted out of England by any other than a subject of His Majesty.

The Canadian statute applies only to a British subject resident in Canada and leaving Canada *with intent to go through such form of marriage.*

The assumption by a state of legislative jurisdiction over certain crimes committed abroad by its subjects, is fully recognized in international law. Wheaton, International Law, sect. 113, says:

By the common law of England, which has been adopted in this respect in the United States, criminal offences are considered as altogether local, and are justifiable only by the courts of that country where the offence is committed. But this principle is peculiar to the jurisprudence of Great Britain and the United States; and even in these two countries it has been frequently disregarded by the positive legislation of each, in the enactment of statutes, under which offences committed by a subject or citizen, within the territorial limits of a foreign state, have been made punishable in the courts of that country to which the party owes allegiance, and whose laws he is bound to obey. There is some contrariety in the opinions of different public jurists on this question, but the preponderance of their authority is greatly in favour of the jurisdiction of the courts of the offender's country, in such a case, wherever such jurisdiction is expressly conferred upon those courts by the local laws of that country. This doctrine is also fully confirmed by the international usage and constant legislation of the different states of the European continent, by which crimes in general, or certain specified offences against the municipal code, committed by a citizen subject in a foreign country, are made punishable in the courts of his own.

See also Bowyer's Universal Public Law, pp. 180-182; W. B. Lawrence in La Revue de Droit International, vol. 2, p. 256.

This extra-territorial jurisdiction has been asserted by the British Parliament not only in cases of bigamy, but also as to several other crimes which are recapitulated in Endlich on the Interpretation of Statutes, p. 234, n. c. ed. 1888, and has been recognized by high judicial authority. The recent case of *The Queen* v. *Jameson* (1), is a remarkable one. By s. 11 of the Foreign Enlistment Act, 1870,

if any person within the limits of Her Majesty's dominions, and without the license of Her Majesty, prepares or fits out any naval or military expedition to proceed against the dominions of any friendly State, the following consequences shall ensue: (1). Every person engaged in such preparation or fitting out, or assisting therein, or employed in any capacity in such expedition, shall be guilty of an offence.

Held, that if there be an unlawful preparation of an expedition by some person within Her Majesty's dominions, any British subject who assists in such preparation will be guilty of an offence even though he renders the assistance from a place outside Her Majesty's dominions.

Lord Chief Justice Russell of Killoween, said :

It may be said generally that the area within which a statute is to operate, and the persons against whom it is to operate, are to be gathered from the language and purview of the particular statute. But there may be suggested some general rules ; for instance, if there be nothing which points to a contrary intention the statute will be taken to apply only to the United Kingdom. But whether it be confined to its operation to the United Kingdom, or whether, as is the case here, it be applied to the whole of the Queen's dominions, it will be taken to apply to all the persons in the United Kingdom or in the Queen's dominions, as the case may be, including foreigners who during their residence there owe temporary allegiance to Her Majesty. And, according to its context, it may be taken to apply to the Queen's subjects everywhere, whether within the Queen's dominions or without. One other general canon of construction is this—that if any construction otherwise be possible, an Act will not be construed as applying to foreigners in respect to acts done by them outside the

(1) [1896] 2 Q. B. 425.

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dominions of the sovereign power enacting. That is a rule based on international law by which one sovereign power is bound to respect the subjects and the rights of all other sovereign powers outside of its own territory. Now apply those considerations to the present case. Sect. 2 provides that "This Act shall extend to all the dominions of Her Majesty." Therefore the preparations mentioned in s. 11 under which this indictment is framed, are preparations made either by subjects of the Queen or by foreigners in any part of the Queen's dominions. And it also seems clear that the provisions of that section were intended to apply to subjects of the Queen wherever they might be, for we must consider the mischief that was aimed at by the Act. I think the objections raised to the ninth and subsequent counts were based on a construction of the statute, both as to the area of its operation and as to the class of persons to whom it is applied, with which I cannot agree. It is no doubt clear that in order to bring a case within s. 11 there must have been a preparation in the Queen's dominions; but I think that, when you have got that fact established, there may be an assistance in such preparation, or an employment of the kind mentioned in the section, outside the Queen's dominions, which will amount to an offence against the Act, if the person rendering such assistance or accepting such employment be a subject of Her Majesty.

Pollock B. and Hawkins J. concurred.

It is contended that this power has been conceded to independent states only; in fact Chief Justice Armour admits that "the Imperial Parliament could enact that it be a crime for a British subject to go through a form or ceremony of marriage abroad;" but the learned judge adds that "the Dominion Parliament, being a subordinate legislature, has no such power." *Subordinate*, in the sense that it is subject to the special laws of the British Parliament, but *omnipotent*, so long as its legislation is not repugnant to that of the Empire. That is the only limit and it is hardly necessary to remark that, in the present case, the Canadian law is not repugnant to the statutes of the Empire; quite the reverse. A nation has undoubtedly the right to govern itself by one or more legislatures, and when acting within the constitutional limitations, it cannot be said that one is subordinate to the other.

All are necessary to secure peace, order and good government throughout the whole Empire. If the Imperial Parliament be silent, the colonial legislatures may pass such laws as the good government of that part of the Empire may require, and those laws are just as binding, at least upon British courts, as any statute of the British Parliament. It is not, therefore, surprising that all those laws are enacted in the name of Her Majesty and of the people immediately interested, and as represented in their respective parliaments.

The internal sovereignty of self-governing British colonies has often been recognized by most eminent Crown law officers and judges of the British courts, both in this country and in England. These opinions and decisions will be found collected in *Reg.* v. *Brierly* (1), and to these the following may be added: Opinions of Sir J. Harding, Queen's Advocate, Sir A. E. Cockburn, Attorney General, and Sir R. Bethel, Solicitor General, Forsyth Const. Cases, 24; Todd, Parliamentary Government in British Colonies, 159; Baron Parke in *Kielley* v. *Carson* (2); *Hodge* v. *The Queen* (3); Ritchie C. J. in *Valin* v. *Langlois* (4).

The opinion of the Secretary of State for the Colonies of the 17th December, 1869, respecting the validity of "an Act respecting perjury," passed by the Parliament of Canada, may be quoted as adverse to the extra-territorial jurisdiction of the Canadian Parliament in any case. But that Act, as well as the Canadian statute passed in 1861 to give jurisdiction to Canadian magistrates in respect of certain offences committed in New Brunswick by persons afterwards escaping to Canada, contain the same defect as the New South Wales statute. They purport to punish "every

(1) 14 O. R. 525.
(2) 4 Moo. P. C. 84.
(3) 9 App. Cas. 132.
(4) 3 Can. S. C. R. 16.

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person" committing the alleged offence or offences' whether a British subject residing in Canada or not.

The semi-sovereign position of the British self-governing colonies has been recognized even by authorities on international law. Eschbach, Int. à l'Etude du Droit, ed. 1856, p. 65, says:

> Un Etat n'est plus que mi-souverain, quand un autre a acquis contractuellement le droit de s'immiscer dans l'exercice de son gouvernement où de le déterminer dans une partie de ses actes intérieurs ou extérieurs. Pareille restriction affecte surtout la souveraineté extérieure, et le degré s'en détermine par les clauses du traité qui a créé cette semi-dépendance. Un Etat, quoique mi-souverain, n'en est pas moins un Etat; il continue à pouvoir invoquer directement les principes du droit international, et conserve le droit de traiter, comme puissance indépendante avec les autres Etats, sur tous les points autres que ceux sur lesquels il est tenu à subordination.

Professor Bluntschli, Droit Int. ed. 1896, p. 97, says:

> Les colonies quoique dépendant politiquement de la métropole, peuvent cependant avoir un certain degré d'indépendance et faire certains actes rentrant dans le domaine du droit international. Le grand éloignement des colonies d'outre-mer rend souvent désirable, dans l'intérêt même de celles-ci, qu'elles aient un gouvernement spécial et jouissent d'une représentation distincte. Quoique à l'origine, la mère-patrie soit seule le siège de la souveraineté, le développement de la colonie exige une plus grande liberté de mouvements. C'est par ce moyen que les colonies arrivent à avoir une vie propre et a s'ériger même en Etats souverains. L'histoire de l'Amérique est très instructive sous ce rapport. Comme exemple de bonne politique coloniale, nous pouvons citer la conduite actuelle de l'Angleterre depuis les réformes de Lord Durham (1836) au Canada et en Australie.

The policy and conduct of the British authorities upon the Canadian legislation since the passing of the Confederation Act in different matters of international concern, and among others, extradition of criminals, Chinese emigration, trade tariff, reciprocity with the United States, and trade arrangements with foreign nations, patents and copyright, banking and currency, navigation and coasting trade, shipwrecks, seacoast fisheries, admiralty, the confirmation of the treaty

of Washington by the Parliament of Canada, etc., demonstrate that Canada, in the eyes of British public law and international law, is no longer to be considered as a mere colonial possession or dependency, but as a component part of the British Empire. They mean that Canada is no longer submitted to the mere dictum of Downing Street, but only to the restrictions of the British Parliament. This clearly results from the language of the British North America Act. The preamble of the Act declares that the provinces now forming the Confederation of Canada

desire to be federally united into one *Dominion*, under the Crown of the United Kingdom of Great Britain and Ireland, with a constitution similar in principle to that of the United Kingdom.

Section 3 enacts that the provinces "shall form and be one Dominion under the name of Canada."

Section 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 as 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 the word "Dominion" means something more than the word "colony," is made apparent by "the Colonial Habeas Corpus Act, 1862," where the Imperial Parliament uses the two expressions "colony" and "foreign dominion of the Crown."

Section 132 of the British North America Act also says:

The Parliament and Government of Canada shall have all powers necessary or proper for performing the obligations of Canada, or of any province thereof, as part of the British Empire, towards foreign countries, arising under the treaties between the Empire and such foreign countries.

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By the Confederation Act Amendment Act, 1871, the Parliament of Canada may establish new provinces and provide for their constitution, and even alter the limits of provinces already established, with their consent.

By the Amendment Act of 1875, the Parliament of Canada may confer upon the Senate and House of Commons of Canada "the privileges, immunities and powers" of the British House of Commons.

And finally, by "An Act to remove doubts as to the validity of Colonial Laws," (28 & 29 Vict. ch. 63) the Imperial Parliament enacts, sec. 2:

Any colonial law, which is or shall be repugnant to the provisions of any Act of Parliament extending to the colony to which such law may relate, or repugnant to any order or regulation made under authority of such Act of Parliament, or having in the colony the force or effect of such Act, shall be read subject to such Act, order or regulation, and shall to the extent of such repugnancy, *but not otherwise*, be and remain absolutely void and inoperative.

Section 3:

No colonial law shall be, or be deemed to have been, void or inoperative on the ground of repugnancy to the law of England, unless the same shall be repugnant to the provisions of some such Act of Parliament, order, or regulation, as aforesaid.

ALBERT BROUGHTON (PLAINTIFF) ... APPELLANT;

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*Mar. 10, 11.
*May 1.

AND

THE TOWNSHIP OF GREY AND THE TOWNSHIP OF ELMA (DEFENDANTS) ... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Municipal law—Drainage—Assessment—Inter-municipal obligations as to initiation and contributions—By-law—Ontario Drainage Act of 1873 —36 *V. c.* 38 *(O.)*—36 *V. c.* 39 *(O.)*—*R. S. O.* (1887) *c.* 184— *Ontario Consolidated Municipal Act of* 1892—55 *V. c.* 42 *(O.)*

The provision of the Ontario Municipal Act (55 V. c. 42, s. 590) that if a drain constructed in one municipality is used as an outlet or will provide an outlet for the water of lands of another the lands in the latter so benefited may be assessed for their proportion of the cost applies only to drains properly so called, and does not include original watercourses which have been deepened or enlarged.

If a municipality constructing such a drain has passed a by-law purporting to assess lands in an adjoining municipality for contribution to the cost a person whose lands might appear to be affected thereby, or by any by-law of the adjoining municipality proposing to levy contributions toward the cost of such works, would be entitled to have such other municipality restrained from passing a contributory by-law, or taking any steps towards that end, by an action brought before the passing of such contributory by-law.

APPEAL from the decision of the Court of Appeal for Ontario (1) which affirmed the judgment of the Common Pleas Division of the High Court of Justice (2), maintaining the judgment of the trial court which had dismissed the plaintiff's action without costs.

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

(1) 23 Ont. App. R. 601. (2) 26 O. R. 694.

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BROUGHTON v. THE TOWNSHIP OF GREY AND THE TOWNSHIP OF ELMA.

The appellant is owner of certain lands in the township of Elma, included amongst lands in that township sought to be affected by a by-law of the corporation of the township of Grey under the provisions of the Ontario Consolidated Municipal Act, 55 Vict. ch. 42, sec. 585, by which taxes were charged and assessed upon these lands to raise funds for the construction and future maintenance of drainage works to be made by the said township of Grey. He brought this action for the purpose of having the said by-law of the township of Grey set aside as null and of no effect so far as his lands were concerned, and further to restrain the corporation of the township of Elma from passing a proposed by-law to raise funds to be levied by rating said lands to meet the proportion of contribution towards said drainage works charged thereon by the report of the engineer on which the by-law of the corporation of Grey had been passed.

Mabee for the appellant.

Garrow Q.C. for the respondent, Township of Grey.

McPherson for the respondent, Township of Elma.

The judgment of the court was delivered by:

GWYNNE J.—Before adverting to the nature of the scheme of drainage work proposed to be executed by the municipality of the township of Grey, so as to affect lands in the township of Elma, in which township the land of the plaintiff is situate, it will be convenient to draw attention to the *status quo ante*, and to the acts of the legislature of Ontario, tracing them from their source, in virtue of which the municipality of the township of Grey claims to be invested with power to assess lands in the township of Elma for the purpose of compelling such lands to contribute to the cost of the construction and maintenance of a work

necessary for the better draining of lands in the township of Grey and proposed to be constructed wholly within that township, the nearest point of which proposed work to the township of Elma is about four miles from the boundary line between the two townships.

In or about the year 1873 a small drain was constructed in the township of Grey under the provisions of secs. 3 and 4 of the Ontario Drainage Act of 1873—36 Vict. ch. 38. By the provisions of that Act, the drain so constructed having been a local one, constructed wholly within the limits of the township of Grey, it became the duty of the municipality of that township to maintain the drain and to keep it in repair when completed, either at the sole expense of the municipality or of the parties more immediately interested, or at the joint expense of such parties and of the municipality.

By an Act passed in the same session of the Ontario legislature, viz.: 36 Vict. ch. 39, s. 2—it was enacted that—

In case the majority in number of the owners as shown by the last revised assessment roll to be resident *on the property to be benefited in any part of the municipality*, do petition the council for the deepening of any stream, creek or watercourse, or for draining of the property (describing it), the council may procure an examination to be made by an engineer or provincial land surveyor of the stream, creek or watercourse proposed to be deepened, or of the locality proposed to be drained, and may procure plans and estimates to be made of the work by such engineer or provincial land surveyor, and an assessment to be made by such engineer or surveyor *of the real property to be benefited* by such deepening or draining, stating as nearly as may be in the opinion of such engineer or provincial land surveyor, *the proportion of benefit* to be derived by such deepening or drainage by every road and lot and portion of lot, and if the council be of opinion that the deepening of such stream, creek or watercourse, or the draining of the locality described or a portion thereof, would be desirable the council may pass by-laws in form or to the effect set forth in the schedule for (among other things) *determining what real property will*

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be benefited by the deepening or draining and the proportion in which the assessment should be made on the various portions of lands *so benefited*,

subject to appeal as provided in the sections.

Then by sec. 7 it was enacted that :

When the deepening and drainage do not extend beyond the limits of the municipality in which they are commenced, but in the opinion of the engineer or surveyor aforesaid *benefit lands in an adjoining municipality* or greatly improve any road lying within any municipality, or between two or more municipalities, then the engineer or surveyor aforesaid *shall charge the lands to be so benefited* and the corporations, corporation or company whose road or roads are improved with such proportion of the costs of the works as he may deem just, and the amounts so charged for roads as agreed upon by the arbitrators, shall be paid out of the general funds of such municipality or company.

By sec. 10 it was enacted that:

The council of the municipality in which the drainage was to be commenced shall serve the head of the council of the municipality *whose lands or roads are to be benefited* without the drainage being continued therein, with a copy of the report, &c., &c., of the engineer so far as they affected such last mentioned municipality, and unless the same is appealed from as hereinafter provided, shall be binding *upon the council of such municipality.*

Sec. 11 enacted that

the council of such last mentioned municipality shall within four months from the delivery to the head of the corporation of the report of the engineer or surveyor as provided in the next preceding section, pass a by-law in the same manner as if a majority of the owners resident on the lands to be taxed, had petitioned, as provided in the first section of this Act, to raise such sum as may be named in the report, or in case of an appeal, for such sum as may be determined by the arbitrators.

Secs. 12 to 15 inclusive provided for the appeal to the arbitrators, and it was enacted by sec. 16 that

in case of difference between the arbitrators the decision of any two of them shall be conclusive.

Then it was enacted by sec. 18 that

should a drain already constructed, or hereafter constructed by a municipality be used as an outlet or otherwise by another muni-

cipality, company or individual, such municipality, company or individual using the same, as an outlet or otherwise, may be assessed for the construction and maintenance thereof in such proportion as shall be ascertained by the engineer, surveyor or arbitrators under the formalities provided in the preceding sections.

All of the above provisions are re-enacted in ch. 184 of R. S. O. 1887, by which all the previous Acts on the subject are repealed. In this ch. 184, the section in which the provisions of sec. 18 of 36 Vict. ch. 39 are re-enacted, is numbered 590, and is as follows :

If a *drain already constructed, or* hereafter constructed *by a municipality is used as an outlet by another municipality*, company or individual, or if any municipality, company or individual, by any means, causes waters to flow upon and injure the lands of another municipality, company or individual, *the municipality*, company or individual *using such drain as an outlet or otherwise* or causing waters to flow upon and injure such lands, *may be assessed* in such proportion and amount as may be ascertained by the engineer, surveyor or arbitrators under the formalities *(except the petition)* provided in the foregoing sections for the *construction* and *maintenance of the drain so used as an outlet as aforesaid, or* for the construction or maintenance of such drain or drains as may be necessary for conveying from such lands the waters so caused to flow upon and injure the same.

Some amendments were made to this section by 52 Vict. ch. 36 sec. 37 (1889) and 53 Vict. ch. 50 sec. 37, (1890), but they are unimportant as regards the present case.

Now in 1891 it was decided by the Court of Appeal for Ontario in the case of the *Township of Orford* v. *Howard* (1), upon the construction of this sec. 590 of R. S. O. of 1887, that a drain to be regarded within the meaning of that section, as an outlet for the waters flowing from a township situated higher up than that in which *the drain has been constructed* must be *a drain artificially* constructed within the limits of the lower township *and must be used* by the upper township as an outlet for carrying off the waters reaching the drain

(1) 18 Ont. App. R. 496.

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from the upper township, and that a municipality from which surface water flows whether by drain or by natural outlets into a natural watercourse cannot be called on to contribute to the expense of a drainage scheme merely because the natural course is used as a connecting link between drains constructed under that scheme and because the drainage scheme is in part necessitated by the large amount of surface water brought into the natural watercourse in question. In that judgment and in the reasons given by the learned judges who pronounced it, I entirely concur. It proceeds much upon the same principle as it appears to me as did the judgment of this court upon one of the points decided in *Chatham* v. *Dover* (1). In that case the Municipal Council of the Township of Chatham upon a report of their engineer adopted by the council passed a by-law for the construction of a drain within the limits of the township of Chatham into a stream called Bear Creek for the drainage of certain lands in Chatham. This stream called Bear Creek flowed through the townships of Chatham and Dover and by it all waters brought into it by drains constructed both in Chatham and Dover flowed down the natural stream into Lake St. Clair. In the engineer's report which was adopted by the by-law it was declared that for the purpose of making the drain proposed to be constructed effectual it would be necessary to deepen the stream, into which the waters coming down the drain would flow, not only in the township of Chatham but also in the township of Dover, and the by-law therefore to compel the lands in the latter township to contribute to the expense of the works assessed the lands in Dover *as for outlet*. The council of Dover appealed against this by-law, insisting, among other things, that the lands in Dover were not liable to con-

(1) 12 Can. S. C. R. 362.

tribute to the cost of such a work. The case came before us on appeal from an award of the arbitrators. In the case before the arbitrators the engineer who devised the scheme which the by-law adopted gave evidence among other things—*that the lands in Dover could use the creek without the drain, and that he had assessed the lands in Dover not because they would derive any possible benefit, but because they used and would use the natural stream* which he called *the outlet.* This court was, however, of opinion that the use by lands in Dover of the natural stream for the purpose of carrying off water brought into it by drains in Dover did not subject those lands to any obligation to contribute to the cost of the work proposed to be done under the Chatham by-law.

In the year 1892 the legislature by the Consolidated Municipal Act of that year, 55 Vict. ch. 42, altered the language of the sec. 590 of ch. 184 of R. S. O. 1887 in some respects. That section in the Act of 1892 reads as follows:—

590. If a drain already constructed, hereafter constructed, or proposed to be constructed, by a municipality, is used as an outlet, or will provide when constructed an outlet for the water of the lands of another municipality, or of a company or individual, or if from the lands of any municipality, company or individual, water is by any means causd to flow upon and injure the lands of another municipality, company or individual, then the lands that use or will use such drain when constructed as an outlet either immediately or by means of another drain from which water is caused to flow upon and injure lands, may be assessed in such proportion and amount as may be ascertained by the engineer or surveyor, Court of Revision, county judge or referee, under the formalities, except the petition, provided in the foregoing sections, for the construction and maintenance of the drain so used or to be used as an outlet as aforesaid,

or for the construction and maintenance of such drain or drains as may be necessary for conveying from such lands the waters so caused to flow upon and injure the same. In

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The Township of Harwich v. *Raleigh* (1), where a question arose identical with that which had arisen in *Orford* v. *Howard* (2), the Court of Appeal for Ontario were divided in opinion upon the question whether the section 590 of the Consolidated Municipal Act of 1892, so differed in its language from sec. 590 of ch. 184 of R. S. O. 1887 under which *Orford* v. *Howard* (2), was decided as to necessitate in *Harwich* v. *Raleigh* (1), a different judgment from that which was pronounced in *Orford* v. *Howard* (2).

The Chief Justice and Mr. Justice Burton were of opinion in the affirmative, Mr. Justice Osler and Mr. Justice Maclennan in the negative, these two learned judges being of opinion that sec. 590 of the Act of 1892, equally as that section in the Act of 1887, applies, upon the question of outlet, only to drains properly so called, and does not extend to nor include original watercourses which have been deepened or enlarged. In this opinion, and in the reasons given in support of it, I certainly concur. Indeed, the contrary opinion appears to me to be wholly inconsistent with the principle upon which the whole of the legislation upon the subject is founded. The language of all of the Acts is very express, and in my opinion very clear, that it is only where *a drain constructed by one municipality* within its own limits *is used* by lands in another municipality for the purpose of carrying off water from the lands in such other municipality that the term *outlet* is used. It is only in such a case that the lands in the latter municipality are subjected to the obligation of contributing to the cost of *the construction of a drain* in another municipality. *A natural stream* running through a municipality in which *a drain is constructed* by the municipality, and into which the waters brought down by the drain are

(1) 21 Ont. App. R. 677. (2) 18 Ont. App. R. 496.

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discharged for the purpose of being carried off thereby, *is no part of the drain constructed* by the municipality; and lands in another municipality situate higher up on the same stream into which the lands in such municipality are also drained by drains discharging their waters into the same stream within the limits of the upper municipality, can in no sense be said to use *a drain constructed* by the lower municipality within its own limits, and which discharges its waters into the same stream, and therefore such lands are not by any of the Acts subjected to the obligation of contributing to the cost of *the construction of a drain* in the lower municipality from which, as *not using it* they do not, and cannot, *derive any benefit.*

There does not appear in any of the Acts a scintilla of intent on the part of the legislature to legislate in such a manner as to enable one municipality by a by-law passed by its council to impose upon lands situate in another municipality an obligation to contribute to the cost of the construction and maintenance of a drain constructed within the limits of the former municipality for the drainage of lands situate therein, which work, in point of fact, contributed no benefit whatever upon the lands in the other municipality. The whole scheme of the legislation upon the subject is that they who derive benefit from such a work, and they only, shall bear the burden of its construction and maintenance. *Qui sentit commodum sentire debet et onus* is the principle upon which all legislation on the subject is expressly founded. The learned counsel for the respondents rested their defence to the present appeal wholly upon the above sec. 590, and upon sec. 585 of the Act of 1892. This latter section enacts as follows:

In any case wherein the better to maintain any drain constructed under the provisions of this Act, or of the Ontario Drainage Act and the amendments thereto, or of the Ontario Drainage Act of 1873, or of

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any other Act respecting drainage works and local assessment therefor, or of the municipal drainage aid Act, or to prevent damage to adjacent lands, it shall be deemed expedient to change the course of such drain or make a new outlet, or otherwise improve, extend or alter the drain, or to cover any portion of the said drain where it passes through a ridge of land, the council of the municipality or of any of the municipalities *whose duty it is to preserve and maintain the said drain*, may, on the report of an engineer or surveyor appointed by them to examine and report on such drain, undertake and complete the alterations and improvements or extension specified in the report under the provisions of sec. 569 to 582 inclusive, without the petition required by sec. 569, and the engineer, or surveyor, Court of Revision, county judge, or referee, (as the case may be) shall for such alterations, improvements or extension, have all the powers to assess and charge lands and roads conferred by said sections, and section 590.

Now in connection with this section all that we have to do with is the drain constructed under the Drainage Act of 1873 within the limits of the township of Grey, and which had been constructed wholly at the expense of the municipality of Grey and the landowners therein who were alone benefited by the work.

Now by the by-law of the township of Grey set out in the plaintiff's statement of claim, we see that this drain "commenced on the road allowance between the 17th and 18th concessions at about the line between lots 28 and 29, and was constructed from that point along the road westerly to Beauchamp Creek," where it terminated, having there its outlet into the creek by which the waters coming down the drain into the creek were carried to the River Maitland, where, as appears by the engineer's report adopted by the by-law, the engineer treated the outlet of the drain to be, thus regarding the Beauchamp Creek which is a natural stream into which drains in Elma also discharge their waters, to *be part of the drain which was constructed* under the Ontario Drainage Act of 1873, which very

clearly it was not. Now what the engineer by the scheme suggested in his report recommended to be undertaken, was the improving this stream called Beauchamp Creek from the mouth of the drain no. 2 to the River Maitland, and so he says in his report:

In order to make a proper outlet for this drain it will be necessary to improve this creek to the line between the 12th and 13th concessions, which is almost its intersection with the Maitland River. This creek as a whole is in a very bad state to *form a proper outlet for the extent of country that drains into it.* In places there is a well defined channel requiring little improvement, while *in most of its courses it will require to be deepened,* widened and straightened, and have all the fallen timber taken out.

The main portion of the work so proposed to be done consists in deepening, widening and strengthening this natural stream called Beauchamp Creek to the junction of its waters, from the point of discharge into it of drain no. 2, the drain constructed under the Ontario Drainage Act of 1873, with the Maitland River so as to give to this creek sufficient capacity to enable it to carry off all the water already discharged into it from drains constructed in Elma and Grey, and which upon the completion of the work the engineer has estimated will be drained into from lands in the township of McKillop, which lands he has assessed (as for "outlet," also apart from any benefits). In another part of his report the engineer speaks of this proposed work in Beauchamp Creek as constituting almost the whole of the work proposed to be done. He says:

The amount of fall in the proposed work being small, the effect of straightening and shortening the course of the proposed work is very important.

The fall in Beauchamp Creek from the mouth of the original drain no. 2 to the Maitland River being small, would doubtless make it very important that the stream should be deepened and its course straightened for the purpose of enabling it to carry off the waters

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flowing into it from drains situate low down upon the stream in the township of Grey, but the sluggish character of the stream there points to the conclusion that the proposed deepening &c., &c., of the stream where proposed to be done would have no sensible effect on the stream in the township of Elma, the nearest point of which is distant four miles from the drain, and so an explanation is given by the engineer why he did not assess any lands in Elma as for any benefit whatever but solely as for "*outlet*," quite apart from any benefit being conferred by the work upon any lands in Elma. The engineer also shows upon his report, which the by-law has adopted, what that which he calls "outlet" is, for which he has assessed the lands in Elma to the amount of $4,013.24. He says:

> In laying out the work I have endeavoured as far as practicable to straighten the course of *the Beauchamp Creek* or *outlet*."

So that it is apparent that what the lands in Elma are assessed for is the outlet which Beauchamp Creek gives to them, and it is the lands and roads *naturally draining into the same*, which in another place the engineer says that he has assessed for *outlet*. Now as to this section 585 it is apparent that if any by-law is authorized to be passed under it, the section in express terms, by making the provisions of the section subject to the provisions in sections 569 to 582, limits the jurisdiction as to any lands outside of the township of Grey to such lands as are benefited by the work proposed to be undertaken and to the extent of such benefit. So as to section 590, as already observed, neither that nor any other section authorizes lands in Elma to be assessed for contribution under the *name* of "outlet" or otherwise for any work constructed wholly within the limits of the township of Grey and which confers no benefit whatever upon the lands in

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Elma. That section in its terms expressly is limited to cases (1) where *a drain already constructed is used as an outlet*, or (2) to one which when "hereafter" *constructed* will *provide* an *outlet* for the water of the lands of another municipality, etc., then *the lands which use* or *will use* such *drain* when *constructed* as an *outlet*, either *immediately or by means of another drain from which* water is caused to flow upon and injure lands *may be assessed.*

Now the government drain no. 2 as originally constructed terminated at the point where it discharged the waters coming down it into Beauchamp Creek—and it will still continue to be in precisely the same spot when the work proposed to be undertaken under the by-law of the township of Grey shall be completed. That drain never has been used as *an outlet* for waters on lands in Elma whether brought into the drain either *immediately* or *by means of another drain*, nor is it suggested that the drain so originally constructed when the work proposed to be undertaken shall be completed *will provide such an outlet* for any lands in Elma. What the by-law regards as an *outlet* for which the lands in Elma have been assessed, plainly is, the natural stream called Beauchamp Creek as proposed to be deepened, &c., which the engineer's report which is adopted by, and made part of, the by-law calls *the outlet of the drain no.* 2. Well, it is equally so of all the water draining into it from lands in Elma; but such an outlet provided by a natural stream for all waters drained into it by drains in the several townships through which it flows is a very different thing from *a drain constructed* in Grey which conducts its waters to the stream being an outlet provided by Grey which is used by lands in Elma, when in point of fact no water from any lands in Elma *passes through the drain* in Grey into

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the stream, but all waters from lands in Elma reach the stream within the limits of the township of Elma by drains constructed in that township.

If the deepening, straightening and widening of Beauchamp Creek, where it is proposed to be deepened, &c., &c., within the township of Grey, benefited lands in Elma for drainage purposes, they might be assessed by a proper by-law for that purpose to the extent of the benefit conferred by such work; but that is a very different case from the present, where it is apparent on the engineer's report adapted by the by-law that the proposed work does not benefit the lands in Elma. But moreover, the by-law assesses the lands in Elma to the amount of $604.12 *for the cost of the original construction of the drain no. 2, in Grey, constructed in* 1873, and has credited the parties originally assessed for that work in Grey with such amount upon the assessments made against the lands in Grey for the work proposed to be undertaken. For this charge there is no pretence of there being any authority whatever.

Thus it appears by the by-law that lands in Elma are charged with the sum of $4,617.36, which with interest added for twenty years during which debentures will run, which are contemplated to be issued to raise the necessary funds, amounts to $6,796.60 as the contribution assessed upon lands in Elma for the execution of work from which those lands do not derive any benefit whatever.

For the above reasons I am of opinion that the lands in Elma purported to be affected by the by-law are not assessable for, nor liable to contribute any part of the cost of, the proposed work, and that as regards these lands the by-law of the township of Grey is absolutely *ultra vires*.

Now it appears that the Township of Elma not only have not appealed, as they might have done, but although requested by the plaintiff to do so have insisted upon acting under it, and have passed a provisional by-law for that purpose which they intend finally to pass unless prevented by process of law, and as the lands of the plaintiff or his title thereto would in the event of the Municipal Council of Elma passing such by-law and issuing debentures thereunder, be prejudiced until the cloud affecting them by such by-law should be judicially removed, the plaintiff has, I think, an undoubted right to appeal now to the courts by the proceeding which he has taken instead of waiting until after the passing of the Elma by-law. Greater difficulties might be raised to his seeking redress if the by-law should be, as it might, and no doubt would be, registered under secs. 351 *et seq.* of the Municipal Act of 1892.

I am of opinion, therefore, that the plaintiff is entitled to the relief prayed in his statement of claim, and that therefore his appeal must be allowed with costs in this court and in the Court of Appeal for Ontario, and that a decree be ordered to be made in the action in the court wherein the action has been brought, to the effect that the by-law no. 53 of the Township of Grey, in the pleadings mentioned, is void and *ultra vires*, as affecting or purporting to affect lands in the township of Elma, and that the defendants, the Township of Elma be enjoined from passing the proposed by-law no. 321 already provisionally passed, and from taking any steps for the purpose of giving effect in the township of Elma to the said by-law of the Township of Grey—with costs against the said Township of Elma.

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The defendants, the Township of Grey to have no costs of defence to the said action.

Appeal allowed with costs.

Solicitor for the appellant: *J. P. Mabee.*

Solicitors for the respondent, the Township of Grey: *Garrow & Proudfoot.*

Solicitors for the respondent, the Township of Elma: *McPherson & Davidson.*

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*May 6.
*June 6.

FANNIE M. MALZARD (PLAINTIFF)......APPELLANT,

AND

REUBEN I. HART (DEFENDANT)..........RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Appeal—Evidence taken by commission—Reversal on questions of fact.

Where the witnesses have not been heard in the presence of the judge but their depositions were taken before a commissioner, a court of appeal may deal with the evidence more fully than if the trial judge had heard it or there had been a finding of fact by a jury and may reverse the finding of the trial court if such evidence warrants it.

APPEAL from the judgment of the Supreme Court of Nova Scotia, *in banc*, affirming the verdict of His Lordship the Chief Justice upon the interpleader issue and the order thereon made against the plaintiff with costs.

The interpleader issue was to try the right to property seized under execution on a judgment by the respondent against Francis L. Malzard. The goods in

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

question are claimed by F. L. Malzard's wife, a married woman doing business in her own name under the provisions of sections 52 and 53 of the Married Woman's Property Act (1).

All the witnesses in the case were examined before a commissioner, and the evidence so taken submitted to the trial judge, who gave judgment for the respondent, and the full court affirmed his judgment in appeal, without costs.

Cahan for the appellant. All the evidence was taken before a commissioner, and the trial judge did not see the witnesses, consequently this court cannot be embarrassed by the findings. *North British & Mercantile Ins. Co.* v. *Tourville* (2). He based his decision upon *Adams* v. *Archibald* and *Slaughenwhite* v. *Archibald*, and erred in supposing that these decisions had any bearing on the case. Neither of these cases control here. In *Slaughenwhite* v. *Archibald*, the court set aside the decision of the trial judge, holding that property acquired by a married woman on her own credit, was property acquired otherwise than from her own husband. That case has not the slightest application here. In *Adams* v. *Archibald* it was held that the facts disclosed a fraudulent design to cover up the husband's property. Nothing of the kind appears here. The appellant carried on the business with her own moneys and credit, as her own separate business, on premises owned by her in her own right, and paid for by money belonging to her. The property seized was purchased in connection with this business. She cannot be divested of her property on account of mere conjectures and loose or indeterminate evidence. Fraud will never be imputed when the circumstances and facts may be consistent with honesty and purity of intention. Bump, Fraudulent Conveyances (4 ed.)

(1) R. S. N.S. (5 ser.) ch. 94. (2) 25 Can. S. C. R. 177.

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p. 593. *Re Dearmer* (1); *Ashworth* v. *Outram* (2); *Eddowes* v. *Argentine Loan & Mercantile Agency Co.* (3).

The provisions of ch. 94 R. S. N. S. (5th ser.) requiring the husband's written authority to carry on a separate business and registration are based on the Married Woman's Property Act of Massachusetts, ch. 198 of the Acts of 1862 (4). Neither the English Act nor the Ontario Act have such provisions. The following authorities, under the Massachusetts statute, are referred to:—*Chapman* v. *Briggs* (5); *Snow* v. *Sheldon* (6); *Long* v. *Drew* (7); *Feran* v. *Rudolphsen* (8); *Bancroft* v. *Curtis* (9); *Chapin* v. *Kingsbury* (10); *O'Neil* v. *Wolffsohn* (11); *Lockwood* v. *Corey* (12). The proper certificates and consent are filed in this case, and the burden is on the person seeking to show that the business is not that of the wife, to show clearly that it is the business of her husband—which is not shown here. Lush, "Married Women," (2 ed.) pp. 170, 171, 302, 323, 397.

Borden Q.C. for the respondent. This appeal should be dismissed because the question is solely one of fact, and a court of appeal will not disturb the findings of the trial judge. Revised Statutes, Nova Scotia, (5th ser.) ch. 104, s. 20, s.s. 4. *Gray* v. *Turnbull* (13); *Arpin* v. *The Queen* (14); *Bowker* v. *Laumeister* (15); *Bickford* v. *Hawkins* (16); *Warner* v. *Murray* (17); *Allan* v. *Quebec Warehouse Co.* (18); *Owners "P. Caland"* v. *Glamorgan S. S. Co.* (19).

(1) 53 L. T. N. S. 905.
(2) 5 Ch. D. 923.
(3) 63 L. T. N. S. 364.
(4) R. S. Mass., 1882, ch. 147, sec. 11.
(5) 11 Allen 546.
(6) 126 Mass. 332.
(7) 114 Mass. 77.
(8) 106 Mass. 471.
(9) 108 Mass. 47.
(10) 135 Mass. 580.
(11) 137 Mass. 134.
(12) 150 Mass. 82.
(13) L. R. 2 Sc. App. 53.
(14) 14 Can. S. C. R. 736.
(15) 20 Can. S. C. R. 175.
(16) 19 Can. S. C. R. 362.
(17) 16 Can. S. C. R. 720.
(18) 12 App. Cas. 101.
(19) [1893] A. C. 207.

The evidence is also clear that the business of appellant's husband, Francis L. Malzard, was carried on continuously after his assignment, first in the name of his assignee, and afterwards in the appellant's own name, and consequently this business must be considered to be his, and the property seized subject to execution for his debts. *Meakin* v. *Samson* (1); *Harrison* v. *Douglas* (2); *Crowe* v. *Adams* (3); *Levine* v. *Claflin* (4); *Campbell* v. *Cole* (5); *Murray* v. *McCallum* (6).

The judgment of the court was delivered by:

SEDGEWICK J.—We are all of opinion that this appeal should be allowed.

The evidence was taken, not before the trial judge but by a commission, and we are therefore at liberty to deal with it with less reserve than if the judge had heard it or there had been a finding of fact by a jury. After a careful perusal of the record I have failed to find any evidence upon which the judgment in question can be supported. *Primâ facie* the goods seized were the property of the appellant—they were purchased for her, in her name, and were then ostensibly in her possession. All the provisions of the statute authorizing her to carry on business in her own name and for her own benefit, were complied with. None of the husband's money or property went into the business. The fact of her carrying on business in her own name was public and notorious, and there was no evidence, nothing but suspicion or surmise, to support the contention that the business was the husband's, not her's. The facts being as stated there was a strong burden upon the creditors attacking the appellant's

(1) 28 U. C. C. P. 355.
(2) 40 U. C. Q. B. 410.
(3) 21 Can. S. C. R. 342.
(4) 31 U. C. C. P. 600.
(5) 7 O. R. 127.
(6) 8 Ont. App. R. 277.

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position, to prove the contrary. In this we think they have signally and conspicuously failed, and therefore that the judgment should be reversed.

The appeal will be allowed with costs and there will be judgment for the plaintiff (appellant) with costs, including the costs of the argument before the court *in banc*.

Appeal allowed with costs.

Solicitor for the appellant: *W. A. Henry.*

Solicitor for the respondent: *A. A. Mackay.*

1897
May 8, 10.
*June 7.

CALIXTE GUERTIN (HYPOTHECARY CREDITOR) .... APPELLANT;

AND

FRANÇOIS GOSSELIN (COLLOCATED CREDITOR) .... RESPONDENT.

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

Appeal — Collocation and distribution—Art. 761 *C.C.P — Hypothecary claims—Assignment—Notice—Registration—Prête-nom—Arts.* 20 *&* 144 *C. C. P.—Action to annul deed—Parties in interest—Incidental proceedings.*

The appeal from judgments of distribution under article 761 of the Code of Civil Procedure is not restricted to the parties to the suit but extends to every person having an interest in the distribution of the moneys levied under the execution.

The provision of article 144 of the Code of Civil Procedure that every fact of which the existence or truth is not expressly denied or declared to be unknown by the pleadings filed shall be held to be admitted, applies to incidental proceedings upon an appeal in the Court of Queen's Bench.

The nullity of a deed of assignment can only be invoked by proceedings to which all persons interested in the deed have been made parties.

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

APPEAL from the judgment of the Court of Queen's Bench (appeal side) on the incidental petition of the respondent, dismissing an appeal by an hypothecary creditor against a judgment of the Superior Court, District of Iberville, which homologated a report of distribution of moneys levied on a sale of lands under execution.

Pending the appeal by the present appellant in the court below, the respondent filed a petition to quash alleging, in substance and without entering upon the merits, that the appellant had no right of appeal, that he was not the transferee or representative of La Compagnie de Prêt et Crédit Foncier, mentioned in the registrar's certificate as hypothecary creditor, that in the pretended transfer, filed on the appeal, the appellant was only the *prête-nom* or *locum-tenens* of one of the administrators and liquidators of the said company, who could not either by himself or through another person acquire the property entrusted to him for sale, and that consequently the transfer was illegal, fraudulent, null and of no effect, and did not confer any right of appeal.

The reasons for quashing the appeal stated in the minutes of the judgment now appealed from are as follows :—

"Considérant que l'intimé a, par sa requête sommaire, plaidé la non-existence du droit d'appel de l'appellant ;

"Considérant que l'appelant n'était pas partie au procès, en première instance, ni dûment représenté ;

"Et considérant qu'il n'a pas, préalablement à l'institution du présent appel, fait signifier le transport de sa créance, qui fait l'objet du litige, et qu'il n'appert pas que le dit transport ait été accepté par le débiteur ;

"Considérant, par conséquent, que l'appelant n'avait pas, lors de l'institution du présent appel, de

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possession utile de la dite créance, à l'encontre des tiers, et notamment à l'encontre des Intimés;"

A statement of facts and of the questions at issue on the present appeal is given in the judgment reported.

Béïque Q.C. and *Lafontaine* Q.C. for the appellant. The appellant's quality of transferee has been admitted by respondent's pleadings specially omitting any denial of the fact although material in the case; (Arts. 20 & 144 C. C. P.); and therefore no signification of the transfer was necessary. The waiver of this ground of defence tacitly admitted the transfer. Had the alleged non-signification been pleaded appellant would have made proof on that issue. Nullities which are relative only must be pleaded. See art. 1484 C. C; *Rolland* v. *La Caisse d'Economie* (1); 24 Laurent no. 50; Dal. Art. 1596 C. N. no. 60. *North-West Transportation Co.* v. *Beatty* (2).

Article 1571 C. C. does not apply to a party coming into court under article 761 C. C. P. See also *Gibeau* v. *Dupuis* (3); *Stanley* v. *Honlon* (4); *Reinhardt, et al.* v. *Davidson* (5); *Bain* v. *City of Montreal* (6); *City of St. John* v. *Christie* (7); *Lamothe* v. *Fontaine* (8); *Berthelet* v. *Guy* (9); 4 Aubry & Rau, 407; 3 Mourlon, no. 682; S. V. 78, 1, 120; S. V. 89, 1, 461.

Geoffrion Q.C. (*Paradis* with him), for the respondent. The purchaser of an hypothecary creditor's claim has no right of appeal, and in any event he is vested with no legal rights until signification of the transfer has been made; C. C. arts. 1027 & 1571. The deed of assignment is in contravention of art. 1484 C. C.

(1) Q. R. 4 Q. B. 314.
(2) 12 App. Cas. 589.
(3) 18 L. C. Jur. 101.
(4) 21 L. C. Jur. 75.
(5) 15 R. L. 42.
(6) 8 Can. S. C. R. 252.
(7) 21 Can. S. C. R. 1.
(8) 7 L. C. R. 49.
(9) 8 L. C. R. 299.

See *Charlebois* v. *Forsyth* (1); *Murphy* v. *Bury* (2); *Bérard* v. *Barrette* (3); *Grenier* v. *Gauvreau* (4).

The judgment of the court was delivered by:

GIROUARD J.—Il s'agit dans cette cause d'une question de procédure en cour d'Appel, mais si importante qu'elle affecte et décide même les droits des parties au fonds. Le cessionnaire d'une hypothèque, dont le transport n'a pas été signifié au débiteur, peut-il interjeter appel d'un jugement de distribution qui l'intéresse?

Voici les faits en quelques mots. Un immeuble est vendu par le shérif, et un jugement de distribution est préparé et homologué selon la pratique ordinaire. Le certificat du Bureau d'Enregistrement constate, entr'autres choses, deux hypothèques, la première par ordre d'inscription, pour $3,500 et intérêt en faveur de la Compagnie de Prêt et de Crédit Foncier, et la seconde pour $1,800 et intérêt en faveur de Cyriac Sansterre. Lors du jugement de distribution, ces deux hypothèques avaient été apparemment transportées, la première à l'appelant, et la seconde à l'intimé. Tous deux n'avaient pas fait enregistrer, ni signifier leur transport, mais l'intimé produisit le sien et d'autres documents dans le dossier avant la préparation du jugement de distribution. Le protonotaire ignora la première hypothèque pour la raison que certains jugements produits par l'intimé établissaient, selon lui, l'extinction de la première hypothèque et colloqua l'intimé. Ce jugement fut homologué par la cour sans contestation. L'appelant, prenant le titre de "cessionnaire de la Compagnie de Prêt et de Crédit Foncier," appela de ce jugement, prétendant qu'il était

(1) 1 R. L. 606.
(2) 24 Can. S. C. R. 668.
(3) 5 R. L. 703.
(4) 14 Q. L. R. 357.

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mal fondé à la face du dossier. Dans son inscription en appel, l'appelant comparaît comme suit:

Nous comparaissons pour Calixte Guertin, marchand de la paroisse de Belœil, district de Montréal, cessionnaire de la Compagnie de Prêt et Crédit Foncier, ci-devant corps politique et incorporé ayant sa principale place d'affaires à Montréal et maintenant représentée par le dit C. Guertin, en vertu de l'acte de cession et transport passê devant Mtre Garand, en date du 19 septembre 1890, annexé à la présente inscription pour en faire partie et déposé avec elle, laquelle dite compagnie est créancière du dit feu Alexandre Sansterre et est inscrite au certificat du régistrateur sur les immeubles vendus en la cause ci-dessus.

L'intimé demande le renvoi de l'appel, non pas parce que le transport n'avait pas été signifié, mais parce qu'il était nul, attendu que l'appelant n'était que le prête-nom d'Alexandre Lapalme, un des liquidateurs de la dite Compagnie en liquidation, et que comme tel, il ne pouvait acquérir aucune partie de ses biens conformément à l'article 1484 du Code Civil.

L'appelant répondit que le transport qui lui avait été fait avait été autorisé par les actionnaires de la compagnie, et que ce fait apparaissait à la face même du transport et que d'ailleurs la validité du dit transport ne pouvait être soulevée par un incident en cour d'Appel, où toutes les personnes intéressées n'étaient pas parties.

La cour d'Appel ordonna une articulation des faits que chaque partie entendait prouver à l'appui de ses prétentions. L'intimé en produisit une dans laquelle il n'est aucunement fait mention du défaut de signification du transport fait à l'appelant ; il se contente d'articuler des faits relatifs à la nullité du transport comme ayant été fait à une personne interposée contrairement à l'article 1484 du Code Civil.

L'appelant articule que le transport en question à été autorisé par les actionnaires de la Compagnie et que d'ailleurs, Sansterre, le débiteur principal, n'a jamais été actionnaire.

L'intimé fit motion demandant la permission de faire une enquête des faits par lui allégués.

Le 21 mai 1895, la cour d'Appel, Bossé et Blanchet dissidents, rejeta cette motion, et renvoya l'appel pour deux raisons :—

Considérant que l'appelant n'était pas partie au procès en première instance, ni dûment représenté ;

Et considérant qu'il n'a pas, préalablement à l'institution du présent appel, fait signifier le transport de sa créance, qui fait l'objet du litige, et qu'il n'appert pas que le dit transport ait été accepté par le débiteur.

Les juges dissidents sont d'avis que "les plaidoiries écrites impliquent une admission de la qualité de cessionnaire."

Nous sommes de cet avis, au moins quant à la signification du transport qui n'a pas été invoquée. L'appelant prend la qualité de cessionnaire dans son inscription ; cette allégation suppose que le transport avait été signifié, autrement la cession ne serait pas complète et l'appelant ne pouvrait être "cessionnaire." L'article 144 du Code de Procédure doit recevoir ici son application :

Nulle forme particulière n'est requise pour les plaidoiries ; mais tout fait dont l'existence ou la vérité n'est pas *expressément* niée, ou déclarée n'être pas connue, est censé admis.

Nous croyons que cet article s'applique aux incidents qui sont soulevés en appel. Puis vient l'article 1130 que l'appelant invoque à bon droit au soutien de son appel. Cet article décréte en effet que

à moins que le tribunal n'en ordonne autrement, l'intimé peut dans les huit jours qui suivent le temps fixé pour faire acte de comparution, opposer par requête sommaire les exceptions, fins de nonrecevoir et tous les moyens résultant (par. 3) de la non-existence ou déchéance du droit à se pourvoir par appel ou pour erreur.

Le moyen résultant du défaut de signification du transport de l'appelant n'a jamais été invoqué par l'intimé.

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Supposant même que le défaut de signification du transport ait été invoqué par l'intimé dans sa requête, nous croyons que le droit d'appel existe. Il se peut que dans les appels ordinaires, la signification du transport soit nécessaire, si un tiers désire exercer le droit d'appel en son nom, point sur lequel nous n'avons pas à nous prononcer.

Le présent appel n'est pas pris en vertu de l'article 1154 cité par l'intimé, mais en vertu de l'article 761 qui donne particulièrement un droit d'appel des jugements de distribution. Cet article se lit comme suit :

Toute partie lésée par un jugement de distribution peut se pourvoir en appel, ou par requête civile s'il y a lieu, soit qu'elle ait comparu dans la cause ou que sa créance soit mentionnée dans le certificat des hypothèques et qu'elle n'ait pas comparu.

Nous sommes d'avis que l'appelant est une "partie lésée par un jugement de distribution," si lésée que, si le jugement est maintenu, il perd sa créance. Nous croyons que dans cet article, le mot "partie" ne veut pas dire seulement partie à une action ou à un procès, mais "toute personne intéressée dans la distribution des deniers." C'est dans ce sens que les articles précédents ayant trait au même sujet, entr'autres les articles 736, 738, 741, 747, 749 et 751, emploient le mot "partie," et il est raisonnable de lui donner la même portée lorsqu'il s'agit du droit d'appel du jugement de distribution. Nous sommes enfin d'opinion que l'acte de transport en question ne peut être annullé que par une procédure adoptée contre toutes les parties intéressées, et particulièrement la Compagnie de Prêt ou ses représentants, qui ne sont pas parties à cet appel. La cour d'Appel n'a pas adjugé sur ce point et a même renvoyé la motion demandant à faire une enquête. Nous croyons qu'elle avait raison. Nous sommes enfin d'avis de renvoyer la requête de l'intimé du 25 septembre 1894, purement et simplement.

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Nous ordonnons donc que le dossier soit remis à la cour du Banc de la Reine, siégeant en appel, pour y être procédé sur le mérite de l'appel, qui y fut intenté par l'appelant, et nous condamnons l'intimé à payer les frais devant cette cour, et aussi les frais encourus devant la dite cour du Banc de la Reine, sur la dite requête, et tous les incidents qui s'y rapportent.

Appeal allowed with costs and case remitted for hearing on the merits.

Solicitors for the appellant: *Béïque, Lafontaine, Turgeon & Robertson.*

Solicitors for the respondent: *Paradis & Chassé.*

1897
*May 10.
*June 7.

CALIXTE GUERTIN (PLAINTIFF).........APPELLANT;

AND

ALEXANDRE SANSTERRE AND OTHERS (DEFENDANTS).................. } RESPONDENTS.

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

Building Societies—Participating borrowers—Shareholders—C. S. L. C. c. 69—42 & 43 V. (Q.) c. 32—Liquidation—Expiration of classes—Assessments on loans—Notice of—Interest and bonus—Usury laws—C. S. C. c. 58—Art. 1785 C. C.—Administrators and trustees—Sales to—Prête-nom—Art. 1484 C. C.

S. applied to a building society for a loan of $3,500 which was subsequently advanced to him upon signing a deed of obligation and hypothec submitting to the conditions and rules applicable to the society's method of carrying on their loaning business and declaring that he had become a subscriber for shares in the company's stock for an amount corresponding to the amount of the loan, namely 70 shares of the nominal value of $50 each in a class to expire after 72 monthly payments, or in six years from the date of its commencement (July, 1878), this term corresponding with the term fixed for the repayment of the loan. He thereby also agreed to make monthly payments of one per cent each upon the stock and that the loan should be repaid at the expiration of the class, when, upon the liquidation of the business of that class, members would be entitled to the allotment of their shares subscribed as paid up, partly by the monthly instalments and partly by accumulated profits to be derived from whatever moneys had been paid in and invested for the benefit of that class, at which time, whatever he might be so entitled to receive in shares of stock should be credited towards the reimbursement of the loan. He further obliged himself to pay, as interest and bonus, the additional sum of one per cent upon the loan by similar monthly instalments during the time it remained unpaid. S. paid all the instalments by semi-annual payments of $420 each until 1st May, 1884, making a total of seventy monthly instalments of $70 each,

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

leaving two more instalments of each kind still to become due before the date originally fixed for the termination of his class. The society went into liquidation under the provisions of 42 & 43 Vict. (Que.) ch. 32, in January, 1884, prior to A.'s last payment and about six months before the date fixed for the expiration of his loan. In October, 1884, the liquidators of the society, in the exercise of the powers vested in the directors under the deed and the society's regulations, passed a resolution declaring a deficit in the business of the class to which A. belonged, and, in order to provide the necessary funds to meet the proportion of deficit attributed as his share, they thereby exacted from him a further series of twenty-eight monthly payments in addition to the seventy-two instalments contemplated at the time of the execution of the deed. Subsequently, (in 1892) the plaintiff, as transferee of the society, brought action for the two original instalments remaining unpaid and also for the amount of the twenty-eight additional monthly payments upon the loan and the subscription of shares.

Held. reversing the judgment of the Court of Queen's Bench, that the subscription for shares and the obligation undertaken in the deed constituted, upon the part of the borrower, merely one transaction involving a loan and an agreement to repay the amount advanced with interest and bonuses thereon amounting together to a rate equivalent to interest at twelve per centum per annum on the amount of his loan.

That the contract made by the building society stipulating that they were to receive such rate of interest and bonus, equivalent to a rate of twelve per centum per annum on the amount so loaned by the society, was not a violation of any laws respecting usury in force in the province of Quebec.

That the fact of the building society going into liquidation had the effect of causing all classes of loans then current to expire at the date when the society was placed in liquidation, notwithstanding that the various terms for which such classes may have been established had not been fully completed.

That under the provisions of the statute, 42 & 43 Vict. (Que.) ch. 32, liquidators have the same powers in regard to the determination of the affairs of expired classes and to declare deficits therein and to call for further payments to meet the same, as the directors of the society had while it continued in operation.

That the notice required by the twenty-first section of the Act, 42 & 43 Vict. (Que.) ch. 32 does not apply to cases where liquidators have determined a loss upon the expiration of a class and required the full amount exigible upon loans to be paid by borrowers.

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That, notwithstanding that the liquidation proceedings deprived the directors of the exercise of their powers as to the determination of the condition of the affairs of a class and the exaction of further payments when exigible in such cases on the expiration of a class, the resolution of the liquidators determining a deficit in the borrower's class and requiring full payment of all sums exigible under his deed of obligation, was sufficient to constitute a valid right of action against the borrower for the amount of the balance of principal money loaned together with the interest and bonus instalments remaining due thereon according to the terms and conditions of his deed of obligation.

Held, further, affirming the decisions of both courts below, that in an action where no special demand to that effect has been made, the court cannot declare the nullity of a deed of transfer alleged to have been made in contravention of the provisions of article 1484 of the Civil Code.

APPEAL from the judgment of the Court of Queen's Bench (appeal side) (1) reversing the judgment of the Superior Court, District of Montreal, and dismissing the plaintiff's action with costs.

The action was originally brought by La Compagnie de Prêt et Crédit Foncier against Alexandre Sansterre, sr., since deceased, the respondents being his executors, and, the company having subsequently transferred all its assets to the appellant, he took up the instance.

A statement of the principal facts and the questions at issue will be found in the judgment of the court delivered by His Lordship Mr. Justice Girouard. The following brief reference to the company's constitution and method of carrying on its business may however be added as explanatory.

The company was a building society subject under its Act of incorporation and an Act amending the same (2) to the provisions of C. S. L. C. ch. 69 and amendments thereto, and went into voluntary liquidation under 42 & 43 Vict. (Que.) ch. 32. Its member-

(1) Q. R. 3 Q. B. 344.

(2) 26 Vict. ch. 28, and 35 Vict. ch. 109.

ship consisted: 1. Of shareholders called permanent members, whose rights and obligations resembled those of shareholders in ordinary joint stock companies; and—2. Of non-permanent shareholders, composed of "classes," each "class" consisting of such persons as should become shareholders during a period of six years terminating at fixed dates. When a class expired, the shares of its members were liquidated and the proceeds paid to the shareholders in the manner provided by the by-laws.

Non-permanent members were subdivided into: Non-borrowing members who paid for their shares by instalments till the expiration of their class, when the received the amount earned either in cash or permanent shares; and—Borrowing members, who were advanced all or part of their shares on subscribing for them, on conditions for the repayment of principal, with interest and bonus provided by the by-laws.

In the class to which the defendant belonged, the borrowers received in advance the face value of their shares, and agreed to repay the principal loaned by 72 monthly instalments of 1 per cent, or 50c a share each, the duration of the class being 72 months, and also to pay every month, till the end of the class, interest and bonus amounting to one per cent of the principal loaned. Borrowing members were either: Non-participating borrowers, whose relations with the company ceased after they had repaid their loans, and who did not participate in the profits or losses of the company; or participating borrowers who at the expiration of their class, shared in its profits, or contributed to the payment of its deficits. If its shares were completely paid up by means of the 72 instalments and accrued profits, the balances of loans on shares were paid by compensation, but if not fully paid, they continued to pay monthly instalments in

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the same way as before until the shares of the class were fully paid up.

The position of a class, at its termination, and the rights and obligations of its various members, were to be determined as soon as possible by resolution of the directors declaring, as the case might be, that the shares had or had not been paid up; in the latter case specifying the amount of the deficit and how much the non-borrowing members and the participating borrowers should respectively pay to make up the deficits. Such resolution was to be *primâ facie* proof of the truth of its contents, and binding on all interested parties.

The original defendant, a participating borrower, became a member of a class formed in July, 1878, by means of a deed wherein he agreed to take 70 shares of the par value of $3,500, that amount of money being then and there advanced to him, and undertook to repay the loan at the extinction of the class according to the rules as to participating borrowers. Up to June 1st, 1884, he made 70 payments of $35 each on account of the shares, and 70 payments of $35 each as interest and bonus.

In the meantime the company went into voluntary liquidation under 42 & 43 Vict. (Que.), ch. 32, and liquidators were appointed who, after examining the affairs of the company, found that no profits had been made in the class in question, but that part of the capital had been eaten up. They accordingly, by resolution, on October 22nd 1884, declared that the 72 monthly payments were not sufficient to pay up the shares, that there was a deficiency of more than 28 per cent of the capital and that the shareholders should pay in addition to the 72 instalments accrued during the existence of the class, 28 further instalments of one per cent each on the amount of their shares.

Trenholme Q.C. and *Béïque* Q.C. for the appellant. At the time the liquidators' resolution was passed the defendant had made 70 payments on account of the principal of his shares, and 70 payments by way of interest and bonus. If sufficient profits had been earned, two more payments on the shares and two more on the interest and bonus would have discharged him, *i. e.* for every dollar received he would only have to pay 72c. But no profits having been earned, only 70 per cent of his debt was extinguished, leaving 30 per cent still to be paid in monthly instalments of $35 each, and until this was paid in full, he was further bound to pay $35 a month, or 12 per cent, as interest and bonus on his obligation.

The contract provided that if the defendant should at any time fail to make six consecutive monthly payments, then the whole capital sum should at once become exigible without the necessity of formal notice, and at the time of the action he was in arrears for eight monthly instalments, so the whole had become due and action was taken for:

30 instalments of $35 on account of principal.......	$1,050.00	
30 instalments of $35, interest and bonus up to date of last instalment on the capital.........	1,050.00	
		$2,100.00
6 p.c. interest on said instalments since last payment..	588.15	588.15
		$2,688.15

based 1st. on the deed of obligation for the advance on the shares; 2ndly. on the by-laws invoked by said deed; 3rdly. on the resolution of the liquidators, and 4thly. on the statute 42 & 43 Vict. ch. 32, secs. 18, 19 and 21.

The liquidation caused all classes to expire, and at that time a balance was due upon this loan and the company was entitled to demand both principal and

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interest according to contract and by-laws, and also interest at 6 per cent since the last payments made.

Geoffrion Q.C. and *P. H. Roy* for the respondents. The defendant opened negotiations in this matter by a simple application for a loan, and never intended to be and never was a member of the plaintiff's corporation; nevertheless the plaintiff, by using equivocal terms and expressions in the deed, took advantage of his ignorance and illiteracy and he should be treated as a non-participating borrower for nothing in the evidence can lead to the conclusion that he was a participating borrower. His obligation ceased at the expiration of the class in which plaintiff thought fit to include him.

The liquidation put an end to all classes and the liquidators were bound, without requiring further instalments on shares (which would have been continuing the operations of the society), to proceed according to section 21 of 42 & 43 Vict. ch. 32, and call in, on the capital of the obligations, such amounts as they might consider necessary to place all shareholders on an equal footing at the close of the liquidation, but only after one month's notice to the debtors. This they did not do.

The company being in liquidation on the 10th January, 1884, and classes all expired, the special powers in respect thereto did not pass to any one because, for such purposes, the directors alone were designated, and consequently the time fixed by the statute lapsed, and the liquidators never had the right either by law or by the by-laws of the society to pass the resolution of October 22nd, 1884. This resolution is *ultra vires* and of no effect.

The plaintiff cannot recover the usurious rate of interest charged (1), and the by-laws charging interest

(1) C. S. C. ch. 58, sec. 9.

above 6 per cent are illegal and *ultra vires*. Section 2 of ch. 69 C. S. L. C does not provide a method of charging more than 6 per cent on loans. The only bonus there authorized is in the case of a member receiving his share in advance before the class to which he belongs is realized, and this bonus cannot be anything but one fixed sum, payable once, and not a series of small sums forming a sum equal to 6 per cent over and above the 6 per cent charged as interest. The *bonus*, in this form, is usury disguised and a violation of the statute against usury with respect to building societies.

The defendant paid plaintiff from 1878 to May, 1884, $5,657.51; the sum loaned was $3,500, and the interest accrued on the capital remaining due after each payment amounts to $630, forming together $4,130, which was all the plaintiff was ever entitled to receive; but defendant has, through ignorance, paid $1,527.51 in excess of his legitimate debt and should have it reimbursed. Thus the defendant owed nothing to the plaintiff at the time of action.

The present appellant has no actual interest in the suit, but is merely the *prête-nom* of one of the liquidators of the company who has, through his intervention, sought illegally to acquire the company's property while a trustee, in contravention of article 1484 of the Civil Code.

The judgment of the court was delivered by:

GIROUARD J.—Cette cause, débarrassée de nombreux détails de fait et de procédure qui sont plus propres à l'embrouiller qu'à l'éclaircir, se réduit à peu de points. En 1878, Alexandre Sansterre, père, devint emprunteur participant, c'est-à-dire à la fois emprunteur et actionnaire d'une société de construction, et comme toujours il espérait que les profits réalisés lui permettraient de

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rembourser, en 72 versements mensuels de $35 chaque' le capital emprunté, savoir $3,500, et les intérêts et bonus au taux de 12 par cent par année, c'est-à-dire, 72 autres versements mensuels de $35 chaque.

L'entreprise ne fut pas aussi profitable que ses promoteurs l'espéraient, et le 10 janvier 1884, elle demanda sa liquidation volontaire. Le 1er mai 1884, Sansterre complétait ses soixante-dix versements en capital et intérêts et bonus de $70 chaque, et il n'avait que deux versements de plus à remplir pour s'acquitter entièrement envers la société, s'il n'était survenu rien d'extraordinaire Mais voilà que le 22 octobre 1884, les liquidateurs constatent, conformément aux règlements de la société, qu'il y a eu perte d'au moins 28 par cent pour la classe de Sansterre, et ajoutant les deux versements non payés, le débiteur devait encore au moins 30 par cent sur le capital. De là, la présente action qui fut intentée le 19 avril 1890 par la société de construction et reprise par l'appelant comme son cessionnaire, une première poursuite ayant été rejetée, sauf à se pourvoir. L'action a deux objets, d'abord le recouvrement de la dite balance de capital et celui de pareille somme à titre d'intérêts et bonus, en tout $2,100 et $586 d'intérêt au taux de 6 par cent par an. La Cour Supérieure (Tait J.) accorda les conclusions de l'action. Sur appel pris par les exécuteurs testamentaires d'Alexandre Sansterre, décédé pendant l'instance, la Cour d'Appel les renvoya *in toto*. Elle fut unanime à juger que la liquidation mettait fin aux opérations de la société, et qu'aucun versement subséquent ne pouvait être demandé aux actionnaires, à ce seul titre, sauf pour payer les dettes imputables à la classe à laquelle Sansterre appartenait, et il n'en existait aucune. Les juges Bossé et Blanchet étaient enfin d'avis que l'emprunteur devait payer la balance de son obligation, et que l'action devait être

maintenue pour autant. Nous sommes aussi de cet avis.

Les intimés prétendent que l'appelant n'est que le prête-nom d'Alexandre Lapalme qui, bien que liquidateur de la dite société, en a acquis l'actif pour son profit et particulièrement la dite réclamation contre lui, par l'interposition de l'appelant contrairement à l'article 1484 du Code Civil. Mais il n'a pas demandé la nullité de ce transport. Et puis, peut-elle être prononcée lorsque la société ou ses liquidateurs ne sont pas en cause ? Ce moyen n'est donc pas fondé, et il a été rejeté tant par la cour Supérieure que par la cour d'Appel.

La majorité des juges de la cour d'Appel invoque la dernière partie de la section 21 de la 42 & 43 Vict. ch. 32 (Québec) qui exige un mois d'avis à l'emprunteur participant, ou actionnaire, avis qui n'a pas été donné ; mais comme je lis cette section, cet avis n'est requis que lorsque les liquidateurs demandent le paiement partiel de ce qui reste dû en vertu de l'obligation, et non pas lorsqu'ils ont décidé, comme ils l'ont fait dans l'espèce, que l'obligation recevrait sa pleine exécution et que l'emprunteur doit payer cent centins par piastre. Cette section 21 en effet se lit comme suit :

Le capital de toute obligation consentie par un actionnaire à la société, et dont l'époque du remboursement est indéterminée ou fixée à l'extinction d'une classe continuera à devenir exigible aux termes de l'obligation même et des règlements de la société ; mais de plus, les liquidateurs pourront, de temps à autre, exiger sur le capital de ces obligations tels montants qui seront jugés par eux nécessaires, pour placer les actionnaires sur un pied d'égalité dans le résultat final de la liquidation, mais tels montants ne deviendront exigibles qu'après un mois d'avis aux débiteurs.

Le paiement des 100 versements a été ordonné par une résolution des liquidateurs passée le 22 octobre 1884, de laquelle je détache le passage suivant :

Considérant en outre qu'il est résulté de ces pertes un déficit, pour chacune des dites classes, excédant vingt-huit pour cent sur leur capital

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respectif, il est maintenant résolu que les actionnaires de ces classes (au nombre desquelles était la classe de Sansterre) auront à payer, en outre des soixante-douze versements mensuels échus pendant la durée des dites classes, vingt-huit autres versements aussi mensuels de un pour cent chacun sur le montant de leurs actions, c'est-à-dire, qu'ils devront payer en tout cent versements mensuels de un pour cent ou le montant entier du capital souscrit par chacun d'eux.

Le jugement de la cour d'Appel déclare cette résolution *ultra vires.* Mais les liquidateurs n'ont fait que ce qu'un premier jugement de la cour d'Appel, présidée par Sir A. A. Dorion, C J., entre les mêmes parties et au sujet du recouvrement de la même obligation, les autorisait de faire. La cour a en effet déclaré dans ses considérants que la mise en liquidation avait éteint toutes les classes de la société et

qu'à compter du 10 janvier 1884, les actionnaires ne pouvaient être appelés à fournir de nouveaux versements qu'en vertu d'une déclaration des liquidateurs à cet effet tel que requis par l'article 3, section 5 des règlements de la société.

Ce jugement me paraît chose jugée entre les parties et s'il ne l'est pas, il constitue, au moins, une forte autorité en faveur de l'appelant que la résolution du 22 octobre 1884 est *intra vires* et légale, et je crois que cette conclusion est bien fondée.

La section 18 de la 42 & 43 Vict., ch. 32, dit que—

les liquidateurs auront tous les pouvoirs conférés et seront soumis envers les actionnaires, à toutes les obligations imposées aux directeurs par la loi et par les règlements de la société.

L'on concède que la résolution aurait pu être adoptée par les directeurs pendant la durée de la société; mais l'on prétend qu'elle ne pouvait l'être par les liquidateurs. Le savant juge en chef Lacoste, observe que la section 18 ajoute que

la société ne pourra pas faire d'autres opérations que celles requises pour parvenir à la liquidation.

Mais en ordonnant le paiement entier des obligations consenties en faveur de la société, les liquidateurs, loin

de faire de nouvelles opérations, liquidaient celles qui avaient été commencées par la société, et qui n'étaient pas terminées.

Je crois enfin que l'acte d'obligation contient une stipulation qui suffit pour déterminer l'échéance et l'exigibilité du capital de la dite obligation, et c'est la suivante :

Et le dit sieur Sansterre, représenté comme susdit, s'oblige de rembourser et payer la dite somme capitale à la dite Compagnie de Prêt et Crédit Foncier, ce acceptant, à l'extinction de la dite classe, savoir : à l'époque où conformément aux lois régissant la constitution de la dite compagnie et à ses règlements, les affaires de la classe de membres dont le dit débiteur fait partie à raison des dites soixante et dix parts seront liquidées et où les membres seront en droit d'en toucher leurs actions ou parts, c'est-à-dire, lorsque les profits accumulés, joints au capital payé sur les parts, formeront un montant égal au montant nominal des dites parts.

La classe à laquelle appartenait Sansterre expirait naturellement le 1er juillet 1884; mais il est admis qu'elle expira et devint éteinte par le seul fait de la mise en liquidation, le 10 janvier 1884.

L'appelant soutient que c'est à l'emprunteur à démontrer que

les profits accumulés, joints au capital payé sur les parts, forment un montant égal au montant nominal des dites parts,

c'est-à-dire, au montant capital de l'obligation. Il a fait plus : il a prouvé qu'il y avait perte ou déficit, au montant de 28 par cent, et ajoutant les deux versements dus en juin et juillet 1884, et nécessaires pour former les 72 paiements payables à tous événements, il ajoute qu'il est en droit de demander les 30 versements. Cette preuve résulte de la résolution du 22 octobre 1884, que Sansterre, en signant les règlements de la société, s'est engagé d'accepter comme preuve *primâ facie*. Voici ce que disent les règlements de la société, art. 3, par. 5 et 6 :

5. Aussitôt possible après l'expiration d'une classe, le Bureau de Direction déclarera, par résolution enregistrée dans son 'Livre de Délibérations' si, d'après les livres de la société, les parts ou actions de

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cette classe sont seulement remplies ou si elles sont remplies avec un surplus de profits, ou, si elles ne sont pas remplies, quel est le déficit et combien les membres non-emprunteurs et les membres participants auront encore à payer à la société pour remplir ce déficit.

6. Et toute telle déclaration fera preuve, *primâ facie*, et jusqu'à preuve du contraire, de la vérité de son contenu et sera obligatoire pour tous les intéressés sans qu'il soit besoin de produire les livres ou un état des livres de la société ou aucune autre preuve quelconque.

Reste une dernière objection. L'appelant, par son action, ne demande pas nommément une balance due sur l'obligation de Sansterre, mais seulement ce qu'il doit sur ses actions. Je crois que la souscription des actions par Sansterre et son obligation ne forment qu'une seule et même transaction, et que comme, en vertu de la convention des parties, les versements sur les actions devaient éteindre et ont éteint l'obligation d'autant, d'après l'aveu de tous, il n'est que juste de considérer cette partie de l'action qui demande $1,050 sur les actions comme ayant pour objet le recouvrement de la balance du capital de l'obligation aux termes de la section 21 de la 42 & 43 Vict., ch. 32. C'est d'ailleurs ainsi que les parties ont considéré la nature de leur contrat. Dans son cinquième plaidoyer le défendeur admet qu'il a emprunté de la demanderesse la somme de $3,500 et qu'il s'agit de cet emprunt dans cette cause, puisque pour des raisons qu'il allègue et que nous ne pouvons pas accepter, il demande qu'il soit déclaré qu'il y a eu compensation. Cependant, si l'appelant le juge nécessaire, nous lui permettons d'amender sa déclaration de manière à faire concorder sa demande avec la preuve.

Il en serait autrement si nous accordions les autres $1,050 à titre d'intérêt et bonus, qui formaient sa mise dans le fonds social dè la société et la source de ses espérances de profits ; nous admettrions par là même que la société peut réaliser des profits, qu'elle est encore en opération, que les actions n'ont pas été éteintes par

la liquidation, et enfin que l'emprunteur est redevable comme actionnaire pur et simple, sans savoir s'il y a des créanciers à satisfaire ou non, ou plutôt sachant qu'il n'y en a pas. Ce serait là un appel à un membre de la société comme simple actionnaire, tandis qu'ici la demande ne lui est faite que comme débiteur ou emprunteur. Voilà pourquoi les sections 19 et 21 du même statut mettent fin à l'intérêt et bonus et déclarent que l'intérêt que les liquidateurs pourront exiger sur ses arrérages, c'est-à-dire, sur la balance de son obligation, sera non pas au taux de 12 par cent, mais à celui de 6 par cent par an. L'appelant ne demande que ce taux d'intérêt sur les 30 versements dus et non payés.

Il n'est que juste que l'emprunteur rembourse le montant de son obligation, avec l'intérêt au taux de 12 par cent, qu'il s'est obligé de payer, et qu'il a de fait payés pendant que la société était en opération, et au taux de 6 par cent sur la balance qui restait non payée lorsqu'elle fut mise en liquidation, et cela aux échéances fixées par le dit acte d'obligation et la résolution du 22 octobre 1884.

Enfin, la classe à laquelle Sansterre appartenait, expirant le 10 janvier 1884, date de la mise en liquidation, Sansterre se trouve avoir payé quatre versements de $35 d'intérêts et bonus qu'il ne devait pas, savoir ceux dus les 1er février, mars, avril et mai 1884, en tout $140 qui doivent être portées à son crédit.

Après mûre délibération, nous sommes arrivés à la conclusion suivante : Sansterre a reçu $3,500 de la société de construction qu'il promit rembourser avec intérêt et bonus au taux de 12 par cent par an. D'après la jurisprudence de toutes les provinces et la décision de toutes les cours dans la présente cause, ce taux pouvait être stipulé sans violer les lois contre l'usure (1).

(1) C. S. L. C., ch. 69, ss. 2 et 11.

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Lorsque la société tomba en liquidation, l'emprunteur avait payé $2,450 sur ses parts ou le capital de son obligation et pareille somme à titre d'intérêt et bonus, et par conséquent, il restait dû, à tous événements, une balance de $1,050 sur le capital, savoir, 30 versements mensuels de $35 chaque, dont deux sont devenus échus avant la résolution du 22 octobre 1884, savoir, le 1er juin et le 1er juillet 1884, tel que porté en l'acte d'obligation, et les vingt-huit autres versements après la dite résolution, à commencer le 1er décembre 1884, et ainsi de suite le premier de chaque mois suivant, jusqu'à ce que la dite somme de $1,050 soit complétée—soit le 1er mars 1887— avec l'intérêt sur chaque versement échu après le 19 avril 1885 (cinq ans avant l'action) au taux de 6 par cent par année, jusqu'à parfait paiement, conformément à la section 19 de la 42 & 43 Vict., ch. 32.

Nous n'allouons que cinq années d'intérêt, accrues avant l'institution de l'action, les intérêts antérieurs au 19 avril 1885 étant prescrits aux termes des articles 2250 et 2267 du Code Civil.

Il faudra déduire les $140 payées après la déclaration en liquidation à titre d'intérêt et bonus, ainsi qu'il est dit plus haut. Cette somme compense les quatre premiers versements échus les 1er juin, juillet, décembre 1884, et janvier 1885. Il reste donc non payés: vingt-six versements, dont le 1er est devenu échu le 1er février 1885 et ainsi de suite le premier de chaque mois, avec intérêt au taux de 6 par cent par année, à compter de chaque échéance arrivant après le 19 avril 1885.

Jugement doit être rendu contre les intimés en faveur de l'appelant sur cette base, c'est-à-dire pour vingt-six versements formant la somme capitale de neuf cent dix piastres, et les intérêts au taux de six par cent par année à compter de l'échéance de chaque

versement mensuel de trente-cinq piastres comme susdit, lesquels intérêts, le jour de l'institution de l'action 19 avril 1890, formaient la somme totale de $195.54 et avec intérêt au même taux sur la dite somme de $910 à compter du jour de l'institution de l'action, le tout avec dépens d'une action excédant mille piastres, tant devant cette cour que devant la cour d'Appel et la cour Supérieure.

Appeal allowed with costs.

Solicitors for the appellant: *Béïque, Lafontaine, Turgeon & Robertson.*

Solicitors for the respondents: *Roy & Roy.*

ALFRED DEMERS (PLAINTIFF)..........APPELLANT;

AND

THE MONTREAL STEAM LAUNDRY COMPANY (DEFENDANT).............. RESPONDENT.

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*May 11.
*June 7.

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

Appeal—Questions of fact—Second appellate court.

Where a judgment upon questions of fact rendered in a court of first instance has been reversed upon a first appeal, a second court of appeal should not interfere to restore the original judgment, unless it clearly appears that the reversal was erroneous.

APPEAL from the judgment of the Court of Queen's Bench for Lower Canada (appeal side) (1), reversing the judgment of the Superior Court, District of Montreal (2), which had awarded the plaintiff $500 damages for injuries received by his minor daughter while in the employ of the defendant.

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

(1) Q. R. 5 Q. B. 191. (2) Q. R. 8 S. C. 354.

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The plaintiff's daughter was employed in the defendant's laundry in the operation of a steam mangle of which she perfectly understood the management. At the time of the accident the machine was in good working order and was not considered dangerous to operate provided the person using it exercised ordinary care and prudence. The Government Inspector of Factories visited the establishment and approved of the machine before the accident occurred and could not suggest any new guard or improvement necessary for the safety of an employee operating it. The factory was kept in the best possible order, was well ventilated and at the time of the accident was not unusually warm. It appeared that the victim of the accident had gone to work on the morning in question without breakfast, and was attacked by faintness, and, while in a state of unconsciousness she dropped her hand into an opening in the machine and received severe injuries by coming in contact with the heated cylinder and large revolving rollers.

Geoffrion Q.C. and *Goyette* for the appellant.

McGibbon Q.C. for the respondent.

The judgment of the court was delivered by:

TASCHEREAU J.—This appeal must be dismissed. We are of opinion with the court below that the plaintiff has wholly failed to prove that the accident in question was caused by the negligence of the defendant. This is an appeal upon a question of fact, and though it is true, as said before us by counsel for the appellant, that his action was maintained by the court of first instance, yet his appeal here does not get much support from it. For it is settled law upon which we have often acted here, that where a judgment upon facts has been rendered by a court of first instance,

and a first court of appeal has reversed that judgment, a second court of appeal should interfere with the judgment on the first appeal, only if clearly satisfied that it is erroneous; *Symington* v. *Symington* (1). Now here the appellant has not only failed to satisfy us that the judgment of the court of appeal is erroneous, but the evidence on record establishes clearly that the judgment of the Superior Court in his favour could never be supported.

Appeal dismissed with costs.

Solicitors for the appellant: *Jasmin & Goyette.*

Solicitors for the respondent: *McGibbon, Hogle & Mitchell.*

ADOLPHE DAVIS *alias* DAVID (PLAINTIFF) .... APPELLANT;

AND

THE CITY OF MONTREAL (DEFENDANT) .... RESPONDENT.

1897
*May 11, 12.
*June 7.

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

Master and servant—Hiring of personal services—Municipal corporation—Appointment of officers — Summary dismissal—Libellous resolution—Statute, interpretation of—Difference in text of English and French versions—52 V. c. 79, s. 79 (Q.)—"A discrétion"—"At pleasure."

The Charter of the City of Montreal, 1889 (52 Vict. ch. 79,) section 79 gives power to the City Council to appoint and remove such officers as it may deem necessary to carry into execution the powers vested in it by the charter, the French version of the Act stating that such powers may be exercised *"à sa discrétion,"* while the English version has the words *"at its pleasure."*

Held, that notwithstanding the apparent difference between the two versions of the statute, it must be interpreted as one and the same enactment, and the City Council was thereby given full and unlimited power, in cases where the engagement has been made indefinitely as to duration, to remove officers summarily and without previous notice, upon payment only of the amount of salary accrued to such officer up to the date of such dismissal.

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

(1) L. R. 2 H. L. Sc. 415.

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APPEAL from the judgment of the Court of Queen's Bench for Lower Canada (appeal side) (1), which set aside and varied the judgment of the Superior Court, District of Montreal in favour of the plaintiff.

By the judgment of the trial court the plaintiff was awarded $3,000 damages for wrongful and abrupt dismissal as an officer of the Corporation of Montreal and a further sum of $487.50, (the equivalent of his salary at the rate of his engagement from the date of the last payment made to him up to the institution of the action,) as salary and damages for the violation of the contract of engagement between him and the respondent. On appeal the Court of Queen's Bench reversed the finding of the Superior Court as to the damages for wrongful dismissal, and reduced the other item to $257.50, amount of salary remaining unpaid at the time of his dismissal.

A statement of the circumstances under which the action was brought and of the facts and questions at issue, will be found in the judgment reported. The resolution of the Council of the City of Montreal dismissing the appellant was in the following terms:—

"Whereas it appears by the report of the Sub-Committee, that Adolphus Davis, the Superintendent of the Water Works Department, Montreal, committed a serious fault by making unfounded charges against his assistant Mr. Laforest, and especially by accusing the latter of incompetency;

"Whereas in said report, said Davis is charged with negligence towards his committee;

"Whereas it appears that said Davis, since he is employed by the city, has refused and still refuses, systematically and without any cause whatever, to recognize Mr. Laforest as his assistant, and tends to

(1) Q. R. 6 Q. B. 177.

render inefficient the administration of the Water Department;

"Be it resolved to dismiss said Davis as Superintendent of the Montreal Water Works, and that he be hereby dismissed as such."

Madore for the appellant. On the appellant's appointment his salary was fixed at a certain rate per year. His engagement was therefore a yearly engagement subject to the ordinary rules as to renewals and termination; Arts. 1609, 1642, 1667, 1670 C. C. Appellant is entitled to his full salary up to the time he brought action, and further recourse for whatever balance he can claim under his contract. No unusual privilege arises from the respondent's powers under 52 Vict. ch. 79, sec. 79. The right of dismissal given by the statute cannot be exercised arbitrarily; it must be done according to the laws applicable to the lease and hire of personal services. In the exercise of all discretion thus given, the rules of reason and justice must be followed. *Rooke's Case* (1); *Keighley's Case* (2); *Lee* v. *Bude and Torrington Junction Railway Co.* (3); and dismissals made in a manner legal and regular and not capriciously. Substantial reasons must be given. *In re Taylor* (4); *Doherty* v. *Allman* (5); *Wilson* v. *Rastall* (6).

There is a difference between the term "at pleasure" used in the English version of this section 79 and "*à discrétion*" in the French version,—and it is quite evident that the French text expressed the intention of the Quebec legislature with the greatest certainty.

Section 79 is the reproduction of section 64 of ch. 51 of 37 Vict., (Que.) under which *Dugdale* v. *The City of Montreal* (7), was decided. This disposition

(1) 5 Rep. 100 *a*.
(2) 10 Rep. 139 *a*.
(3) L. R. 6 C. P. 576; 40 L. J. C. P. 285.
(4) 4 Ch. D. 157; 46 L J. Ch. 399.
(5) 3 App. Cas. 709.
(6) 4 T. R. 753 at p. 757.
(7) 25 L. C. Jur. 149.

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did not give the right to dismiss servants, unfairly, without notice and in violation of contract. *The Montreal Turnpike Trustees* v. *Rielle* (1), decided under a similar clause of the charter of the Montreal Turnpike Trustees supports this contention, as also does *Brown* v. *The City of Montreal* (2).

The respondents have failed to justify their conduct and ought to be mulct in damages on account of the libellous terms of their resolution, which was malicious and based only upon the hostility of certain members of the council towards the appellant.

Ethier Q.C. for the respondent. It has not been proved that the city council or its members who voted for the motion of dismissal were actuated by malice, but the council appears to have acted in good faith.

The proper interpretation of section 79 of the city charter (52 Vict. ch. 79) gives the council power to appoint and remove officers at its pleasure. We have to deal here with a commission conferred during pleasure, called by the authors *ad nutum* or *durante beneplacito*. Full power is given to the employer to remove the employee for reasons that may be good or bad, and the value of which cannot be scrutinized by the courts because the employee or officer accepts the position on those terms. *Houseman* v. *The Commonwealth* (3). Angell & Ames on Corporations, sec. 426, and authorities quoted. Dillon on Municipal Corporations, (4 ed.) secs. 249, 250 and cases cited in note 3. 1 Beach on Public Corporations, sec. 189. Harrison's Municipal Manual, (5 ed.) p. 205 and cases cited under note *e*. No damages have been proved by appellant.

The judgment of the court was delivered by :

(1) M. L. R. 6 Q. B. 53. (2) 31 L. C. Jur. 138.
(3) 100 Penn. 222.

TASCHEREAU J.—The appellant, who held the position of superintendent of the water-works in the city of Montreal, having been summarily dismissed, has taken an action against the city for damages and a portion of his salary, pretended to have become due subsequently to the date of his dismissal. The facts of the case may be briefly stated as follows:—On the first of August, 1892, the appellant was appointed by the city council as superintendent of the water-works. At that time nothing was mentioned of his salary, but two months later, on the third day of October, a resolution was passed by the council fixing it at $3,500 per annum. On the twenty-first day of May, 1895, the city council passed a resolution dismissing him. Hence the present action, containing a number of allegations, to the effect that the council were prompted by pure malice and hostility towards the appellant; that a conspiracy had been got up by certain members of the council with the object of getting rid of him; that an investigation had taken place before the water committee with the determination on the part of its members to obtain his dismissal; that Laforest, his assistant, with a view of superseding him, had influenced the committee in every possible way, and that, the dismissal being unjustifiable, he, (the appellant), was well founded in asking $50,000 damages and $487.50 for salary.

The answer of the respondent to those allegations consists in stating that the agreement entered into between the city and the appellant on the first of August, 1892, was vague and uncertain; no time was therein mentioned for its duration, and even no salary of any kind was determined; that by 52 Vict. ch. 79, sec. 79,

the council may appoint such officers as it may think necessary to carry into execution the powers vested in it by the said Act, and may prescribe and regulate by by-law the duties of such officers re-

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pectively, and *at its pleasure* remove any such officer and appoint another in his place;

that this privilege of nominating and dismissing officers is absolute.

The Superior Court gave judgment in favour of the appellant for $3,000 damages and $487.50 salary. In the court of appeal the action was dismissed *in toto* as to the damages claimed and judgment entered but for the salary that had accrued at the time of the dismissal.

There is no cross appeal, and the amount so granted to the plaintiff in the court of appeal is not in controversy here.

The plaintiff's appeal must in my opinion be dismissed. As to the damages, there is no evidence whatever in the record that the corporation acted through malicious motives when passing the resolution to dismiss the appellant. There is nothing that I can see in the wording of that resolution of a nature at all injurious to the appellant's character and reputation, either as an engineer or as a private citizen.

As to the claim for salary the appeal must also fail. When the legislature empowered the corporation to remove its officers at its pleasure, it must have intended to vest it with the power claimed by it in this case. The statute would otherwise have no meaning. It must be interpreted as giving powers which otherwise would not lie in the corporation. The appellant has attempted in vain to have us find a difference on this point between the French and English versions of the statute. There would appear at first sight to be one, but we have to interpret both as one and the same enactment, not as two different ones. And the statute would mean nothing if the appellant's contention as to the French word *discrétion* as differing from the English version "at pleasure" was to prevail. Chief Justice Sir Alexandre Lacoste's reasoning for the court

on both parts of the claim seems to me unanswerable, and I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Madore & Guerin.*

Solicitors for the respondent: *Rouer Roy* and *L. J. Ethier.*

JAMES McGOEY (PLAINTIFF) ....APPELLANT;

AND

SARAH E. LEAMY (DEFENDANT)........RESPONDENT.

1897
May 12.
*June 7.

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

Agreement respecting lands—Boundaries—Referee's decision—Bornage—Arbitrations—Arts. 941-945 *and* 1341 *et seq. C. C. P.*

The owners of contiguous farms executed a deed for the purpose of settling a boundary line between their lands, thereby naming a third person to ascertain and fix the true division line upon the ground and agreeing further to abide by his decision and accept the line which he might establish as correct. On the conclusion of the referee's operations one of the parties refused to accept or act upon his decision, and action was brought by the other party to have the line so established declared to be the true boundary and to revendicate the strip of land lying upon his side of it.

Held, reversing the judgment of the Court of Queen's Bench, that the agreement thus entered into was a contract binding upon the parties to be executed between them according to the terms therein expressed and was not subject to the formalities prescribed by the Code of Civil Procedure relating to arbitrations.

APPEAL from the judgment of the Court of Queen's Bench for Lower Canada (appeal side), which reversed the decision of the Superior Court, District of Ottawa, maintaining the plaintiff's action with costs.

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

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The circumstances under which the action was brought, and questions in issue, are stated in the report of the judgment on a motion to quash the present appeal (1), and are also referred to in the final judgment now reported.

Foran Q.C. for the appellant. This case depends upon the binding effect of the agreement the parties made in 1889 referring their dispute to the decision of a third party. That agreement must be carried out between them according to the provisions it contains, and does not call for the observance of the formalities required by the Code of Civil Procedure (2) governing submissions to arbitration. The appellant is not obliged to proceed to a *bornage* (3), but is entitled to have the agreement fully carried out and validated as a link in his chain of title to the lands in dispute up to the division line which was ascertained and fixed by the referee on the ground.

The technical objections as to formalities taken in the Court of Queen's Bench and here, even if they can apply, were not set up in defendant's pleadings filed in the trial court and thus she is not, in any event, entitled to succeed upon them, especially as it appears from the record that she was fully aware of the referee's proceedings and only claims title to the disputed strip of land by virtue of long possession without any other title—"*Omnia præsumuntur contra spoliatorem.*" "*Usurpateur n'acquiert que pied à pied*" (4). As to questions not put in issue by the pleas, see *L'Union St. Joseph* v. *Lapierre* (5); *Bain* v. *City of Montreal* (6); *Venner* v. *Sun Life Insurance Co.* (7); *Heyneman* v. *Smith* (8); *The Queen* v. *Cimon* (9); *Rolland* v. *Cassidy* (10).

(1) 27 Can. S. C. R. 193.
(2) Arts. 1341 *et seq.*
(3) Arts. 941-945 C. C. P.
(4) Poth. Pos. no. 41.
(5) 4 Can. S. C. R. 164.
(6) 8 Can. S. C. R. 252, 291.
(7) 17 Can. S. C. R. 394, 402.
(8) 21 L. C. Jur. 298.
(9) 23 Can. S. C. R. 62, 73.
(10) 13 App. Cas. 770.

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Geoffrion Q.C., (*Champagne* with him,) for the respondent. The deed of 1889 is a deed of submission, under which the surveyor Farley, the third party named therein, was bound to make an award, and therefore he had to proceed under the rules contained in articles 1341 and following of our Code of Civil Procedure. His proces-verbal and survey do not constitute an award or decision binding upon the parties, and as there was no award ever rendered the respondent could properly refuse to sign the proces-verbal or accept the line. If the deed was not a submission, but a simple agreement to proceed to a *bornage*, and if the signature and acquiescence of the respondents were necessary, the respondents were justifiable in refusing to accept such *bornage* as unjust, erroneous and illegal. The deed does not comply with art. 1344 C. C. P., as the time within which the award must be given is not stated, and it appears that prior to his appointment Farley had already begun his proceedings, without the knowledge of the respondent.

Article 1352 C. C. P. requires awards to be made out in notarial form, or deposited with a notary who draws up an authentic act of the deposit, and they must be given or pronounced to the parties, or served upon them, within the delay fixed by the submission. None of these formalities have been observed. On the effect of the informalities we refer the court to *Chapman* v. *Hodgson* (1); *Peters et al.* v. *Commissaires du Hâvre de Québec* (2); *Hébert et al.* v. *Wright* (3). An award which has been neither pronounced nor served upon the parties within the time fixed by the submission is null, whatever knowledge the parties may have otherwise had of the award, and it can be pronounced only by reading the award to the party.

(1) 9 L. C. Jur. 112. (2) 15 Q. L. R. 277.
(3) 18 R.L. 538; Q.R. 1 Q.B. 304.

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The respondents claim that it is clearly established that their possession for more than thirty years, of the land now occupied by them, is determined by a fence. The evidence both before the surveyor and before the Superior Court, shows these properties as separated by an existing fence for over forty years, and that the appellant and his *auteurs* recognized this fence as the division line. The surveyor adopted the fence as being the line for part of the way, and rejected it for another part; this is a mere caprice on his part as the fence is visible in all its course and is straight and without deviations.

The Superior Court held that Farley's survey was in conformity with the titles of the parties as to the contents of their properties, and that from the measurement, it would appear that the fence encroaches on the appellant's side. Though the surveyor says as much in his proces-verbal, no titles were produced. At any rate titles are of no value against peaceable possession for thirty years, even beyond the limits mentioned in the titles.

The judgment of the court was delivered by:

TASCHEREAU J.—This is an appeal by the plaintiff. His action was maintained in the Superior Court but dismissed in the court of appeal. By his declaration he alleged that the defendant and he were each owners respectively of two lots of land that were contiguous but not divided by any regular line or boundaries; that in November, 1889, he and the defendant agreed that for the future such a line should be established by a surveyor named Farley, binding themselves to abide by and accept the said surveyor's report as indicating the boundary line between their said respective properties. He further alleged that in the said month of November, and

in December, January and February following, Farley proceeded to ascertain the true line of delimination and declared by his survey and proces-verbal and plan that a line "D. H.," was the true boundary of the properties; but that although he, the appellant, accepted the result of such operations and had signed the proces-verbal, the other parties to the agreement, now represented by the respondent, had refused to do so on demand being made, and continued to occupy a considerable strip of land west of the line, and refused to allow appellant to enter upon it and to remodel the fences according to the surveyor's decision. The appellant's conclusions are that the line as marked in the field and recorded in the plan and proces-verbal of survey of Farley, the surveyor, should be declared the true line of division, that the respondent should be enjoined not to trespass beyond it and give up possession of all land west of it; that appellant should be declared proprietor of the land up to the line and be put in possession of it; and finally, that fixed and final boundary marks should be placed in the field along the line in question to determine the same.

The respondent by her plea admits that the parties are owners of the contiguous properties as alleged in the declaration. By several allegations she claims that she was at the time of the action, the owner of the land as divided from the appellant's by a fence for over forty years. The respondent further alleges that she never refused to proceed to a *bornage*, and she specially denies that she was bound to accept the boundary line as fixed and determined by the surveyor Farley; that the respondent refused to sign the said proces-verbal of survey because the same was irregular, erroneous, and not in conformity to the titles and possession of the parties; that the respondent was not obliged to sign or accept any proces-verbal of survey, more espe-

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cially when said proces-verbal of survey was irregular, erroneous and contrary to the rights of the parties. By the conclusions of her plea, the respondent declared that she is ready to run a line of division between the properties in question, according to the possession of the said respondent, and provided said survey takes place according to the formalities indicated by the laws of the province.

The grounds upon which the court of appeal relied for reversing the judgment of the Superior Court are exclusively that the formalities required for awards of arbitrators by the Code of Civil Procedure, arts. 1344 and following, had not been complied with. I am of opinion that we should not thus allow shipwreck of a good cause to be made on the rocks of refined technicality. This is not a case of arbitration under the Code, but of an agreement binding upon the parties. Here are two neighbours who, to avoid litigation and settle amicably the division line between their properties, agree that a line to be drawn upon the spot by a third party, be he a surveyor or anything else, shall thereafter be that division line, and bind themselves to accept that third party's decision, but, now that this third party has fixed that line, the respondent refuses to be bound by his conclusions, because they are not in accordance with her opinions and contentions in the matter. She wishes us to read her agreement of November, 1889, as if she had expressly stipulated therein that she would not be bound by it, if the third party's line did not suit her or was not in accordance with her views. We cannot do that. She cannot be so allowed to repudiate her engagements. No fraud or malversation of any kind is imputed to this surveyor's operations, and the Superior Court was right in maintaining the action. I would allow the appeal, and restore the judgment of the Superior Court. It does

not, however, grant that part of the plaintiff's conclusions that final boundaries be placed in the field along the said line by said Farley or any other surveyor to be named by the Superior Court, according to said proces-verbal, but that may be added on the drawing up of the minutes if thought necessary.

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Appeal allowed with costs.

Solicitor for the appellant: *Thomas P. Forán.*

Solicitors for the respondent: *Rochon & Champagne.*

TÉLESPHORE VALADE (DEFENDANT)...APPELLANT;

AND

AUGUSTIN LALONDE AND ANOTHER (PLAINTIFFS).................... RESPONDENTS.

1897
*May 12.
*June 7.

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

Sale—Donation in form of—Gifts in contemplation of death—Mortal illness of donor—Presumption of nullity—Validating circumstances—Dation en paiement—Arts. 762, 989 *C. C.*

During her last illness and a short time before her death, B. granted certain lands to V. by an instrument purporting to be a deed of sale for a price therein stated, but in reality the transaction was intended as a settlement of arrears of salary due by B to the grantee and the consideration acknowledged by the deed was never paid.

Held, reversing the decision of the Court of Queen's Bench, that the deed could not be set aside and annulled as void, under the provisions of article 762 of the Civil Code, as the circumstances tended to shew that the transaction was actually for good consideration (*dation en paiement*,) and consequently legal and valid.

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

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APPEAL from the decision of the Court of Queen's Bench for Lower Canada, reversing the judgment of the Superior Court, sitting in Review at Montreal, which set aside the judgment of the trial court in favour of the plaintiff.

The facts and questions at issue in this case are set out in the judgment of the court pronounced by His Lordship Mr. Justice Girouard.

Geoffrion Q.C. and *Beaudin* Q.C. for the appellant. The appellant has proved the true consideration for the grant of the lands to him to have been legal and valid. Art. 989 C.C.; *O'Brien* v. *Molson* (1); 6 Toullier, nos. 176 & 177. It is not necessary to express the consideration in a deed except where the law expressly requires it; 1 Larombière art. 1132 C. N., no. 8; Dem., "Contrats," vol. 1, no. 373; Merlin Rep. vo. "Convention" § 2, no. N; *Farrau* v. *Syndics Cartier* (2). The appellant had been in possession of the property for a long time during the donor's lifetime in anticipation of his title being made perfect by a deed for the consideration of salary due him. Art. 762 C.C., by its exceptions as to validating circumstances and peaceable possession, covers the case.

Madore for the respondents. The debt due the appellant could not have been enforced at law as it appeared he had received, under a former donation and otherwise, adequate indemnity for any wages owing to him, and consequently, as no valid debt existed at the time of the passing of the deed of sale, and no money was paid upon the purchase price mentioned, this was necessarily a deed of donation passed during the mortal illness of the donor and in contemplation of her death. Art. 762 C. C.; Pothier (Bugnet ed.) vol. I. title XV. no. 7, p, 352. Donations

(1) 21 L. C. Jur. 287. (2) S.V. 55, 1, 751.

inter-vivos, id. vol. VIII., p. 350, 351. nos. 11 et 15.

The judgment of the court was delivered by

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GIROUARD J.—Le 9 août 1892, dame Mathilde Brabant, la mère de l'appelant, passa un acte de vente, en sa faveur, d'une propriété située sur la rue Saint-Félix, étant le numéro 697 du quartier Saint-Antoine, en la cité de Montréal, pour le prix de $6,000 ;—

En déduction de laquelle somme ladite venderesse reconnaît et confesse avoir eu et reçu du dit acquéreur celle de cinq mille dollars, dont quittance d'autant.

A cette date, la venderesse était malade d'une maladie dont elle mourut onze jours plus tard, le 20 août 1892, et sa succession réclame cette propriété comme étant une donation déguisée à cause de mort, et par conséquent nulle aux termes de l'article 762 du Code Civil. L'appelant a répondu que cette vente était sérieuse et véritable, et que bien que l'acte de vente constate qu'il a payé cinq mille piastres en acompte, il peut prouver qu'il a donné bonne et valable considération équivalant à la dite somme, et particulièrement ses services comme gérant de l'hôtel tenu par sa mère. Il invoque l'article 989 qui déclare que le contrat n'est pas moins valable, quoique la considération soit exprimée incorrectement dans l'écrit qui le constate.

La cour Supérieure (Gill J.), a annulé la vente comme simulée. La cour de Rivision (Jetté et Taschereau JJ., Curran J. dissident) a infirmé ce jugement:

Considérant qu'il est suffisamment prouvé que l'acte de vente du neuf août 1892, par Mathilde Brabant au défendeur, a réellement comporté dans l'esprit des contractants et dans la vérité des faits, une vente véritable et faite pour cause ou considération valable et non pas une donation déguisée, laquelle aurait été nulle comme faite durant la maladie mortelle de la donatrice ; qu'un contrat n'est pas moins valable quoique la considération n'en soit pas exprimée ou soit incorrecte-

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ment exprimée dans l'écrit qui le constate (Code Civil, art. 989) ; que dans l'espèce, il est établi que lors de la passation du dit acte, il était dû au défendeur par la venderesse, pour arrérages de salaire, une somme beaucoup plus considérable que le montant fixé par l'acte comme prix de vente de l'immeuble ; que cette vente, dans l'esprit des contractants aurait dû être opérée depuis longtemps et n'avait été retardée que par négligence ou oubli, et que le prix de vente y stipulé représente les arrérages de salaire ainsi dus au défendeur, quoique l'acte mentionne incorrectement un paiement opéré au comptant au moment de la vente ; que quoique gravement malade, la dite venderesse était le neuf août 1892, parfaitement en état, sous le rapport mental, de donner son consentement au dit acte de vente, et l'a librement donné.

La cour d'Appel a infirmé ce jugement pour les motifs qui suivent :

Considérant qu'à la date de cet acte, la dite dame Mathilde Brabant était malade de la maladie dont elle est morte le vingt du même mois, et que lors de l'acte, cette maladie était réputée mortelle ;

Considérant que l'intimé n'a, ni avant ni lors de l'acte de vente payé aucune somme d'argent, en raison d'icelui ;

Considérant que l'intimé n'a pas prouvé que la venderesse fût endettée envers lui, en aucune somme d'argent, pour services d'administration et autres qu'il invoque, et qu'il a aussi failli d'établir une considération appréciable en argent ;

Considérant que le dit acte de vente était une donation à titre gratruit déguisée sous la forme d'une vente, et qu'aucune circonstance n'aide à le valider ;

Vu l'article 762 du Code Civil.

Considérant que le dit acte de vente est frappé de la nullité prononcée par cet article et doit, en conséquence, être déclaré nul.

Nous sommes d'avis que ce jugement est mal fondé et que celui de la cour de Revision doit être maintenu. L'article 762 ne déclare pas toutes les donations entre vifs réputées à cause de mort et nulles, lorsqu'elles sont faites pendant la maladie réputée mortelle du donateur, mais seulement celles que les circonstances n'aident à valider. Or, quelles sont les circonstances dans cette espèce ? L'appelant a rendu des services à la donatrice valant plus que la somme de cinq mille piastres. L'acte de vente était une dation en paiement. Ceci est prouvé hors de tout doute, et il est

aussi en preuve qu'avant de signer l'acte de vente, la donatrice et toute la famille considéraient que l'immeuble en question était la propriété de l'appelant pour le récompenser de ses services.

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Nous sommes donc d'avis que le jugement de la cour d'Appel est erroné et que celui de la cour de Revison doit être suivi au moins quant à la propriété du dit immeuble qui est la seule question soulevée devant nous, et à cet égard, l'action des intimés est déboutée avec dépens devant toutes les cours.

Appeal allowed with costs.

Solicitors for the appellant: *Beaudin, Cardinal, Loranger & St. Germain.*

Solicitors for the respondents: *Madore & Guerin.*

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*May 12, 13.
*June 7.

ARSÈNE CHARLEBOIS (PLAINTIFF).....APPELLANT;

AND

LOUIS JOSEPH ARTHUR SURVEYER (DEFENDANT)..................... } RESPONDENT.

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

Malicious prosecution—Probable cause.

S., being a holder of a promissory note indorsed to him by the payees, sued to recover the amount, but his action was dismissed upon evidence that it had never been signed by the person whose name appeared as maker, nor with his knowledge or consent, but had been signed by his son without his authority. The son's evidence on the trial of the suit was to the effect that he never intended to sign the note, and if he had actually signed it with his father's name, it was because he believed that it was merely a receipt for goods delivered by express. Immediately after the dismissal of the suit, S. wrote to the payees asking them if they would give him any information which would help him in laying a criminal charge in order to force payment of the note and costs. He also applied to the express company's agent, by whom the goods were delivered and the note procured, and was informed that there was a receipt for the goods in the delivery-book but that the signature was denied and could not be proved. However, without further inquiry, and notwithstanding the warning of a mutual friend against taking criminal proceedings, S. laid an information against the son for forgery. The Police Magistrate at Montreal, upon the investigation of the charge, declared it to be unfounded and discharged the prisoner.

Held, reversing the judgments of both courts below, that, under the circumstances, the prosecution was without reasonable or probable cause, and the plaintiff was entitled to substantial damages.

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

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

judgment of the Superior Court, District of Montreal, which dismissed the plaintiff's action with costs.

A statement of the case and matters at issue will be found in the judgment of the court pronounced by His Lordship Mr. Justice Gwynne.

Saint-Pierre Q.C. for the appellant.

Geoffrion Q.C. and *Beaudin* Q.C. for the respondent.

The judgment of the court was delivered by:

GWYNNE J.—This is an action for malicious prosecution on a criminal charge.

The plaintiff in his declaration alleges that on the 22nd of October, 1892, the defendant without any reasonable or probable cause, but from mere malice and after having been previously warned of the illegality of his procedure and of the risk he would run, laid a complaint upon oath before a Justice of the Peace for the Province of Quebec in which he accused the plaintiff of having feloniously and with intent to defraud, forged the name of his father Léon Charlebois upon a certain promissory note. The complaint made by the defendant before the justice was then set forth whereby it appeared that the defendant had deposed on oath that he had become the bearer of a promissory note for the sum of sixty dollars, dated Newmarket, 25th March, 1892, payable at sixty days from date, to the order of the Newmarket Washing Machine Company, at the Bank of Ontario, at Newmarket, signed "Léon Charlebois"—that he had since ascertained that the said note had been feloniously forged—that the signature "Léon Charlebois" should be that of Mr. Léon Charlebois, merchant of Pointe Clair, in the District of Montreal, but that the said Léon Charlebois had denied upon oath in a civil court that he had ever signed the said note—that Arsène Charlebois, his

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son, had admitted in the same cause indirectly having set the signature at the foot of the note and that the father, Léon Charlebois, had also sworn in court that he had never authorized any person to sign the said note, "in consequence of which" the complaint proceeded, the defendant accused the said Arsène Charlebois with *having feloniously forged the said note with intent to defraud.* This complaint had been dismissed by the Police Magistrate, Judge Desnoyers, as unfounded. To this declaration the defendant pleaded among other things that he was the bearer for value of a promissory note bearing the signature of Léon Charlebois, the plaintiff's father; that having sued the said Léon Charlebois in the Circuit Court upon the note he pleaded to the said action, and made oath that the signature placed at the foot of the note was not his, and that he had never authorized any one to sign it for him; that upon trial of the cause the defendant's action was dismissed with costs because it was then and there proved that the signature at the foot of the note had never been set thereto by the said Léon Charlebois, but by his son, the plaintiff, in the present action, without the authority, consent or knowledge of the said Charlebois; that in these circumstances and considering the position of the plaintiff, his information and business experience, the defendant was justified in believing and had good reason to believe that the plaintiff knew perfectly well what he was doing when he signed the name of his father.

The Superior Court and the Court of Appeal dismissed the plaintiff's action—and hence the present appeal.

It is noteworthy here that the defendant in his complaint before the magistrate alleged that since the trial of the action in the Circuit Court *he had ascertained* that the note had been feloniously forged. The

dismissal of the complaint shows that he failed in establishing that allegation. In the present action the defendant justifies his having made the charge upon much the same grounds. It becomes therefore important to consider whether the matter alleged by the defendant in his deposition upon the criminal charge and in his plea fairly states the whole of the matters brought to his notice before he made the criminal charge, and whether, in view of the circumstances which were so brought to his knowledge, it can be said that he had reasonable and probable cause for making the accusation against this young man who, according to the evidence, appears to bear the very best character and belongs to a family of the highest reputation of their class in the neighbourhood where they live.

Immediately after the trial of the action on the note and upon the 1st of October, 1892, the defendant wrote to Mr. Isaac Shupe, Newmarket, the agent of the company, and from whom the defendant had received the note, as follows:

DEAR SIR,—I have just got through with my lawsuit with Charlebois, amount $60.00, which I lost. The father came and swore that he never authorized his son to sign notes or cheques and the son swore that he never intended and had no authority to sign notes, and that he signed this one just as a receipt to the express, believing that it was the express receipt. *Can you give me any information that would lead me to make of this a criminal case, for besides the loss of* $60.00 *I have a bill of costs of* $40.00. *I would like to get repaid if I can from father or son.* I hope to hear from you soon.

We have not the whole of the evidence which was given in the action in the Circuit Court. However, in the present action the defendant has called and examined on his own behalf the plaintiff in this action, and on his examination the document purporting to constitute his father agent of the Newmarket Washing Machine Co., was put into his hands

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the same as was spoken of in the civil action and he was required to read it, which he did. The document is headed:

NEWMARKET WASHING MACHINE CO.,
NEWMARKET, ONT.,
POINTE-CLAIRE, 12th March, 1892.

This is to certify that we have this day appointed Léon Charlebois our agent to sell machines in the parish of La Pointe-Claire and surrounding country.

We agree to furnish Léon Charlebois with all the machines he may require for thirty dollars a dozen, payable in sixty days, or twenty-four dollars cash on delivery, the said Charlebois to have and to hold the agency as long as he will push the sales and continue to purchase. Said Léon Charlebois agrees to keep the retail prices up to four dollars each. We further agree to take back at manufacturer's prices and will pay cash on delivery, at any time after the expiration of sixty days from date hereof any machines that said Léon Charlebois cannot sell.

Upon the back of the document were printed the words following:—

NEWMARKET WASHING MACHINE CO.,
NEWMARKET, Ont., March 12th, 1892.

Please have manufactured and sent me by express to Pointe Claire two dozen of your washing machines for which I agree to pay thirty dollars per dozen, in sixty days, by note, or twenty-four dollars per dozen, cash on delivery.

LÉON CHARLEBOIS,
Per ARSÈNE CHARLEBOIS.

The witness having been asked whether he had signed his father's name to this document, answered that he had; that he had been requested to do so by Mr. Shupe, but that he had never read what was on the back; that he had read what was on the face, and Shupe had explained it to him to mean that at the expiration of 60 days such of the machines as were not sold, if not returned, should be paid for, and that such as should have been sold should also be paid for, and he stated that his uncle Duchesneau was present at the time, but witness swore that he had not observed

nor was his notice drawn to the words on the back of the document, nor was there any mention made of a note; that the only conditions of the bargain were those on the face of the document which Shupe explained as above, and that he relied wholly upon what Shupe explained to be the conditions which the document imposed. The witness also swore that when he went to the station on the 25th March for the machines, Parent, the agent, never said a word about there being $48 to be paid, or a promissory note at 60 days to be given. That it was about six o'clock in the evening when witness went to the station, that Parent said, "sign this," and that witness signed without reading what he signed; that then Parent said there was a dollar and something over to pay for freight, and witness said that he did not recollect whether he had paid it or not, but he repeated and swore positively that not a word was said either about a promissory note or $48, and the witness added that he had been examined as a witness in the action in the Circuit Court, and had given this same testimony in the presence of the defendant.

The defendant in his examination before the Police Magistrate Mr. Desnoyers, on the criminal charge against the plaintiff, said that the plaintiff in his examination in the action in the Circuit Court admitted that he had signed his father's name on the note produced in the action and that he had done so under the belief that he was signing a receipt for the express, and that he had signed no other receipt for the machines. He admitted also that Léon Charlebois had said in his evidence in the same action that he had returned 22 of the machines, and that he was ready to pay for the other two, but the defendant never informed Mr. Shupe of this fact. He further said that he knew that Shupe's forms of contract per-

mitted the agent to return machines at the manufacturer's price, and that he had reason to believe that 22 of the machines had been returned, but that he had not been reimbursed by the Newmarket Washing Machine Company the manufacturer's price of the returned machines. He admitted also that Mr. St. Pierre, the advocate, before the commencement of the criminal proceedings, had requested him to suspend his proceedings until Mr. St. Pierre should have an opportunity to see Léon Charlebois to obtain the necessary information in the matter, and that Mr. St. Pierre told the defendant that if after obtaining such information he should be of opinion that either the plaintiff or his father were in any manner responsible to the defendant, that he would advise them to pay the note, and further, that on two different occasions Mr. St. Pierre had called at defendant's place of business and had told the defendant's agents that he had seen the Charlebois, both the father and the son, and after hearing their explanations he advised defendant as his friend not to take the criminal proceeding. He admitted also that he did not believe that the plaintiff had been benefited in any manner by writing the name of his father on the note in question, but he added that if the machines had been sold it might have been different, and he said that he did not act upon Mr. St. Pierre's advice because he considered it impossible for a man of business to sign a receipt for a promissory note.

On his examination in the present action he admitted that it was at his instance that Mr. Bryce the superintendent wrote a letter which was produced to Mr. Parent, and that Mr. Bryce submitted to defendant Parent's reply *immediately upon receipt of which he* made the criminal charge against the plaintiff.

These letters are as follows :—

CANADIAN EXPRESS COMPANY,
SUPERINTENDENT'S OFFICE,
MONTREAL, October 7th, 1892.

Agent—POINTE CLAIRE, QUE.

DEAR SIR,—*Re* shipment as per all way-bill. It is claimed by the party receiving the consignment that he signed the note for $60.00 instead of paying the C. O. D. and in signing the note he did so merely as receiving the goods and has no other receipt for the goods. Do you hold receipt in your book for the consignment, whom by, and on what date delivered? Your prompt reply will oblige,

Yours truly,
J. BRYCE, Supt.

POINTE CLAIRE, October 11th, 1892.

MR. BRYCE—DEAR SIR,—The party receiving the goods, I have his signature in delivery book but he denies having signed. I cannot swear it is his own signature but he signed the note all right and I gave him to understand what it was for.

Yours truly,
R. PARENT.

Now, at the time of the defendant writing to Mr. Shupe the letter of the 1st October, 1892, he had the plaintiff's statement upon oath of the circumstances under which Shupe procured him to sign the document appointing his father agent of the Washing Machine Manufacturing Company which, upon its face has not a word about a promissory note being to be given, and further, that the plaintiff's attention had not been drawn to the nature and purport of the indorsement in which the words "by note" are introduced thus changing the purport and effect of what appears on the face of the document which had been explained to him by Shupe in the manner described by the plaintiff. No evidence whatever had been given to shake this sworn testimony of the plaintiff, and uncontradicted it seems to point very strongly to the fact of a deception of no uncommon character having been practised upon this youth by Mr. Shupe and calculated to deceive and which has succeeded in deceiving and defrauding more experienced persons

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than this youth of 20 years of age as the experience of courts of justice has abundantly shown. No promissory note having been mentioned in the transaction, and the plaintiff's attention not having been drawn as he swore it had not to the contents of the indorsement which Shupe procured him to sign, it was but natural that he should not have expected a promissory note to be presented to him for his signature when he went for the machines at six o'clock on the evening of the 25th March, and only one paper having been presented to him for his signature when he received the machines, it is by no means incredible that the plaintiff should have signed it without reading it in the belief that it was a receipt for the goods that were being delivered to him that he was asked to sign. Yet it is upon the suggested incredibility of this statement of the plaintiff on his oath that the defendant mainly rests his charge against the plaintiff of his having feloniously forged his father's name to the note although no possible benefit that he could obtain or fraud that he could thereby have committed has been or apparently can be suggested. The defendant also in the civil action heard Léon Charlebois swear that he had returned twenty-two of the machines as unsaleable and in accordance with the terms of the document appointing him agent of the company, and the defendant has admitted that he knew Shupe's forms of contracts, and that they allow agents to return unsold machines at the manufacturer's prices, and that he had reason to believe that twenty-two of the machines received by Charlebois had been returned. It is apparent then from the defendant's knowledge of the above facts that he had not, and from his letter of the 1st of October, 1892, that he knew he had not any reasonable grounds whereon to make a charge of forgery against the plaintiff, and that his object in

writing the letter was to try to obtain any evidence whereon to found such a charge in the hope and expectation of thereby compelling Léon Charlebois, the father, to pay what the defendant had lost by his civil action having failed instead of suing the company who were liable to him as the indorsers. Now the only further evidence upon which the defendant rested his charge of felonious forgery against the plaintiff was Parent's answer to the latter written to him by Mr. Bryce at the defendant's suggestion, immediately after seeing which the defendant admits that he laid the charge in which he swore that since the action *he had ascertained* that the promissory note upon which the action was founded *had been feloniously forged.* From the above facts it plainly appears, I think, that the defendant was willing to catch at any straw to satisfy his conscience and to enable him to force the plaintiff or his father rather to reimburse to him his loss, when he accepted this letter of Parent as sufficient to displace all the sworn testimony and to support such a grave charge as felonious forgery which the contents of Parent's letter, even if uncontradicted, were wholly insufficient to support. I must say that the making of such a charge under the circumstances appearing in evidence as above detailed and in the face of the warning given by Mr. St. Pierre, an intimate acquaintance of the defendant and the plaintiff's father, was a wrongful, wanton, reckless and utterly unfounded proceeding originating in what is plainly shown to be actual malice.

Upon the charge before the magistrate the defendant appears to have called Parent to substantiate the statement in his letter. Comparing his evidence so given in chief with what is in his letter no one could suppose, although established by himself in cross-

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examination that the receipt for the machines in the book of the express company which is in the name of "L. Charlebois," and over the "L" the letter "A" is inserted erasing the "L" is in the handwriting of Parent himself, and whom it would be as reasonable to accuse of forgery as to charge the plaintiff with forgery, even if he had knowingly set his father's name to the note. The witness stated that it was in the evening, about 6 o'clock, when he, Parent, was very much engaged that plaintiff signed the paper, the entry having been presented to him upon receipt of which the machines were delivered to him; had the defendant been in possession of Parent's affidavit instead of his letter only there was nothing in it which in the face of all the other matters in the defendant's knowledge could have justified him in making the charge.

I think that the judgment of the court below cannot be sustained, and that the plaintiff is entitled to substantial damages for a very grave charge maliciously preferred against him without any reasonable or probable cause whatever. The appeal must therefore be allowed with costs and judgment be ordered to be entered for the plaintiff in the action in the court below for five hundred dollars damages and costs in all the courts of the class of action as brought.

Appeal allowed with costs.

Solicitors for the appellant: *Saint-Pierre, Pellissier & Wilson.*

Solicitors for the respondent: *Beaudin, Cardinal, Loranger & St. Germain.*

BENJAMIN TOOKE (DEFENDANT)........APPELLANT;

AND

FELIX BERGERON (PLAINTIFF) ....RESPONDENT.

1897

*May 13.
*June 7.

ON APPEAL FROM THE SUPERIOR COURT FOR LOWER CANADA, SITTING IN REVIEW AT MONTREAL.

Negligence—Master and servant—Injuries sustained by servant—Responsibility—Contributory negligence—Protection of machinery.

Where an employee sustains injuries in a factory through coming in contact with machinery, the employer, although he may be in default, cannot be held responsible in damages, unless it is shown that the accident by which the injuries were caused was directly due to his neglect.

APPEAL from the judgment of the Superior Court for Lower Canada, sitting in review at Montreal, affirming the judgment of the Superior Court, District of Montreal (1), which awarded the plaintiff damages for injuries sustained by his daughter (a minor.) whilst in the defendant's employ, with costs of suit.

The judgment of the court delivered by His Lordship Mr. Justice Girouard, contains a statement of the case.

McGibbon Q.C. for the appellant. The appellant's establishment was kept in the best possible order. *Cooper* v. *Wooley* (2); *Nichols* v. *Hall* (3). The revolving shaft where the accident occurred cannot by any practicable means be guarded so as to prevent such accidents. The skirt board introduced after the accident could not prevent accidents under similar circumstances. *Desroches et al.* v. *Gauthier* (4). There is no proof of any fault, on the part

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

(1) Q. R. 9 S. C. 506.
(2) L R. 2 Ex. 88.
(3) L. R. 8 C. P. 322.
(4) 3 Dor. Q. B. 25; 5 Legal News 40.

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of the appellant, to which the accident was directly due. *Montreal Rolling Mills Co.* v. *Corcoran.* (1); *Mercier* v. *Morin* (2); *Dominion Oil Cloth Co.* v. *Coallier* (3); *Sarault* v. *Viau* (4); *Thomas* v. *Quartermain* (5); *Radley* v. *London and North-Western Railway Co.* (6). The breach of a duty imposed by the "*Quebec Factories Act*" does not vest any right of action for damages in a person injured; *Atkinson* v. *Newcastle etc. Waterworks Co.* (7); it is merely an Act providing for police regulations; *Wilson* v. *Merry* (8); *Montreal Rolling Mills* v. *Corcoran* (1). This Act merely requires reasonable and necessary guards, such as are practicable, not that every conceivable point should be protected. The master is not an insurer of his servant's safety. *Moffette* v. *The Grand Trunk Railway Co.* (9); *Canadian Pacific Railway Co.* v. *Goyette* (10); *Currie* v. *Couture* (11). The accident could not have been foreseen or provided against by the appellant.

The factory rules strictly prohibited employees making their toilet before the closing hour, or at or near the machines. The accident was due to the employee's disobedience of rules, negligence and imprudence; "*Volenti non fit injuria.*" Sourdat, "Responsabilité" nos. 660 & 912; 7 Larombière, Arts. 1382-1383 C. N. no. 29 p. 560; Dal. Rep. Jurisp. vo. "*Ouvrier*" no. 104; *Globe Woolen Mills Co.* v. *Poitras* (12), and *Roberts* v. *Dorion* (13).

Beaudin Q.C. for the respondent. The appellant was in default. He had not fulfilled the requirements of the "*Quebec Factories Act*," and the presumptions

(1) 26 Can. S. C. R. 595.
(2) Q. R. 1 Q. B. 86.
(3) M. L. R. 6 Q. B. 268.
(4) 11 R. L. 217.
(5) 18 Q. B. D. 685.
(6) 1 App. Cas. 754.
(7) 2 Ex. D. 441.
(8) L. R. 1 H. L. Sc. 341.
(9) 16 L. C. R. 231.
(10) M. L. R. 2 Q. B. 310.
(11) 19 R. L. 443.
(12) Q. R. 4 Q. B. 116.
(13) Q. R. 4 Q. B. 117.

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are against him as a wrongdoer, responsibility follows as a matterof course. The case of *The Montreal Rolling Mills Co.* v. *Corcoran* (1), must be distinguished, for there the cause of the accident was a mystery, whilst in this case it is clearly shown to have been caused by the unguarded shaft. The facts have been found in the respondent's favour in the trial court, and in the Court of Review; these findings should not be disturbed here.

The judgment of the court was delivered by

GIROUARD J.—Le 8 octobre 1894, quelques minutes avant six heures, la fille mineure de l'intimé, depuis près de trois ans à l'emploi de l'appelant, fabriquant de chemises, fut la victime d'un grave et pénible accident. Attendant l'heure de la fermeture, 6 heures, p.m., elle se mit en frais de faire la toilette de sa chevelure, étant encore à son siège, en face de sa machine à coudre, mue par la vapeur. Malheureusement, le peigne de sa chevelure tomba, et dans la recherche qu'elle fit pour le retrouver, la chevelure, qui était pendante, fut prise par la courroie qui se trouvait au bas, sans garde, ni protection, et la conséquence fut la perte de la chevelure et d'une oreille. Depuis l'accident, à la recommandation de l'inspecteur provincial, une planche fut placée en avant de la machine, croyant par là même au moins diminuer le danger.

Il est en preuve que l'appelant tenait un établissement modèle sous tous les rapports et qu'avant l'accident, ces machines, partout où elles fonctionnaient, n'avaient pas la planche que l'inspecteur exigea après.

En supposant même que l'appelant eut été en défaut à cet égard, nous sommes d'opinion que ce défaut n'a pas été la cause du dommage. La cause principale et immédiate de l'accident, a été l'imprudence de la jeune

(1) 26 Can. S. C. R. 595.

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fille, qui, contrairement aux règlements de l'établissement, commença à faire sa toilette au siège de son ouvrage et exposa sa chevelure aux évolutions de la courroie. En décidant ainsi, nous ne faisons que suivre la jurisprudence de la province de Québec, particulièrement dans les causes de *Moffette* v. *The Grand Trunk Railway Co. of Canada* (1); *Sarault* v. *Viau* (2); *Desroches* v. *Gauthier* (3); *Compagnie de Navigation du Richelieu et d'Ontario* v. *St. Jean* (4); *St. Lawrence Sugar Refining Co.* v. *Campbell* (5); *Canadian Pacific Railway Co.* v. *Cadieux* (6); *Allan* v. *La Compagnie d'Assurance Maritime des Marchands du Canada* (7).

Nous sommes donc d'avis d'infirmer le jugement de la cour de Revision, et l'action du demandeur est déboutée avec dépens devant toutes les cours.

Appeal allowed with costs.

Solicitors for the appellant: *McGibbon, Hogle & Mitchell.*

Solicitors for the respondent: *Beaudin, Cardinal, Loranger & St. Germain.*

(1) 16 L. C. R. 231.
(2) 11 R. L. 217.
(3) 3 Dor. Q.B. 25; 5 Legal News 404.
(4) M.L.R. 1 Q. B. 252; 28 L. C. Jur. 91.
(5) 4 Dor. Q. B. 186; 29 L. C. Jur. 174.
(6) M. L. R. 3 Q. B. 315.
(7) 18 R. L. 481.

JOHN ROBERTSON (PLAINTIFF)........APPELLANT;

AND

WILLIAM H. DAVIS (DEFENDANT)........RESPONDENT.

1897

*May 14.
*June 7.

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

Action—Suretyship—Promissory note—Qualified indorsement.

D. indorsed two promissory notes, *pour aval*, at the same time marking them with the words "not negotiable and given as security." The notes were intended as security to the firm of A. & R. for advances to a third person on the publication of certain guide-books which were to be left in the hands of the firm as further security, the proceeds of sales to be applied towards reimbursement of the advances. It was also agreed that payment of the notes was not to be required while the books remained in the possession of the firm. The notes were protested for non-payment and, A. having died, R. as surviving partner of the firm and vested with all rights in the notes, sued the maker and indorser jointly and severally for the full amount. At the time of the action some of the books were still in the possession of R. and it appeared that he had not rendered the indorser any statement of the financial situation between the principal debtor and the firm.

Held, that the action was not based upon the real contract between the parties and that the plaintiff was not, under the circumstances, entitled to recover in an action upon the notes.

Held further, per Sedgewick J., that neither the payee of a promissory note nor the drawer of a bill of exchange can maintain an action against an indorser, where the action is founded upon the instrument itself.

APPEAL from the judgment of the Court of Queen's Bench for Lower Canada (appeal side), reversing the judgment of the Superior Court, District of Montreal, which maintained the plaintiff's action with costs.

The plaintiff by his declaration claimed from one McConniff and the present respondent jointly and severally:

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

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v.
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1.	The amount of a promissory note dated 7 Nov., 1891, by McConniff to Austin & Robertson, indorsed by the appellant, *pour aval*, payable in four years	$1,750 00
2.	Costs of protest thereof	3 59
3.	The amount of a promissory note dated 6 Oct., 1895, from the same party to the same firm, indorsed by the appellant, *pour aval*, payable thirty days after date (this note having been given in renewal of another of the same amount, dated 6 Oct., 1891, payable in four years)	3,500 00
4.	Costs of protest thereof	3 59
	Total amount of claim	$5,257 18

He also alleged that the firm of Austin & Robertson was dissolved by the death of Austin and that he took over the business of the firm and was vested with its rights.

McConniff did not contest, but on the contestation by the respondent it appeared that both the notes sued on had written across their faces the words "not negotiable and given as security"; that the respondent had agreed in this manner to become security for advances the firm made to McConniff for the publication of several editions of guide-books, the whole of which were to be left in the hands of the firm as further security, the proceeds of sales to be credited to McConniff, in deduction of the amount of the advances. A number of sales were made, the moneys received placed to McConniff's credit and in the meantime further advances made as the editions were published. At the time of the action some of the books were still in the hands of the firm, and it appeared that no statement of the accounts between McConniff and the firm had been furnished to respondent.

Greenshields Q.C. and *Lafleur* for the appellant. The notes were accommodation paper, indorsed by respondent without consideration, for the purpose of accommodating, by a loan of his credit, McConniff

who was to provide for the notes when they fell due (1). Although as between the party accommodated and accommodating party the relations are those of principal and surety, yet the accommodation indorser is not entitled to be credited with the amount of any securities in the hands of the holder taken by the latter from the principal debtor, until the accommodation indorser has himself paid the principal debt (2); so we were not obliged to account or to tender the books The security was continuing and survived the dissolution of the firm by Austin's death.

The cases cited and remarks of Sir William Ritchie C.J. in *Starrs* v. *Cosgrave* (3), show the distinctions between that case and the present one. See also remarks by Fournier J. in the same case, p. 587, and Gwynne J. at p. 593.

Macmaster Q.C. for the respondent. The conditions of the contract show that there was not to be a continuing security, but one which lasted only until the amount of the notes was reached, and the advances of that amount were fully reimbursed by receipts from sales before action; *Gerson* v. *Hamilton* (4); subsequent advances were upon McConniff's own credit; art. 1935 C. C.

The retention of the books in his possession would bar this action, and plaintiff was also bound to render a full statement of the financial situation of the principal debtor before acting on the security; arts. 1931, 1941 C. C.

The essential character of promissory notes was taken away from the instruments sued upon by the indorsement of a condition. Art. 2344 C. C.; 53 Vict. (D.) ch. 33, s. 82. The instruments constituted a contract of

(1) Randolph Com. Paper, Art. 472; Daniel, 189, Byles, 138, 412.

(2) Am. and Eng. Cycl. Vol. 2, p. 372.

(3) 12 Can. S. C. R. 571.

(4) 30 La. Ann. 737.

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suretyship, which terminated either upon the repayment of the first moneys to that amount, or at any rate, upon the death of Austin. *Starrs* v. *Cosgrave* (1); *Haffield* v. *Meadows* (2); *Leathley et al.* v. *Spyer* (3).

TASCHEREAU J.—This appeal must be dismissed. I would myself have done so after having heard the appellant, without calling upon the respondent.

The appellant cannot get over the objection that his action is not based on the real contract that he has proved between the firm of Austin & Robertson and the respondent. He has alleged a certain cause of action, and he has proved another. That is fatal to him. Upon that ground, taken by the Court of Appeal, the appeal is dismissed with costs.

Though we adopt this reason for disposing of the appeal, the appellant must not be led to understand that he would have succeeded, had he taken the proper action, on the question of the respondent's payment in full of all his liabilities under the agreement in question.

GWYNNE, KING and GIROUARD JJ. concurred.

SEDGEWICK J.—I agree, but with this further statement. Upon the authority of *Steele* v. *McKinlay* (4), in the House of Lords, this action is not maintainable. Under no circumstances can the payee of a promissory note or the drawer of a bill of exchange maintain an action against an indorser, where the action is founded upon the instrument itself.

Appeal dismissed with costs.

Solicitors for the appellant: *Greenshields, Greenshields, Laflamme & Glass.*

Solicitors for the respondent: *Macmaster & Maclennan.*

(1) 12 Can. S. C. R. 571.
(2) L. R. 4 C. P. 595.
(3) L. R. 5 C. P. 595.
(4) 5 App. Cas. 754.

MÉDARD GAUTHIER DIT LANDREVILLE (PLAINTIFF) ... APPELLANT;

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*May 14.
*June 7.

AND

MADAME MARIE EUGÉNIE JOSEPHTE MASSON AND OTHERS *ès qualitiés* (DEFENDANTS IN WARRANTY AND INTERVENANTS). RESPONDENTS.

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

Action on disturbance—Possessory action—" Possession annale "—Arts. 946 *and* 948 *C. C. P—Nature of possession of unenclosed vacant lands—Boundary marks—Delivery of possession.*

In 1890, G. purchased a lot of land 25 feet wide, and the vendor pointed it out to him, on the ground, and showed him the pickets marking its width and depth. The lot remained vacant and unenclosed up to the time of the disturbance, and was assessed as a 25 foot lot to G., who paid all municipal taxes and rates thereon. In 1895 the adjoining lot, which was also vacant and unenclosed, was sold to another person who commenced laying foundations for a building, and, in doing so, encroached by two feet on the width of the lot so purchased by G., who brought a possessory action within a couple of months from the date of the disturbance.

Held, that the *possession annale*, required by article 946 of the Code of Civil Procedure, was sufficiently established to entitle the plaintiff to maintain his action.

APPEAL from the judgment of the Court of Queen's Bench (appeal side), affirming the judgment of the Superior Court, District of Montreal, which dismissed the plaintiff's action with costs.

A statement of the facts and questions at issue in the case will be found in the judgment reported.

Belcourt for the appellant.

Madore and *Merrill* for the respondents.

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

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v.
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The judgment of the court was delivered by:

GIROUARD J.—Cette cause ne présente aucune difficulté. L'appelant a pris une action possessoire, alléguant la possession annale d'un lot vacant situé en la cité de Montréal, et connu sous le numéro 1189-3 au cadastre du quartier Saint-Jacques. Cet emplacement faisait partie d'un terrain plus étendu appartenant à feu M. Duhamel, C. R., qui l'avait divisé. L'appelant acheta son lot de M. Duhamel en 1890, en même temps que deux ou trois de ses voisins.

M. Duhamel s'était engagé par le contrat à donner l'alignement de chaque lot, et en conséquence peu de temps après, en 1890, il en fit tirer les bornes et les indiqua par des piquets ou petits poteaux fichés en terre selon l'usage, pour indiquer chaque alignement et la superficie de chaque lot, qui devait avoir vingt-cinq pieds de front sur quatre-vingt-dix pieds de profondeur; puis il informe chaque acquéreur, et en particulier l'appelant, que son terrain se trouve entre tel et tel alignement, et de fait le met en possession ouverte et publique. Cette tradition constitue la possession.

Mais une fois la tradition opérée,—dit Appleton,—(1) tout change, l'acquéreur a la possession, il peut y joindre celle de son vendeur et exercer les actions possessoires tant contre ce dernier que contre les tiers.

Il est inutile d'observer qu'un terrain vacant est susceptible de la possession comme un terrain bâti ou clôturé; seulement, lorsqu'il est simplement vacant, il est plus difficile de prouver l'étendue exacte de cette possession, surtout si le lot voisin est aussi vacant. Dans l'espèce, cette difficulté ne se présente pas, puisqu'il y avait des bornes bien visibles, qui ont existé jusqu'à l'année 1895, époque où Gratton acheta de la succession Duhamel le lot voisin, le numéro 1189-2, et

(1) De la Possession n° 300.

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commença à bâtir, en enlevant les bornes du lot de l'appelant, et empiétant de deux pieds sur ce dernier lot, ne lui laissant par conséquent que vingt-trois pieds de front.

Ces bornes bien constatées suffisent pour prouver la possession du terrain entre les dites bornes, que le terrain soit vacant ou non. Dans la cause de *Laprade* v. *Gauthier* (1), la cour d'Appel jugea que l'action possessoire complète au possesseur d'un héritage non enclos et non délimité par des bornes légales ou naturelles bien visibles, lorsque son étendue est déterminée par des marques quelconques capables de faire reconnaître l'endroit jusqu'où la possession s'est exercée, et le possesseur troublé, sans recourir à l'action en bornage, peut tout de suite intenter l'action possessoire. Et dans une autre cause, la même cour déclarait que le simple procès-verbal de bornage, fait par un arpenteur avec le consentement des parties, suffisait pour établir la possession annale jusqu'à ces bornes. *Laviolette* v. *Leclerc* (2). La cour de Revision, à Québec, a même décidé que le placement des bornes pour en déterminer le cours ou l'alignement indique, d'une manière permanente, la ligne qui doit diviser les terrains et l'étendue de la possession, non seulement à l'endroit où se trouvent les dites bornes, mais sur toute la profondeur des héritages où il n'y avait pas de bornes, et ce jugement fut confirmé à l'unanimité par la cour d'Appel. *Cormier* v. *Leblanc* (3). Il est vrai que dans cette dernière cause les bornes avaient été posées par un arpenteur, qui avait dressé un procès-verbal de son arpentage, mais ce placement ne pouvait avoir plus d'autorité que celui qui est fait par les parties intéressées, par exemple, par le vendeur lui-même, comme cela eut lieu dans l'espèce actuelle. Ici les bornes ont été placées

(1) 1 R. L. 145.
(2) 19 L. C. Jur. 183.
(3) 16 R. L. 288.

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Girouard J.

non seulement à la devanture, mais aussi à la profondeur des lots vendus. La décision du Conseil Privé dans *de Gaspé* v. *Bessener* (1), est aussi en faveur de l'appelant. Il y fut jugé que, pour maintenir l'action possessoire, il faut des bornes connues, si non visibles. Les bornes du terrain de l'appelant étaient et connues et visibles.

Pendant tout cet espace de temps qui s'est écoulé depuis le placement des bornes, qui doit être considéré en possession du terrain tel qu'aligné, à titre de propriétaire ? Ce n'est certainement pas M. Duhamel, ou ses héritiers, les intimés. Ce n'est pas non plus Gratton qui n'a acquis d'eux le lot voisin qu'en 1895, quelques mois avant l'institution de l'action. Le possesseur ne peut être que l'appelant qui, peu de temps après son achat et lors de l'alignement fait par son vendeur en exécution du contrat de vente, a de fait pris possession de son lot, publiquement à titre de propriétaire, possession qu'il a continué d'exercer paisiblement et sans interruption jusqu'à la date du trouble causé par Gratton. C'est lui qui en a payé les taxes et redevances municipales, les comptes de la corporation et les rôles d'évaluation municipales comme le cadastre et le plan officiel faisant mention d'un lot de vingt-cinq pieds de front sur quatre-vingt-dix pieds de profondeur. L'appelant se trouve donc avoir acquis la possession requise par les articles 946 du Code de Procédure et 2193 du Code Civil, c'est-à-dire, la possession annale, continue et non interrompue, paisible, publique, non-équivoque et à titre de propriétaire, ayant de justes motifs pour se croire propriétaire de tout le terrain compris entre les lignes piquées. Il a donc l'action possessoire. Voilà la seule question devant nous, et que nous avons à décider.

(1) 4 App. Cas. 135.

Nous sommes d'avis que dans les circonstances, la possession de tout le terrain, compris entre les dites bornes, était complète et que s'il y a erreur dans la délimitation, elle doit faire l'objet d'une action pétitoire, ou en bornage, et qu'enfin l'action possessoire de l'appelant a été bien intentée. Appleton, n. 303 ; *Laviolette* v. *Leclerc* (1), Décider autrement serait permettre le cumul du possessoire et du pétitoire, contrairement à l'article 948 du Code de Procédure. Nous accordons l'appel et maintenons l'action de l'appelant, avec dépens devant toutes les cours contre les intimés.

Appeal allowed with costs.

Solicitors for the appellant: *Lamothe, Trudel & Trudel.*

Solicitor for the respondents: *Alfred E. Merrill.*

JOHN S. MURRAY (PLAINTIFF)..........APPELLANT;

AND

THE TOWN OF WESTMOUNT (DEFENDANT)................................ RESPONDENT.

1897
May 8, 14, 15,
*June 7.

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

Appeal—Jurisdiction—Title to lands—Municipal law—By-law—Widening streets—Expropriation—R. S. C. c. 135, s. 29 (b)—54 & 55 V. c. 25, s. 3—56 V. c. 29, s. 1.

In an action to quash a by-law passed for the expropriation of land the controversy relates to a title to lands, and an appeal lies to the Supreme Court of Canada, although the amount in controversy is less than $2,000.

The judgment on the merits dismissed the appeal for the reasons stated in the judgment of the court below.

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

(1) 19 L. C. Jur. 183.

1897
MURRAY
v.
THE
TOWN OF
WESTMOUNT.

APPEAL from the decision of the Court of Queen's Bench for Lower Canada (appeal side) affirming the judgment of the Superior Court, District of Montreal (1), which dismissed the plaintiff's action with costs.

The respondents adopted a by-law for the widening of a street, by adding a strip of five feet on one side, and of ten feet on the other, and authorizing the council to acquire the necessary lands by expropriation proceedings, the cost, indemnity and damages to be paid by means of a special tax levied, in part, upon the properties fronting on the street to be widened and for the balance, upon such properties as the commissioners might declare benefited by such widening.

The appellant, whose property abuts upon the section to be so widened, brought an action to quash the by-law and the proceedings by which part of his lot was expropriated, as illegal, null and void, and as being *ultra vires* of the corporation. His action was dismissed by the Superior Court, and this judgment was unanimously affirmed by the Court of Queen's Bench on appeal.

On the inscription for hearing on the present appeal in the Supreme Court of Canada the respondents moved to quash on the ground that no appeal lay under the provisions of "The Supreme and Exchequer Courts Act," as the matters in controversy did not amount to the sum or value of $2,000, nor involve or relate to any question or matter included amongst the provisions of section 29 of the said Act.

Geoffrion Q.C. and *Dunlop* Q.C. for the motion cited as to jurisdiction *The City of Sherbrooke* v. *McManamy* (2); *The County of Verchères* v. *The Village of Varennes* (3); *Quebec, Montmorency and Charlevoix Railway Co.*

(1) Q. R. 9. S. C. 366.
(2) 18 Can. S. C. R. 594.
(3) 19 Can. S. C. R. 365.

1897
MURRAY
v.
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TOWN OF
WESTMOUNT.

v *Mathieu* (1); *Bell Telephone Co.* v. *The City of Quebec* (2); *Dubois* v. *Village of Ste. Rose* (3); *Webster* v. *City of Sherbrooke* (4); *City of Ste. Cunégonde* v. *Gougeon* (5); *Wineberg* v. *Hampson* (6); *O'Dell* v. *Gregory* (7); *Larivière* v. *School Commissioners of Three Rivers* (8); *Sauvageau* v. *Gauthier* (9). There can be no appeal in corporation cases; arts. 1033 & 1115 C. C. P.

Falconer, contra. The by-law involves the expropriation of lands, and either deprives appellant of his title to the strip of land sought to be expropriated, or, if declared null, confirms him in his title. All the cases cited by respondent can be distinguished from such a case as the present; but such cases as *Les Ecclésiastiques de St. Sulpice* v. *City of Montreal* (10); *Blatchford* v. *McBain* (11); and *Lefeuntun* v. *Véronneau* (12), are in point.

Their Lordships after hearing counsel decided to reserve judgment upon the motion to quash and directed that the appeal should in the meantime be heard upon the merits.

Upon the hearing on the merits,

Falconer and *Gibb* appeared as counsel for the appellant and *Geoffrion* Q.C. and *Dunlop* Q.C. for the respondents.

The judgment of the court was delivered by:

TASCHEREAU J.—The motion to quash made by the respondent must be dismissed with costs. The controversy relates to a title to land, and the case is therefore appealable.

(1) 19 Can. S. C. R. 426.
(2) 20 Can. S. C. R. 230.
(3) 21 Can. S. C. R. 65.
(4) 24 Can. S. C. R. 52.
(5) 25 Can. S. C. R. 78.
(6) 19 Can. S. C. R. 369.
(7) 24 Can. S. C. R. 661.
(8) 23 Can. S. C. R. 723.
(9) L. R. 5 P. C. 494.
(10) 16 Can. S. C. R. 399.
(11) 19 Can. S. C. R. 42.
(12) 22 Can. S. C. R. 203.

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Taschereau J.

Upon the merits, the appeal must be dismissed. There is nothing in the appellant's contentions but an attempt to override the clear intentions of the legislature by refined technicalities. He should have been convinced of the unsoundness of his contentions by the reasoning of the learned judge who gave the judgment of the court below, and he cannot expect more from us here, in rejecting his appeal, than a reference to that judgment, and the reasons given in support of it.

The appeal is dismissed with costs.

Motion to quash and appeal both dismissed with costs.

Solicitors for the appellant: *Robertson, Fleet and Falconer.*

Solicitors for the respondent: *Dunlop, Lyman & Macpherson.*

1897

*May 15.
*June 7.

ARTHUR TURCOTTE (DEFENDANT AND OPPOSANT) .... APPELLANT;

AND

JUSTINE DELPHINE DANSEREAU (PLAINTIFF) .... RESPONDENT.

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

Action—Service of—Judgment by default—Opposition to judgment—Reasons of—"Rescissoire" joined with "Rescindant"—Arts. 16, 89 *et seq.*, 483, 489, *C. C. P.—False return of service.*

No entry of default for non-appearance can be made, nor *ex parte* judgment rendered, against a defendant who has not been duly served with the writ of summons, although the papers in the action may have actually reached him through a person with whom they were left by the bailiff.

The provisions of articles 483 and following of the Code of Civil Procedure of Lower Canada relate only to cases where a defendant is legally in default to appear or to plead and have no application to an *ex parte* judgment rendered, for default of appearance, in an action which has not been duly served upon the defendant, and the defendant may at any time seek relief against any such judgment, and have it set aside notwithstanding that more than a year and a day may have elapsed from the rendering of the same, and without alleging or establishing that he has a good defence to the action on the merits.

An opposition asking to have a judgment set aside, on the ground that the defendant has not been duly served with the action, which also alleges the defendant's grounds of defence upon the merits, should not be dismissed merely for the reason that the *rescissoire* has thus been improperly joined with the *rescindant*.

APPEAL from the judgment of the Court of Queen's Bench for Lower Canada (appeal side), which affirmed the judgment of the Superior Court, District of Three Rivers, dismissing the appellant's opposition with costs.

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

1897
TURCOTTE
v.
DANSEREAU.

The action is based upon promissory notes. The writ of summons and declaration were handed by the bailiff charged with the service to a person whom he met on the street outside of the defendant's residence. It appeared that the papers were mailed to the defendant and received by him at the city of Quebec, but he paid no attention to the action. Upon the bailiff's return that the service had been made by leaving the papers with a reasonable person of the defendant's family at his domicile in the city of Three Rivers, default was entered for non-appearance, and about a year later, (in 1889,) upon the application of the plaintiff, the prothonotary rendered judgment *ex parte* against the defendant under the provisions of articles 89 and following of the Code of Civil Procedure. In 1892 the defendant sought relief against this judgment by opposition on the ground that he had not been duly served with the action and setting forth also grounds of a defence to the merits. The plaintiff contested and the opposition was dismissed by the Superior Court, (Bourgeois J.) for reasons stated as follows:—

"Considérant que le dit défendeur et opposant ne s'est pas pourvu dans le délai de l'an et jour fixé par l'article 483 du Code de Procédure Civile pour faire reviser le jugement qui a été rendu contre lui en cette cause;

"Considérant que le défendeur et opposant a cumulé dans sa dite opposition des moyens d'exception à la forme à l'encontre de l'assignation en cette cause et des moyens de défense au mérite à la demande de la demanderesse.

"Considérant que les informalités dans l'assignation dont se plaint le dit défendeur et opposant pouvaient tout au plus faire présumer la fraude, de manière à permettre au dit défendeur et opposant de fair valoir,

par opposition à jugement, en vertu de l'article 484 du Code de Procédure Civile, les moyens qu'il pouvait avoir à opposer au mérite de la demande de la dite demanderesse, mais n'auraient pu à elles seules donner ouverture à une opposition à jugement."

This judgment was affirmed by the Court of Queen's Bench by the judgment now appealed against.

Languedoc Q.C. for the appellant. Oppositions like the present may be founded on grounds of exception to the form or resulting from irregularities and on grounds of defence to the merits, or both (1); without modifying the law then existing of which it was merely an extension. In respect to oppositions the rule laid down by Loysel has always prevailed: "*le rescindant et le rescissoire sont accumulables.*" Article 492 C. C. P. puts this beyond matter of doubt. The irregularity in this case is so fundamental that the appellant was never before the court, and can never be said to have been in default at any time. The rule as to filing oppositions within the year and a day (1) only applies where a defendant is lawfully placed in default. We refer to *Hall* v. *Harrison* (2); *Jubinville* v. *The Bank of British North America* (3); *Brunet* v. *Colfer* (4); *Eastern Townships Bank* v. *Wright* (5). See also 2 Carré & Chauveau, pp. 3 and 177.

Lajoie for the respondent. The defendant has no substantial grievance and has waived the irregularity of the service by his failure to oppose within the year and a day (6), and allowing four years to elapse without taking proceedings, although he was aware that he had been sued and had the suit papers in his possession; *Ross* v. *Leprohon* (7); *Goulet* v. *McCraw* (8);

(1) Arts. 483-489 C. C. P. [art. 5905 R. S. Q. as amended by 52 Vict. ch. 49 alters art. 483*a* C. C. P.]
(2) 4 Legal News, 325.
(3) 18 L. C. Jur. 237.
(4) 11 Q. L. R. 208.
(5) M. L. R. 3 S. C. 206.
(6) Arts. 119 & 483 C. C. P.
(7) M. L. R. 3 S. C. 137.
(8) 19 R. L. 214.

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TURCOTTE
v.
DANSEREAU.

Any such irregularity must be set up by exception to the form (1); and cannot be entertained when set up in a plea to the merits as has been practically done in this case. *Jubinville* v. *The Bank of British North America* (2). This appeal raises merely a question of practice and the decision of the court below should not be interfered with; *The Mayor of Montreal* v. *Brown & Springle* (3); *Arpin* v. *The Merchants Bank of Canada* (4); *Dawson* v. *The Union Bank of Canada* (5); *Kellond* v. *Reed* (6).

The judgment of the court was delivered by:

TASCHEREAU J.—The appellant was the defendant in the Superior Court at Three Rivers in an action by the respondent on two promissory notes instituted on September 26th, 1888. The service of this action on the appellant, it is conceded, was absolutely illegal. It was served upon a third party, not at the appellant's domicile, and though the documents eventually reached the appellant, (when and whether before or after the return of the writ does not appear) yet he had the right to disregard it and treat it as a nullity.

Over a year afterwards, on 19th October, 1889, the respondent had a judgment entered *ex parte* against the appellant. The respondent never attempted to execute her judgment, and on the 25th April, 1892, the appellant filed an opposition to the judgment, asking, *inter alia*, that the said judgment be set aside, on the ground that he, the appellant, had never been duly served with the action; art. 16 C. C. P. He, however, went further in the opposition and alleged his grounds of defence to the merits on the action; and it is on this ground, because he had joined the *rescissoire*

(1) Arts. 116 & 119 C. C. P.
(2) 18 L. C. Jur. 237.
(3) 2 App. Cas. 184.
(4) 24 Can. S. C. R. 142.
(5) Cass. Dig. 2 ed. 428.
(6) 18 L. C. Jur. 309.

to the *rescindant*, that the court below has dismissed the opposition.

The other ground relied upon by the Superior Court, that the opposition had not been filed within a year and a day after the judgment as required by article 483 of the Code of Procedure, is clearly untenable. The law cannot be so unjust as to peremptorily bind any one to exercise a right before he is in a position to be possibly aware of that right. 1 Pigeau, (ed. 1787) p. 490; 1 Poncet, "*Des Jugements*," nos. 152, *et seq.*

Now as to the ground on which the respondent mainly relied to support the judgment of the court below, the joining of the *rescissoire* with the *rescindant*, to which I have already referred, I am of opinion that the appellant must succeed, and that the judgment must be reversed. I fail to see any reason whatever for the rule which must have been the one followed by the court below, that if an opposant to judgment wrongfully mixes up the *rescissoire* with the *rescindant*, his opposition must, on that ground alone, be dismissed. The insufficiency of a litigant's allegations may be fatal to his claim, but if he alleges more than is necessary, or adds to a legitimate demand conclusions which he is not entitled to, that is no reason to reject the whole of his demand. It is a contradiction in any one to ask that a judgment be set aside because he has not been served with the action, and at the same time, to conclude by a plea to the merits of the action. He is not bound to plead at all to an action which has not been served upon him. He may certainly waive the want of service but the appellant here has not done so.

The articles 483 and following of the Code of Procedure have no application. They are enactments on cases where judgment has been rendered by default, where the defendant was in default to appear or to

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Taschereau J.

plead. But how can a party who has not been summoned be said to be in default for non-appearance? Merlin, Rep. vo. "*Opposition*," §I, par. 1. The judgment here was rendered against the respondent, only because he appeared by the return of the bailiff to have been summoned, but now that, as it is conceded, this was a false return, a return *soufflé* (1), the judgment falls to the ground as an inevitable consequence, the moment at any time, were it ten years or twenty years afterwards, that the defendant invokes that nullity, not having waived it in any way. The respondent obtained a judgment against the appellant upon false representations upon her bailiff's return which now turns out to have been untrue. Can such a judgment be supported? She would vainly rely on the merits of her claim. That is not in question here. It is not on her claim, or on the appellant's liabilities, that we have to adjudicate here, but exclusively on the judgment she has obtained against the appellant. And that judgment cannot stand. This appellant's opposition should not be defeated on technicalities and it is on technicalities exclusively that the courts below have found reasons to dismiss it.

No judgment can be legally entered on promissory notes under articles 89 and following of the Code of Procedure, as this one assumes to have been, if the defendant is not in default to appear or to plead, and he cannot be in default if he has not been summoned. The plaintiff, respondent, has obtained this judgment against the appellant upon a false bailiff's return; that falsity now being established that judgment must be set aside. And the appellant has the right to have it set aside, without alleging or establishing that he has a good defence to the action; the respondent is not entitled to ask that from him, not having served the

(1) 1 Poncet, "*Des Jugements,*" no. 190.

action upon him. His having alleged a defence does not disentitle the appellant from invoking the nullity of the judgment, as he does in his opposition. I repeat it, the appellant is not, and never has been in default. The judgment against him is not only voidable, but it is void as an absolute nullity.

Appeal allowed with costs.

Solicitor for appellant: *W. C. Languedoc.*

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

ROBERT TAYLOR AND OTHERS (PLAINTIFFS) .... APPELLANTS;

1897
*May 4.
*June 7.

AND

SELDEN W. CUMMINGS AND PEOPLE'S BANK OF HALIFAX (DEFENDANTS) .... RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Assignment for the benefit of creditors—Preferred creditors—Moneys paid under voidable assignment—Liability of assignee—Statute of Elizabeth—Hindering and delaying creditors.

In an action to have a deed of assignment for the benefit of creditors set aside by creditors of the assignor on the ground that it is void under the statute of Elizabeth neither moneys paid to preferred creditors nor trust property disposed of in good faith by the assignor or persons claiming under him can be recovered, nor can persons holding under the deed be held personally liable for moneys or property so received by them. *Cox* v. *Worrall* (26 N.S. Rep. 366) questioned.

APPEAL from the judgment of the Supreme Court of Nova Scotia, *in banc*, affirming the judgments in the Supreme Court of Nova Scotia (Townshend J.) in favour of the defendants, the People's Bank of Halifax

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

1897 TAYLOR v. CUMMINGS.

and Selden W. Cummings, respectively, and dismissing plaintiffs' appeals therefrom with costs.

The suit is in connection with an assignment for the benefit of his creditors by one Neil McKinnon to the respondent Selden W. Cummings wherein the other respondent, the People's Bank of Halifax, was preferred for $200, which amount was subsequently paid in full to the bank, as a preferred creditor, by the assignee. The firm of "Wm. Cummings & Sons," another creditor, was likewise preferred therein to the amount of $1,201.

The clauses of the assignment in reference to these preferred claims are as follows:—"In the second place, to pay the People's Bank of Halifax the sum of two hundred dollars due the said the Peoples' Bank of Halifax by the said assignor. And, in the third place, after payment in full of the said claim of the People's Bank of Halifax, to pay to the firm of Wm. Cummings & Sons, of Truro, merchants, the sum of twelve hundred and one dollars, due by the said assignor to the said firm of Wm. Cummings & Sons. And in the fourth place, after payment in full of the said claims of the People's Bank of Halifax and Wm. Cummings & Sons, to pay and discharge out of the residue then remaining, if any, all debts due by the said assignor to the following persons *pro rata* according to the amount of their several claims against the assignor and in satisfaction so far as such money will extend of the debts, viz.: (*here follows a list of creditors.*)"

The plaintiffs sued on behalf of themselves and all other creditors and claimed; a declaration that the assignment was fraudulent and void as against the plaintiffs and other creditors; an account from the defendants Selden W. Cummings, Wm. Cummings & Sons and the People's Bank of Halifax, of all property, moneys and assets received or paid by them or any or

either of them under the provisions of the assignment; payment of the plaintiffs' claims, respectively, by the said Selden W. Cummings, Wm. Cummings & Sons and the People's Bank of Halifax out of any property and moneys received by them or any of them under said deed; the appointment of a receiver; an injunction, and other relief.

The statement of plaintiffs' claims alleged, as reasons against the assignment, that the Peoples' Bank of Halifax was preferred for $200, which was paid to them by Selden W. Cummings, as assignee and trustee, and accepted and received by them pursuant to the terms of said assignment; that there was a secret agreement between McKinnon, Selden W. Cummings and Wm. Cummings & Sons, whereby the said Wm. Cummings & Sons were preferred therein for a large sum in excess of their claim, which agreement was not set forth in the deed nor communicated to the other creditors and therefore hindered, delayed and defeated such creditors, retained a benefit for McKinnon by enabling him to retain a portion of such preference for himself, and was part of a fraudulent scheme by which he attempted to retain a portion of his estate.

Other facts affecting the issues in this case are stated in the report of *McDonald* v. *Cummings* (1), in which the deed in question was set aside. Before the present action was taken, however, the assignee had disposed of the assets and, acting in good faith, had made the payments to the preferred creditors as provided in the deed of assignment, without notice of its fraudulent character.

McNeil for the appellants. We rely on *Cox* v. *Worrall* (2) as establishing the right of creditors to take such proceedings as these.

(1) 24 Can. S. C. R. 321. (2) 26 N. S. Rep. 366.

1897
TAYLOR
v.
CUMMINGS.

Borden Q.C. and *Lovett* for the respondents, cited *Collumb* v. *Read* (1), *Davis* v. *Wickson* (2).

The judgment of the court was delivered by:

SEDGEWICK J.—We are of opinion that this appeal should be dismissed, not only for the reasons stated by the learned judges below, but because in our view the action itself was baseless except in so far as it sought to set aside the deed in question and thereby render the property covered by it available for execution or garnishment at the instance of judgment creditors.

The claim of the plaintiff for an account against William Cummings & Son and the People's Bank, with a view of making them pay over to the creditors the moneys received by them under the deed on account of the assignor's indebtedness to them, is absolutely untenable under English law, in an action to declare a deed void under the statute of Elizabeth. No decree has ever yet been made ordering restitution of property parted with by the assignor of the deed or persons claiming under him. That statute avoids the deed, nothing more—it leaves the creditor defeated or delayed to his ordinary remedies, execution, garnishment. No English case has been shown where, in a suit of this kind, a personal liability for property disposed of has been cast upon persons taking under the deed, and the reason is obvious. A creditor, as such, has no claim either at law or in equity to his debtor's property. He must first obtain his judgment and charge it by way of execution.

In this view we must express our dissent from the decision of the Supreme Court of Nova Scotia in *Cox* v. *Worrall* (3), it being understood, however, that we are not dealing with a case where persons deliberately

(1) 24 N. Y. 505.
(2) 1 O. R. 369.
(3) 26 N. S. Rep. 366.

combine and conspire to dispose of property in fraud of creditors, but only with a case where a deed is sought to be set aside and the assignee and creditors have, in the meantime, in good faith, acted under it.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellants: *Alexander McNeil.*

Solicitor for the respondent Cummings: *H. A Lovett.*

Solicitor for the respondent, People's Bank of Halifax: *Jas. A. McDonald.*

STEVENSON *et al.* v. THE CITY OF MONTREAL AND RICHARD WHITE.

1897
*May 13.
*June 7.

Municipal corporation—Highway—Private way—Widening streets—Special assessments—Res judicata.

APPEAL from the judgment of the Court of Queen's Bench for Lower Canada (appeal side), (1), affirming the judgment of the Superior Court, District of Montreal, which dismissed the petition of the appellants praying that three special assessment rolls, in connection with the widening of a portion of Stanley street in the city of Montreal, should be set aside and annulled.

After having heard counsel on behalf of the parties, the court reserved judgment, and on a subsequent day dismissed the appeal and affirmed the judgment in the court below with costs.

Trenholme Q.C. and *Weir* Q.C. for the appellants.

Ethier Q.C. for the respondent, The City of Montreal.

White for the respondent Richard White.

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

(1) Q. R. 6 Q. B. 107.

1897
*May 6, 7.
*June 15.

ABRAHAM ERNST (DEFENDANT)...........APPELLANT;

AND

SAMUEL A. B. ZWICKER (PLAINTIFF)...RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Statute—Construction of—Estates tail, acts abolishing—R. S. N. S. (1 ser.) c. 112—R. S. N. S. (2 ser.) c. 112—R. S. N. S. (3 ser.) c. 111—28 V. c 2 (N.S.)—Will—Construction of—Executory devise over—Dying without issue—"Lawful heirs"—"Heirs of the body"—Estate in remainder expectant—Statutory title—R. S. N. S. (2 ser.) c. 114, ss. 23 & 24—Title by will—Conveyance by tenant in tail.

The Revised Statutes of Nova Scotia, 1851 (1 ser.) chap. 112, provided as follows: "All estates tail are abolished, and every estate which would hitherto have been adjudged a fee tail shall hereafter be adjudged a fee simple; and, if no valid remainder be limited thereon, shall be a fee simple absolute, and may be conveyed or devised by the tenant in tail, or otherwise shall descend to his heirs as a fee simple." In the revision of 1858 (R. S. N. S. 2 ser. c. 112) the terms are identical. In 1864 (R. S. N. S. 3 ser. c. 111) the provision was changed to the following: "All estates tail on which no valid remainder is limited are abolished, and every such estate shall hereafter be adjudged to be a fee simple absolute, and may be conveyed or devised by the tenant in tail, or otherwise shall descend to his heirs as a fee simple." This latter statute was repealed in 1865 (28 Vict. c. 2) when it was provided as follows: "All estates tail are abolished and every estate which hitherto would have been adjudged a fee tail shall hereafter be adjudged a fee simple and may be conveyed or devised or descend as such."

Z., who died in 1859, by his will, made in 1857, devised lands in Nova Scotia to his son, and in default of lawful heirs, with a devise over to other relatives, in the course of descent from the first donee. On the death of Z., the son took possession of the property as devisee under the will, and held it until 1891, when he sold the lands in question in this suit to the appellant.

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

Held, per Taschereau, Sedgewick and King JJ., that notwithstanding the reference to "valid remainder" in the statute of 1851 all estates tail were thereby abolished, and further, that subsequent to that statute there could be no valid remainder expectant on an estate tail, as there could not be a valid estate tail to support such remainder.

Held further, *per* Taschereau, Sedgewick and King JJ., that in the devise over to persons in the course of descent from the first devisee, in default of lawful issue, the words "lawful heirs," in the limitation over, are to be read as if they were "heirs of his body"; and that the estate of the first devisee was thus restricted to an estate tail and was consequently, by the operation of the statute of 1851, converted into an estate in fee simple and could lawfully be conveyed by the first devisee.

Held, per Gwynne and Girouard JJ., that estates tail having a remainder limited thereon were not abolished by the statutes of 1851 or 1864, but continued to exist until all estates tail were abolished by the statute of 1865; that the first devisee, in the case in question, took an estate tail in the lands devised and having held them as devisee in tail up to the time of the passing of the Act of 1865, the estate in his possession was then, by the operation of that statute, converted into an estate in fee simple which could be lawfully conveyed by him.

APPEAL from the judgment of the Supreme Court of Nova Scotia, *in banc*, affirming the decision of the trial court in favour of the plaintiff.

The facts of the case and questions at issue are stated in the judgment reported.

C. H. Tupper Q.C. and *Borden* Q.C. for the appellant. If the devise did not, by virtue of the Wills Act independently of the statute abolishing estates tail, amount to a devise in fee simple, it became a devise in fee simple by virtue of that statute. The real estate is devised over, in default of heirs of the first devisee, to ulterior devisees related to the prior devisee so as to be in the course of descent from him. The prior devisee in that case could not die without heirs while the devisee over existed, so the word "heirs" means "heirs of the body," and the estate of the first devisee, by the effect

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of the devise over, is restricted to an estate tail, and the estate of the devisee over, becomes a remainder expectant on that estate. 2 Jarman (5 ed.) 1170, 1175. *Simson* v. *Ashworth* (1). Then by virtue of the statute abolishing estates tail, the estate so acquired became an absolute estate in fee simple; but that statute does not convert a remainder expectant upon an estate tail into an executory devise. The remainder ceased to exist when the estate in fee tail was converted by the statute into an estate in fee simple, as it had no estate tail to support it. *Nottingham* v. *Jennings* (2); *Tyte* v. *Willis* (3); *Morgan* v. *Griffiths* (4); *Harris* v. *Davis* (5); *Doe d. Hatch* v. *Bluck* (6); *Tyrwhitt* v. *Dewson* (7).

The words "lawful heirs" used in the context are sufficient to create an estate tail. *Good* v. *Good* (8). The words "die without having any lawful heirs" import indefinite failure of issue and therefore create an estate tail. A devise for life and "if my son Richard (the eldest) do happen to die without heirs, then my son John shall enjoy my lands," gave an estate tail to Richard. 2 Jarman, "Wills," (5 ed.) 1320 to 1324, and cases cited. *Harris* v. *Davis* (9). *Theobald*, "Wills," (4 ed.) 576, 582. *Goodright* v. *Godridge* (10); *Forsyth* v. *Gault* (11); *Doe d. Forsyth* v. *Quackenbush* (12); *Dawson* v. *Small* (13); *In re Sallery* (14). The word "heirs" in the present case has its usual technical meaning. *Leach* v. *Jay* (15); *Morrall* v. *Sutton* (16); *Lloyd* v. *Jackson* (17). 2 Jarman, "Wills," (5 ed.) 1205 to 1217 and 930. 2 Williams, "Executors," (9 Eng. ed.)

(1) 6 Beav. 412.
(2) 1 P. Wm 23.
(3) Talb. 1.
(4) 1 Cowp. 234.
(5) 1 Col. C. C. 416.
(6) 6 Taun. 484.
(7) 28 Gr. 112.
(8) 7 E. & B. 295.
(9) 1 Col. C. C. 423 and 424.
(10) Willes, 369.
(11) 21 U. C. C. P. 408; 22 U. C. C. P. 115.
(12) 10 U. C. Q. B. 148.
(13) 9 Ch. App. 651.
(14) 11 Ir. Ch. 236.
(15) 6 Ch. D. 496.
(16) 1 Phillips, at p. 541.
(17) L. R. 1 Q. B., at p. 578.

929 and 930. *Smith* v. *Butcher* (1); *Doe d. Comberbach* v. *Perryn* (2); *Hall* v. *Priest* (3).

Wade Q. C. for the respondent. All the contingencies upon which the devise to plaintiff depended having occurred, the plaintiff is entitled to the property unless the devise to him cannot have effect. The executory limitation is in defeasance of the prior estate in fee. *Armstrong* v. *Nason* (4); *Gray* v. *Richford* (5); *Bowey* v. *Ardill* (6); *Parkes* v. *Trusts Corporation of Ontario* (7); *Muskett* v. *Eaton* (8); *Dean* v. *Dean* (9).

The words in the will, "but should my son Jonas die without leaving any lawful heirs" cannot be construed to mean an indefinite failure of issue but must be construed as a failure at the time of Jonas' death. R. S. N. S. (2 ser.) ch. 114, sec. 24. (Same as ch. 89, sec. 26, Revised Statutes of Nova Scotia, 5th series.) Jarman, p. 1320. The devise to plaintiff is therefore not affected by the rule against perpetuities, which allows a devise to a life or any number of lives in being and twenty-one years thereafter. Jarman, pp. 214-215. *Whitter* v. *Bremridge* (10); *Right* v. *Creber* (11); *Haliburton* v, *Haliburton* (12).

The word "heirs" in the sentence, "but should my son Jonas die without leaving any lawful heirs" should be construed as meaning "children" or "issue," or "heirs of the body." This construction is obvious from the evident absurdity of supposing the testator to mean that his devise over should depend on an event which cannot happen without involving the extinction of its immediate object. Since the plaintiff being a second cousin of Jonas is one of his heirs, he,

(1) 10 Ch. D. 113.
(2) 3 T. R. 484.
(3) 6 Gray, (Mass.) 18.
(4) 25 Can. S. C. R. 263.
(5) 2 Can. S. C. R. 431.
(6) 21 O. R. 361.
(7) 26 O. R. 494.
(8) 1 Ch. D. 435.
(9) [1891] 3 Ch. 150.
(10) L. R. 2 Eq. 736.
(11) 5 B. & C. 866.
(12) 2 Oldright 312.

the plaintiff, would have to die in order to get the property. By giving "heirs" the meaning of "children" or "heirs of the body" the devise is freed from this absurdity. *North* v. *Martin* (1); *Gummoe* v. *Howes* (2); *Milroy* v. *Milroy* (3); *Doe d. Comberbach* v. *Sir R. Perryn* (4). Jarman, 930, 1229, 1278-9. If the word "heirs" is ambiguous it must be construed so as not to be repugnant to the definite devise to plaintiff. Jarman, 436, 439, 440. The paramount intention of the testator should govern the construction of the will. *Jenkins* v. *Hughes* (5); *Jeffray* v. *Tredwell* (6). That plaintiff was intended to take on death of Jonas without children is indicated by the testator's wish expressed immediately after the devise to plaintiff, that his estates should for a time at least be retained and held by parties bearing his name.

TASCHEREAU J.—I agree that this appeal should be allowed for the reasons stated in the judgment of Mr. Justice King.

GWYNNE J.—The question involved in this appeal arises upon the will of George Peter Zwicker, who departed this life in 1859, in the county of Lunenburg, in the province of Nova Scotia, having first made his will bearing date the 4th day of April, 1857, whereby among other things he devised as follows :—

I give and bequeath to my grandson, Emanuel Zwicker, who is now absent at sea, a certain piece of land lying in the north-west range, bought from Frederick Nick Lowe, being part of lot number forty-six, letter B, containing twenty-one acres more or less, as will more fully appear by two deeds from said F. Lowe, but should my grandson Emanuel Zwicker not return home, this last mentioned lot to revert and go to my son Jonas, together with all the remainder of my

(1) 6 Sim. 266.
(2) 23 Beav. 184.
(3) 14 Sim. 48.
(4) 3 T. R. 484.
(5) 8 H. L. C. 590.
(6) [1891] 2 Ch. 640.

real estate as well as personal property, cattle, household furniture, &c., which I give and bequeath all to my son Jonas, viz. : my homestead, a lot of land lying in the rear of lot number nine and ten, being part of mill grant ; also part of 300 acre lot number four, letter C, in first division, containing forty-two six-sevenths acres ; also a lot at north-west, letter A, number 42, being that part which joins No. 41 containing 15 acres, but should my son Jonas die without leaving any lawful heirs, then I order that all my real estate now made over to my son Jonas revert and fall back to my great-grandson Elias Peter, and should my great-grandson Elias Peter die before my son Jonas, or before he comes of age, or should he die without any heirs, then I order, give or bequeath all my real estate to Samuel B. A. Zwicker and his heirs, youngest son of Benjamin Zwicker, Esquire. It being my sincere wish that my real estate should remain in my name, reserving the dower to my daughter-in-law as long as she remains a widow, should she survive my son Jonas.

Having sold in his lifetime the piece of land above devised to Emanuel, the testator by a codicil gave to Emanuel in lieu thereof the money he had received on the sale of such piece of land, so that we have to deal only with the residue of the real property devised to Jonas.

Now Jonas having died without issue, and Elias Peter having also died in the lifetime of Jonas, and under age, and without issue, Samuel B. A. Zwicker has brought the present action in which he has recovered judgment in the Supreme Court of Nova Scotia against the appellant Ernst, who is in possession of the lands so as above devised to Jonas under deeds of bargain and sale executed by Jonas in his lifetime conveying the lands to Ernst in fee simple.

The contention of the appellant in support of this title is that the estates devised by the will of Jonas and Elias Peter respectively, were estates to them and the heirs of their respective bodies successively in fee tail with remainder in fee simple to the respondent, and that the estate tail in the first tenant in tail Jonas has been by the statute law of the province of Nova Scotia

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converted into a fee simple whereby he had right to convey and by the deeds executed by him has conveyed a good title in fee simple to the appellant, whereas the contention on behalf of the respondent is that the estate devised to the respondent Samuel B. A. Zwicker was a fee simple estate by way of executory devise, and that in the events which have happened he is now entitled to recover possession of the lands so devised.

The Nova Scotia statutes upon which the appellant relies are as follows:—

In 1851 it was enacted by a statute inserted as ch. 112 of the consolidated statutes of Nova Scotia (first series) that

All estates tail are abolished, and every estate which would hitherto have been adjudged a fee tail, shall hereafter be adjudged a fee simple, and if no valid remainder be limited thereon shall be a fee simple absolute, and may be conveyed or devised by tenant in tail, or otherwise shall descend to his heirs as a fee simple.

In 1858 this chapter was inserted in the consolidated statutes of that year, the second series, still as ch. 112 and in the identical terms of ch. 112 of the first series.

This statute was in 1864 inserted in the consolidated statutes of that year as ch. 111 (third series) in the terms following:—

All estates tail on which no valid remainder is limited are abolished, and every such estate shall hereafter be adjudged a fee simple absolute, and may be conveyed or devised by the tenant in tail, or otherwise shall descend to his heirs as a fee simple.

In 1865 an alteration was made by a statute of the legislature, 28 Vic., ch. 2, which is in the terms following:—

All estates tail are abolished, and every estate which hitherto would have been adjudged a fee tail, shall hereafter be adjudged a fee simple, and may be conveyed and devised or descend as such.

In the consolidation of the statutes in 1873 (fourth series), ch. 78, and in the consolidation of the statutes in 1884 (fifth series), ch. 88, this chapter 2 of 28 Vict. is inserted verbatim.

The question to be determined is, what estate did Jonas the testator's son, Elias Peter his great-grandson and Samuel B. A. Zwicker, a person who was capable of inheriting as an heir of Elias Peter upon failure of his issue, take respectively upon the decease of the testator in 1859 in the lands devised to Jonas?

The will appears to have been drawn by a person having a slight but by no means an accurate knowledge of the technical language of wills or of the proper use of such language or of the construction put thereon by the courts. In construing wills this is a matter to be taken into consideration by courts when endeavouring to construe an ambiguously expressed will so as best to promote what can be gathered from the will to have been the intention of the testator. *Thelluson* v. *Rendlesham* (1); *Richards* v. *Davies* (2).

The testator's intention in the present case I gather from his will to have been that the lands devised should remain in his name and in the direct line of descent as long as possible; and that Samuel B. A. Zwicker should not take anything until the issue of Jonas and of Elias Peter respectively should be exhausted. He says that he has devised the lands in the manner stated in his will—it being his sincere wish that his real estate should remain in his name—by which I understand him to have meant *as long* as possible, first in the direct line of Jonas so long as it should last, then in the direct line of Elias Peter, and afterwards to Samuel B. A. Zwicker in fee simple. Now if the testator had consulted a person competent

(1) 7 H. L. Cas. 429. (2) 13 C. B. N. S. 87.

to advise him and had employed him to draw his will, such person would have advised that treating Jonas, his son, and Elias Peter, his great-grandson, as the persons in the direct line whom he desired to benefit before his collateral relative, the respondent, should get anything, the ordinary mode in use for attaining his wish would be to limit an estate tail to Jonas and the heirs of his body with remainder to Elias Peter and the heirs of his body in like manner with remainder over to the respondent and his heirs in fee simple, and he would no doubt have so drawn the will with such limitations plainly expressed. What the testator did, however, was to devise the lands of which he was seized in fee simple to Jonas in language which was sufficient by force of ch. 114 of the first series of the Consolidated Statutes of Nova Scotia if it stood alone, to give to Jonas a fee simple estate but which was qualified by the words

but should my son Jonas die without leaving any lawful heirs, then I order that all my real estate now made over to my son Jonas revert and fall back to my great-grandson Elias Peter, &c., &c.

It may be admitted that the testator in using this language was ignorant of its effect, but the courts in order that the testator's manifest intention to benefit his great-grandson, Elias Peter, should not be defeated by the testator's ignorant use of legal terms construe the words "without leaving any lawful heirs" so used as meaning "heirs of the body of Jonas," and give effect to them as if the limitation had been expressed to be to Jonas and the heirs of his body, and *then*, that is on the termination of that estate, to Elias Peter. The word "*then*" in the sentence "then I order," &c., must be construed as relating to the determination of the first limitation of the estate to Jonas and the heirs of his body. *Beauclerk* v. *Dormer* (1). The rule that a devise to

(1) 2 Atk. 308.

A. in language sufficient to convey the fee simple followed in a subsequent part of the will or in a codicil by a limitation over if A. should die "without leaving lawful heirs," here meaning heirs of the body of the donee, must be construed as a fee tail, is so imperative that it cannot be departed from unless there be language in the will itself which unmistakably shows the testator's intention to be that the limitation over should take effect upon the death of the first taker without leaving issue him surviving. The authorities upon this point are numerous and unequivocal. *Nottingham* v. *Jennings* (1); *Nanfan* v. *Legh* (2); *Tenny* v. *Agar* (3); *Jones* v. *Legg* (4); *Coltsmann* v. *Coltsmann* (5); *Ex parte Davies* (6); *Doe d. Comberbach* v. *Perryn* (7). That the words "without leaving," &c., &c., in a devise of realty will not have that effect is now well established upon the authority of *Forth* v. *Chapman* (8), notwithstanding the contrary opinion expressed by Lord Kenyon in *Porter* v. *Bradley* (9); but in the case of a devise of personalty these words will be construed as relating to the death of the preceding donee. *Crooke* v. *De Vandes* (10); *Doe d. Comberbach* v. *Perryn* (7); *Fornereau* v. *Fornereau* (11); *Dansey* v. *Griffiths* (12); *Daintry* v. *Daintry* (13); *Simpson* v. *Ashworth* (14); *Morgan* v. *Morgan* (15); *Slattery* v. *Ball* (16).

In *Porter* v. *Bradley* (9), the devise over was if the first taker should die "leaving no issue *behind* him." These last words were considered sufficient to make

(1) 1 P. Wm. 23.
(2) 7 Taunt. 85.
(3) 12 East 252.
(4) 9 Mod. 461.
(5) L. R. 3 H. L. 121.
(6) 2 Sim. N.S. 114.
(7) 3 T. R. 484.
(8) 1 P. Wm. 663.
(9) 3 T. R. 143.
(10) 9 Ves. 197, 203.
(11) 2 Doug. 487.
(12) 4 M. & S. 61.
(13) 6 T. R. 307.
(14) 6 Beav. 412.
(15) L. R. 10 Eq. 99.
(16) 36 Ch. D. 508.

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the limitation over an executory devise instead of a remainder on an estate tail. In *Mortimer* v. *Hartley* (1), a testator who died in April, 1826, devised certain of his real estate to his son John with a declaration that neither he nor his heirs to the third generation should have power to sell or mortgage any part of the devised property, but that if it should happen that his son John die without leaving lawful issue, the testator's daughter Ann should have his share subject to the same restrictions, limitations and exceptions under which John had it, and if it should please God to take away both Ann and John under age or without leaving lawful issue, then he gave and bequeathed the same lands to his, the testator's, brother Joseph, his heirs and assigns forever. The question was what estate Joseph took, namely, whether by way of executory devise or remainder in fee, and it was held that the limitation to him was of an estate in remainder in fee expectant upon an estate tail. See also *Biss* v. *Smith* (2). In *Coltsmann* v. *Coltsmann* (3), Lord Chancellor Cottenham and Lords Cranworth and Chelmsford show very clearly that language sufficient to justify the construction that the words "dying without lawful issue" in a case like the present should be applied to the time of the death of the donee of the precedent estate must be found in the will itself. Lord Cottenham there says that although he cannot admit that the words

"die without heirs of the body" are necessarily inflexible, still that they are technical words, and they are very strong words, but they are words the technical meaning of which may on construction be controlled by *the context*. A gift over if A. shall die without heirs of the body *at his death* or *living at his death* would imply a failure of heirs of the body at that *punctum temporis* only, and the question in this case is: Does *the context* limit the words "heirs of the body"?

(1) 6 Ex. 47; 3 De G. & S. 316. (2) 2 H. & N. 105.
(3) L. R. 3 H. L. 121.

in the same way, and it was held that the context did so limit the words and made the gift over an executory devise instead of a remainder expectant upon an estate tail, the judgment being rested expressly upon the fact that the words "at his death" were found in direct connection with the limitation over. The testator by his will had devised a property called Flesk Castle which he held in fee simple to his son John, precisely as in the present case. He afterwards made a codicil to his will in which he said :

If it should happen that my son John Coltsmann die without heirs of his body lawfully begotten, etc., in that case and in default of such heirs, I do hereby devise that my lands, etc., (now subject to certain charges) *shall at my son's death* descend and be transferred to my grandson Daniel Cronin, his heirs forever,

and it was held expressly upon the construction of the words "shall at my son's death descend, &c." that the devise was of an estate to John Coltsmann, in fee with an executory devise over to Daniel Cronin in the event that happened of John Coltsmann dying without heirs of his body *living at his death*.

That case is precisely similar to the present case only in the crucial point that the will in the present case has not any such words as "shall at my son's death," or any words qualifying in any respect the construction which the law attaches, in the absence of qualifying language to the words

but should my son Jonas die without leaving any lawful heirs, then I order that all my real estate now made over to my son Jonas revert and fall back to my great-grandson, Elias Peter, &c.

The judgment in *Ex parte Davies* (1), had proceeded upon the same grounds as that in *Coltsmann* v. *Coltsmann* (2). In *Gray* v. *Richford* (3), the devise was to the testator's son John, his heirs and assigns for ever :

but if my said son John should die without leaving any issue of his body lawfully begotten, or the children of such issue *surviving him*—

(1) 2 Sim. N. S. 114. (2) L. R. 3 H. L. 121.
(3) 2 Can. S. C. R. 431.

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then he devised the said lands to his son Thomas, his heirs and assigns, to have and to hold the same *at the death of John.*

Nothing could be more express than this language that the time when the limitation over was to take effect *at the death of John without leaving issue, that is an heir of his body him surviving.*

In *Armstrong* v. *Nason* (1), after a devise by testator of certain land to one of two daughters and of other land to the other, the words used were:

and be it understood that if either of my daughters die without lawful issue, the part and portion of the deceased shall revert to the *surviving daughter.*

This word "surviving" so used plainly indicated the intention of the testator to be that the limitation over should take effect in the survivor *immediately upon the decease of the other* without leaving issue her *surviving*, for if the deceased daughter should leave a child her surviving, being her lawful issue, the surviving sister of the deceased would take nothing under the will even though the child of the deceased sister should die in infancy and unmarried.

In *Bowey* v. *Ardill* (2), the devise over was to testator's wife of a farm to have and to hold *until* testator's daughter E. E. should arrive at the age of 21 years, after that to his said daughter and her heirs for ever, and should his *said daughter die before attaining the age of twenty-one years*, then he devised the farm to his wife and to her heirs for ever. So in *Parkes* v. *The Trusts Corporation* (3), a testator devised a farm to his executors in trust for his grandson, with power to sell and to apply the proceeds for his benefit, and in case he died *before attaining twenty-one* they were to transfer the land, or if sold, the balance of the proceeds to his father. The father died before his son, who also

(1) 25 Can. S. C. R. 263.
(2) 21 O. R. 361.
(3) 26 O. R. 494.

died before attaining twenty-one without issue; the land was not sold, and it was held that the grandson took a vested estate in fee simple subject to being divested upon the happening of a certain event which had become impossible. It is obvious that with these two last cases cited by the learned counsel for the respondent we have nothing to do whether they be well or ill decided, for they have no bearing upon the question raised in the present case. So also *Whitter* v. *Bremridge* (1), also cited in behalf of the respondent, has no bearing on the present case. There, testator devised his residuary, real and personal property upon trust to sell and invest, and pay the said property and the interest arising therefrom to his godson *on his attaining the age of twenty-four years*, but *in case of his not* attaining that age or leaving male issue, then over. The question in the case was whether the infant legatee was entitled to maintenance during his minority, which depended upon the question whether the gift was of a *vested interest* or wholly *contingent* upon his attaining twenty-four. The contention upon behalf of the infant was that he took a vested interest liable to be divested in the event of *his not attaining the age of twenty-four* or of his dying *under that age* without having male issue, and Vice Chancellor Wood, delivering judgment, said: "It will be sufficient for the decision of the point to declare that the infant is absolutely entitled to the testator's residuary estate under the trusts of the will liable to be divested in the events in the will mentioned."

So neither has *Muskett* v. *Eaton* (2), also cited upon behalf of the respondent, any application in the present case. There the devise was of land

to one C. M. for life and in the event of his having a son, *born, or to be born in due time after his decease who should live to attain the age of*

(1) L. R. 2 Eq. 736. (2) 1 Ch. D. 435.

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twenty-one, then to such son and his heirs *if he should live to attain twenty-one*

with *remainder* over, and it was held that on the death of C. M. his infant son took a *vested* estate in the devised property subject to be divested *if he should die under twenty-one*. So neither has *Dean* v. *Dean* (1) any application. The devise was to A. for life and after the decease of A. unto and to the use of such child or children of A. *living at his decease*, and such issue *then* living of the child or children of A. then deceased as either before or after the death of A. should *die under that age* and leave issue. The learned counsel for the respondent has furnished us with a list of many other like cases, but none of them cast a shadow of a doubt upon the judgment in *Coltsmann* v. *Coltsmann* (2), and cases of that class which are those which apply in the present case. It has been argued here that a subsequent clause of the will whereby the testator declared his will to be that certain personal property should be equally divided between his son John, his daughter Elizabeth and his "three great-grandchildren, the heirs of his grandson, Elias Zwicker," has the effect of limiting the time when the limitation over of the real estate to Elias Peter should take effect, to be the time of the death of Jonas *without leaving any child him surviving*, and so in like manner the time of the limitation over to Samuel B. A. Zwicker taking effect, to the death of Elias Peter without his leaving a child *him surviving*, and *Right* v. *Creber* (3) is cited as in support of this contention. But it is obvious that neither the language in the clause relied upon in the will now under consideration, nor that used in the will under consideration in *Right* v. *Creber* (3), which relate to gifts of personalty and to the designation of the persons to take

(1) (1891) 3 Ch. 150.
(2) L. R. 3 H. L. 121.
(3) 5 B. & C. 866.

under such gifts have any bearing upon the construction of limitations of freehold property or as to the *time when* those limitations take effect with which subject limitation clauses in a will bequeathing personalty have no connection whatever and have no relation to the rule as laid down in *Coltsmann* v. *Coltsmann* (1), and cases of that class.

In *Right* v. *Creber* (2), a testator had devised lands to trustees in trust to the use of his daughter Joan for life, and from and after her death he devised the property in which she had an equitable estate for life unto the heirs of her body *share and share alike*, their heirs and assigns for ever. At the time of the testator's death his daughter Joan had one child, a son, living, but after testator's death she had eleven others and the question was whether the child of Joan who was living at testator's death took the whole as a vested remainder in fee to him and his heirs forever to the exclusion of all the other children of Joan.

Bayley J. giving judgment says:

Here there are the words *share and share alike* which show that the testator did not mean the property to go to the eldest male issue only, which he must have intended if the words "*heirs of the body*" be taken in a strict legal sense

Then again:

If the words *heirs of the body* were not used in a strict legal sense the first question is, in what sense were they used? I think they were used in a sense similar to that expressed by the words *descendants, children* or *issue.* That being so, *if the testator had used the words children or issue* which are words apt and proper to express the sense in which he used the words *heirs of the body,* then, according to *Doe* v. *Perryn,* the estate limited to the children was a contingent remainder in fee which on the birth of each child vested in that child, subject to open and let in those who were born after. It is a settled rule that wherever a remainder can be construed to be a vested remainder it is to be considered vested and not contingent.

Then again he says:

(1) L. R. 3 H. L. 121.
(2) 5 B. & C. 866.

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Where it can be collected *from expressions in the will* that those words, (*heirs of the body*) are used in a different sense (from their strict légal sense, viz.,) as a designation of a person, then the remainder vests notwithstanding the general rule that *nemo est hæres viventis.*

Then he says:

I think there is * * * *sufficient on the face of the will* to show that the words "heirs of the body" were used to denote children, and therefore that it was the intention of the testator that the remainder should *vest* in the *first born* child subject to open and let in the *other children* as soon as they came into esse,

and so it was adjudged.

Holroyd J. in the same case, says:

It has been said that the testator meant those children only who were living at the death of *Joan* Creber, there is *nothing in the will to show* that that was his meaning, the words *share and share alike* and their heirs *and assigns* show that the words *heirs of the body* were not used in their strict legal sense.

The judgment in this case in fact appears to be rather in support of the contention of the appellant than that of the respondent as being confirmatory of the rule laid down in *Coltsmann* v. *Coltsmann* (1), and cases of that class, namely, that when words are used in a will which have a strict legal sense they will be construed in such sense unless it be *apparent from expressions in the will itself used in connection with those words that they are used by the testator in a sense different from their strict legal sense.*

Then there is the case of *Richards* v. *Davies* (2), where a testator devised real property to trustees and their heirs to the use of his daughter for life and after her decease in trust for such one or more of her children or his, her or their issue in such form, etc., as his daughter should by will appoint, and in default of appointment, in trust for all and every of her children and the heirs of their body or bodies lawfully begotten in equal shares and pro-

(1) L. R. 3 H. L. 121. (2) 13 C. B. N. S. 69.

portions; and in case of the death of his said daughter *without leaving any child her surviving, and in the event of such child or children her surviving and dying without leaving any issue of his or her body, then in trust for his own right heirs forever;* and it was held that upon this will the children of the testator's daughter, tenant for life, were made tenants in tail with cross remainders between them, and that the limitation to the right heirs of the testator was barred by a disentailing deed which had been executed by the tenant for life jointly with a son of hers in his lifetime who, however, had died in the lifetime of his mother.

ERLE C.J. there says:

The general scheme of the will, as it seems to me, is that the daughter was to take an estate for life with remainder to issue intact and in the event of her leaving no issue then the estate was to go to the right heirs of the testator. Although this construction enables a child of the first taker to defeat the limitation over it as an invariable rule in the construction of wills that the testator is not to be supposed to have in his contemplation the possibility of his intentions being frustrated by the exercise by a tenant in tail of his disentailing power. If that power had not been exercised in this case the whole intention of the testator would have been carried into effect by the construction which I put upon the whole will—the line of the daughter having failed, the limitation over to the testator's right heirs would have taken effect.

Then there is the case of *Doe d. Blesard* v. *Simpson* (1), where testator by his will devised certain copyhold lands to his son, his heirs and assigns for ever, followed by the words:

but if it shall happen my said son shall die *without leaving any child or children,* in that case I give, devise and bequeath all the before mentioned estates, &c., unto my five children (who were illegitimate, naming them) their heirs and assigns forever, to be equally divided among them share and share alike, and if any of my said five children should die before they come of age, without issue, such share of him, her or them so dying shall go equally among the survivors.

(1) 3 Man. & G. 929.

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Now there the words "*without leaving any child or children*" were expressly used as it is contended on behalf of the respondent that the words "*without leaving any lawful heirs*" in the will now under consideration should be construed as having been used, and yet it was held in the above case that if the lands had been freehold the testator's sons would, under the will, *have taken an estate tail* with remainder over to the testator's five natural children, as the words *child or children* were used in the sense of *issue generally,* but that the lands being copyhold and not being capable of being entailed, the testator's son took a fee simple conditional on which no remainder could be limited, and further, that the lands being copyhold lands and so incapable of being entailed, afforded no ground for construing the devise to the five natural children to be an executory devise to take effect in the event of the testator's son *dying without any child living at his death.*

Haliburton v. *Haliburton* (1) was also relied upon by the learned counsel for the respondent, but as the conclusion arrived at in that case is expressly based upon the judgment in *Right* v. *Creber* (2), which, as already observed, has no application in the present case, we cannot recognize the judgment in *Haliburton* v. *Haliburton* (1), either as of any authority in the present case.

Many other cases were cited by the learned counsel for the respondent showing that the word "heirs" in a will, will in some cases be construed as if the word "children" had been used instead. It is not necessary to refer to those cases further than has been already done, for it is not questioned that the word "heirs" will be so construed when it is plain from the context in which the word is used that is intended by it to designate that the persons who are intended to take are

(1) 2 Old. (N. S.) 312. (2) 5 B. & C. 866.

to take as purchasers, but such cases have no bearing upon the present case. There is one case, however, cited by the learned counsel for the respondent the judgment in which although not affecting the judgment to be rendered in the present case is very instructive as a guide in the construction of wills. It is the case of *Jeffray* v. *Tredwell* (1). There a testator directed his trustees to pay the income of a trust fund to his wife during her life *or until she should marry again*, and from and after her marrying again he directed his trustees to pay her an annuity of £2,000 during her life, *and from and after the death of his wife* he directed them to levy and pay certain legacies, all which although payment was postponed until after the decease of his said wife he directed should be taken as *vested immediately upon his own decease.* The testator's wife survived him and married again—the question was whether the legacies were payable upon the life estate to the wife being determined by her second marriage or not until her decease.

Lord Justice Lindley delivering judgment says at p. 653:

There is no ambiguity in the will at all. There is no expression which gives rise to any doubt or difficulty. But we are asked to look out of the will into authorities, and I protest against having recourse to authorities for the purpose of raising a difficulty. I understand having recourse to authorities for the purpose of grappling with a difficulty when it arises, but it appears to be a misuse of cases on construction to depart from a plain instrument and *to find from authorities something which you do not find in the instrument itself, and which you import from the authorities into the instrument, and thereby raise a doubt, and then have recourse to the same authorities for the purpose of seeing how the doubt is to be met. It appears to me that is fundamentally erroneous, and I think our duty is upon a plain will to adopt the construction which the words require.*

In the will before us, to construe the estate vested in Jonas by the will to be an estate in fee simple with

(1) [1891] 2 Ch. 640.

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an executory devise over to the testator's great-grandson Elias Peter, in the event of Jonas dying without leaving a child or children living at the death of Jonas, would have the effect of wholly defeating the devise over to Elias Peter in the event, which was a quite possible one, of Jonas dying and leaving a child or children his lawful issue him surviving, which issue should die in infancy and unmarried. In that event neither Elias Peter nor his issue who might continue for many generations would take anything, and the testator's manifest intention of benefiting Elias Peter and his issue would be defeated, as likewise would be the devise over to the present respondent. As then there is not a single expression in the will to qualify the construction which the law of England puts upon the word "heirs" in the context in which they are used in the present will, there can be no doubt that in 1859, upon the death of the testator, if the above ch. 112 of the first series of the Statutes of Nova Scotia had never been passed, the estate devised to testator's son Jonas must have been adjudged to be an estate in fee tail, and so likewise that the limitation over to Elias Peter, the testator's great-grandson, must have been adjudged an estate in fee tail upon default of issue of Jonas, and the limitation over to the respondent to have been a remainder in fee simple expectant upon the termination of the estates tail vested in Jonas and Elias Peter respectively.

The only difference between the devise of Jonas and that to Elias Peter, is that in the latter case the words used are: "And should my great-grandson Elias Peter *die before my son Jonas, or* before he becomes of age, *or* should he die without any heirs, then &c." But in *Mortimer* v. *Hartley* (1), the words in the will after the devise to testator's son John were:

(1) 6 Ex. 47; 3 De G. & S. 316.

If it should happen that my son John die *without leaving lawful issue* it is my will that my daughter Ann have his share, subject &c., &c., and—if it should please God to take away both Ann and John *under age*, or without *leaving lawful issue*, I give and bequeath to my brother Joseph and his heirs for ever, all, &c., &c.

Ann survived her father and died *under age and unmarried;* John also survived his father *and attained the age of twenty-five years*, leaving two surviving children who died in infancy. John by will devised all his real estate to the defendant. The question was whether (John having reached the age of twenty-five leaving children him surviving, who, however, had died in infancy,) Joseph the testator's brother or the devisees of John took the real property devised to John and Ann, and it was held that the word "or" in the clause "if it should please God to take away both Ann and John, *under age, or without lawful issue*, must be read in its ordinary sense in the disjunctive and not as the copulative *and.* Baron Parke giving judgment says:

If we change "*or*" into "*and*" for the purpose of effecting the conjectural intention, to give a benefit to the issue on the death of their parents respectively under twenty-five, we defeat *the clear and manifest intention to give the remainder to Joseph on failure of issue of John and Ann*, and cause an intestacy as to that remainder, a circumstance which ought to be avoided.

And it was judged that notwithstanding that John had passed the age of twenty-five, yet upon failure of the issue of John and Ann, that is upon the termination of the estates tail, Joseph took the lands under his estate in fee in remainder upon the determination of the estates tail. Here, however, it is of no importance whether the word "*or*" be read in the disjunctive or as "*and*" for the estate tail to Elias Peter was determined by his death, under age and without issue, in the lifetime of Jonas.

It remains only to consider what effect, if any, ch. 112 of the first and second series of the Consolidated

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Statutes of Nova Scotia, or any other of the above cited subsequent statutes, have upon the construction which in the absence of these statutes must, I think, have been put upon the will under consideration.

In the matter of *The Estate of Simpson* (1), the Supreme Court of Nova Scotia in 1863 held that the above mentioned ch. 112 absolutely abolished all estates tail both past and future, both those where a reversion in fee remained in the settler or donor and those whereon a remainder was limited.

The then Chief Justice of that court, the late Sir William Young, in his elaborate judgment in that case shews that the terms "fee simple *absolute*" and "*valid* remainder" as used in ch. 112 and the sentence in which they are found were taken from a statute of the State of New York *without their context in that statute*, which shews the sense in which they were there used, and he proceeded as we must also now do to construe the sentence as it stands in the ch. 112, wholly apart from the omitted part of the New York statute. There can, I think, be no doubt that the ch. 112 did abolish all estates tail then existing where the reversion in fee remained in the heirs of the settler or donor, and converted the estate tail into an estate in fee simple as effectually as a fine and recovery could have done or a disentailing deed executed under the Nova Scotia statute, 55 Geo. 3, ch. 14, which was thenceforth expunged from the statutes of Nova Scotia, not being thereafter contained in the Consolidated Statutes.

It is certainly difficult to understand upon what principle a remainder in fee expectant upon the determination of an estate tail should be more respected than a reversion, and it was no doubt because the Supreme Court of Nova Scotia could see no good reason

(1) 1 Old. (N. S.) 317.

for it, that they held *all* estates tail, including those whereon a remainder was limited, to be abolished, and the estate of the tenant in tail converted into a fee simple equally as if a disentailing deed had been executed. The expunging from the Statutes of Nova Scotia of the disentailing Act 55 Geo. 3, ch. 14, as in that case no longer necessary, certainly favoured that conclusion, but with the greatest deference to the judgment of that court I cannot concur in that conclusion. The construction which I think must be put upon what the learned Chief Justice in the above case in very moderate terms designates the "ambiguous and inartistic sentence" which forms the ch. 112, is that only estates tail whereon no remainder was limited were abolished notwithstanding the first words in the sentence. It was argued in the case before us that the meaning of that *ambiguous and inartistic sentence* was to abolish the estates tail whereon a remainder was limited equally as all others, but nevertheless to preserve the remainder as valid notwithstanding the destruction of the estate tail whereon the remainder was limited; but as the remainder could not be preserved in accordance with the principles of the law of England upon the subject without preserving the estate tail whereon the remainder was limited until its determination for the want of heirs to inherit, it was then argued that what the ch. 112 effected was to convert the estate tail into a fee simple with an *executory devise* over in fee in the event of the person who was formerly tenant in tail dying *without leaving issue him surviving*, an heir or heirs competent to have inherited the estate tail if it had not been abolished and converted into a fee simple. As to this construction it is sufficient, I think, to say that the language used warrants no such violent construction, and that such a construction could not be maintained without the

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establishment of some new canons for the construction of statutes. Now whatever the draftsman of this obscure statute, ch. 112, contemplated by framing into a statute what Chief Justice Sir William Young has shown to be an imperfect extract from a statute of the State of New York, it is plain, I think, that the legislature of Nova Scotia did not by it abolish estates tail *having a remainder limited thereon*, whatever may have been their reason, if any was considered, for preserving them. That the creation of such estates tail in the future was not prohibited or declared to be ineffectual appears sufficiently from ch. 114 of the same first series of the Consolidated Statutes, by the 26th sec. of which chapter it is enacted that:

Where any person to whom any real estate *shall be devised for an estate tail, or for an estate in quasi entail shall die in the lifetime of the testator leaving issue, who would be inheritable under such entail if such estate existed* (that is if the tenant in tail had not died before the testator), *and any such issue shall be living at the time of the death of the testator, such devise shall not lapse but shall take effect as if the death of such person had happened immediately after the death of the testator,* unless a contrary intention shall appear by the will.

This enactment is repeated and consolidated in the second and also in the third series of the Consolidated Statutes of Nova Scotia, in which third series, enacted in 1864, immediately after the judgment of the Supreme Court of Nova Scotia *in re Simpson's Estate* (1), the ch. 112 of the first and second series is consolidated as ch. 111 in language which must, I think, be construed as giving the true construction of the said ch. 112, as follows:—

All estates tail *on which no valid remainder is limited are abolished*, and every such estate shall hereafter be adjudged a fee simple absolute, and may be conveyed or devised by the tenant in tail, or otherwise shall descend to his heirs as a fee simple.

In the following year, A.D. 1865, the legislature of Nova Scotia passed the statute 28 Vict. ch. 2, whereby it was enacted as follows:—

(1) 1 Old. (N. S.) 317.

All estates tail are abolished, and every estate which hitherto would have been adjudged a fee tail shall hereafter be adjudged a fee simple, and may be conveyed or devised or descend as such.

This statute has been continued in every series of the consolidated statutes since enacted. Now in view of all those statutes it is impossible, in my opinion, to construe the above ch. 112 in the first series as having abolished estates tail having a remainder limited thereon, and in view of the enactments contained in sec. 26 of ch. 114 of the said first series consolidated in ch. 112 of the third series of the Consolidated Statutes of Nova Scotia, and in view of the above statute, 28th Vict. ch. 2, we cannot hold otherwise than that such estates tail remained in existence in full force until they were abolished and converted into estates in fee simple in the tenants in tail in possession at the time of the passing of the last mentioned Act, and that therefore upon the sale and conveyance long after the passing of the said last mentioned Act by Jonas Zwicker, the tenant in tail in possession at the time of the passing of that Act, to the appellant Ernst and his heirs, an estate in fee simple in the lands in question was vested in Ernst and his heirs, and therefore this appeal must be allowed with costs, and judgment must be ordered to be entered for the defendants in the action in the court below with costs.

SEDGEWICK J. was of opinion that the appeal should be allowed for reasons stated in the judgment of His Lordship Mr. Justice King.

KING J.—The plaintiff in this action (and respondent here) claims the land in question as devisee under the will of Peter Zwicker.

The defendant claims under conveyance from Jonas Zwicker, a son of the testator to whom the property was devised, with certain limitations over, and the

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question is as to the nature and extent of Jonas Zwicker's interest under the will.

The will was made in 1857. After devise of a certain lot to his grandson Emanuel Zwicker, who was then at sea, the testator goes on as follows:—

> But should my grandson Emanuel Zwicker not return home, this last mentioned lot to revert and go to my son Jonas, together with all the remainder of my real estate as well as personal property, cattle, household furniture, etc., which I give and bequeath to my son Jonas. * * * But should my son Jonas die without leaving any lawful heirs, then I order that all my real estate now made over to my son Jonas, revert and fall back to my great-grandson Elias Peter, aforesaid, and should my great-grandson Elias Peter die before my son Jonas, or before he becomes of age, or should he die without any heirs, then I order, give and bequeath all my real estate to Samuel B. A. Zwicker and his heirs, youngest son of Benjamin Zwicker, Esq. It being my sincere wish that my real estate should remain in my name, reserving the dower to my daughter-in-law as long as she remains a widow, should she survive my son Jonas. * * * I also order that my son Jonas keep and maintain my sick son John in a kind manner and give him good treatment out of my real and personal property, made over to my son Jonas, during his life.

The testator died in 1859. The learned trial judge has found that Emanuel never returned home, but was lost at sea, and that Elias Peter died before he reached the age of twenty-one (21) years, and during the lifetime of Jonas without ever having been married. Jonas died in 1894, having in 1891 conveyed the land in question to the appellant.

Samuel B. A. Zwicker, who is a son of a cousin of the testator, claims that, in the events that have happened, he is entitled to the property.

Mr. Justice Meagher, who tried the case, decided in his favour upon the ground that Jonas took an estate for life merely.

The Supreme Court of Nova Scotia, on appeal, maintained the judgment in plaintiff's favour, but upon another ground, viz., that Jonas took an estate in fee

simple with executory devises over, which, upon the events that happened, divested the fee simple out of Jonas and vested it in Samuel B. A. Zwicker.

In 1851 an Act was passed relative to the abolition of estates tail (1), which appears in identical terms in the revision of 1858 (2), and is as follows:—

All estates tail are abolished, and every estate which would hitherto have been adjudged a fee tail shall hereafter be adjudged a fee simple, and if no valid remainder be limited thereon, shall be a fee simple absolute, and may be conveyed or devised by the tenant in tail, or otherwise shall descend to his heirs as a fee simple.

In *Re Simpson* (3), (1863), a case where the devise was made long anterior to the Act, the Supreme Court of Nova Scotia decided that the Act absolutely abolished all estates tail, even although a valid remainder be limited thereon.

In the opinion of that court the expressions of the Act, "all estates tail are abolished," "and every estate which would hitherto have been adjudged a fee tail, shall hereafter be adjudged a fee simple," are too comprehensive and precise to admit of the exclusion of estates tail with remainder expectant on their termination, by inference, and simply because the effect of the general clause upon one of the classes of estates tail, viz., that where there is a reversion upon the termination of the estate tail, was alone particularized. In their view the like consequences followed, by law, in the other class of cases where there was a valid remainder expectant upon the termination of the estate tail.

Bliss J., while agreeing that every estate tail was abolished and converted into an estate in fee simple, considered that the effect of the latter part of the section was this: that where there was no valid re-

(1) R. S. N. S. (1851) ch. 112. (2) R. S. N. S. (1858) ch. 112.
(3) 1 Old. (N. S.) 317.

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mainder limited on the estate tail, the fee simple was to be a "fee simple absolute," while, if there be such a remainder, the estate tail is none the less converted into a fee simple, but it is a fee simple *conditional* within the common law signification of the term.

Practically there was no substantial difference between a fee simple conditional at common law and an estate tail under the statute *de donis* (1), but they were, however, none the less, different estates.

In the view of all the learned judges, therefore, estates tail were abolished and converted into fees simple, and there was no longer such a thing as a valid remainder expectant on the termination of an estate tail.

It is unnecessary to decide between these two views, the divergence between which does not practically affect the question before us. It seems to me sufficient to say that we should follow the judgment of the Supreme Court of Nova Scotia upon the construction of a statute affecting the tenure of real property, which was long ago pronounced, and which has not since been questioned in the courts of Nova Scotia.

In 1864 the legislature substituted for the then existing enactment, one which in terms was confined to estates tail on which no valid remainder was limited. This Act had a very short life, and was repealed the next year by an Act which plainly and in terms abolished all estates tail, and converted every estate which theretofore would have been adjudged a fee tail into a fee simple, without any declaration as to the effect of there being no valid remainder limited thereon.

In all these enactments the body of law relating to the creation of estates tail prior to the abolition of them is recognized in the expression, repeated in the successive statutes, "every estate which would

(1) 4 Kent. Com. 12.

hitherto have been adjudged a fee tail shall hereafter be adjudged a fee simple." The courts, therefore, are required to interpret an instrument as before, and if, in the state of the law prior to the abolition of such estates there would have been adjudged to be an estate tail, it is by force of the statute to be converted into an estate in fee simple. But, equally as a result of the view of Bliss J. as of the majority of the court, there could be no valid remainder expectant on an estate tail after 1851, because there could be no valid estate tail to support such remainder. As to estates created before 1851, the remainder expectant on the termination of the estate tail was a vested estate, and at the time of the Act was a valid remainder.

Next, as to the construction of the will: Does it purport to give to Jonas an estate tail with remainders over as claimed by appellant, or an estate for life only with remainders over as held by Mr. Justice Meagher, or an estate in fee simple with executory devises over, as held by Mr. Justice Henry speaking for the rest of the judges?

The devising clause to Jonas is to him without any words of limitation. Under the Wills Act this carries the entire interest of the testator, unless a contrary intention appears by the will. The will goes on to direct what disposition is to be made in case Jonas should die without leaving any lawful heirs. In that event it is to go (in the first instance) to the testator's great-grandson.

There appears to be no more settled rule applicable to the transmission of real property by devise than that expressed by the following passage from Jarman on Wills (1).

Where real estate is devised over in default of *heirs* of the first devisee, and the ulterior devisee stands related to the prior devisee so

(1) 2nd Vol. (5 ed.) p. 1175.

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as to be in the course of descent from him, whether in the lineal or collateral line and however remote, as the prior devisee in that case could not die without heirs while the devisee over exists, the word "heirs" is construed to mean heirs of the body, and accordingly the estate of the first devisee, by the effect of the devise over, is restricted to an estate tail, and the estate of the devisee over becomes a remainder expectant on that estate. This construction is induced by the evident absurdity of supposing the testator to mean that his devise over should depend on an event which cannot happen without involving the extinction of its immediate object.

See also other cases cited for the appellant. *Simson* v. *Ashworth* (1); *Harris* v. *Davis* (2); *Morgan* v. *Griffiths* (3); *Doe d. Hatch* v. *Bluck* (4).

Here Elias Peter and Samuel B. A. Zwicker, the two named devisees over, are persons who might take in course of descent from Jonas Zwicker, and so the words "lawful heirs" in the limitation over are to be read as if they were "heirs of his body," *i. e.*, of the body of Jonas; and accordingly the estate of Jonas is, by the effect of the devise over, restricted to an estate tail, and the devisee over has an estate in remainder expectant on the termination of the estate tail. The rule of law is stated by Kent (5), to be established by a series of cases in the English law uniform from the time of the Year Book down to the date of his writing.

Mr. Justice Meagher, who recognized the rule, felt pressed by the declaration, in the will, of the testator's wish that his real estate should remain in his name, to limit the interest of Jonas under the will to a life estate, as the most efficacious way of accomplishing this object. But it would hardly seem that so general a declaration of intention could vary the sense in which words having such a settled meaning are used. The learned judge's view would also make a partial

(1) 6 Beav. 412.
(2) 1 Col. C. C. 416.
(3) Cowp. 234.
(4) 6 Taunt. 484.
(5) 4 Kent Com. 276.

intestacy in the event of Jonas dying leaving heirs of his body. The provision as to providing during the life of John for his support, out of the real and personal property made over to him, is also against such view.

Then, as to the contention that Jonas took an estate in fee simple with executory devise over. We are not to stop at a certain point and say: "Here is what would, if taken by itself, make an estate in fee simple," and then give effect to this as if it stood alone, and then go on to construe the devise over independently. The whole is to be taken together, the words of devise and the devise over in default of leaving lawful heirs. The question is: What does the whole import, each part being allowed its fair weight, alone and together with the other?

Here again comes in the rule of law already referred to, unless there is something on the face of the will showing a manifest intention that the words are used in a different sense.

If the words were "die without leaving lawful heirs him surviving," this would point to a definite failure at the date of Jonas' death, and we might have an executory devise. So, if the words were "die without leaving issue," or "die without issue," or "have no issue," or other like terms, for by statute R. S. N. S. (1854) c. 114, sec. 24, these words would *primâ facie* mean a want or failure of issue in the lifetime or at the death of Jonas. But the words "die without leaving lawful heirs," or "die without leaving heirs," are not within the statute and import an indefinite failure, and in connection with a devise over, have a fixed and technical operation in restricting the prior estate in fee simple to an estate tail. That fixed and technical meaning is imperative unless, from something else in the will, it is evident that the words are used in a different sense, or there is some repugnancy.

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Here there is nothing having this effect. The word "issue" is a more flexible term than "heirs," and yields to a secondary meaning more readily.

Under a like Imperial Act (1), a devise over in case the prior taker "should die without heirs male of his body lawfully begot" was held to refer to an indefinite failure of heirs male.

In *Dawson* v. *Small* (2), Sir W. M. James, L.J., there says:

Mr. Chitty argued that section 29 of the Wills Act applied, and that the gift over was in the event of John Small Lowther dying without leaving heirs male living at his death; but I am of opinion that the Act has no reference to such a case. The legislature there deals with "die without issue," "die without leaving issue," and similar ambiguous expressions; but here there is no ambiguity, the gift over is on failure of heirs male of the body.

Then, supposing that the limitations here were to be treated as executory devises; the first (to Elias Peter) would be void as against the rule as to perpetuities, inasmuch as the contingency on which it is to become vested is the indefinite failure of heirs of the body, and this being so, the limitation might *possibly* not take effect within the lifetime of any person in being at the testator's death or within twenty-one years thereafter.

Treating this then as void, how is it with the subsequent limitation in favour of the respondent? If it is an executory devise and is dependent upon the coming into existence of the prior limitation, the rendering void of the first would also invalidate the second. But if the one is not dependent on the other, or on like condition, then the nullity of the first would cause the second limitation to operate as if the void demise had never been made. In this state of things the devise to the respondent would depend upon these contingencies, viz., the death of Elias Peter in the

(1) 1 Vict. c. 26, sec. 29. (2) 9 Ch. App. 651.

lifetime of Jonas, his death under age, or his death without leaving heirs. As to this last contingency, it would equally be obnoxious to the rule against perpetuities, but the avoiding of this would not avoid the limitation so far as it is made dependent upon the other two contingencies. Per Lord Chelmsford in *Evers* v. *Challis* (1).

The other two contingencies, viz., the death of Elias Peter in Jonas' lifetime, or under age, would of course necessarily be determined during lives in existence at the testator's death. But we then should have the fee simple in the testator's son Jonas defeated during his lifetime, or notwithstanding that he had heirs of his body, and the estate in fee simple passing to Samuel B. A. Zwicker, in the event of Elias Peter dying in the lifetime of Jonas or under age.

This is a result that would seem opposed to what one would say must have been the real intention with regard to Jonas, viz., to give him an estate which might pass to the heirs of his body.

Upon the whole, therefore, I think that the estate devised to Jonas purported to be an estate tail, which, by operation of the statute, has been converted into an estate in fee simple, and that therefore the appeal should be allowed.

GIROUARD J. concurred for reasons stated in the judgment of His Lordship Mr. Justice Gwynne.

Appeal allowed with costs.

Solicitor for the appellant: *Charles W. Lane.*

Solicitors for the respondent: *Wade & Paton.*

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(1) 7 H. L. Cas. 555.

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*June 5.
*June 15.

MARY HARTE THOMPSON AND OTHERS (PLAINTIFFS) .... APPELLANTS;

AND

JOSEPH SMITH, MAUD BRIGHAM AND EUGENIA FLORENCE REIFFENSTEIN (DEFENDANTS) .... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Will—Construction of—Words of futurity—Life estate—Joint lives—Time for ascertainment of class—Survivor dying without issue—"Lawful heirs."

A devise of real estate to the testator's wife and only child for their joint lives, with estate for life to the survivor and remainder in fee to his lawful heirs, is not evidence of intention upon the part of the testator to exclude the child from the class entitled to the fee, in case such child should survive the testator.

APPEAL from the judgment of the Court of Appeal for Ontario (1), which reversed the decision of the Chancery Division (2), in favour of the plaintiffs.

A sufficient statement of the case appears in the judgment reported.

McCarthy Q.C. and *Wyld* for the appellants. The rule that the "heir" means the "heir at the testator's death" is subject to the qualification "unless a contrary intention appear." Here a contrary intention does appear, for a life estate is expressly given to the daughter and this is important in construing the devise. *Morgan* v. *Thomas* (3). The fact that his daughter was his only heir points to the conclusion that by the words "my lawful heirs," the testator meant persons

PRESENT:—Taschereau, Gwynne, Sedgewick, King and Girouard JJ.

(1) 23 Ont. App. R. 29. (2) 25 O. R. 652.
(3) 9 Q. B. D. 643.

other than the daughter. The peculiar context distinguishes the present will from that presented for decision in *Re Ford, Patten* v. *Sparks* (1); *Wrightson* v. *McCauley* (2); and *Bullock* v. *Downes* (3). The following are in point: *Gibbons* v. *Gibbons* (4); *Coltsmann* v. *Coltsmann* (5); *Ex parte Davies* (6); *Parker* v. *Birks* (7). The law is compendiously stated in Watson's Equity at p. 735. We also refer to the following cases as to the intention: *Brennan* v. *Munro* (8); *Keeler* v. *Collins* (9); *Clow* v. *Clow* (10); *Evans* v. *King* (11); *Re Ferguson, Bennett* v. *Coatsworth* (12); *Leader* v. *Duffey* (13); and to Challis on Real Property, (2 ed.) p. 154. As to the words "my lawful heirs" excluding the daughter, the sole heir, see *Jones* v. *Colebeck* (14); *Clarke* v. *Hayne* (15); *Lees* v. *Massey* (16); *Doe d. King* v. *Frost* (17); *Say* v. *Creed* (18).

Even if the daughter took a life estate only, the respondents are not entitled to a lien for improvements as directed by the judgment of His Lordship the Chancellor. The improvements of a life tenant, however substantial or lasting, are not chargeable against the inheritance. *Re Smith's Trusts* (19). The daughter having an interest in the land when the improvements were made is not entitled to compensation therefor. *Beatty* v. *Shaw* (20). But even if entitled to compensation for improvements, the judgment should be varied by directing the respondents to account for

(1) 72 L. T. N. S. 5.
(2) 14 M. & W. 214.
(3) 9 H. L. Cas. 1.
(4) 6 App. Cas. 471.
(5) L. R. 3 H. L. 121.
(6) 2 Sim. N. S. 114.
(7) 1 K. & J. 156.
(8) 6 U. C. Q. B. (O. S.) 92.
(9) 7 U. C. Q. B. 519.
(10) 4 O. R. 355.
(11) 21 Ont. App. R. 519.
(12) 25 O. R. 591.
(13) 13 App. Cas. 294.
(14) 8 Ves. 38.
(15) 42 Ch. D. 529.
(16) 3 De G. F. & J. *per* Campbell L. C. at pp. 121, 122, and *per* Turner L. J. at p. 124.
(17) 3 B. & Ald. 546.
(18) 5 Hare 580.
(19) 4 O. R. 518.
(20) 14 Ont. App. R. 600.

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the rents and profits from the time the testator's daughter regarded herself as owner in fee. She could not claim to be at once owner in fee and life tenant, and is only entitled to compensation for improvements, if at all, as being made under the belief that she was owner in fee. *McCarthy* v. *Arbuckle* (1); *Munsie* v. *Lindsay* (2); *Niagara Falls Park Commissioners* v. *Colt* (3).

Robinson Q.C. and *O'Gara* Q.C. for the respondents. The rule of law is clear that unless a will contains a clear intention to the contrary, or "demonstration plain" as explained by Baron Parke, estates vest in interest at the earliest possible period after the death of the testator in order that the right of families may be ascertained, and that the property may be properly looked after, which would not be done if the owner was not ascertained. *Wrightson* v. *McCauley* (4); *In re Rawlin's Trusts* (5); *Mortimer* v. *Slater* (6). Words of futurity in the devise do not postpone the vesting of the remainder, but refer only to the enjoyment, the rule being that where the 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. 1 Jarman (3 ed.) 758, 764 *et seq.* Theobald, 'Wills" (3 ed.) 264; *Wharton* v. *Barker* (7). Gifts to the "lawful heirs," or "right heirs," when they occur in wills without any other explanation from the context

(1) 31 U. C. C. P. 405.
(2) 11 O. R. 520.
(3) 22 Ont. App. R. 1.
(4) 14 M. & W. 214.
(5) 45 Ch. D. *per* Bowen L. J. at p. 307.
(6) 7 Ch. D. *per* Thesiger L. J. at p. 329.
(7) 4 K. & J. 483.

must be interpreted, according to their strict sense, as devises to the person who would succeed in case of intestacy. 2 Jarman, p. 55. *Baldwin* v. *Kingstone* (1); *Wrightson* v. *McCauley* (2); *Doe d. King* v. *Frost* (3); *Smith* v. *Butcher* (4). If there was no devise of the remainder the daughter, as heir-at-law, would be entitled at the death of the testator. No reason can be adduced why she should be deprived of the devise to the "lawful heirs" if she answers that description at the death of the testator. In *Miles* v. *Harford* (5), see remarks by Lord Jessel at page 698. The language used must determine the meaning and not surmise as to general intent. *King* v. *Evans* (6). The true construction of a will depends on what the testator has said. *Re Rawlin Trusts* (7).

The judgments of Hagarty C.J. and Osler J. in the Court of Appeal for Ontario maintain the contention of the appellants. They point to *Re Ford, Patton* v. *Sparks* (8); and *Brabant* v. *Lalonde* (9) which were decided since the Chancellor's judgment.

However, should the appellants be declared entitled to the lands, the respondents are entitled to a lien for the enhanced value by reason of the permanent improvements made, as was decided by the Chancellor. R. S. O., c. 100, sec. 30. *Fawcett* v. *Burwell* (10); *McGregor* v. *McGregor* (11).

The judgment of the court was delivered by:

SEDGEWICK J.—On the 4th of August, 1853, one Charles Palmer Thompson made his will, the clauses in question upon this appeal being as follows:—

(1) 18 Ont. Ap. R. 63.
(2) 14 M. & W. 214.
(3) 3 B. & Ad. 546.
(4) 10 Ch. D. 113.
(5) 12 Ch. D. 691.
(6) 24 Can. S. C. R. *per* Strong C. J. at p. 365.
(7) 45 Ch. D. 307.
(8) 72 L. T. N. S. 5.
(9) 26 O. R. 379.
(10) 27 Gr. 445.
(11) 27 Gr. 470.

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Sedgewick J.

I further will and desire that the profits of and the interests in any residue of the property or estate, real or personal, that I may be possessed of at the time of my decease shall be enjoyed solely by my beloved wife Lissy Thompson and my beloved daughter Mary Anna Thompson, the profits and interests thereof and therein to be equally divided, share and share alike between my said beloved wife Lissy Thompson and my said beloved daughter Mary Anna Thompson during their natural lives.

I do further will and desire that in the event of the death of either of the above named Lissy Thompson or Mary Anna Thompson, the residue of my property, real or personal, shall be enjoyed by and go to the benefit of the survivor.

I do further will and desire that at the decease of both the said Lissy Thompson and Mary Anna Thompson, the said residue of my real and personal property shall be enjoyed and go to the benefit of my lawful heirs.

The effect of this was to give to his wife and daughter a life estate during their joint lives, and an estate for life to the survivor with remainder in fee to the heirs of the testator whoever they might be.

Both devisees survived the testator, the widow dying in 1878, and the daughter in 1893, she having married the defendant Joseph Smith, but dying without issue.

The controversy is between the nephews and nieces of the testator claiming the property as his heirs, and the defendant Joseph Smith claiming it as the devisee of his wife, the only daughter of the testator, and the question is: Did the deceased intend to exclude and did he succeed in excluding his daughter from the class described in the will as "my lawful heirs"? The contention of the plaintiffs is that those only were his "lawful heirs" who would have been so had he survived his wife and daughter.

I take it to be reasonably clear that this contention cannot prevail. The rule established in *Bullock* v. *Davies* (1), is that where in a case like the present the

(1) 9 H. L. Cas. 1.

testator uses the word "heirs," he must be taken to mean heirs at the time of his death unless the contrary contention is apparent from the will. This rule was subsequently followed and applied in *Mortimore* v. *Mortimore* (1), and in *Re Ford; Patten* v. *Sparks* (2).

I do not see in this will any intention expressed or implied to exclude the daughter from the class entitled to the fee. The testator's object seems to have been to provide immediately for his wife and daughter during their lives, leaving the property upon the death of the survivor to descend to his heirs whoever they might be as in the case of intestacy.

There is not any indication of an intent to exclude his daughter, or to prefer his collateral relatives to her. On the contrary he seems intentionally to have been silent as to the particular persons who were to take upon the determination of the life estates.

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

Appeal dismissed with costs.

Solicitors for the appellants: *Bradley & Wyld.*

Solicitors for the respondents: *O'Gara, MacTavish & Gemmell.*

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(1) 4 App. Cas. 448. (2) 72 L. T. N. S. 5.

1897 *Oct. 9. *Oct. 12.

LOUIS *alias* WILFRID DUROCHER.....PETITIONER;

AND

LOUIS DUROCHER.........................RESPONDENT.

Petition in revocation of judgment — Requête civile — Concealment of evidence—Jurisdiction—C. P. Q. art. 1177—*R. S. C. c.* 135, *s.* 67.

Where judgment on a case in appeal has been rendered by the Supreme Court of Canada and certified to the proper officer of the court of original jurisdiction, the Supreme Court has no jurisdiction to entertain a petition (*requête civile*) for revocation of its judgment on the ground that the opposite party succeeded by the fraudulent concealment of evidence.

PETITION by way of *requête civile* to have a judgment of this court, pronounced on 1st May, 1897, set aside and the proceedings in the cause re-opened.

The petitioner was plaintiff and appellant in the case decided on 1st May, 1897, in the report of which (1) will be found a statement of the matters there in issue. The petition in revocation (*requête civile*) now presented asks to have the judgment of the Supreme Court of Canada and of the courts below set aside on the ground that the dismissal of a petitory action brought by the petitioner had been obtained through fraudulent concealment by the respondent of a deed of lands, which the petitioner had discovered only since the judgments were rendered. Prior to the presentation of the petition, the certified judgment of the Supreme Court of Canada had been transmitted to the court of original jurisdiction under the provisions of the sixty-seventh section of "The Supreme and Exchequer Courts Act."

Belcourt for the petitioner, quoted C. P. Q. arts. 505 and 1177; R. S. C. c. 135, ss. 59, 61, 96 & 98; and cited *Cooke* v. *Caron* (2).

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

(1) 27 Can. S.C.R. 363.

(2) 11 Q. L. R. 268.

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Geoffrion Q.C. for the respondent. So far, at least. as this court is concerned, the judgment in question is final and conclusive, between all parties and privies, as to material facts; C. C. P. arts. 505 to 509 and art. 1166; See also *Law* v. *Hansen*, (1); and cases cited by Mignault (2) at 505 C. C. P. also R. S. C. c. 135 s. 67. The petition cannot be entertained.

The judgment of the court was delivered by:

TASCHEREAU J.—The appellant, in 1894, brought a petitory action against the defendant. His action was dismissed by the Superior Court and the Court of Appeal in Montreal, by a judgment which was confirmed by this court in May last. The case is reported at page 363 of vol. 27, Supreme Court Reports, where the details fully appear. The appellant now seeks to set aside the judgment of this court, and the judgments against him in the courts below, by a *requête civile*, under article 1177 of the new Code of Civil Procedure. The conclusions of his petition are:

That by the judgment to be rendered upon this present petition, he will be held and declared to be the proprietor of five-twelfths of the lot above described, and bearing the number 22 of the official plan and book of reference for St. Louis Ward of the City of Montreal, as he would have been so held and declared, pursuant to the conclusions of his said action, cited in the course of the proceedings taken on the present petition, had the defendant declared the truth at the trial, and the judgment of the Superior Court of the District of Montreal, rendered in this suit on the thirteenth of April, one thousand eight hundred and ninety-five, the judgment of the Court of Queen's Bench sitting in appeal side for the District of Montreal, rendered in this suit on the twenty-ninth of October, one thousand eight hundred and ninety-six, and the judgment of the Supreme Court of Canada, rendered on or about the first day of May last (1897) be considered as not having been rendered, and be set aside and annulled.

The ground upon which this petition is based is that he has since the judgment of this court discovered a

(1) 25 Can. S.C.R. 69.

(2) Code de Procédure Civile (annoté).

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deed of the 25th November, 1867, which said deed, he alleges, was fraudulently concealed by the respondent, and that it is by fraud that the respondent obtained the dismissal of appellant's action.

Without entering upon the merits in law of the allegations of the petition, or upon their sufficiency or insufficiency, if proved, to support a *requête civile*, we dismiss it upon the simple ground that we have no jurisdiction to entertain it.

Section 67 of The Supreme Court Act enacts that:—

> The judgment of the Supreme Court in appeal shall be certified by the registrar of the court to the proper officer of the court of original jurisdiction, who shall thereupon make all proper and necessary entries thereof, and all subsequent proceedings may be taken thereupon as if the judgment had been given and pronounced in the said last mentioned court.

Now, in this case, the judgment and the record have been sent back to the Superior Court at Montreal, and this court has now no jurisdiction over it of the nature of the remedy asked for by the petitioner. We do not, of course, determine whether the Superior Court has, or has not, in this case, upon the allegations of the petitioner, jurisdiction to entertain his demand. We determine nothing but that we have no jurisdiction.

There are cases in which this court has, as every court must have, power to annul errors in its own judgments, as we did for instance, in *Rattray* v. *Young* (1), but this is clearly not one of them. See also *Providence Washington Insurance Co.* v. *Gerow* (2); and *Dawson* v. *Macdonald* (3).

Petition dismissed with costs.

Solicitors for the petitioner: *Robidoux, Chènevert & Robillard.*

Solicitors for the respondent: *Geoffrion, Dorion & Allan.*

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(1) Cass. Dig. 2 ed. 692.
(2) 14 Can. S. C. R. 731.
(3) Cass. Dig. 2 ed. 587.

UNION COLLIERY COMPANY OF BRITISH COLUMBIA .... APPELLANTS;

1897
*Oct. 19.
*Oct. 22.

AND

THE ATTORNEY GENERAL OF BRITISH COLUMBIA AND OTHERS .... RESPONDENTS.

Re COAL MINES REGULATION ACT, 1890.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

Appeal—Jurisdiction—Judgment—Reference to court for opinion—54 *V. c.* 5 (*B.C.*)—*R. S. C. c.* 135, *ss.* 24 *&* 28.

The Supreme Court of Canada has no jurisdiction to entertain an appeal from the opinion of a provincial court upon a reference made by the Lieutenant-Governor-in-Council under a provincial statute, authorizing him to refer to the court for hearing and consideration any matter which he may think fit, although the statute provides that such opinion shall be deemed a judgment of the court.

MOTION to quash an appeal from an opinion or judgment of the Supreme Court of British Columbia *en banc* pronouncing the Statute of the Province of British Columbia cited as the "Coal Mines Regulation Amendment Act," 1890, to be within the scope of the legislative authority of the legislature of the Province of British Columbia.

The Lieutenant-Governor of British Columbia in Council made a reference to the Supreme Court of British Columbia pursuant to the provisions of 54 Vict. ch. 5, (B.C.) intituled "An Act for expediting the decision of constitutional and other provincial questions," for hearing and consideration of a case submitted to ascertain whether in the opinion of that

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court the legislature of the province had jurisdiction to pass the Act 53 Vict. ch. 33, (B.C.) intituled "An Act to amend the Coal Mines Regulation Act." The full court heard and considered arguments by parties interested in the decision of the question and certified to the Provincial Secretary that the conclusion arrived at was that the statute in question was within the scope of the legislative authority of the Province of British Columbia.

The present appeal is from the opinion so expressed by the court upon such reference which by the provincial statute (1) is declared to be a judgment of the court.

The respondents moved to quash the appeal for want of jurisdiction.

Robinson Q.C. for the motion, *McCarthy* Q.C. and *McInnes* with him. The certificate given by the court is not in any way a final judgment binding upon any person, but is merely intended to advise the Provincial Secretary that in the opinion of the judges a certain statute was within the legislative competence of the Provincial Assembly. It is not in any sense *res judicata*; it decides no controversy. *The Queen* v. *Robertson* per Strong J. (2). See also remarks by Taschereau J. in *The Attorney General of Canada* v. *The Attorney General of Ontario* (3); and *In re Provincial Fisheries* (4). It is not a final judgment within the meaning of "The Supreme and Exchequer Courts Act," sections 24, 26 & 28.

Hogg Q.C. contra.

The judgment of the court was delivered by:

TASCHEREAU J.—54 Vict., ch. 5, of the statutes of British Columbia, authorizes the Lieutenant-Governor-

(1) 54 Vict. ch. 5.
(2) 6 Can. S. C. R. 127.
(3) 23 Can. S. C. R. 472.
(4) 26 Can. S. C. R. 539.

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in-Council to refer to the Supreme Court of the province, or to a Divisional Court thereof, or to the full court, for hearing and consideration, any matter which he thinks fit so to refer, and the opinion of the court, upon such a reference, is to be deemed a judgment of the court, and an appeal shall lie thereon, says the Act, as in the case of a judgment in an action.

This appeal is taken from the opinion of the court of British Columbia upon a reference under the aforesaid Act. We clearly have no jurisdiction to entertain the appeal. There is no judgment to be appealed from. The British Columbia statute itself says "shall be deemed a judgment." That is saying that it is not a judgment. There is no action, no parties, no controversy perhaps, and the British Columbia legislature, did it intend to do so, cannot extend our jurisdiction, and create a right to appeal to this court.

The motion to quash is allowed, and the appeal quashed without costs.

Appeal quashed without costs.

Solicitors for the appellants: *Davie, Pooley & Luxton.*

Solicitor for the respondent, The Attorney General: *The Attorney General in person.*

Solicitors for the respondents, The New Vancouver Coal Mining & Land Co.: *Drake, Jackson & Helmcken.*

Solicitors for the respondents, The Miners & Mine Labourers Protective Association of British Columbia: *W. W. B. McInnes.*

1897
*Oct. 19.
*Oct. 22.

THE CITY OF TORONTO ....APPELLANT;

AND

THE TORONTO RAILWAY CO.........RESPONDENT.

Appeal—Jurisdiction—52 V. c. 37 s. 2 (D.)—Appointment of presiding officers—County Court Judges—55 V. c. 48 (Ont.)—58 V. c. 47 (Ont.)—Statute, construction of—Appeal from assessment—Final judgment.

By 52 Vict. ch. 37, sec. 2, amending "The Supreme and Exchequer Courts Act," an appeal lies in certain cases to the Supreme Court of Canada from courts "of last resort created under provincial legislation to adjudicate concerning the assessment of property for provincial or municipal purposes, in cases where the person or persons presiding over such court is or are appointed by provincial or municipal authority." By the Ontario Act, 55 Vict. ch. 48 as amended by 58 Vict. ch. 47, an appeal lies from rulings of municipal courts of revision in matters of assessment to the county court judges of the county court district where the property has been assessed.

On an appeal from the decision of the county court judges under the Ontario statutes:

Held, King J. dissenting, that if the county court judges constituted a "court of last resort" within the meaning of 52 Vict. ch. 37, sec. 2, the persons presiding over such court were not appointed by provincial or municipal authority, and the appeal was not authorized by the said Act.

Held, per Gwynne J., that as no binding effect is given to the decision of the county court judges, under the Ontario Acts cited, the court appealed from was not a "court of last resort" within the meaning of 52 Vict. ch. 37, sec. 2.

Quære. Is the decision of the county court judges a "final judgment" within the meaning of 52 Vict. ch. 37, sec. 2?

MOTION to quash an appeal from the judgment or decision of a court of appeal from a municipal court of revision as to assessment of property, on the grounds

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PRESENT:—Taschereau, Gwynne, Sedgewick, King and Girouard JJ.

that the county court judges who presided over the court appealed from were not persons appointed by provincial or municipal authority, and that the court was not a "court of last resort," nor their decision a "final judgment" within the meaning of "The Supreme and Exchequer Courts Act," and its amendment by 52 Vict. ch. 37, sec. 2.

Laidlaw Q.C. for the motion. The court from which the appeal is taken is constituted under "The Consolidated Assessment Act, 1892," [Ont.] and the amending Acts, 55 Vict. ch 48, and 58 Vict. ch. 47. It is presided over by county court judges who are appointees of the Government of Canada under the provisions of "The British North America Act, 1867." They are not persons appointed by provincial or municipal authority within the meaning of "The Supreme and Exchequer Courts Act," as amended by 52 V. c. 37, s. 2. Neither is their court, as constituted by the Ontario statutes, a "court of last resort," nor their judgment a final judgment within the meaning of the Supreme Court Acts refered to. *Re Pacquette* (1); *Re Young* (2); *The Canadian Pacific Railway Co.* v. *The Little Seminary of Ste. Thérèse* (3); *Godson* v. *The City of Toronto* (4). The decision of the county court judges is not appealable as they are not a court of last resort and the judgment is not final nor effective under the Ontario statutes until certain formalities are complied with, when it becomes, by statute, conclusive for the assessment of the year. The statute also declares the decision to be non-appealable. *Danjou* v. *Marquis* (5). See judgment of Lord Cairns in *Théberge* v. *Laudry* (6). See also *Glengarry Election case, Kennedy* v. *Purcell* (7); *McDonald* v. *Abbott* (8).

(1) 11 Ont. P. R. 463.
(2) 14 Ont. P. R. 303.
(3) 16 Can. S. C. R. 606.
(4) 18 Can. S. C. R. 36.
(5) 3 Can. S. C. R. 260.
(6) 2 App. Cas. 102.
(7) 59 L. T. N. S. 279.
(8) 3 Can. S. C. R. 278.

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Robinson Q.C. contra. Our appeal is a matter of right given by Dominion legislation authorized by the B. N. A. Act, 1867, sec. 101, and cannot be taken away by provincial legislation, even when legislating as to municipal institutions. *Clarkson* v. *Ryan* (1); *Forristal* v. *McDonald* (2); per Richie C.J., in *The Queen* v. *Severn* (3); *Attorney General of Ontario* v. *Attorney General for the Dominion* (4).

There is no alteration possible in the judgment of the court on the reference to a judge of the Court of Appeal provided by the provincial Act; it is a conclusive decision binding on the parties, the result of full hearing and deliberation. The provincial legislature has created a new court vested with all the paraphernalia and attributes of a court of final resort upon the questions it is constituted to decide. Regular procedure is provided distinct from that of the county courts. The matters over which jurisdiction is given is not in any way ancillary to the county court jurisdiction, territorial or otherwise. The statute (5), provides also for the remuneration of the judges designated as the persons to preside over this court of appeal from municipal courts of revision. They are not appointed by name, but they are *personæ designatæ* appointed by the statute to an office separate and distinct from that to which the Dominion Government appointed them, but which is made their qualification as presiding officers of the municipal appeal court. As to what forms a court, see *Re Bell Telephone Co. and The Minister of Agriculture* (6). In *Godson* v. *City of Toron*·· (7); the County Court Judge was not acting judicially, he was not required to decide a case but merely to report upon matters referred to him for inquiry.

(1) 17 Can. S. C. R. 251.
(2) 9 Can. S. C. R. 12.
(3) 2 Can. S. C. R. 70.
(4) [1896] A. C. 363
(5) 58 Vict. ch. 47 s. 6 (Ont.).
(6) 7 O. R. 609.
(7) 18 Can. S. C. R. 36; 16 Ont. App. R. 452.

The case *Re Pacquette* (1), is not in point as it refers merely to a case of exercise of summary jurisdiction. Neither does *Re Young* (2) which was a special matter in insolvency nor *Théberge* v *Laudry* (3) where the order appealed from was in the exercise of discretion. As to the statute of 1894, ch. 51, sec. 5, the submission to the Lieutenant Governor in Council is a matter of prerogative.

TASCHEREAU J.—This appeal is taken under the provisions of the Supreme Court Amendment Act of 1889 (4) which gives an appeal to this court from the judgment of any court of last resort created under provincial legislation to adjudicate concerning the assessment of property for provincial or municipal purposes, *in cases where the person or persons presiding over such court is or are appointed by provincial or municipal authority.*

The judgment, or decision, appealed from was rendered by the court, composed of county court judges, constituted under 55 Vict. c. 48 (Ont.), as amended by 58 Vict. c. 47 (Ont.), for hearing appeals from the Court of Revision, as to assessments in Ontario, and the respondent moves to quash the appeal on the ground, *inter alia*, that the county court judges presiding over the said appeal court, are not appointed by *provincial or municipal authority*, and that consequently the case does not fall within the statute.

I am of opinion that we should allow the motion, and quash the appeal. The county court judges are not appointed by provincial or municipal authority, therefore the appeal does not lie. The Ontario statute authorizes them to preside, or constitutes them the presidents of

(1) 11 Ont. P. R. 463.
(2) 14 Ont. P. R. 303.
(3) 2 App. Cas. 102.
(4) 52 Vict. c. 37, sec. 2.

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Taschereau J.

such court, but they are appointed as county court judges by the federal authority. The word "appointed" cannot be extended so as to mean that the legislature has appointed them. *Appointed*, in that clause imports an act of the executive authority.

To entertain this appeal would be to strike out the words "in cases where the persons presiding over such court are *appointed by provincial or municipal authority*." The federal authority could never constitute such a court, or designate the persons who were to preside over it, and it cannot have been the intention of the legislature to provide for an impossible contingency.

To give effect to these words, as we must do if possible, we have to construe them as limiting the right of appealing to this court to cases where some other persons than judges appointed by the federal power are to be judges of that municipal court. Otherwise they would have no meaning.

If Parliament had intended to give an appeal in all cases, the words "in cases, &c., &c.," would have been absolutely unnecessary, for all such municipal courts must be presided over by persons, *quoad hoc*, appointed or designated by provincial power.

GWYNNE J.—This is a motion to quash an appeal to this court in the matter of an assessment made by the appellants upon the respondents in respect to certain property of theirs situate in the city of Toronto, which appeal the appellants claim to have a right to make under the provisions of an Act of the Dominion passed in the year 1889 (1), whereby it was enacted that an appeal should lie to this court

(*j*) from the judgment of any court of last resort created under provincial legislation to adjudicate concerning the assessment of property

(1) 52 Vic. ch. 37, sec. 2.

for provincial or municipal purposes in cases where the person or persons presiding over such court is or are appointed by provincial or municipal authority, and the judgment appealed from involves the assessment of property at a value of not less than ten thousand dollars.

I am of opinion that the court contemplated by this statute as a court from whose judgment an appeal was given to this court, was a court which had yet to be created, and to which should be given, as a court of last resort, uniform appellate jurisdiction over all cases of appeal from the decision of the revision courts, and whose judgment should be conclusive, not merely as regards the particular assessment roll affected by it, but binding upon all revision courts and upon all other courts within the province in which the court should be created upon all questions of law adjudicated upon by such court, whatever might be the amount of the assessment complained of.

By chapter 193 of the Revised Statutes of Ontario, [1887], the Act then in force in relation to assessments, an appeal was given "to the county judge" from all decisions of courts of revision within the county of the county court of which he is the judge, and assuming these words "the county judge," by reason of the provisions of the subsections of sec. 68 and of sec. 69, to be sufficient to constitute the judge of the county court in such county a court of appeal in all assessment cases arising within the county of the county court of which he is the judge, his judgment was not made final otherwise than as regulating finally the assessment rolls of the year which must be completed within the year; nor even in that respect final in all cases, for by sec. 67 it is enacted that when the assessment complained of is of the value of $50,000 and over, although the appeal is in such case equally as in all others "to the county judge," still the appellant may request in writing the

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said county court judge to associate with himself on hearing of the said appeal, the judge of the county court of the county whose county town is nearest to the court house of the county to the judge of whose county court the appeal is given, and these two judges were directed then to hear the said appeal; and although by subsec. 3 of sec. 76 these two judges are declared to have the powers and duties which were by the Act assigned to "the county judge," acting alone, viz.: compelling attendance of witnesses, examination of all parties on oath, &c., &c., still in case they differ no judgment can be given, neither by the two conjointly by reason of their difference in opinion, nor yet by "the county judge" to whom the appeal is given. Special provision in such case is therefore made by subsection 4 of sec. 76, precisely similar in effect, it is true, to that which is the effect of the judgment of a court of appellate jurisdiction when its judges are divided in opinion; that subsection enacts that when two judges hear the appeal and differ in their opinion as to the allowance of the said appeal or otherwise, the assessment appealed from shall stand confirmed. In such a case, however, it must be observed that the confirmation of the judgment of the Court of Revision is effected by an express statutory provision and not by the judgment of any court, and moreover the confirmation of the judgment of the Court of Revision only affects the assessment roll of that year.

Such being the provisions in relation to appeal from the courts of revision when the above Dominion Act was passed, it does not appear to me that there was then any court in the province of Ontario which can be said to have been a court contemplated by the Dominion statute as being "a court of last resort created to adjudicate concerning the assessment of

property," from the judgment of which an appeal was given to this court.

Now all the above provisions of R. S. O. [1887] ch. 193, still remain in force precisely as therein enacted save as hereinafter mentioned. The appeal from the decision of the Court of Revision is still "to the county judge," nor has there been any alteration in the language used save as appears in 57 Vic. ch. 51, sec. 5 (1894), and in 58 Vic. ch. 47, sec. 5 (1895). By the former a new subsection was added to sec. 76, intituled 76*a*, whereby "in order to facilitate uniformity of decision without the delay or expense of appeals," it was enacted that a county judge may after his judgment in the case or matter, prepare a statement of the facts in the nature of a case on any question of general application which has arisen under the Act to be submitted in the manner provided in the Act to a judge of the Court of Appeal whose duty is declared to be to hear the case argued as also is provided in the Act, and to certify to the Lieutenant-Governor-in-Council his opinion thereon, and the Act proceeds to enact that such opinion shall forthwith be published in the Ontario Gazette, and a copy thereof sent to every judge of a county court, or the judge may, at any stage of the proceedings, refer the case to the full court for hearing and adjudication, and the said court shall have the authority and perform the duties assigned by the Act to, or conferred upon the judge (1).

Now, although it is provided by sec. 6 of this Act that the statement of any such case shall not delay the final revision of the assessment roll, the taxes imposed being necessary to be collected annually, yet the Act provides that the judge of the appeal court or the full court, should the matter be referred to them, shall

(1) 57 V. c. 51 s. 5, by ss. 7 of new sec. 76*a*.

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adjudicate upon the matter and make such order in the premises and as to costs and the payment thereof as will in the opinion of the judge or of the full court, as the case may be, do justice to all parties concerned, and any such order may be enforced as an order of a judge of the High Court under the Judicature Act or otherwise. Now, although the judgment of a judge or of the full court of appeal cannot alter the assessment roll of the year in which the case is prepared by "the judge," it is very obvious, I think, from the provisions enacted for the promulgation of the judgment of the judge of the Court of Appeal or of the full court, to whom the case should be referred, that their adjudication should in future be binding upon all county court judges upon all points of law by them decided, and such being the case, I am the more confirmed in my view that neither since nor before the passing of this Act was there a court in existence in Ontario which can be said to be a court of last resort created to adjudicate concerning the assessment of property.

Now, the only alteration made by 58 Vict. ch. 47, sec. 5, was to amend the section 76 by substituting two judges instead of one, thus providing that the appellant might request in writing "the county judge" to whom his appeal from the decision of the Court of Revision was made, to associate with himself two judges of county courts instead of one as previously provided by that section, and by enacting that when these three judges hear the appeal the decision of the majority shall prevail; that, in effect, is to say that in the one case the decision of the Court of Revision shall remain, and in the other that the clerk of the municipality shall alter the roll to conform to the decision of the majority. But, as already observed, this is a provision specially ordained by the statute and not the judgment of a court. "The county judge," if he

is a court, is the court which is in possession of the appeal.

In the present case, although the judges of county courts who have been associated with "the county judge" to whom the appeal was made, heard the appeal which involved a very grave question of law, and although their decision was at variance with the opinion of "the county judge" who, upon the assumption that he is a court, constitutes the court in possession of the appeal, but is made to prevail, still such their decision cannot, as it appears to me, be said to be the judgment of a court of last resort created to adjudicate concerning assessments within the meaning of the Dominion statute. That decision, although made to prevail over the opinion of "the county judge" as regards the particular assessment roll under consideration, is not given any binding effect whatever upon a revision court in any other county nor upon "the county judge" in any other county to whom an appeal should be made wherein the same point of law should arise, nor even upon "the county judge" having jurisdiction in appeals from the Revision Court in the city of Toronto, who, as it appears to me, if the same question should hereafter arise before him upon an assessment under $50,000 where his judgment is made final, would not be bound by the decision in the present case but might adjudicate in accordance with his own judgment unfettered hereby. An f he should entertain any doubt as to the propriety of his doing so, he could prepare a case under the provisions of the statute and cause it to be submitted o a judge and eventually to the full Court of Appeal for Ontario, to adjudicate thereon, under the provisions of the statute in that behalf. The statute declaring the object of this provision being to facilitate uniformity of decision seems, I think, to show that the intent of

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the legislature in the directions for the publication and promulgation of such judgment was to compel conformity by all county court judges with such judgment, however imperfect the statute may be for securing such conformity. The provision shows, I think, that the legislature did not regard any tribunal in the province as a court of final resort for adjudicating concerning the assessment of property. The Court of Appeal was not, for it could only render a judgment on a case submitted at his pleasure by a county court judge, and for the reasons already given, the "county judge" assuming him to be a court, was not such a court.

I am of opinion, therefore, that the motion to quash the appeal must be granted.

SEDGEWICK J. was of opinion that the appeal should be quashed for the reasons stated by His Lordship Mr. Justice Taschereau.

KING J.—(Dissenting.) By 52 Vict. c. 37, sec. 2, an appeal is given to this court

(j) from the judgment of any court of last resort created under provincial legislation to adjudicate concerning the assessment of property for provincial or municipal purposes in cases where the person or persons presiding over such court is or are appointed by provincial or municipal authority, and the judgment appealed from involves the assessment of property at a value of not less than ten thousand dollars.

The Consolidated Assessment Act of Ontario (1) establishes a Court of Revision for the trial of all complaints in regard to persons wrongfully placed upon or omitted from the roll or assessed at too high or too low a sum.

By sec. 68 it is declared that an appeal to the county judge shall lie against the decisions of the Court of

(1) 55 Vict. c. 48 ss. 68 *et seq.*

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Revision. Upon receiving notice of the intended appeals the county court judge appoints a time and place at which a court will be held to hear appeals, and notice is given to all parties to attend. The clerk of the municipality is appointed the clerk of the court, and in all proceedings before the county judge, under or for the purposes of the Act, it is enacted that he shall possess all such powers for compelling the attendance of, and for the examination on oath of all parties, &c., and for the enforcement of his orders, decisions and judgments, as belong to or might be exercised by him in the division court or in the county court. The decision of the judge is declared to be final and conclusive in every case adjudicated.

Where a person or corporation has been assessed to an amount aggregating $50,000, such person or corpoation has the right to have the appeal from the Court of Revision heard by a board consisting of the judges of the counties which constitute the county court district, if the property assessed be in a county which forms part of a county court district, and if not, then by the county court judge and the judge of the county court of the county whose county town is nearest to the court house where the appeal is to be heard; and the said judges acting together have the powers and duties conferred upon and assigned to the county judge when acting alone under the Act (1).

The case before us is one where the proceedings were before a board of county court judges under the provisions last referred to. It seems manifest that what is sought to be appealed from to us is a judgment, and a judgment of a court of last resort created under provincial legislation to adjudicate concerning the assessment of property for provincial or municipal purposes, and the material question argued on the

(1) 55 V. c. 48 s. 76.

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motion to quash is whether the person or persons presiding over the court (in this case two county court judges), were appointed by provincial authority within the meaning of 52 Vict. c. 37, sec. 2 of the Acts of Canada.

The answer to be given to this question depends upon the meaning of the word "appointed," as used in the clause limiting the appeal to cases

where the person or persons presiding over such court is or are appointed by provincial or municipal authority.

The judges presiding in the court in question had been by the Dominion Government appointed to their respective offices as county court judges of certain counties or divisions; but the court over which they were presiding in the adjudication appealed from was not a county court, nor were the proceedings declared to be as in the county court. A distinct court was set up with independent officers, and certain of the powers and authorities of the county court, as for example, for compelling the attendance of witnesses and for examination on oath, and for enforcement of orders, &c., are conferred upon the county judges when acting as judges of the court so created. The effect of this is that the county court judges act, not *as such*, but as *personæ designatæ*. Their being county court judges is their qualification. It is by reason of their being such that they are appointed by the provincial legislature to preside in the court created to adjudicate concerning assessments.

Now it appears to me that the appointment that is referred to in the clause of 52 Vict. c. 37, sec. 2, already cited, means an appointment to preside over the court created to adjudicate concerning the assessment of property. The appointment of such persons to some other office, judicial or otherwise, by the Dominion Government is not a relevant fact at all, and indeed,

appointment by the Dominion Government of such persons to a non-judicial office, would be quite as relevant as their appointment to a judicial office other than that of a judge of the court created for the purpose mentioned in the Act.

In the present case, where the court consisted of two county court judges, it is clear that no authority other than provincial authority appointed such persons to preside over the court. It is not necessary to say what might be the proper conclusion if the jurisdiction were declared to be a part of the ordinary jurisdiction of the county court. Nor is it material that, upon the view here taken, perhaps no case might arise where persons appointed by other than provincial or municipal authority should preside in such a court as that referred to in the Act.

I think, therefore, that Mr. Robinson's contention is correct, and that the terms of the Act are fully met, and so the motion, in my opinion, ought to be disallowed.

GIROUARD J. was of opinion that the appeal should be quashed for the reasons stated by His Lordship Mr. Justice Taschereau.

Appeal quashed with costs.

Solicitors for the appellant: *Thomas Caswell.*

Solicitors for the respondent: *Laidlaw, Kappelle & Bicknell.*

1897
*Oct. 28.
*Oct. 29.

JOHN O'DONOHOE (DEFENDANT).........APPELLANT;

AND

C. E. BOURNE AND ANOTHER (PLAINTIFFS)........................ RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Appeal—Jurisdiction—Final judgment—Discretionary order—Default to plead—R. S. C. c. 135, *ss.* 24 *(a)*, 27—*R. S. O. c.* 44, *s.* 65—*Ontario Judicature Act, rule* 796.

After judgment has been entered by default in an action in the High Court of Justice it is in the discretion of a master in chambers to grant or refuse an application by the defendant to have the proceedings re-opened to allow him to defend, and an appeal to the Supreme Court from the decision of the court of last resort on such an application is prohibited by sec. 27 of "The Supreme and Exchequer Courts Acts."

Quære. Is the judgment on such application a "final judgment" within the meaning of sec. 24 (*a*) of the Act ?

MOTION to quash an appeal from a decision of the Court of Appeal for Ontario (1), dismissing the appeal of the defendant from the judgments of the Divisional Court and of Meredith J., respectively, which dismissed two appeals against the order of the Master in Chambers rejecting an application to set aside a judgment entered against him by default with costs.

The motion to quash the appeal was based on the grounds, first, that the order in question was not a final judgment within the meaning of the Supreme and Exchequer Courts Acts; and secondly, that the order was made in the exercise of the judicial discretion of the court appealed from under rule 796

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

(1) 17 Ont. P. R. 522.

of the Supreme Court of Judicature of Ontario and was not appealable.

Latchford for the motion cited *Morris* v. *London and Canadian Loan and Agency Co.* (1); *Martin* v. *Moore* (2); R. S. C. c. 135, ss. 24 (*a*) and 27.

The appellant in person contra.

The judgment of the court was delivered by:

TASCHEREAU J.—This case is before us on a motion to quash, heard yesterday.

The respondent's action was begun on the 15th April, 1896, claiming possession, under a mortgage, of premises occupied by the appellant.

Upon the appellant not filing any statement of defence judgment was entered against him on the 7th May, 1896.

The appellant then moved before the Master in Chambers to have the said judgment set aside and for leave to defend the action. On the 27th May, 1896, the master dismissed that application. The appellant then appealed from the master's order to Mr. Justice Meredith, who, on the 8th of June, 1896, dismissed the appeal. Then, a further appeal was taken to the Divisional Court and likewise dismissed on the 24th of October, 1896 (3). An appeal to the Court of Appeal met with the same fate on the 30th June, 1897 (4). From this last judgment the defendant now brings this appeal.

The respondent's contentions are that this court cannot entertain it, 1st. Because there is no final judgment to be appealed from, within the meaning of the words "final judgment" in the Supreme Court Act; and 2ndly. Because the judgment appealed from was an

(1) 19 Can. S. C. R. 434.
(2) 18 Can. S.C.R. 634.
(3) 17 Ont. P. R. 274.
(4) 17 Ont. P. R. 522.

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O'DONOHOE v. BOURNE.

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order in the discretion of the court, and consequently not appealable to this court under section 27 of the Supreme Court Act.

The respondent relies upon the authority of *The Rural Municipality of Morris* v. *The London and Canadian Loan and Agency Co.* (1), to support his contention that the judgment appealed from here is not a final judgment. That case, though not precisely a similar one, seems to strongly support his views. See *Maritime Bank* v. *Stewart* (2); *In re Cahan* (3); *McGugan* v. *McGugan* (4); *Williams* v. *Leonard* (5). *Gladwin* v. *Cummings* (6) is more directly in point. But if there were any doubt on this branch of respondent's argument, there seems none possible under the other point, as to the judgment falling under sec. 27 of the Act, which prohibits appeals in matters of discretion. That an order of this kind is a discretionary order is unquestionable. I refer to the cases cited in Holmsted & Langton under sec. 65 of the Judicature Act, and under rule 796; also to *Cusack* v. *London and North-Western Railway Co.* (7), and to the cases cited in Snow's Practice of 1896, p. 584. The giving leave to appear or plead after judgment has always been treated as a discretionary order, using the word "discretionary" always, of course, as not at all meaning "arbitrarily;" *Nelson* v. *Thorner* (8); *Collins* v. *Hickok* (9). I refer also to Mr. Justice Patterson's remarks on this point in the case of *The Rural Municipality of Morris* v. *The London and Canadian Loan and Agency Co.* (1). If the Court of Appeal had granted the defendant's motion, the plaintiff would have had no right to appeal to this court. *Papay-*

(1) 19 Can. S. C. R. 434.
(2) 20 Can. S. C. R. 105.
(3) 21 Can. S. C. R. 100.
(4) 21 Can. S. C. R. 267.
(5) 26 Can. S. C. R. 406.
(6) Cass. Dig. 2 ed. p. 426.
(7) [1891] 1 Q. B. 347.
(8) 11 Ont. App. R. 616.
(9) 11 Ont. App. R. 620.

anni v. *Coutpas* (1). Now, if giving leave to defend is a discretionary order, refusing it is likewise a discretionary order. The appellant cannot contend that he has a right to have it reviewed by this court whether the judgment of the Court of Appeal was a right exercise of a discretionary power. That would be repealing the statute. It would be giving the right to appeal from every discretionary order, and the statute enacts that there shall be none, except in certain cases of which this is not one.

Appeal quashed with costs.

Solicitor for the appellant: *Edward Meek.*

Solicitors for the respondent: *Martin & Martin.*

HER MAJESTY THE QUEEN (RESPONDENT) .... APPELLANT;

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*Oct. 19.

AND

GEORGE B. BRADLEY (CLAIMANT).....RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Statute, construction of—51 *V. c.* 12, *s.* 51—*Civil service—Extra salary —Additional remuneration—Permanent employees.*

The Civil Service Amendment Act, 1888 (51 Vict. ch. 12), by section 51, provides that "No extra salary or additional remuneration of any kind whatever shall be paid to any deputy-head, officer or employee in the Civil Service of Canada, or to any other person permanently employed in the public service of Canada."

Held, that reporters employed on the Hansard staff of the House of Commons of Canada, are persons subject to the operation of the statute quoted.

Held, further, that in the section referred to, the words "no extra salary or additional remuneration" apply only to payments which, if made, would be extra or additional to the salary or remuneration payable to an officer for services which, at the time of his acceptance of the appointment, could legitimately have been intended or expected to be within the scope of the ordinary duties of his office, although additional to them.

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

(1) W. N. [1880], 109.

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APPEAL from the judgment of the Exchequer Court of Canada (1), declaring that the claimant was entitled to recover $1,366.10 and costs of suit from the Crown.

A statement of the case is given in the judgment reported. It may be mentioned, however, that the claimant's office was established by resolution of the House of Commons of Canada, on the 28th April, 1880 (2), which is as follows:—

"*Resolved*, That as greater permanency in the personnel of the reporting staff would ensure a higher state of efficiency, the committee would recommend that six reporters be engaged and recognized as officers of the House, subject to such regulations as may from time to time be enacted by the Commissioners for the Internal Economy of the House, or by the Select Committee appointed to supervise the Official Report of the Debates of the House."

"That the staff so to be employed shall rank and be paid as follows:—

1 Chief reporter, at a salary of.	$1,500 00
5 Assistants, one of whom to be qualified to report in both languages..	5,000 00
Total............................	$6,500 00"

"That the reporting staff be organized, and tenders issued for the necessary translation, printing and binding, forthwith; so that the several contracts may be entered into, and submitted for the approval of the House, during the present session."

The claimant was appointed chief reporter by resolution of the House of Commons on 6th May, 1880.

The respondent contended that the 51st section of the Civil Service Act did not apply to him as he was not a civil servant but an employee of the House of

(1) 5 Ex. C. R. 409.

(2) Jour. H. of C. of Can. vol. xiv, [1880], p. 268 & 281.

Commons, and his employment and service were regulated by the Act respecting the House of Commons (1); that he was not under the control of the Crown, but appointed by the House of Commons, and subject to be suspended or removed by the House through the agency of the Speaker; that (in the Civil Service Act, sec. 51,) the words "or to any other person permanently employed in the public service," should be read *ejusdem generis* with the preceding words of the section and meant some one of a like class with "a deputy-head, officer or employee in the Civil Service of Canada," that is, persons in the employ of the executive government, not included in schedules "A" and "B" of the Civil Service Act, but permanently employed in the public service and entitled to superannuation under the Civil Service Superannuation Act (2),—permanent public servants of the same grade, class or kind as those specifically enumerated in the section.

He asserted that he was not permanently employed in the public service but stood in the same relation to the House of Commons as the persons temporarily employed continuously in the Government service, referred to in section 11, and did not come within the definition of a permanent officer or servant of the Senate and the House of Commons entitled to the benefits of the Civil Service Superannuation Act (3), or entitled to contribute to the superannuation fund.

It appeared that the Hansard reporters made an effort at one time to be placed on the permanent list, and for a few months deductions were made from their salaries for the superannuation fund; but the decision of the Speaker of the House being that this could not be done, the deductions made were refunded to them.

(1) R. S. C. c. 13. (2) R. S. C. c. 18.
(3) R. S. C. ch. 18, s. 2.

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The claimant also contended that the words "no extra salary or additional remuneration," in the section in question, have reference only to extra payments within the scope of the officer's duty or employment, and not for work and services done outside of his duties or to other charges; that he had not been required to take the oath in schedule "C" to the Civil Service Act (1), as an employee of Parliament, and that there was nothing in the section or oath of office making it illegal for a civil servant to receive payment from the Government for services done outside of the duties of his office for the Government, nor for the Government to pay for such services.

Newcombe Q.C. for the appellant. The claimant was at the time of his employment, and when he performed the services in question, a person permanently employed in the public service, and he is absolutely precluded from recovering anything by the terms of the section quoted.

Hogg Q.C. for the respondent was not called upon by the court.

The judgment of the court was delivered by:

TASCHEREAU J.—This is an appeal by the Crown from a judgment of the Exchequer Court of Canada, by which the Crown was ordered to pay to the respondent the sum of $1,366.10 and costs of suit.

The action was brought by the respondent under a reference from the Department of Finance, to recover from Her Majesty the Queen the sum of $3,235.35, being the balance for work and services performed by the respondent and accepted by Her Majesty, which work and services consisted of the shorthand reporting during the years 1892, 1893 and 1894, of 13,599

(1) R. S. C. ch. 17.

folios of evidence in connection with the Royal Commission upon the liquor traffic in Canada, and for editing and preparing for the press the evidence so taken.

During the progress of the work under the commission, the respondent was paid on account from time to time considerable sums of money, and at the close of the commission there was due and unpaid, as claimed by the respondent, for reporting work, the sum of $2,029.50, and for other work and services the sum of $1,484.35, making together the amount claimed.

The respondent was at the time in the employment of Her Majesty, as chief of the Hansard staff of reporters of the House of Commons of Canada, and his engagement to do the work above mentioned on the said commission was secured by the late Sir Joseph Hickson, who was the chairman of the commission. The payments made to the respondent on account of the work performed by him, were by the cheques of the chairman, but the accounts were from time to time returned to the Department of Finance in the usual course for audit, the money for the payments being supplied by the Government of Canada.

The Crown did not and do not deny that the work was done by the respondent and accepted by the Crown, but contended that if the Crown was legally liable for any sum, the respondent should be paid at lower rates, viz:

For 10 copies.............. 25 cents per folio.
" 8 " .... 20 " " "
" 4 " .... 15 " " "

His Lordship, the Judge of the Exchequer Court, decided upon the evidence at the trial, that the claimant was entitled to be paid at the rates claimed by him, and with respect to the other sums claimed, he allowed $105, and $93.60 for editing work, but disallowed

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the remainder. Certain other deductions were also made by the judge, the result being as set out in the following statement:—

To total account for reporting............	$3,780 50	
" amount for editing........................	105 00	
" " " "	93 60	
" amount claimed for living allowance in paragraph 6 statement of claim .	1,036 00	
		$5,015 10
By amount paid on account of reporting work	$1,751 00	
" amount of living allowance disallowed	1,036 00	
" cash from Finance Department	28 75	
" deduction of amount payable to other reporters	833 25	
		3,649 00
		$1,366 10

for which balance judgment was given.

As the judge of the court below has found upon the evidence that the respondent had been duly employed by Her Majesty to do the work aforesaid, and also held that the prices charged for the work done and accepted by Her Majesty were those claimed by the respondent, no question as to these matters arises on this appeal.

The Crown, at the trial sought to be relieved from liability to the respondent upon legal grounds, and urged that the respondent was not entitled to recover against Her Majesty, for the reason that he was barred in his action by the provisions of the 51st section of the Civil Service Amendment Act of 1888, 51 Vic. ch. 12. That section is as follows:—

No extra salary or additional remuneration of any kind whatever, shall be paid to any deputy head, officer or employee in the Civil Service of Canada, or to any other person permanently employed in the public service.

His Lordship the Judge of the Exchequer Court held against this contention of the Crown. That is the only point on this appeal.

The respondent's contention that he does not, as an officer of the House of Commons, fall under that enactment, is unfounded. But we hold, with the Exchequer Court, that the words "No *extra* salary, or *additional remuneration*," have reference only to payments which, if made, would be *extra* of those that an officer receives for his services within the scope of his ordinary duties, and additional to them. The Act intends that a civil servant who accepts an office at a fixed salary must not be paid anything *extra* for the duties of his office; nothing *extra* for that, nothing additional to that. But if he is employed anywhere else or for any other purpose than what can legitimately have been expected or intended when he accepted office, the Act does not say that he will not be paid for it. These are *other* duties, requiring *other* pay, *other* remuneration, not *extra* duties, not *extra* or *additional* pay. It is not an extra or an addition to his salary as an officer of the House of Commons that the respondent claims. And that is the only kind of claim that the Act prohibits.

The appeal must be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *E. L. Newcombe.*

Solicitors for the respondent: *O'Connor, Hogg & Magee.*

1897
*May 4, 5.
*Nov. 10.

SOPHIA C. KNOCK (DEFENDANT)........APPELLANT;

AND

JOSEPH KNOCK (PLAINTIFF)...........RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Easement—Necessary way—Implied grant—User—Obstruction of way—Interruption of prescription—Acquiescence—Limitation of action—R. S. N. S. (5 ser.) c. 112—R. S. N. S. (4 ser.) c. 100—2 & 3 Wm. IV. (Imp.) c. 71, ss. 2 & 4.

K. owned lands in the county of Lunenburg, N.S., over which he had for years utilized a roadway for convenient purposes. After his death the defendant became owner of the middle portion, the parcels at either end passing to the plaintiff, who continued to use the old roadway, as a winter road, for hauling fuel from his wood-lot to his residence, at the other end of the property. It appeared that though the three parcels fronted upon a public highway, this was the only practical means plaintiff had for the hauling of his winter fuel, owing to a dangerous hill that prevented him getting it off the wood-lot to the highway. There was not any formed road across the lands, but merely a track upon the snow during the winter months, and the way was not used at any other season of the year. This user was enjoyed for over twenty years prior to 1891, when it appeared to have been first disputed, but from that time the way was obstructed from time to time up to March, 1894, when the defendant built a fence across it that was allowed to remain undisturbed and caused a cessation of the actual enjoyment of the way, during the fifteen months immediately preceding the commencement of the action in assertion of the right to the easement by the plaintiff.

The statute (R. S. N. S. 5 ser. ch. 112) provides a limitation of twenty years for the acquisition of easements and declares that no act shall be deemed an interruption of actual enjoyment, unless submitted to or acquiesced in for one year after notice thereof and of the person making the same.

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

Held, that notwithstanding the customary use of the way as a winter road only, the cessation of user for the year immediately preceding the commencement of the action was a bar to the plaintiff's claim under the statute.

Held also, that the circumstances under which the roadway had been used did not supply sufficient reason to infer that the way was an easement of necessity appurtenant or appendant to the lands formerly held in unity of possession, which would without special grant pass by implication, upon the severance of the tenements.

APPEAL from a decision of the Supreme Court of Nova Scotia, affirming the judgment on the trial of the cause in favour of the plaintiff with costs

The action asserted a right of way or easement over lands in the county of Lunenburg, Nova Scotia, for the purposes of a winter road. Statements of the facts of the case and of the questions raised upon the appeal appear in the judgments of their Lordships Justices Gwynne and King, now reported.

Wade Q.C. for the appellant. As the claim is adverse to the true owner of the soil the plaintiff must clearly make out the existence of the right. He must show a strict compliance with the statute which requires user for the full period of twenty years next before action. Actual user within a year of the commencement of the action must be shown. *Lowe* v. *Carpenter* (1); *Wright* v. *Williams* (2); *Earl de la War* v. *Miles* (3); *Hollins* v. *Verney* (4). Plaintiff did not use the road for the fifteen months preceding his action; *Parker* v. *Mitchell* (5); *Bailey* v. *Appleyard* (6). His user was not open and as of right; *Hollins* v. *Verney* (4); *Livett* v. *Wilson* (7); *Gaved* v. *Martin* (8). A contentious user will not satisfy the statute; *Eaton* v. *Swansea Waterworks Co.* (9). The interruptions by the locking of gates

(1) 6 Ex. 825.
(2) 1 M. & W. 77.
(3) 17 Ch. D. 535.
(4) 13 Q. B. D. 304.
(5) 11 A. & E. 788; 4 Jur. 915.
(6) 8 A. & E. 161.
(7) 3 Bing. 115.
(8) 19 C. B. N. S. 732.
(9) 17 Q. B. 267; 15 Jur. 675.

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and erection of barriers across the way are acts showing that no right to use the way was acknowledged, and that if the way were used a trespass would be committed. Goddard on Easements (3rd ed. pp. 135-6 and 230-231).

From the winter of 1894 until June 5th, 1895, the date of action, the obstruction of the way by means of the fence was submitted to by plaintiff, who thus abandoned any right he may have claimed and admitted defendant's right to obstruct the way. *Tapling* v. *Jones* (1).

The contention, that the way existed prior to purchase from the former owner of the whole tract, and that on the severance of the lots the way continued in existence and the prior user during unity of possession in the last grantor can be tacked on to the subsequent user, is not law. Easements are by their nature rights possessed by the owner of one piece of land in another piece of land belonging to a different person. If seisin of the two pieces be united in one owner the right must cease as an easement, for it becomes one of the rights of property to which all owners of land are entitled. The right is not merely suspended on union of seisin so as to revive again on severance of the properties, for easements have their origin in grant, and on severance the easements cannot revive without a fresh grant, and then the rights granted are not the old easements, but new easements. Goddard on Easements (3rd ed. p. 494). *Sury* v. *Pigot* (2); *Buckby* v. *Coles* (3).

The easement claimed could not exist as a way of necessity; *Holmes* v. *Goring* (4); the tenement was not landlocked so as to imply a grant; *Brown* v. *Alabaster* (5).

(1) 11 H. L. Cas. 290; 34 L. J. C. P. 342.
(2) Pop. 166.
(3) 5 Taunt. 311.
(4) 2 Bing. 76.
(5) 37 Ch. D. 490.

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There can be no distinction between an appurtenant easement and any other easement for all easements are appurtenant, and to claim an easement as being appurtenant is the same as claiming an easement because it is an easement. This does not help to ascertain how the easement was created or what the easement is appurtenant to. No easement or right passed to plaintiff by deed, for in it there is no mention of easements or appurtenances. An easement will not pass by deed to the grantee of the dominant tenement unless mentioned in the deed. Goddard (3rd ed. p. 128). *Midland Ry. Co.* v. *Gribble* (1).

An inchoate right which has not ripened into an easement will not pass by general words in a deed. *Langley* v. *Hammond* (2).

Incorporeal hereditaments pass by grant, not by livery, and are to be distinguished from land the possession of which may be passed from one squatter or trespasser to another by livery and so make a claim sufficient to satisfy the statute of limitations. *Hewlins* v. *Shippam* (3).

This court may review the findings of fact in the trial court, where it is clear an erroneous view has been taken. *Bigsby* v. *Dickinson* (4); *Smith* v. *Chadwick* (5); *McCord* v. *Cammel* (6); *North British and Mercantile Insurance Co.* v. *Tourville* (7).

Harrington Q.C. for the respondent. We claim twenty years user and the benefit of the statute R. S. N. S (5th ser.) ch. 112, s. 27, which re-enacts R. S. N. S. (4th ser.) ch. 100, and corresponds with 2 & 3 Wm. IV., ch. 71, ss. 2 and 4.

With regard to the last interruption to which, it is contended, the respondent submitted for upwards of

(1) [1895] 2 Ch. D. 827.
(2) L. R. 3 Ex. 161.
(3) 5 B. & C. 221.
(4) 4 Ch. D. 24.
(5) 9 App. Cas. 187.
(6) [1896] A. C. 57.
(7) 25 Can. S. C. R. 177.

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one year, it need only be said that the road or way was used in the winter time only, and for a limited purpose, and the necessity for its user after the year 1894 would not again arise until 1895. The year 1895 was the last one in which the interruption was made, and appellant could not be defeated by reason of submission unless such submission continued for a year after the winter season of 1894–95. The appellant enjoyed the easement for the year 1894, and that year is to be reckoned out of the statutory period of submission. The obstruction was really begun in January, 1895, as found by the trial judge. A cessation of user which does not exclude the inference of actual enjoyment is not fatal. *Hollins* v. *Verney* (1). Gale on Easements, pp. 181, 182 (notes). *Carr* v. *Foster* (2).

The appellant cannot recover in any event, for in January, 1893, she brought "suit or action" against the respondent, whereby the "matter was brought into question." *Cooper* v. *Hubbuch* (3).

Even supposing that the respondent has not had the user required by the statute, still his right is absolute under the common law, the road having been used by the respondent and his predecessors in title continuously from, say 1891, back for thirty years at least. See cases in Goddard on Easements, p. 201, and Gale p. 177 (note). Before the conveyance of the lands to the plaintiff his grantors had, by continuous user, an easement as of right, subject to be defeated only by acts of interruption and acquiescence as specified in section 29 of the Act, while they continued to be the owners of the lots; and, inasmuch as they conveyed the lands after more than twenty years' uninterrupted enjoyment, the easement passed under that conveyance, and thereupon became indefeasible in the hands

(1) 13 Q. B. D. 304 per Lindley L.J. at p. 314.
(2) 3 Q. B. 581.
(3) 12 C. B. N. S. 456.

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of the respondent. *Kay* v. *Oxley* (1); *Leonard* v. *Leonard* (2); *Doe d. Pritchard* v. *Jauncey* (3); *Staples* v. *Heydon* (4). The obstructions occurred subsequently, and, upon the authority of the cases last above cited, as an indefeasible easement had been already acquired under section 27, it passed to respondent and the interruptions are acts of trespass.

The respondent is entitled to the way in question as of necessity or as a way without which the premises cannot be enjoyed. There was no access to the wood lot except over the lands at present owned and occupied by the appellant. Having regard to the division of the land and also to the previous user of the road for the purpose of hauling firewood from the wood-lot to the homestead, the case comes within such cases as *Pearson* v. *Spencer* (5); *Bayley* v. *Great Western Railway Co.* (6). Indeed this is a much stronger case than *Pearson* v. *Spencer* (5), where there was merely unity of possession, but no necessity for the right claimed. See also *Barnes* v. *Loach* (7), per Cockburn C. J. at p. 97; *Russell* v. *Watts* (8), per Cotton L. J, 573, and Fry, L. J., p. 584. *Polden* v. *Bastard* (9); *Pyer* v. *Carter* (10); *Thomas* v. *Owen* (11); *Briggs* v. *Semmens* (12).

As to the findings of the trial judge on questions of fact being conclusive, where the evidence is conflicting, see *Webster* v. *Friedberg* (13); *Metropolitan Railway Co.* v. *Wright* (14); *Phillips* v. *Martin* (15); *McCall* v. *McDonald* (16).

TASCHEREAU J. dissented from the judgment of the majority of the court but gave no written reasons.

(1) L. R. 10 Q. B. 360.
(2) 7 Allen (Mass.), 277.
(3) 8 C. & P. 99.
(4) 6 Mod. 1.
(5) 3 B. & S. 761.
(6) 26 Ch. D. 434.
(7) 4 Q. B. D. 494.
(8) 25 Ch. D. 559.
(9) L. R. 1 Q. B. 156.
(10) 1 H. & N. 916.
(11) 20 Q. B. D. 225.
(12) 19 O. R. 522.
(13) 17 Q. B. D. 736.
(14) 11 App. Cas. 152.
(15) 15 App. Cas. 193.
(16) 13 Can. S. C. R. 247.

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GWYNNE J.—This is an appeal from a judgment recovered by the respondent in an action instituted by him for the obstruction by the appellant of a private right of way which the respondent claimed to have over certain land of the appellant as a winter road to a close of the plaintiff for cutting and hauling wood. The sole contention at the trial was whether or not the plaintiff had established a title by prescription, by actual enjoyment without interruption for the full period of twenty years next before the commencement of the action which took place on the 5th June, 1895. The obstruction of which the plaintiff in his statement of claim complained is thus alleged:

The defendant in or about the month of October, 1891, and on various other times thereafter wrongfully obstructed the said way by placing a fence or fences across the said way and has kept the said way obstructed by said fence or fences and she threatens that she will continue to obstruct the said way.

At the trial the plaintiff himself, giving his evidence on his own behalf, said that the fence was put up by the defendant in the fall of 1891 on the line between the land of the plaintiff and that of the defendant at the place where the plaintiff claimed right to enter from his land on to the way claimed on the land of the defendant. He said that the defendant thereby obstructed his right of way, and that in the winter ensuing its having been put up he asked the defendant to take it down, and told her that if she did not he would, and that she replied: "You can take it down if you put it up," and that he told her that he would put it up; he then said that he took it down but did not put it up again; the defendant herself had to put it up again. Then, as to the year 1893, he said that he went with his cattle and was obliged to return, and that he was much inconvenienced and damaged, and he added, "if I had taken the fence away I would

have been sued." Then he said that he and his brother Nathan, in January, 1893, met the defendant at the place in dispute, and, in relation to what took place then, his evidence as given in his own language is as follows :—

I had just taken down the fence and was going home with a load of firewood ; she said, *who gave you leave to remove the fence?* I said, *I gave myself leave.* She said, if you don't put it up I will sue you. I said, *sue as quick as you like.*

Plaintiff's brother Nathan gave his evidence of what occurred on this occasion as follows :—

I was hauling with my brother across the way. We had reached this place on the way home. Defendant met us there. She said, *who told you to take the fence down?* He said, *I gave myself leave because I have got the right of way to the road.* She told him to stop hauling or she would sue. He said he would not. She said she would sue him, and she did.

The plaintiff then put in evidence a summons bearing date the 25th January, 1893, whereby the plaintiff was summoned to appear before a magistrate to answer an information and complaint of the defendant charging the plaintiff with having unlawfully, on the 16th January, 1893, thrown down and broken part of the line fence of the defendant. The plaintiff in his evidence stated that he attended upon this summons, and that it was dismissed.

There was then produced in evidence upon the part of the plaintiff two letters from the solicitors of the plaintiff to the defendant, the one bearing date the 15th November, 1893, and the other the 16th February, 1894, in both of which the plaintiff's solicitors on his behalf assert his right to the easement in question, but allude to the obstruction offered thereto by the defendant as follows : In the former letter they say :

Mr. Joseph Knock, of Second Peninsula, informs us *that you have obstructed by a fence* the road leading from his property to his wood and timber lands, a part of which said road passes over your land.

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And in the letter of February 9th, 1894, they say:

You will doubtless remember having last winter taken action before R. H. Griffiths, J.P., against Joseph Knock, of Second Peninsula, farmer, for taking down a fence which you alleged to be on your property, snd that after a hearing before said justice extending over a period of several days, your case was by him dismissed. *As you are aware the fence in question was one erected and maintained by you across the road* leading from said Joseph Knock's homestead property to his wood and timber lands and passing through your property. Notwithstanding that he is entitled to the free use of this road as well for the purpose of reaching his said wood and timber lands with teams, &c., hauling his winter wood over it, &c., &c., as otherwise, *you have during the last two or three years,* although requested and notified to desist therefrom, *undertaken to obstruct and prevent him* in the use of said road to his serious damage and detriment.

As to the winter of 1894-5 the plaintiff gave evidence that he had not used the road in consequence of the fence being still maintained by the defendant where it had been erected, for he says:

That winter *I was obliged* to go round the common and get bushes.

The defendant in relation to what took place as regards the erection of the fence by her, testified as follows:

In October, 1891, I put up the fence across the alleged right of way. In winter of 1892 plaintiff came to ask me if he might take down a length of fence to haul his wood. I said he could provided he put it up. He said he would. I asked him how long it would take him to haul his wood home. He said three or four days. I said, then after you are done put it up for the winter, then in the spring put it up for good. He did not put it up. He did not say then that if I did not take down the fence he would. I had a man to put up the fence in the spring. It stood until the winter and plaintiff knocked it down, and I met him. I asked him who gave him liberty to knock down the fence. He said, *I myself.* I said, *you take the law in your own hands.* I sued him for that and there was a trial and the magistrate dismissed the suit.

This suit was the complaint before the magistrate for trespass, which, when it appeared that plaintiff did what was complained of in the assertion of a right,

the magistrate having no longer jurisdiction in the matter had no alternative but to dismiss the complaint.

The defendant's evidence was confirmed by her son-in-law, one Alexander Smith, and his wife, defendant's daughter.

The learned judge who tried the case gave judgment for the plaintiff with twenty dollars damages and an injunction restraining the defendant *from continuing or repeating* said obstruction, saying that he adopted the plaintiff's version of what had taken place between the plaintiff and defendant in the winter of 1891 and 1892, after the erection of the fence in October, 1891; but as shown above, while the plaintiff since that time has been always asserting a right to the way claimed, a right to remove the obstruction caused by the fence, all the evidence given by and on behalf of the plaintiff establishes the correctness of the allegation in the statement of claim which is made the very gist and cause of the action, namely, that the defendant in October, 1891, erected the fence which has caused the obstruction complained of by the plaintiff, and thereby wrongfully obstructed the said way, and has ever since kept up and maintained the fence which caused the obstruction. The erection of the fence in 1891 was a manifest obstruction and interruption of the right of way claimed by the plaintiff, and was plainly understood so to be by him. The continuance of it by its re-erection in 1892 after it had been taken down by the plaintiff, and the summons obtained by the defendant for trespass against the plaintiff in January, 1893, for his having then recently taken it down again, its re-erection and maintenance ever since, and the letters of plaintiff's solicitors made part of the plaintiff's evidence, show conclusively, as is alleged in the statement of claim, that in October, 1891, the defendant erected the fence, which is the obstruction complained

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of in the statement of claim, and has persistently maintained and still maintains that fence, and has thereby ever since October, 1891, interrupted the enjoyment by the plaintiff of the way to which he claims a right.

The question is not whether or not the plaintiff has abandoned a right of way which he previously had, but whether he has had the *uninterrupted* enjoyment ot the way, to which he claims a right, for the full period of twenty years next preceding the commencement of this action, and that by the plaintiff's own allegation in the record and by his evidence given at the trial he plainly had not, however entitled he might have been to succeed in his action if it had been commenced in 1892 instead of in 1895. In that case the question would have arisen which need not now be entered upon, namely, whether the former user of the way claimed by the plaintiff was of right or permissive only. In the present action he cannot, in my opinion, succeed. The appeal should, I am of opinion, be allowed with costs, and the action in the court below dismissed with costs.

SEDGEWICK J. was of opinion that the appeal should be allowed with costs.

KING J.—This action which was commenced on the 5th of June, 1895, is in assertion of a right of way. The right claimed is that of hauling firewood in the winter season from a wood-lot belonging to plaintiff to his house-lot over intervening land of the defendant. Both parties derive title through Philip Knock who owned and occupied the entire tract for many years prior to 1858, and who in that year died, devising it in portions to his three sons, Edward, John and Henry. All the lots abut upon a public road, but Philip Knock, while in the occupation of the whole,

was accustomed to use the roadway claimed for purposes connected with the convenient and practical use of it. The plaintiff in his statement of claim bases his right (*a*) upon lost grant; (*b*) upon immemorial usage; (*c*) as appurtenant; (*d*) upon continuous user for 20 years; and (*e*) generally under the provisions of chapter 112, sec. 27 of the Revised Statutes of Nova Scotia, 5th series.

The case was tried without a jury and the learned judge presiding came to the conclusion upon the evidence that there had been a continuous user of the way as of right for twenty years next preceding the action. He also found that

practically the only way in which plaintiff can haul wood in the winter season from the land beyond the defendant's boundary, is across the defendant's land; that to get it off by the main road, it would be a dangerous operation by reason of the steep ground at that place.

The Supreme Court of Nova Scotia upon appeal (Mr. Justice Meagher dissenting) sustained the judgment, upon the grounds of sufficient proof of twenty years' user, and also of the way passing as appurtenant to the lots devised by Philip Knock to his son Edward, through whom the plaintiff claims.

By the Revised Statutes of Nova Scotia, (5 ser.) c. 112, sec. 27, it is enacted as follows:—

No claim which may be lawfully made at the common law by custom, prescription or grant, to any way or other easement, or to any water-course, or the use of any water to be enjoyed or derived upon, over or from any land or water of Our Lady the Queen, her heirs or successors, or being the property of any ecclesiastical or lay person, or body corporate, when such way or other matter as herein last before mentioned shall have been actually enjoyed by any person claiming right thereto without interruption for the full period of twenty years, shall be defeated or destroyed by showing only that such way or other matter was first enjoyed at any time prior to such period of twenty years; but nevertheless such claim may be defeated in any other way by which the same is now liable to be defeated; and

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where such way or other matter as herein last before mentioned shall have been so enjoyed as aforesaid for the full period of forty years, the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was enjoyed by some consent or agreement expressly given or made for that purpose by deed or writing.

And by sec. 29:

Each of the respective periods of years in the twenty-seventh and twenty-eighth sections mentioned shall be deemed and taken to be the period next before some suit or action wherein the claim or matter to which such period may relate shall have been or shall be brought into question; and no act or other matter shall be deemed to be an interruption within the meaning of this chapter, unless the same shall have been or shall be submitted to or acquiesced in for one year after the party interrupted shall have had or shall have notice thereof, and of the person making or authorizing the same to be made.

This enactment in terms follows the provisions of the English Act 2 & 3 Wm. IV., c. 71.

The state of the law thereunder and the various authorities were fully considered by the Court of Appeal in 1884 in *Hollins* v. *Verney* (1).

After pointing out that actual enjoyment for the full period of twenty years may be established by evidence which falls short of proving actual user for the whole of that period without any cessation, the court say:

It is obvious * * that in the case of a discontinuous easement like a right of way, it is extremely difficult if not impossible, to say exactly what cessations of actual user are, and what are not, consistent with such an actual enjoyment for the full period of twenty years as the statute requires to establish the right. The statute leaves the difficulty to be solved in each case as best it may. * * * *

The truth is that the question whether, in any particular case, a right of way has or has not been actually enjoyed for the full period of twenty years appears to be left by the Act to be treated as a question of fact to be decided by a jury, unless the court sees that, having regard to section 6 (as to presumption of law) and the other provisions of the statute, there is no evidence on which the jury can properly find such enjoyment.

It was held that while such an interruption as the statute defines, continuing for a year, is, of course,

(1) 13 Q. B. D. 304.

fatal, acts of interruption for less than a year are merely circumstances to be considered with the other facts of the case. So cessation of user for a year or more is not necessarily fatal, whether it occurs at the beginning, in the course of, or at the close of the twenty year period before action. It may be explained in a way that renders it consistent with an inference of actual enjoyment for the twenty years:

> At the same time the total absence of user for any year of the statutory period will be fatal unless explained in such a way as to warrant the inference of continued actual enjoyment notwithstanding such temporary non-user.

This reasoning is applicable to the provisions of the statute now under consideration, and it only remains to apply it to the facts as proved.

What has to be proved is an actual enjoyment by plaintiff claiming right thereto, for twenty years next before action brought, and without interruption submitted to or acquiesced in for one year after notice to plaintiff of defendant having made or authorized the interruption.

It is clear that there was sufficient evidence of user from which to infer actual uninterrupted enjoyment as of right for the full statutory period, provided the action had been brought in the year 1891; but it is contended that what took place between 1891 and 1895 excludes the reasonable inference of twenty years actual enjoyment as of right for the period of twenty years before the latter year, the date of the commencement of the action.

As to what took place prior to the year 1894, I am disposed to think that the conclusions of fact of the learned trial judge, fortified as they are by the concurrence of a majority of the judges of the court *en banc*, are fairly supported by the evidence given on behalf of the plaintiff which (for the purpose of this

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appeal) must be taken to be substantially correct. There was no interruption for a year, and no cessation for a year, and the user cannot be regarded as merely permissive, upon the hypothesis of the truth of plaintiff's account of it. But when we come to the year 1894, more difficulty arises. It is admitted that in the spring of that year the defendant put up a fence across the alleged way, and that it was suffered to remain undisturbed from that time until the commencement of the action in June, 1895, a period of about 15 months. It is clear that the plaintiff knew of the fence being there, and that it had been put up by defendant; and if, at the time it was put up, it constituted an act of interruption to plaintiff's claim of right, its continuance until the spring of 1895 would be fatal to plaintiff's right, as an interruption within the statute. But it is not possible to regard it as an act of interruption from the time that it was put up, because the winter season, during which alone plaintiff's right existed and was capable of being exercised, being at an end, the defendant had a right to put the fence there and plaintiff had no right to complain of it. It became an obstacle to and interference with the actual enjoyment of plaintiff's alleged right only when the next succeeding winter season set in, and its effect as an interruption began to run only from that time; and so there was not, at the time of action brought, an interruption in fact extending to a period of one year.

But there was, none the less, an entire cessation of user by plaintiff during the 12 months before action brought. This, of itself, would not be conclusive against the actual enjoyment for the twenty years before action brought, if there had appeared any explanation of the circumstance consistent with an inference, upon the whole case, of an actual enjoyment for the full period of twenty years next before action brought.

But this total cessation of user for a full year of the statutory period is fatal unless explained in such a way as to warrant an inference of continued actual enjoyment for the twenty years notwithstanding it.

In *Carr* v. *Foster* (1), where the right claimed was a common of pasture, a non-user for two years was explained by the fact that the party claiming had at the time no commonable beasts, and the explanation was deemed not inconsistent with the inference of actual enjoyment of the right. This is said by the court in *Hollins* v. *Verney* (2), to be the strongest case in that direction In the present case the plaintiff required to use the way in 1894-95, and was, as he says, obliged, in consequence of the obstruction, to get bushes from a common for firewood. The evident reason for, and explanation of, the cessation of user for over a year was, of course, that the defendant had put up the fence. But the obstruction of the plaintiff's right, and his yielding to it, are not consistent with an inference of actual enjoyment as of right for the full period of twenty years covering such period of cessation. It is rather an enforced cessation which goes to negative the inference of a twenty years actual enjoyment next before action brought. It is true that the cessation for the twelve months covered several months when the way could not be used, viz.: during the summer season; but where a way is claimed for a limited period (as in this case for the winter season) the reasons explanatory of non-user must be germane to such user or non-user. For, as to the other portion of the year, there could be no inference drawn one way or the other from non-user, for nothing done or omitted during such period could be relevant to the question of actual enjoyment of the way during the portion of the year when alone it could possibly be enjoyed. There was, therefore, an

(1) 3 Q. B. 581. (2) 13 Q. B. D. 304.

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entire cessation of user during the whole year preceding action brought, which remains unexplained, or rather, which is explained in a way that excludes reasonable inference of actual enjoyment for the full period of twenty years next before the commencement of the action. Hence the claim under the statute fails.

There remains the contention that the way passed to plaintiff's father upon devise of Philip Knock at a time when there was in him, as to the whole of the land, unity of possession. This is claimed as passing by simple implication upon the devise of the house-lot and wood-lot, inasmuch as there are no words of grant, either general or particular, indicating an intention to pass things appurtenant or enjoyed therewith, but, perhaps, an implied intent to the contrary in the fact of the express inclusion, in respect of other lands devised by the will of rights of way.

Then, as to easements by implication, Bowen L. J. says, *Ford* v. *Metropolitan Railway Co.* (1):

> By the grant of part of a tenement, it is now well known, there will pass to the grantee all those continuous and apparent easements over the other part of the tenement which are necessary to the enjoyment of the part granted, and have been hitherto used therewith.

It is not material whether the right claimed had its origin prior to the unity of possession, or was founded solely upon the manner of enjoyment of the several parts of his property by the person having unity of possession. Such modes of enjoyment, while not in the strict sense appurtenances to the land, are treated as quasi appendant thereto.

The rule above expressed as to the passing by implication of easements or quasi easements upon the severance of unity of possession is not entirely confined to easements of necessity and to continuous and apparent easements reasonably necessary to the enjoy-

(1) 17 Q. B. D. 27.

ment of the part granted and previously used therewith. In *Thomas* v. *Owen* (1), Fry L. J. (speaking for himself, the Master of the Rolls and Bowen L. J.) says :

> But then, it is urged that, alike in implied reservations and in implied grants, a rule exists to this effect, that whilst such an implication may arise in the case of easements of necessity and continuous easements, it cannot arise in the case of easements which are neither of necessity nor continuous ; and, for this proposition, *Polden* v. *Bastard* (2) is cited, and many other authorities might have been invoked. But on this principle, as established by such decisions, there has been engrafted by other decisions an exception in the case of a formed road made over an alleged servient tenement to and for the apparent use of the dominant tenement ; per Bramwell B. in *Langley* v. *Hammond* (3) ; *Watts* v. *Kelson* (4).

The way here in question (notwithstanding the finding of the learned trial judge) was not what is known as a way of necessity. The land fronted on a highway which was a boundary common to all the parcels; there was no physical obstacle to access thereby and the cost of a new road would only be, as the evidence shows, from $25 to $100. Nor was it a continuous and apparent easement. Was it then, within the above exception, a formed road made over the alleged servient tenement to and for the apparent use of the dominant tenement? I do not think so. There was nothing upon the land to indicate its course and bounds. As a winter road it would for the most part be traced in the snow, and all traces of it would be obliterated with the disappearance of the snow. Being in no sense a formed road, and without the requisite characteristics of permanence and definiteness, it seems impossible to treat it (within the settled law on the subject) as passing, without any words of grant, but by mere implication, upon the severance of tenements previously held in unity of

(1) 20 Q. B. D. 225 at p. 231.
(2) L. R. 1 Q. B. 156.
(3) L. R. 3 Ex. 161.
(4) 6 Ch. App. 166.

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possession. Nor does there seem any good reason, growing out of the circumstances of the ownership of land in this country, for relaxing the rules as to the acquisition of rights of way by mere implication.

The result is that the action fails and the appeal should be allowed, notwithstanding the able judgements of the learned judges below.

GIROUARD J. also dissented from the judgment of the majority of the court but did not state his opinion in writing.

Appeal allowed with costs.

Solicitors for the appellant: *Wade & Paton.*

Solicitors for the respondent: *Owen & Ruggles.*

1897
*June 3.
*Nov. 10.

BLAKELEY *et al.* v. GOULD *et al.*

Insolvency—Pressure—Assignment of expected profits—Fraudulent preferences—Statute of Elizabeth—Assets exigible in execution.

APPEAL from the judgment of the Court of Appeal for Ontario (1) affirming the judgment of Street J., in the High Court of Justice, which dismissed the action of the plaintiffs with costs.

This action was brought to set aside an assignment, by way of security, to the defendant of an interest in the profits expected to be earned under a contract for the performance of work, on the ground that it was made to defeat, hinder, defraud, delay and prejudice the plaintiffs and the other creditors of the assignor, (who was insolvent,) and to give the assignee an unjust preference. In the trial court the decision in favour of the defendant was based on the ground that the assignment had been made under pressure and

(1) 24 Ont. App. R. 153.

was therefore valid. The Court of Appeal affirmed this judgment, but upon other grounds, holding that as the subject of the assignment did not consist of assets which could be reached by creditors at the time when it was made, the assignment did not come within the Act respecting assignments and preferences.

After hearing counsel for both parties, the Supreme Court of Canada reserved judgment and on a later day dismissed the appeal with costs, the judges adopting the reasoning of the judges in the Court of Appeal for Ontario as reported in volume 24 of the Ontario Appeal Reports.

Robinson Q.C. and *W. H. Ferguson* for the appellants.

Miller Q.C. for the respondents.

Ex parte JAMES W. MACDONALD.

1896
*Dec. 29.
*Dec. 31.

Habeas corpus—Jurisdiction—Form of commitment—Territorial division—Judicial notice—R. S. C. c. 135, *s.* 32.

A warrant of commitment was made by the stipendiary magistrate for the police division of the municipality of the county of Pictou, in Nova Scotia, upon a conviction for an offence stated therein to have been committed "at Hopewell, in the county of Pictou." The county of Pictou appeared to be of a greater extent than the municipality of the county of Pictou, there being also four incorporated towns within the county limits—and it did not specifically appear upon the face of the warrant that the place where the offence had been committed was within the municipality of the county of Pictou. The Nova Scotia statute of 1895 respecting county corporations (58 Vict. ch. 3, s. 8) contains a schedule which mentions Hopewell as a polling district in Pictou county entitled to return two councillors to the county council.

Held, that the court was bound to take judicial notice of the territorial divisions declared by the statute as establishing that the place so mentioned in the warrant was within the territorial limits of the police division.

The jurisdiction of a judge of the Supreme Court of Canada in matters of *habeas corpus* in criminal cases is limited to an inquiry into the cause of imprisonment as disclosed by the warrant of commitment.

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APPLICATION before Girouard J. in chambers for a writ of *habeas corpus* to inquire into the cause of commitment of the petitioner for the reason that the jurisdiction of the committing magistrate did not sufficiently appear upon the face of the warrant.

The material facts presented to the judge on the application are mentioned in the judgment reported.

Owen Ritchie for petitioner *ex parte.*

The following is the judgment delivered by:

GIROUARD J.—On the 2nd of November, 1896, the petitioner was committed to the common jail in the county of Pictou, in the province of Nova Scotia, under a warrant signed under seal by "James Roy, stipendiary magistrate for the municipality of Pictou."

The warrant of commitment contains among others, the following allegations: "Whereas James W. Macdonald, of Hopewell, in the county of Pictou, was, on the eighth day of September in the year of our Lord one thousand eight hundred and ninety-six, at the town of New Glasgow, in the county of Pictou, duly convicted before the undersigned James Roy, a stipendiary magistrate for the municipality of the county of Pictou, for that he, the said James W. Macdonald, between the first day of June last past and the thirty-first day of August, in the year of our Lord one thousand eight hundred and ninety-six, at Hopewell, in the county of Pictou, unlawfully did sell intoxicating liquor contrary to the provisions of the second part of the Canada Temperance Act then in force in the said county of Pictou."

The petitioner contends that the said warrant is defective upon its face, inasmuch as it does not appear that "Hopewell in the county of Pictou" was in the municipality of the county of Pictou. He makes the

following statement in the affidavit which is filed before me:

The province of Nova Scotia at the time of the making both of the said conviction and warrant of commitment was, and now is, composed of eighteen counties, of which the county of Pictou is and was one, and at the time of the making of the said conviction and warrant and of the taking of the said information on which they are founded, the said county of Pictou was, and now is, composed and made up of the municipality of the county of Pictou, incorporated under chapter 3 of the Acts of the legislature of the province of Nova Scotia for the year 1895 and four incorporated towns existing in law and governed by the Towns Incorporation Act, 1895. The said municipality of the county of Pictou is not now and never was territorially or otherwise co-extensive with the said county of Pictou, but is territorially less than the said county of Pictou and was so at the time of the making of the said conviction and warrant aforesaid. The municipality of the county of Pictou at the time of the making of the said conviction and warrant aforesaid comprised and now comprises that portion of the said county of Pictou, other than the four incorporated towns aforesaid, which said four incorporated towns with the said municipality of the county of Pictou now and at the time of the making of the said conviction and warrant of commitment, made up that geographical division of Nova Scotia known as the county of Pictou.

For this reason (and others which were not urged before me) the petitioner made an application to the Honourable Mr. Justice Graham, one of the justices of the Supreme Court of Nova Scotia, for his discharge from imprisonment under a writ of *habeas corpus*, (R. S. N. S. 4 ser. ch. 99, sec. 3) but the learned judge refused to discharge him.

The petitioner then renewed his application to the Supreme Court of Nova Scotia, sitting in banc, (McDonald C.J., Weatherbe, Townshend and Henry JJ.), but that honourable court also refused unanimously to discharge him.

Mr. Justice Townshend delivered the opinion of the court. He said:

The offence for which he was convicted is stated to have been committed at Hopewell, in the county of Pictou. It is contended that

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this warrant does not show as it should on its face jurisdiction in the committing magistrate. By Acts of 1895, c. 89, s. 1, "The municipality of the county of Pictou is hereby created a police division." Roy was duly appointed stipendiary magistrate for this police division. If Hopewell is within it, jurisdiction is shown. By ch. 3, sec. 1, Acts 1895, the municipality of the county of Pictou is defined to be what at that time was known as the county of Pictou. Although not very clearly expressed, this section—read with other parts of the Act—in my opinion indicates that the area of the original county is designated as the area of the municipality of the county. This is made clear by section 2 which cuts out of this area all cities or incorporated towns and proceeds to define the term "county" as that part of the county or district within the territorial jurisdiction of the county council. The warrant describes "Hopewell" as in the county of Pictou. The question is whether that necessarily means the municipality of the county of Pictou, or may it with equal reason be read as in some of the incorporated towns, or one of the incorporated towns.

It was pointed out that in the schedule to the Act Hopewell in Pictou county is described as polling section no. 17, entitled to return to the municipal council of the municipality of Pictou two councillors. We know from other portions of the same Act that no locality can return councillors except it be part of the municipality, and this in itself seems a conclusive reason for saying that Hopewell is within the police division and therefore within the jurisdiction of the stipendiary of the municipality of the county of Pictou.

The petitioner has filed before me a copy of the warrant of commitment and also of the conviction and information filed before the stipendiary magistrate, and other papers, but I must say that I am not inclined to go into any inquiry behind the warrant of commitment.

I am not disposed to go beyond what appears to me to be the plain words of the Supreme Court Act and the well settled jurisprudence of this court; *Re Boucher*, 1879 (1); *Re Poitvin*, 1881 (2); *Re Trépanier*, 1885 (3); *Re Sproule*, 1886 (4).

The first paragraph of section 32 of the Supreme and Exchequer Courts Act, sec. 32, provides as follows:

(1) Cass. Dig. (2 ed.) 325.
(2) Cass. Dig. (2 ed.) 327.
(3) 12 Can. S. C. R. 111.
(4) 12 Can. S. C. R. 140.

Every judge of the court shall have concurrent jurisdiction with the courts or judges of the several provinces, to issue writs of *habeas corpus ad subjiciendum*, for the purpose of an inquiry into the cause of commitment in any criminal case under any Act of the Parliament of Canada.

I believe therefore that the jurisdiction of a judge of the Supreme Court in matters of *habeas corpus* in any criminal case, is limited to an inquiry into the cause of commitment, that is, as disclosed by the warrant of commitment, under any Act of the Parliament of Canada.

The question then is whether the warrant of commitment discloses jurisdiction on the part of the stipendiary magistrate. The counsel for the petitioner has referred me to Paley on Summary Convictions, 7th ed., and other authorities, to establish that jurisdiction must appear upon the face of the warrant, and especially as to the locality where the offence is alleged to have been committed. But the learned counsel has forgotten to quote from Paley at page 196 which shows that the court will take judicial notice of the general division of the kingdom into counties.

This is the rule laid down by all the judges of the Supreme Court of Nova Scotia, and I believe it expresses the law not only of that province but of the whole Dominion. Mr. Justice Townshend has most appropriately referred to Taylor on Evidence, sec. 15:

Courts also notice the territorial extent of the jurisdiction and sovereignty exercised *de facto* by their own government and the local divisions of their country, such as states, provinces, counties, counties of cities, cities, towns, parishes and the like so far as political government is concerned or affected, but not the relative position of such local divisions, nor their precise boundaries further than may be prescribed in public statutes.

The same principle was upheld by Mr. Justice Ramsay of the Quebec Court of Appeals in 1880 in a case very much similar to the present one, *Ex parte Archambault* (1). See also *Sleeth* v. *Hurlburt* (2).

(1) 3 Legal News, 50.
(2) 25 Can. S. C. R. 620.

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I am therefore of opinion that the application should be rejected, and it is rejected. I have the satisfaction of knowing that the petitioner is not without recourse. He may appeal to the full court under the second paragraph of sec. 32 of The Supreme and Exchequer Courts Act.

Writ refused.

Solicitor for the petitioner: *John J. Power.*

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ACTION — *Of warranty — Suretyship — Recourse of sureties inter se—Ratable contribution—Banking—Discharge of co-surety—Reserve of recourse—Trust funds in possession of a surety—Arts.* 1156, 1959 *C. C.*] Where one of two sureties has moneys in his hands to be applied towards payment of the creditor, he may be compelled by his co-surety to pay such moneys to the creditor or to the co-surety himself if the creditor has already been paid by him.—Where a creditor has released one of several sureties with a reservation of his recourse against the others and a stipulation against warranty as to claims they might have against the surety so released by reason of the exercise of such resources reserved, the creditor has not thereby rendered himself liable in an action of warranty by the other sureties.

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2——*Administrations—Trustees—Agents—Nullity—Art.* 1484 *C. C.*] In an action where no special demand to that effect has been made, the court cannot declare the nullity of a deed of transfer alleged to have been made in contravention of the provisions of article 1484 of the Civil Code. GUERTIN *v.* SANSTERRE — 522

3——*Suretyship — Promissory note — Qualified indorsement.*] D. indorsed two promissory notes, *pour aval*, at the same time marking them with the words "not negotiable and given as security." The notes were intended as security to the firm of A. & R. for advances to a third person on the publication of certain guide-books which were to be left in the hands of the firm as further security, the proceeds of sales to be applied towards reimbursement of the advances. It was also agreed that payment of the notes was not to be required while the books remained in the possession of the firm. The notes were protested for non-payment and, A. having died, R. as surviving partner of the firm and vested with all rights in the notes, sued the maker and indorser jointly and severally for the full amount. At the time of the action some of the books were still in the possession of R. and it appeared that he had not rendered the indorser any statement of the financial situation between the principal debtor and the firm. *Held*, that the action was not based upon the real contract between the parties and that the plaintiff was not, under the circumstances, entitled to recover in an action upon the notes. *Held* further, per Sedgewick J., that neither the payee of the promissory note nor the drawer of a bill of exchange can maintain an action against an indorser, where the action is founded upon the instrument itself. ROBERTSON *v.* DAVIS — 571

4——*Action on disturbance—Possessory action—"Possession annale"—Arts.* 946 *and* 948 *C. C. P—Nature of possession of unenclosed vacant lands—Boundary marks—Delivery of possession.*] In 1890, G. purchased a lot of land 25 feet wide, and the vendor pointed it out to him, on the ground, and showed him the pickets marking its width and depth. The lot remained vacant and unenclosed up to the time of the disturbance, and was assessed as a 25 foot lot to G., who paid all municipal taxes and rates thereon. In 1895 the adjoining lot, which was also vacant and unenclosed, was sold to another person who commenced laying foundations for a building, and, in doing so encroached by two feet on the width of the lot so purchased by G., who brought a possessory action within a couple of months from the date of the disturbance. *Held*, that the *possession annale*, required by article 946 of the Code of Civil Procedure, was sufficiently established to entitle the plaintiff to maintain his action. GAUTHIER *v.* MASSON—575

5——*Service of—Judgment by default—Opposition to judgment—Reasons of—"Rescissoire" joined with "Rescindant"—Arts.* 16, 89 *et seq.*, 483, 489, *C. C. P.—False return of service.*] No entry of default for non-appearance can be made, nor *ex parte* judgment rendered, against a defendant who has not been duly served with the writ of summons, although the papers in the action may have actually reached him through a person with whom they were left by the bailiff.—The provisions of articles 483 and following of the Code of Civil Procedure of Lower Canada relate only to cases where a defendant is legally in default to appear or to plead and have no application to an *ex parte* judgment rendered, for default of appearance, in an action which has not been duly served upon the defendant, and the defendant may at any time seek relief against any such judgment, and have it set aside notwithstanding that more than a

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year and a day may have elapsed from the rendering of the same, and without alleging or establishing that he has a good defence to the action on the merits.—An opposition asking to have a judgment set aside, on the ground that the defendant has not been duly served with the action, which also alleges the defendant's grounds of defence upon the merits, should not be dismissed merely for the reason that the *rescissoire* has thus been improperly joined with the *rescindant*. TURCOTTE *v.* DANSEREAU—583

6——*Testamentary succession—Balance due by tutor—Executors—Account, action for—Action for provisional possession—Parties to action.* CREAM *et al. v.* DAVIDSON — — 362

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ADMISSIONS — *Evidence —Judicial admissions —Nullified instruments—Cadastre—Plans and official books of reference—Compromise—"Transaction"—Estoppel—Arts.* 311 *and* 1243-1245 *C. C.*—*Arts.* 221-225 *C. C. P.*] A will, in favour of the husband of the testatrix, was set aside in an action by the heir at law and declared by the judgment to be *un acte faux*, and therefore to be null and of no effect. In a subsequent petitory action between the same parties: *Held*, Girouard J. dissenting, that the judgment declaring the will *faux* was not evidence of admission of the title of the heir at law by reason of anything the devisee had done in respect of the will, first, because the will having been annulled was for all purposes unavailable, and, secondly, because the declaration of *faux*, contained in the judgment, did not show any such admission.—The constructive admission of a fact resulting from a default to answer interrogatories upon articulated facts recorded under art. 225 C. C. P., cannot be invoked as a judicial admission in a subsequent action of a different nature between the same parties.—Statements entered upon cadastral plans and official books of reference made by public officials and filed in the lands registration offices, in virtue of the provisions of the Civil Code of Lower Canada, do not in any way bind persons who were not cognizant thereof at the time the entries were made. Where a deed

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entered into by the parties to a suit in order to effect a compromise of family disputes and prevent litigation failed to attain its end, and was annulled and set aside by order of the court as being in contravention of article 311 of the Civil Code of Lower Canada, no allegation contained in it could subsist even as an admission. DUROCHER *v.* DUROCHER — 363

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2——*Will — Construction of — Donation—Partition per stirpes or per capita—Usufruct—Accretion between legatees* — — — — 347

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APPEAL — *Jurisdiction — Expropriation of lands — Assessments — Local improvements — Future rights— Title to lands and tenements—R. S. C. c.* 135, *s.* 29 (*b*) ; 56 *V. c.* 29, *s.* 1 (*D*).] A by-law was passed for the widening of a portion of a street up to a certain homologated line, and for the necessary expropriations therefor. Assessments for the expropriations for certain years having been made whereby proprietors of a part of the street were relieved from contributing any proportion to the cost, thereby increasing the burden of assessment on the properties actually assessed, the owners of these properties brought an action to set aside the assessments. The Court of Queen's Bench affirmed a judgment dismissing the action. On an application for leave to appeal: *Held*, that as the effect of the judgment sought to be appealed from would be to increase the burden of assessment not only for the expropriations then made, but also for expropriations which would have to be made in the future, the judgment was one from which an appeal would lie, the matter in controversy coming within the meaning of the words " and other matters or things where the rights in future might be bound," contained in subsec. (*b*) of sec. 29, Supreme and Exchequer Courts Act, as amended by 56 Vict. ch. 29, sec. 1. STEVENSON *v.* THE CITY OF MONTREAL — 187

2——*Action en bornage—Future rights—Title to lands—R. S. C. c.* 135, *s.* 29 (*b*)—54 *&* 55 *V. c.* 25, *s.* 3 (*D.*)—56 *V. c.* 29, *s.* 1 (*D.*)] The parties executed a deed for the purpose of settling the boundary between contiguous lands of which they were respectively proprietors, and thereby named a provincial surveyor as their referee to run the line. The line thus run being disputed, M. brought an action to have this line declared the

APPEAL—*Continued.*

true boundary, and to revendicate a disputed strip of land lying upon his side of the line so run by the surveyor. *Held*, that under R. S. C. c. 135, s. 29, s.s. (*b*), as amended by 56 V. c. 29, s. 1 (D.), an appeal would lie to the Supreme Court of Canada, first, on the ground that the question involved was one relating to a title to lands, and secondly, on the ground that it involved matters or things where rights in future might be bound. *Chamberland* v. *Fortier* (23 Can. S. C. R., 371) referred to and approved. McGoey *v.* Leamy — — 193

3——*Appeal — Election petition — Preliminary objection—Delay in filing—Objections struck out —Order in chambers—R. S. C. c. 8, s. 50.*] The Supreme Court refused to entertain an appeal from the decision of a judge in chambers granting a motion to have preliminary objections to an election petition struck out for not being filed in time. Such decision was not one on preliminary objections within s. 50 of the Controverted Elections Act, and if it were no judgment on the motion could put an end to the petition. West Assiniboia Election Case — — — — 215

4——*Appeal—Preliminary objections—R. S. C. c. 9, ss. 12 and 50—Order dismissing petition—Affidavit of petitioner.*] The appeal given to the Supreme Court of Canada by The Controverted Elections Act (R. S. C. c. 9, s. 50), from a decision on preliminary objections to an election petition can only be taken in respect to objections filed under sec. 12 of the Act. No appeal lies from a judgment granting a motion to dismiss a petition on the ground that the affidavit of the petitioner was untrue. Marquette Election Case — — — 219

5——*Questions of practice—Duty of appellate court.*] The Supreme Court of Canada will take into consideration questions of practice when they involve substantial rights or the decision appealed from may cause grave injustice. Part of lands seized by the sheriff had been withdrawn before sale, but on proceedings for *folle enchère* it was ordered that the property described in the *procès verbal* of seizure should be resold, no reference being made to the part withdrawn. On appeal, the Court of Queen's Bench reversed the order on the ground that it directed a resale of property which had not been sold, and further, because an apparently regular sheriff's deed of the lands actually sold had been duly registered, and had not been annulled by the order for resale, or prior to the proceedings for *folle enchère*. *Held*, that the Court of Queen's Bench should not have set aside the order, but should have reformed it by rectifying the error. Lambe *v.* Armstrong — 309

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7——*Jurisdiction—Appealable amount—Future rights—" Other matters and things "—R. S. C. c.* 135, *s.* 29 (*b*)—59 *V. c.* 29 (*D.*)] The classes of matters which are made appealable to the Supreme Court of Canada under the provisions of section 19, subsec. *b* of " The Supreme and Exchequer Courts Act," as amended by 56 Vict. ch. 29, do not include future rights which are merely pecuniary in their nature and do not affect rights to or in real property or rights analogous to interests in real property. *Rodier* v. *Lapierre* (21 Can. S. C. R. 69) and *O'Dell* v. *Gregory* (24 Can. S. C. R. 661) followed. Raphael *v.* Maclaren — 319

8——*Evidence taken by commission — Reversal on questions of fact.*] Where the witnesses have not been heard in the presence of the judge but their depositions were taken before a commissioner, a court of appeal may deal with the evidence more fully than if the trial judge had heard it or there had been a finding of fact by a jury, and may reverse the finding of the trial court if such evidence warrants it. Malzard *v.* Hart — — — — — — — 510

9——*Appeal—Collocation and distribution—Art.* 761 *C. C. P.—Arts.* 20 *&* 144 *C. C. P—Action to annul deed—Parties in interest—Incidental proceedings.*] The appeal from judgments of distribution under article 761 of the Code of Civil Procedure is not restricted to the parties to the suit but extends to every person having an interest in the distribution of the moneys levied under the execution.—The provision of article 144 of the Code of Civil Procedure that every fact of which the existence or truth is not expressly denied or declared to be unknown by the pleadings filed shall be held to be admitted, applies to incidental proceedings upon an appeal in the Court of Queen's Bench. Guertin v. Gosselin — — — — — — — — 514

10——*Questions of fact—Second appellate court.*] Where a judgment upon questions of fact rendered in a court of first instance has been

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11——*Jurisdiction—Title to lands—Municipal law—By-law—Widening streets—Expropriation —R. S. C. c.* 135, *s.* 29 (*b*)—54 *&* 55 *V. c.* 25, *s.* 3—56 *V. c.* 29, *s.* 1.] In an action to quash a by-law passed for the expropriation of land the controversy relates to a title to lands, and an appeal lies to the Supreme Court of Canada, although the amount in controversy is less than $2.000. The judgment on the merits dismissed the appeal for the reasons stated in the judgment of the court below. (See Q. R. 6 Q. B. 345.) MURRAY *v.* WESTMOUNT — 579

12—— *Jurisdiction — Judgment — Reference to court for opinion*—54 *V. c.* 5 (*B.C.*)—*R. S. C. c.* 135, *ss.* 24 *and* 28.] The Supreme Court of Canada has no jurisdiction to entertain an appeal from the opinion of a provincial court upon a reference made by the Lieutenant-Governor-in-Council under a provincial statute, authorizing him to refer to the court for hearing and consideration any matter which he may think fit, although the statute provides that such opinion shall be deemed a judgment of the court. UNION COLLIERY COMPANY OF BRITISH COLUMBIA *v.* THE ATTORNEY GENERAL OF BRITISH COLUMBIA AND OTHERS — 637

13——*Jurisdiction*—52 *V. c.* 37 *s.* 2 (*D.*)—*Appointment of presiding officers—County Court Judges*—55 *V. c.* 48 (*Ont.*)—58 *V. c.* 47 (*Ont.*) —*Statute, construction of—Appeal from assessment—Final judgment.*] By 52 Vict. ch. 37, sec. 2, amending "The Supreme and Exchequer Courts Act," an appeal lies in certain cases to the Supreme Court of Canada from courts "of last resort created under provincial legislation to adjudicate concerning the assessment of property for provincial or municipal purposes, in cases where the person or persons presiding over such court is or are appointed by provincial or municipal authority." By the Ontario Act, 55 Vict. ch. 48 as amended by 58 Vict. ch. 47, an appeal lies from rulings of municipal courts of revision in matters of assessment to the county court judges of the county court district where the property has been assessed. On an appeal from a decision of the county court judges under the Ontario statutes: *Held,* King J. dissenting, that if the county court judges constituted a "court of last resort" within the meaning of 52 Vict. ch. 37, sec. 2, the persons presiding over such court were not appointed by provincial or municipal authority, and the appeal was not authorized by the said Act. *Held,* per Gwynne J., that as no binding effect is given to the decision of the county court judges, under the Ontario Acts cited, the court appealed from was not a "court of last resort" within the meaning of 52 Vict. ch. 37, sec. 2. *Quære.*—Is the decision of the county court judges a "final judgment" within the meaning of 52 Vict. ch. 37, sec. 2? THE CITY OF TORONTO *v.* THE TORONTO RAILWAY CO. 640

14——*Jurisdiction — Final judgment — Discretionary order—Default to plead—R. S. C. c.* 135, *ss.* 24 (*a*), 27—*R. S. O. c.* 44, *s.* 46—*Ontario Judicature Act, rule* 796.] After judgment has been entered by default in an action in the High Court of Justice it is in the discretion of a master in chambers to grant or refuse an application by the defendant to have the proceedings re-opened to allow him to defend, and an appeal to the Supreme Court from the decision of the court of last resort on such an application is prohibited by sec. 27 of "The Supreme and Exchequer Courts Acts." *Quære.* —Is the judgment on such application a "final judgment" within the meaning of sec. 24 (*a*) of the Act? O'DONOHOE *v.* BOURNE — 654

15——*Interlocutory order—Trial by jury— Final judgment—R. S C. c.* 135, *s.* 24—*Arts.* 348-350 *C. C. P.* DEMERS *v.* BANK OF MONTREAL — — — — — 197

16——*Matters of fact—Evidence* — — 1
See CONTRACT 1.

ARBITRATION—*Agreement respecting lands —Boundaries—Referee's decision—Bornage— Arts.* 941-945 *and* 1341 *et seq. C. C. P.*] The owners of contiguous farms executed a deed for the purpose of settling a boundary line between their lands, thereby naming a third person to ascertain and fix the true division line upon the ground and agreeing further to abide by his decision and accept the line which he might establish as correct. On the conclusion of the referee's operations one of the parties refused to accept or act upon his decision, and action was brought by the other party to have the line so established declared to be the true boundary and to revendicate the strip of land lying upon his side of it. *Held,* reversing the judgment of the Court of Queen's Bench, that the agreement thus entered into was a contract binding upon the parties to be executed between them according to the terms therein expressed and was not subject to the formalities prescribed by the Code of Civil Procedure relating to arbitrations. MCGOEY *v.* LEAMY — — — — — 545

ASSESSMENT AND TAXES—*Exemptions —Real property—Chattels—Fixtures—Gas pipes —Highway—Title to portion—Legislative grant*

ASSESSMENT AND TAXES—*Continued.*

of soil—11 *V. c.* 14 (*Can.*)—55 *V. c.* 48 (*O.*)—"*Ontario Assessment Act*, 1892."] Gas pipes which are the property of a private corporation laid under the highways of a city are real estate within the meaning of the "Ontario Assessment Act of 1892" and liable to assessment as such, as they do not fall within the exemptions mentioned in the sixth section of that Act. The enactments effected by the first and thirteenth clauses of the company's Act of incorporation (11 V. ch. 14), operated as a legislative grant to the company of so much of the land of the streets, squares and public places of the city as might be found necessary to be taken and held for the purposes of the company and for the convenient use of the gas works, and when the openings where pipes may be laid are made at the places designated by the city surveyor, as provided in said charter, and they are placed there, the soil they occupy is land taken and held by the company under the provisions of the said Act of incorporation. The proper method of assessment of the pipes so laid and fixed in the soil of the streets, squares and public places in a city ought to be separately in the respective wards of the city in which they may be actually laid, as in the case of real estate. The Consumers Gas Co. of Toronto *v.* City of Toronto — — — **453**

2——*Drainage, intermunicipal—Initiation and contribution—By-law—Ontario Drainage Act of* 1873—*Ontario Consolidated Municipal Act*, 1892.] The provision of the Ontario Municipal Act (55 Vict. c. 42, s. 590) that if a drain constructed in one municipality is used as an outlet or will provide an outlet for the water of lands of another the lands in the latter so benefited may be assessed for their proportion of the cost applies only to drains properly so called, and does not include original watercourses which have been deepened or enlarged. If a municipality constructing such a drain has passed a by-law purporting to assess lands in an adjoining municipality for contribution to the cost, a person whose lands might appear to be affected thereby, or by any by-law of the adjoining municipality proposing to levy contributions toward the cost of such works, would be entitled to have such other muncipality restrained from passing a contributory by-law, or taking any steps towards that end, by an action brought before the passing of such contributory by-law. Brouhton *v.* Grey and Elma — **495**

3——*Appeal—Expropriation of lands—Local improvements—Future rights* — — **187**

See Appeal 1.

4——*Appeal—Jurisdiction* — 52 *V. c.* 37, *s.* 2 (*D.*)—*Appointment of presiding officers—County Court Judges*—55 *V. c.* 48 (*Ont.*)—57 *V. c.* 51, *s.* 5 (*Ont.*)—58 *V. c.* 47 (*Ont.*)—*Statute, construction of—Appeal from assessment—Final judgment*—"*Court of last resort*" — — **640**

See Appeal 13.

ASSIGNEE—*Assignment for the benefit of creditors — Preferred creditors — Money paid under voidable assignment—Liability of assignee —Statute of Elizabeth—Hindering and delaying creditors* — — — — — **589**

See Assignment 1.

ASSIGNMENT—*For benefit of creditors—Preferred creditors—Moneys paid under voidable assignment—Liability of assignee—Statute of Elizabeth—Hindering and delaying creditors.*] In an action to have a deed of assignment for the benefit of creditors set aside by creditors of the assignor on the ground that it is void under the statute of Elizabeth, neither moneys paid to preferred creditors nor trust property disposed of in good faith by the assignor or persons claiming under him can be recovered, nor can persons holding under the deed be held personally liable for moneys or property so received by them. *Cox* v. *Worrall* (26 N. S. Rep. 366) questioned. Taylor *v.* Cummings — **589**

2——*Insolvency—Pressure—Assignment of expected profits—Fraudulent preferences—Statute of Elizabeth — Assets exigible in execution.* Blakeley *et al. v.* Gould *et al.* — — **687**

3——*Mortgage—Leasehold premises—Terms of mortgage—Assignment or sublease* — — **435**

See Mortgage.

BAILIFF—*Election petition—Preliminary objections—Service of petition—Bailiff's return—Cross-examination—Production of copy.*] A return by a bailiff that he had served an election petition by leaving true copies, "duly certified," with the sitting member is a sufficient return. It need not state by whom the copies were certified. Arts. 56 and 78 C. C. P.—Counsel for the person served will not be allowed to cross-examine the bailiff as to the contents of the copies served without producing them or laying a foundation for secondary evidence. Beauharnois Election Case — — — — **232**

BANKING—*Suretyship—Recourse of sureties inter se—Ratable contribution—Action of warranty—Discharge of co-surety—Reserve of recourse—Trust funds in possession of a surety—Arts.* 1156, 1959 *C. C.* — — — — — **94**

See Action 1.

BIGAMY—*Constitutional law—Criminal Code ss.* 275, 276—*Canadian subjects marrying abroad —Jurisdiction of Parliament.*] Secs. 275 and 276 of the Criminal Code, 1892, respecting the

BIGAMY—*Continued.*

offence of bigamy, are *intra vires* of the Parliament of Canada. Strong C.J. *contra.* CRIMINAL CODE, 1892, SECTIONS RELATING TO BIGAMY — — — — — — — 461

BILL OF EXCHANGE.

See PROMISSORY NOTE.

BORNAGE — *Agreement respecting lands—Boundaries—Referee's decision—Arbitration—Arts.* 941-945 *and* 1341 *et seq. C. C. P.* — 545

See ARBITRATION.

BOUNDARIES—*Appeal—Action en bornage—Future rights—Title to lands—R. S. C. c.* 135, *s.* 29 (*b*)—54 *&* 55 *V. c.* 25, *s.* 3—56 *V. c.* 29, *s.* 1 — — — — — — — — — 193

See APPEAL 2.

2——*Boundary marks—Possessory action—Delivery of possession—Vacant lands* — — 575

See EVIDENCE 8.

BUILDING SOCIETY—*Participating borrowers—Shareholders—C. S. L. C. c.* 69—42 *&* 43 *V. c.* 32 (*Q.*)—*Liquidation—Expiration of classes—Assessments on loans—Notice of—Interest and bonus—Usury laws—C. S. C. c.* 58—*Art.* 1785 *C. C.* —*Administrators and trustees—Sales to—Prête-nom—Art.* 1484 *C. C.*] S. applied to a building society for a loan of $3,500 which was subsequently advanced to him upon signing a deed of obligation and hypothec submitting to the conditions and rules applicable to the society's method of carrying on their loaning business and declaring that he had become a subscriber for shares in the company's stock for an amount corresponding to the amount of the loan, namely 70 shares of the nominal value of $50 each in a class to expire after 72 monthly payments, or in six years from the date of its commencement (July, 1878), this term corresponding with the term fixed for the repayment of the loan. He thereby also agreed to make monthly payments of one per cent each upon the stock and that the loan should be repaid at the expiration of the class, when, upon the liquidation of the business of that class, members would be entitled to the allotment of their shares subscribed as paid up, partly by monthly instalments and partly by accumulated profits to be derived from whatever moneys had been paid in and invested for the benefit of that class, at which time whatever he might be so entitled to receive in shares of stock should be credited towards the reimbursement of the loan. He further obliged himself to pay, as interest and bonus, the additional sum of one per cent upon the loan by similar monthly instalments during the time it remained unpaid. S. paid all the instalments by semi-annual payments of $420 each until 1st May, 1884, making

BUILDING SOCIETY—*Continued.*

a total of seventy monthly instalments of $70 each, leaving two more instalments of each kind still to become due before the date originally fixed for the termination of his class. The society went into liquidation under the provisions of 42 & 43 Vict. ch. 32 (Que.), in January, 1884, prior to A.'s last payment and about six months before the date fixed for the expiration of his loan. In October, 1884, the liquidators of the society, in the exercise of the powers vested in the directors under the deed and the society's regulations, passed a resolution declaring a deficit in the business of the class to which A. belonged, and, in order to provide the necessary funds to meet the proportion of deficit attributed as his share, they thereby exacted from him a further series of twenty-eight monthly payments in addition to the seventy-two instalments contemplated at the time of the execution of the deed. Subsequently, (in 1892) the plaintiff, as transferee of the society, brought action for the two original instalments remaining unpaid and also for the amount of the twenty-eight additional monthly payments upon the loan and the subscription of shares. *Held*, reversing the judgment of the Court of Queen's Bench, that the subscription for shares and the obligation undertaken in the deed constituted, upon the part of the borrower, merely one transaction involving a loan and an agreement to repay the amount advanced with interest and bonuses thereon amounting together to a rate equivalent to interest at twelve per centum per annum on the amount of his loan. That the contract made by the building society stipulating that they were to receive such rate of interest and bonus, equivalent to a rate of twelve per centum per annum on the amount so loaned by the society, was not a violation of any laws respecting usury in force in the province of Quebec. That the fact of the building society going into liquidation had the effect of causing all classes of loans then current to expire at the date when the society was placed in liquidation, notwithstanding that the various terms for which such classes may have been established had not been fully completed. That under the provisions of the statute, 42 & 43 Vict. ch. 32, liquidators have the same powers in regard to the determination of the affairs of expired classes and to declare deficits therein and to call for further payments to meet the same, as the directors of the society had while it continued in operation. That the notice required by the twenty-first section of the Act, 42 & 43 Vict. ch. 32, does not apply to cases where liquidators have determined a loss upon the expiration of a class and required the full amount exigible upon loans to be paid by borrowers. That, notwithstanding that the liquidation proceedings deprived the directors of the exercise of their powers as to

BUILDING SOCIETY—*Continued.*

the determination of the condition of the affairs of a class and the exaction of further payments when exigible in such cases on the expiration of a class, the resolution of the liquidators determining a deficit in the borrower's class and requiring full payment of all sums exigible under his deed of obligation, was sufficient to constitute a valid right of action against the borrower for the amount of the balance of principal money loaned together with the interest and bonus instalments remaining due thereon according to the terms and conditions of his deed of obligation. *Held*, further, affirming the decisions of both courts below, that in an action where no special demand to that effect has been made, the court cannot declare the nullity of a deed of transfer alleged to have been made in contravention of the provisions of article 1484 of the Civil Code. Guertin *v.* Sansterre—522

BY-LAW—*Drainage, intermunicipal—Initiation and contribution—Ontario Drainage Act—Consolidated Municipal Act—Assessment*—495
See Drains and Watercourses.

2——*Municipal corporation—Negligence—Snow and ice on sidewalks—Construction of statute—55 V. c. 42, s. 531 (O.)—57 V. c. 50, s. 13 (O.)—Finding of jury—Gross negligence* — — 46
See Negligence 1.

3——*Waterworks — Resolution — Agreement in writing—Injunction—Art. 1033a C. C. P.*—329
See Injunction.

CADASTRAL PLANS—*Evidence—Admissions—Arts.* 1243-1245 *C. C.*—Statements entered upon cadastral plans and official books of reference made by public officials and filed in the lands registration offices, in virtue of the provisions of the Civil Code of Lower Canada, do not in any way bind persons who were not cognizant thereof at the time the entries were made. Durocher *v.* Durocher — — 363

CASES—*Attorney-General* v. *Sheraton* (28 N. S. Rep.) approved and followed — — 355
See Lease 1.
" Mines and Minerals.
" Statute, Construction of, 2.

2——*Chamberland* v. *Fortier* (23 Can. S. C. R. 371) referred to and approved — — 193
See Appeal 2.

3——*Cornwall, Town of* v. *Derochie* (24 Can. S. C. R. 301) followed — — — 46
See Municipal Corporation 1.
" Negligence 1.

CASES—*Continued.*

4——*Cox* v. *Worrall* (26 N. S. Rep. 366) questioned — — — — — 589
See Assignment 1.
" Debtor and Creditor.

5——*Dufresne v. Guévremont* (26 Can. S. C. R. 216) followed — — — — 316
See Appeal 6.
" Statute, Construction of, 1.

6——*Filiatrault* v. *Goldie* (Q. R. 2 Q. B. 368), distinguished — — — — 406
See Immoveable Property.
" Moveables.
" Sale 4.
" Vendor and Purchaser.

7——*Lainé* v. *Béland* (26 Can. S. C. R. 419), distinguished — — — — 406
See Immoveable Property.
" Moveables.
" Sale 4.
" Vendor and Purchaser.

8——*Richelieu Election Case* (21 Can. S. C. R. 168) followed — — — — 201
See Election Law 1.

CIVIL CODE—*Arts.* 1156 (*subrogation*), 1959 (*Release of surety*) — — — 94
See Action 1.
" Principal and Surety 1.
" Warranty.

2——*Arts.* 1019 (*Interpretation*), 1238, 1242 (*Presumptions*), 1473 (*Sale*), 1599 (*Exchange*) 102
See Deed 1.
" Evidence 2.

3——*Arts.* 1053, 1064 (*Responsibility*), 1071 (*Damages*), 1626, 1627 (*Obligations of lessee*), 1629 (*Loss by fire of leased property*) — 126
See Evidence 3.
" Landlord and Tenant.

4——*Arts.* 311 (*Accounts of tutorship*) *and* 1243-1245 (*Admissions*) — — — 363
See Admissions.
" Deed 2.
" Evidence 5.
" Interrogatories.
" Judgment 1.

5——*Arts.* 1484 (*Incapacity of buyers*) *and* 1785 (*Loans upon Interest*) — — 522
See Building Society.
" Trustees 2.

CIVIL CODE—*Continued.*

6——*Arts.* 762 (*Gifts inter vivos*) *and* 989 (*Consideration of contract*) — — 551
See DATION EN PAIEMENT.
" NULLITY 1.
" SALE 5.

CIVIL CODE OF PROCEDURE—*Arts.* 56 (*Service of process*) *and* 78 (*Return of service*) 232
See BAILIFF.
" ELECTION LAW 5.

2——*Art.* 688 (*Sheriff's sales*)—*Arts.* 690 *et seq.* (*Resale for false bidding*) — — 309
See APPEAL 5.
" SALE 3.

3——*Arts.* 1115, 1115*a* (*Appeals from judgments of Superior Court*), 1178 (*Appeals to Privy Council* — — — — — 316
See APPEAL 6.
" STATUTE, CONSTRUCTION OF, 1.

4——*Art.* 1033*a* (*Injunctions*) — — 329
See CONTRACT 2.
" INJUNCTION.
" MUNICIPAL CORPORATION 3.

5——*Arts.* 221-225 (*Faits et articles*) — 363
See ADMISSIONS.
" EVIDENCE 5.
" INTERROGATORIES.

6——*Arts.* 20, 144 *and* 171 (*Collocation, Distribution, Opposition to judgment*) — — 514
See JUDGMENT OF DISTRIBUTION.
" PRACTICE 1.

7——*Arts.* 941-945 *and* 1341 *et seq.*—*Agreement respecting lands*—*Boundaries*—*Referee's decision*—*Bornage*—*Arbitration* — — 545
See ARBITRATION.
" CONTRACT 3.

8——*Arts.* 946 & 948 (*Possessory actions*)—575
See ACTION 4.
" EVIDENCE 8.
" POSSESSION 1.

9——*Arts.* 16 (*Service*), 89 *et seq.* (*Judgment by default*), 483, 489 (*Remedies against judgments*) — — — — — — 583
See ACTION 5.
" OPPOSITION 1.

10——*Art.* 1177 (*Requête civile*) — — 634
See JUDGMENT 2.
" REQUÊTE CIVILE.

CHAMPERTY—*Will*—*Sheriff's deed*—*Proof of heirship*—*New trial* — — — — 443
See EVIDENCE 6.

CIVIL SERVICE—*Extra salary*—*Additional remuneration*—*Permanent employees*—51 *V. c.* 12, *s.* 51 — — — — — — 657
See STATUTE, CONSTRUCTION OF, 7.

CODE.
See CIVIL CODE.
" CIVIL CODE OF PROCEDURE.

COLLOCATION.
See JUDGMENT OF DISTRIBUTION.

COMMISSION—*Appeal*—*Evidence taken by commission*—*Reversal on questions of fact.*] Where the witnesses have not been heard in the presence of the judge but their depositions were taken before a commissioner, a court of appeal may deal with the evidence more fully than if the trial judge had heard it or there had been a finding of fact by a jury and may reverse the finding of the trial court if such evidence warrants it. MALZARD *v.* HART — — — 510

COMMITMENT—*Form of*—*Jurisdiction*—*Judicial notice*—*R. S. C. c.* 135, *s.* 32 — 682
See HABEAS CORPUS.

CONSTITUTIONAL LAW—*Convention of* 1818—*Treaty, construction of*—*Statute, construction of*—*Fisheries*—*Three mile limit*—*Foreign fishing vessels*—"*Fishing*"—59 *Geo. III., c.* 38, (*Imp.*)—*R. S. C. cc.* 94 & 95.] Where fish has been enclosed in a seine more than three marine miles from the coast of Nova Scotia, and the seine pursed up and secured to a foreign vessel, and the vessel was afterwards seized with the seine still so attached within the three mile limit, her crew being then engaged in the act of bailing the fish out of the seine. *Held,* the Chief Justice and Gwynne J. dissenting, affirming the decision of the court below, that the vessel when so seized was "fishing" in violation of the convention of 1818 between Great Britain and the United States of America and of the Imperial Act 59 Geo. III., ch. 38, and the Revised Statutes of Canada, ch. 94, and consequently liable with the cargo, tackle, rigging, apparel. furniture and stores to be condemned and forfeited. THE SHIP "FREDERICK GERRING JR."*v.* THE QUEEN — — — 271

2——*Criminal Code ss.* 275, 276—*Bigamy*—*Canadian subject marrying abroad*—*Jurisdiction of Parliament.*] Secs. 275 and 276 of the Criminal Code, 1892, respecting the offence of bigamy, are *intra vires* of the Parliament of Canada. Strong C.J., *contra.* THE CRIMINAL CODE, 1892, SECTIONS RELATING TO BIGAMY — 461

CONTRACT—*Sale by sample—Objections to invoice—Reasonable time — Acquiescence — Evidence.*] If a merchant receives an invoice and retains it for a considerable time without making any objection, there is a presumption against him that the price stated in the invoice was that agreed upon. (Judgment of the Court of Queen's Bench, that the evidence was sufficient to rebut the presumption, reversed, Gwynne J. dissenting and holding that the appeal depended on mere matters of fact as to which an appellate court should not interfere.) KEARNEY *v.* LETELLIER — — — — 1

2——*Agreement in writing—Municipal corporation — Waterworks — Extension of works—Repairs — By-law — Resolution — Injunction—Highways and streets—R. S. Q. art. 4485——Art. 1033a. C. C. P.*] By a resolution of the Council of the Town of Chicoutimi, on 9th October, 1890, based upon an application previously made by him, L. obtained permission to construct waterworks in the town and to lay the necessary pipes in the streets wherever he thought proper, taking his water supply from the river Chicoutimi at whatever point might be convenient for his purposes, upon condition that the works should be commenced within a certain time and completed in the year 1892. He constructed a system of waterworks and had it in operation within the time prescribed, but the system proving insufficient a company was formed in 1895 under the provisions of R. S. Q., art. 4485, and given authority by by-law to furnish a proper water supply to the town, whereupon L. attempted to perfect his system, to alter the position of the pipes, to construct a reservoir, and to make new excavations in the streets for these purposes without receiving any further authority from the council. *Held*, reversing the judgment appealed from, (Gwynne J. dissenting,) that these were not merely necessary repairs but new works, actually part of the system required to be completed during the year 1892 and which after that date could not be proceeded with except upon further permission obtained in the usual manner from the council of the town. *Held*, further, that the resolution and the application upon which it was founded constituted a "contract in writing" and a "written agreement" within the meaning of article 1033a of the Code of Civil Procedure of Lower Canada, and violation of its conditions was a sufficient ground for injunction to restrain the construction of the new works. LA VILLE DE CHICOUTIMI *v.* LÉGARÉ — — 329

3——*Agreement respecting lands—Boundaries—Referee's decision—Bornage—Arbitrations—Arts. 941-945 and 1341 et. seq. C.C.P.*] The owners of contiguous farms executed a deed for the purpose of settling a boundary line between their lands, thereby naming a third person to ascer-

CONTRACT—*Continued.*

tain and fix the true division line upon the ground and agreeing further to abide by his decision and accept the line which he might establish as correct. On the conclusion of the referee's operations one of the parties refused to accept or act upon his decision, and action was brought by the other party to have the line so established declared to be the true boundary and to revendicate the strip of land lying upon his side of it. *Held*, reversing the judgment of the Court of Queen's Bench, that the agreement thus entered into was a contract binding upon the parties to be executed between them according to the terms therein expressed and was not subject to the formalities prescribed by the Code of Civil Procedure relating to arbitrations. MCGOEY *v.* LEAMY — — — 545

4—— *Vendor and purchaser—Unpaid vendor—Conditional sale—Suspensive condition—Moveables incorporated with freehold—Immoveables by destination — Hypothecary charges — Arts. 375 et seq. C. C.* — — — 406

See SALE 4.

CONTROVERTED ELECTIONS—*Election petition—Service—Copy—Status of petitioner—Preliminary objection* — — — 201

See ELECTION LAW 1.

2——*Appeal — Election petition — Preliminary objections—Delay in filing—Objections struck out—Order in chambers—R. S. C. c. 8, s. 50.* — — — — — — 215

See ELECTION LAW 2.

3——*Appeal—Preliminary objections—R. S. C. c. 9, ss. 12 and 50—Order dismissing petition—Affidavit of petitioner* — — — 219

See ELECTION LAW 3.

4——*Election petition—Preliminary objections—Affidavit of petitioner—Bona fides—Examination of deponent—Form of petition—R. S. C. c. 9—54 & 55 V. c. 20, s. 3* — — 226

See ELECTION LAW 4.

5——*Election petition—Preliminary objections—Service of petition—Bailiff's return—Cross-examination—Production of copy* — — 232

See ELECTION LAW 5.

6——*Controverted election—Corrupt treating—Agent of candidate—Limited agency—Trivial or unimportant corrupt act—54 & 55 V. c. 20, s. 19—Benefit of* — — — — 241

See ELECTION LAW 6.

CONVENTION.

See TREATY.

CONVEYANCING — *Mortgage — Leasehold premises—Terms of mortgage—Assignment or sub-lease* — — — — — 435

See MORTGAGE.

COUNTY COURT JUDGES — *Appeal — Jurisdiction—52 V. c. 37, s. 2 (D.)—Appointment of presiding officers—County Court Judges —55 V. c. 48 (Ont.)—57 V. c. 51, s. 5 (Ont.)— 58 V. c. 47 (Ont.)—Statute, construction of— Appeal from assessment — Final judgment— "Court of last resort"* — — — 640

See APPEAL 13.

COURT—*Appeal — Jurisdiction—52 V. c. 37, s. 2 (D.)—Appointment of presiding officers— County Court Judges—55 V. c. 48 (Ont.)—57 V. c. 51, s. 5 (Ont.)—58 V. c. 47 (Ont.)—Statute, construction of—Appeal from assessment—Final judgment—"Court of last resort"* — 640

See APPEAL 13.

CRIMINAL LAW—*Criminal Code ss. 275, 276—Canadian subject marrying abroad— Jurisdiction of Parliament* — — — 461

See BIGAMY.

CUSTOMS DUTIES — *Revenue — Imported goods—Importation into Canada—Tariff Act, Construction of — Retrospective legislation — R. S. C. c. 32—57 & 58 V. c. 33 (D.)—58 & 59 V. c. 23 (D.)* — — — — 395

See LEGISLATION.

DATION EN PAIEMENT—*Sale—Donation in form of—Gifts in contemplation of death— Mortal illness of donor—Presumption of nullity —Validating circumstances — Arts. 762. 989 C. C.*] During her last illness and a short time before her death, B. granted certain lands to V. by an instrument purporting to be a deed of sale for a price therein stated, but in reality the transaction was intended as a settlement of arrears of salary due by B. to the grantee and the consideration acknowledged by the deed was never paid. *Held*, reversing the decision of the Court of Queen's Bench, that the deed could not be set aside and annulled as void, under the provisions of article 762 of the Civil Code, as the circumstances tended to show that the transaction was actually for good consideration (*dation en paiement*), and consequently legal and valid. VALADE *v.* LALONDE — — — — — — 551

DEBTOR AND CREDITOR—*Assignment for the benefit of creditors—Preferred creditors —Moneys paid under voidable assignment—Liability of assignee—Statute of Elizabeth—Hindering and delaying creditors.*] In an action to have a deed of assignment for the benefit of ditors set aside by creditors of the assignor on the ground that it is void under the statute of Elizabeth, neither moneys paid to preferred creditors nor trust property disposed of in good faith by the assignor or persons claiming under him can be recovered, nor can persons holding under the deed be held personally liable for moneys or property so received by them. *Cox v. Worrall* (26 N. S. Rep. 366) questioned. TAYLOR *v.* CUMMINGS — — — 589

DEED — *Construction of—Title to lands — Ambiguous description—Evidence to vary or explain deed—Possession—Conduct of parties— Presumptions from occupation of premises— Arts.* 1019, 1238, 1242, 1473, 1599 *C. C.*—47 *V. c.* 87, *s.* 3 (*D.*); 48 & 49 *V. c.* 58, *s.* 3 (*D.*) —45 *V. c.* 20 (*Q.*)] By a deed made in August, 1882, the appellant ceded to the Government of Quebec, who subsequently conveyed to the respondent, an immovable described as part of lot no. 1937, in St. Peters Ward in the city of Quebec, situated between the streets St. Paul, St. Roch, Henderson and the river St. Charles, with the wharves and buildings thereon erected. Of the lands which the respondents entered into possession by virtue of said deeds they remained in possession for twelve years without objection to the boundaries. They then brought an action to have it declared that, by the proper construction of the deeds, an additional strip of land and certain wharves were included and intended to be transferred. They contended that the description in the deed was ambiguous, and that Henderson street as a boundary should be construed as meaning Henderson street extended, and they sought to establish their case by the production of certain correspondence which had taken place between the parties prior to the execution of the deed of August, 1882. *Held*, reversing the judgment of the Court of Queen's Bench for Lower Canada, the Chief Justice and King J. dissenting, that the words "Henderson Street" as used in the deed must be construed in their plain natural sense as meaning the street of that name actually existing on the ground ; that the correspondence was not shown to contain all the negotiations or any finally concluded agreement, and could not be used to contradict or modify the deed which should be read as containing the matured conclusions at which the parties had finally arrived ; that the deed should be interpreted in the light of the conduct of the parties in taking and remaining so long in possession without objection, which raised against them a strong presumption, not only not rebutted but strengthened by the facts in evidence ; and that any doubt or ambiguity in the deed, in the absence of evidence to explain it, should be interpreted against the vendees, and in favour of the vendors. THE CITY OF QUEBEC *v.* THE NORTH SHORE RAILWAY COMPANY — — 102

DEED—*Continued.*

2——A deed was entered into by the parties to a suit in order to effect a compromise of family disputes and prevent litigation but failed to attain its end, and was annulled and set aside by order of the court as being in contravention of article 311 of the Civil Code of Lower Canada. *Held,* Girouard J. dissenting, that upon the nullification of the deed no allegation contained in it could subsist even as an admission. DUROCHER *v.* DUROCHER — — 363

3——*Title of lands—Seignorial tenure—Deed of concession—Construction of deed—Words of limitation—Covenant by grantee—Charges running with the title—Servitude—Condition, si voluero—Prescriptive title—Edits & Ordonnances, (L. C.)—Municipal regulations*—23 *V.* (*Can.*), *c.* 85 — — — — — 147

See SERVITUDE 1.

4——*Sale by sheriff—Folle enchère—Registration—Nullity* — — — — — 309

See APPEAL 5.

5——*Building society—Assessments on loans—Administrators and trustees—Sales to—Nullity—Art.* 1484 *C. C.* — — — — — 522

See BUILDING SOCIETY.

6——*Sale—Donation in form of—Gifts in contemplation of death—Mortal illness of donor—Presumption of nullity—Validating circumstances—Consideration—Dation en paiement—Arts.* 762, 989 *C. C.* — — — — — 551

See SALE 5.

7——*Assignment for the benefit of creditors—Preferred creditors—Money paid under voidable assignment—Liability of assignee—Statute of Elizabeth—Hindering and delaying creditors* — — — — — — — — 589

See ASSIGNMENT 1.

DISCRETION—*Appeal—Jurisdiction—Discretionary order—Default to plead—R. S. C. c.* 135, *ss.* 24 (*a*) *and* 27—*R. S. O. c.* 44, *s.* 65—*Ontario Judicature Act, rule* 796 — — 654

See APPEAL 14.

DISTRIBUTION.

See JUDGMENT OF DISTRIBUTION.

DONATION—*Sale—Donation in form of—Gifts in contemplation of death—Mortal illness of donor—Presumption of nullity—Validating circumstances—Dation en paiement—Arts.* 762, 989 *C. C.* — — — — — — 551

See SALE 5.

DRAINS AND WATERCOURSES—*Municipal law—Drainage—Assessment—Intermunicipal obligations as to initiation and contributions—By-law—Ontario Drainage Act of* 1873—36 *V. c.* 38 (*O.*)—36 *V. c.* 39 (*O.*)—*R. S. O.* [1887] *c.* 184—*Ontario Consolidated Municipal Act of* 1892—55 *V. c.* 42 (*O.*)] The provisions of the Ontario Municipal Act (55 V. c. 42 s. 590), that if a drain constructed in one municipality is used as an outlet, or will provide an outlet for the water of lands of another, the lands in the latter so benefited may be assessed for their proportion of the cost, applies only to drains properly so called, and does not include original watercourses which have been deepened or enlarged.—If a municipality constructing such a drain has passed a by-law purporting to assess lands in an adjoining municipality for contribution to the cost, a person whose lands might appear to be affected thereby, or by any by-law of the adjoining municipality proposing to levy contributions toward the cost of such works, would be entitled to have such other municipality restrained from passing a contributory by-law, or taking any steps towards that end, by an action brought before the passing of such contributory by-law. BROUGHTON *v.* GREY AND ELMA — — 495

"DYING WITHOUT ISSUE"—*Statute, construction of—Estates tail, acts abolishing—R. S. N. S.* (1 *ser.*) *c.* 112—*R. S. N. S.* (2 *ser.*) *c.* 112—*R. S. N. S.* (3 *ser.*) *c.* 111—23 *V. c.* 2 (*N. S.*)—*Will—Construction of—Executory devise over—"Dying without issue"—"Lawful heirs"—"Heirs of the body"—Estate in remainder expectant—Statutory title—R. S. N. S.* (2 *ser.*) *c.* 114, *ss.* 23 *and* 24—*Title by will—Conveyance by tenant in tail* — — — — 594

See WILL 4.

2——*Will—Construction of—Words of futurity—Life estate—Joint lives—Time for ascertainment of class—Survivor dying without issue—"Lawful heirs"* — — — — 628

See WILL 5.

EASEMENT—*Necessary way—Implied grant—User—Obstruction of way—Interruption of prescription—Acquiescence—Limitation of actions—R. S. N. S.* (5 *ser.*) *c.* 112—*R. S. N. S.* (4 *ser.*) *c.* 100—2 & 3 *Wm. IV.* (*Imp.*) *c.* 71, *s.* 2 *and* 4.] K. owned lands in the county of Lunenburg, N. S., over which he had for years utilized a roadway for convenient purposes. After his death the defendant became owner of the middle portion, the parcels at either end passing to the plaintiff, who continued to use the old roadway, as a winter road, for hauling fuel from his wood-lot to his residence, at the other end of the property. It appeared that though the three parcels fronted upon a public highway, this was the only practical means plaintiff had for the hauling of his winter fuel, owing to a dangerous hill that prevented him getting it

EASEMENT—*Continued.*

off the wood-lot to the highway. There was not any formed road across the lands, but merely a track upon the snow during the winter months, and the way was not used at any other season of the year. This user was enjoyed for over twenty years prior to 1891, when it appeared to have been first disputed, but from that time the way was obstructed from time to time up to March, 1894, when the defendant built a fence across it that was allowed to remain undisturbed and caused a cessation of the actual enjoyment of the way, during the fifteen months immediately preceding the commencement of the action in assertion of the right to the easement by the plaintiff. The statute (R. S. N. S. 5 ser. ch. 112) provides a limitation of twenty years for the acquisition of easements and declares that no act shall be deemed an interruption of actual enjoyment, unless submitted to or acquiesced in for one year after notice thereof and of the person making the same. *Held*, that notwithstanding the customary use of the way as a winter road only, the cessation of user for the year immediately preceding the commencement of the action was a bar to the plaintiff's claim under the statute. *Held* also, that the circumstances under which the roadway had been used did not supply sufficient reason to infer that the way was an easement of necessity appurtenant or appendant to the lands formerly held in unity of possession, which would without special grant pass by implication, upon the severance of the tenements. KNOCK *v.* KNOCK — — — — — — 664

And see SERVITUDE.

ELECTION LAW—*Election petition—Service—Copy—Status of petitioner—Preliminary objection.*] On the hearing of preliminary objections to an election petition to prove the status of the petitioner a list of voters was offered with a certificate of the Clerk of the Crown in Chancery which, after stating that said list was a true copy of that finally revised for the district, proceeded as follows: "And is also a true copy of a list of voters which was used at said polling division at and in relation to an election of a member of the House of Commons of Canada for the said electoral district * * which original list of voters was returned to me by the returning officer for said electoral district in the same plight and condition as it now appears, and said original list of voters is now on record in my office." *Held*, that this was, in effect, a certificate that the list offered in evidence was a true copy of a paper returned to the clerk of the Crown by the returning officer as the very list used by the deputy returning officer at the polling district in question, and that such list remained of record in possession of said clerk. It was then

ELECTION LAW—*Continued.*

a sufficient certificate of the paper offered being a true copy of the list actually used at the election. *Richelieu Election Case* (21 Can. S. C. R. 168) followed. WINNIPEG ELECTION CASE. MACDONALD ELECTION CASE — — 201

2——*Appeal—Election petition—Preliminary objection—Delay in filing—Objections struck out—Order in chambers—R. S. C. c.* 8, *s.* 50.] The Supreme Court refused to entertain an appeal from the decision of a judge in chambers granting a motion to have preliminary objection to an election petition struck out for not being filed in time. Such decision was not one on preliminary objections within s. 50 of the Controverted Election Act, and if it were no judgment on the motion could put an end to the petition. WEST ASSINIBOIA ELECTION CASE — — — — — 215

3——*Appeal—Preliminary objections—R. S. C. c.* 9, *ss.* 12 *and* 50—*Order dismissing petition—Affidavit of petitioner.*] The appeal given to the Supreme Court of Canada by The Controverted Elections Act (R. S. C. c. 9, s. 50), from a decision on preliminary objections to an election petition can only be taken in respect to objections filed under sec. 12 of the Act.—No appeal lies from a judgment granting a motion to dismiss a petition on the ground that the affidavit of the petitioner was untrue. MARQUETTE ELECTION CASE — — — — 219

4——*Election petition—Preliminary objections—Affidavit of petitioner—Bona-fides—Examination of deponent—Form of petition—R. S. C. c.* 9—54 *&* 55 *V. c.* 20, *s.* 3 (*D.*)] By 54 & 55 V. c. 20, sec. 3, amending The Controverted Elections Act (R. S. C. c. 9) an election petition must be accompanied by an affidavit of the petitioner "that he has good reason to believe and verily does believe that the several allegations contained in the said petition are true." The petitioner in this case used the exact words of the Act in his affidavit. *Held*, that the respondent to the petition was not entitled on the hearing on preliminary objections to examine him as to the grounds of his belief. *Held* further, that it was not necessary that the petition should be annexed to or otherwise identified by the affidavit, as in case of an exhibit, the references in the affidavit being sufficient to show what petition was referred to.—It is no objection to an election petition that it is too general (as by the Act it may be in any prescribed form) if it follows the form that has always been in use in the province. Moreover, any inconvenience from generality may be obviated by particulars. LUNENBURG ELECTION CASE — — — — — 226

5——*Election petition—Preliminary objections—Service of petition—Bailiff's return—Cross-*

ELECTION LAW—*Continued.*

examination—Production of copy.] A return by a bailiff that he had served an election petition by leaving true copies, "duly certified," with the sitting member is a sufficient return. It need not state by whom the copies were certified. Arts. 56 and 78 C. C. P.—Counsel for the person served will not be allowed to cross-examine the bailiff as to the contents of the copies served without producing them or laying a foundation for secondary evidence. Beauharnois Election Case — — 232

6—*Controverted election—Corrupt treating—Agent of candidate—Limited agency—Trivial or unimportant corrupt act*—54 & 55 *V. c.* 20, *s.* 19 (*D.*)—*Benefit of.*] During an election liquor was given to an elector who at the same time was asked to vote for a particular candidate. *Held*, that this was corrupt treating under section 86 of the Dominion Elections Act, R. S. C. c. 8.—If a political association is formed for a place within the electoral district, and it is not shown that there was any restriction on the members to work for their candidate within the limits of that place only, they are his agents throughout the whole district.—Though the only corrupt act proved against a sitting member was of a trivial and unimportant character, and he had at public meetings warned his supporters against the commission of illegal acts, yet as such act was committed by an agent whom he had taken with him to canvass a certain locality, and there were circumstances which should have aroused his suspicion, he should have given a like warning to this agent, and not having done so he was not entitled to the benefit of the amendment to The Controverted Elections Act in 54 & 55 V. c. 20, s. 19. West Prince Election Case — — 241

EMINENT DOMAIN—*Appeal—Jurisdiction—Title to lands—Municipal law—By-law—Widening streets—Expropriation—R. S. C. c.* 135, *s.* 29 (*b*)—54 *&* 55 *V. c.* 25, *s.* 3—56 *V. c.* 29, *s.* 1.] In an action to quash a by-law passed for the expropriation of land, the controversy relates to a title to lands, and an appeal lies to the Supreme Court of Canada, although the amount in controversy is less than $2,000. The judgment on the merits dismissed the appeal for the reasons stated in the judgment of the court below. (See Q. R. 6 Q. B. 345.) Murray *v.* Westmount — — — — 579

ESTOPPEL — *Evidence—Judicial admissions—Nullified instruments—Cadastre—Plans and official books of reference—Compromise—"Transaction"—Arts.* 311 *and* 1243-1245 *C. C.—Arts.* 221-225 *C. C. P.* — — — — 363

See Admissions.

EVIDENCE — *Will—Undue influence.*] In order to set aside a will on the ground that its execution was obtained by undue influence on the mind of the testator, it is not sufficient to show that the circumstances attending the execution are consistent with the hypothesis that it was so obtained. It must be shown that they are inconsistent with a contrary hypothesis. Adams *v.* McBeath — — 13

2—*To vary or explain deed—Construction of deed—Title to lands—Ambiguous description—Possession—Conduct of parties—Presumptions from occupation of premises—Art.* 1019, 1238, 1242, 1473, 1599 *C. C.*—47 *V. c.* 87, *s.* 3 (*D.*)—48 *&* 49 *V. c.* 58, *s.* 3 (*D.*)—45 *V.* (*Q.*) *c.* 20.] By a deed made in August, 1882, the appellant ceded to the Government of Quebec, who subsequently conveyed to the respondent, an immoveable described as part of lot no. 1937, in St. Peters Ward in the city of Quebec, situated between the streets St. Paul, St. Roch, Henderson and the river St. Charles, with the wharves and buildings thereon erected. Of the lands of which the respondents entered into possession by virtue of said deeds they remained in possession for twelve years without objection to the boundaries. They then brought an action to have it declared that, by the proper construction of the deeds, an additional strip of land and certain wharves were included and intended to be transferred. They contended that the description in the deed was ambiguous, and that Henderson street as a boundary should be construed as meaning Henderson street extended, and they sought to establish their case by the production of certain correspondence which had taken place between the parties prior to the execution of the deed of August, 1882. *Held*, reversing the judgment of the Court of Queen's Bench for Lower Canada, the Chief Justice and King J. dissenting, that the words "Henderson Street" as used in the deed must be construed in their plain natural sense as meaning the street of that name actually existing on the ground; that the correspondence was not shewn to contain all the negotiations or any finally concluded agreement, and could not be used to contradict or modify the deed which should be read as containing the matured conclusion at which the parties had finally arrived; that the deed should be interpreted in the light of the conduct of the parties in taking and remaining so long in possession without objection, which raised against them a strong presumption, not only not rebutted but strengthened by the facts in evidence; and that any doubt or ambiguity in the deed, in the absence of evidence to explain it, should be interpreted against the vendees, and in favour of the vendors. The City of Quebec *v.* The North Shore Railway Company — — — 102

EVIDENCE—*Continued.*

3——*Landlord and tenant—Loss by fire—Cause of fire—Negligence—Civil responsibility—Legal presumption — Rebuttal of — Onus of proof — Hazardous occupation—Arts.* 1053, 1064, 1071, 1626, 1627, 1629 *C. C.*] To rebut the presumption created by Article 1629 of the Civil Code of Lower Canada it is not necessary for the lessee to prove the exact or probable origin of the fire or that it was due to unavoidable accident or irresistible force. It is sufficient for him to prove that he has used the premises leased as a prudent administrator (*en bon père de famille*), and that the fire occurred without any fault that could be attributed to him or to persons for whose acts he should be held responsible. Judgment of the Court of Queen's Bench for Lower Canada affirmed, Strong C. J. dissenting. Murphy *v.* Labbé — — 126

4——*Negligence — Defective machinery — Evidence for jury.*] T. was employed as a weaver in a cotton mill and was injured while assisting a less experienced hand, by the shuttle flying out of the loom at which the latter worked, and striking her on the head. The mill contained some 400 looms, and for every forty-six there was a man, called the "loom fixer," whose duty it was to keep them in proper repair. The evidence showed that the accident was caused by a bolt breaking by the shuttle coming in contact with it, and as this bolt served as a guard to the shuttle, the latter could not remain in the loom. The jury found that the breaking of the bolt caused the accident, and that the "loom fixer" was guilty of negligence in not having examined it within a reasonable time before it broke. T. obtained a verdict, which was affirmed by the Court of Appeal. *Held*, Gwynne J. dissenting, that the "loom fixer" had not performed his duty properly; that the evidence as to negligence could not have been withdrawn from the jury; and that, as there was evidence to justify the finding, their verdict should stand. Per Gwynne J., that the finding of the jury that the negligence consisted in the omission to examine the bolt was not satisfactory, as there was nothing to show that such examination could have prevented the accident, and there should be a new trial. The Canadian Coloured Cotton Mills Co. *v.* Talbot — — 198

5——*Election petition—Preliminary objections —Service of petition—Bailiff's return—Cross-examination—Production of copy.*] A return by a bailiff that he had served an election petition by leaving true copies, "duly certified," with the sitting member is a sufficient return. It need not state by whom the copies were certified. Arts. 56 and 78 C. C. P.—Counsel for the person served will not be allowed to cross-examine the bailiff as to the contents of the copies served without producing them or laying a foundation for secondary evidence. Beauharnois Election Case — — 232

6——*Evidence—Judicial admissions—Nullified instruments—Cadastre—Plans and official books of reference—Compromise — "Transaction" — Estoppel—Arts.* 311 *and* 1243-1245 *C. C.—Art.* 221-225 *C. C. P.*] A will, in favour of the husband of the testatrix, was set aside in an action by the heir-at-law and declared by the judgment to be *un acte faux* and therefore to be null and of no effect. In a subsequent petitory action between the same parties: *Held*, Girouard J. dissenting, that the judgment declaring the will *faux* was not evidence of admission of the title of the heir-at-law, by reason of anything the devisee had done in respect of the will, first, because the will having been annulled was for all purposes unavailable, and, secondly, because the declaration of *faux*, contained in the judgment, did not show any such admission.—The constructive admission of a fact resulting from a default to answer interrogatories upon articulated facts recorded under C. C. P. art. 225, cannot be invoked as a judicial admission, in a subsequent action of a different nature between the same parties.—Statements entered upon cadastral plans and official books of reference made by public officials and filed in the lands registration offices, in virtue of the provisions of the Civil Code of Lower Canada, do not in any way bind persons who were not cognizant thereof, at the time the entries were made.—Where a deed entered into by the parties to a suit in order to effect a compromise of family disputes and prevent litigation failed to attain its end, and was annulled and set aside by order of the court as being in contravention of article 311 of the Civil Code of Lower Canada no allegation contained in it could subsist even as an admission. Durocher *v.* Durocher — — 363

7——*Will—Sheriff's deed—Evidence—Proof of heirship — Rejection of evidence — New trial —Champerty—Maintenance.*] A will purporting to convey all the testator's estate to his wife was attacked for uncertainty by persons claiming under alleged heirs-at-law of the testator and through conveyances from them to persons abroad. The courts below held that the will was valid. *Held*, affirming such decision, that as the evidence of the relationship of the alleged grantors to the deceased was only hearsay and the best evidence had not been adduced; that as the heirship at law was dependent upon the alleged heir having survived his father and it was not established and the court would not presume that his father died before him; and that as the persons claiming under the will had no information as to the identity of the parties in interest who were represented in the transactions by men of straw, one of whom was alleg-

EVIDENCE—*Continued.*

ed to be a trustee, and there was no evidence as to the nature of his trust and there was strong suspicion of the existence of champerty or maintenance on the part of the persons attacking the will, the latter had failed to establish the title of the persons under whom they claimed and the appeal should be dismissed. May *v.* Logie — — — — — — 443

8——*Appeal—Evidence by commission—Reversal on questions of fact.*] Where the witnesses have not been heard in the presence of the judge but their depositions were taken before a commissioner, a court of appeal may deal with the evidence more fully than if the trial judge had heard it or there had been a finding of fact by a jury and may reverse the finding of the trial court if such evidence warrants it. Malzard *v.* Hart — — — 510

9——*Action on disturbance—Possessory action—"Possession annale"—Arts.* 946 *and* 948 *C. C. P.—Nature of possession of unenclosed vacant lands—Boundary marks—Delivery of possession.*] In 1890, G. purchased a lot of land 25 feet wide and the vendor pointed it out to him on the ground, and showed him the pickets marking its width and depth. The lot remained vacant and unenclosed up to the time of the disturbance, and was assessed as a 25 foot lot to G., who paid all municipal taxes and rates thereon. In 1895 the adjoining lot, which was also vacant and unenclosed, was sold to another person who commenced laying foundations for a building, and, in doing so, encroached by two feet on the width of the lot so purchased by G., who brought a possessory action within a couple of months from the date of the disturbance. *Held*, that the *possession annale*, required by article 946 of the Code of Civil Procedure, was sufficiently established to entitle the plaintiff to maintain his action. Gauthier *v.* Masson — — — — — — 575

10——*Contract—Sale by sample—Objections to invoice — Reasonable time—Acquiescence—Presumptions* — — — — — 1

See Contract 1.

11——*Trustee—Account of trust funds—Abandonment by cestui que trust* — — — 249

See Trusts 1.

12——*Accident insurance—Renewal of policy—Payment of premium—Agent's authority—Instructions to agent—Finding of jury* — 374

See Insurance, Accident.

13——*Sale—Donation in form of—Gifts in contemplation of death—Mortal illness of donor—Presumption of nullity—Validating circumstances—Dation en paiement—Arts.* 762, 989 *C. C.* — — — — — — 551

See Sale 5.

EXCHANGE—*Title to lands—Ambiguous description—Possession—Conduct of parties—Presumptions from occupation of premises—C. C. art.* 1599 — — — — — 102

See Deed 1.

EXECUTORS — *Testamentary succession—Balance due by tutor—Account, action for—Action for provisional possession—Parties to action.* Cream *et al. v.* Davidson — 362

EXEMPTIONS — *Real property—Chattels—Fixtures — Gas pipes — Highway — Legislative grant of soil*—11 *V. c.* 14 *(Can.)*—55 *V. c.* 48 *(O.)*—"*Ontario Assessment Act,* 1892" — 453

See Assessment and Taxes 1.

EXPROPRIATION—*Of lands—Assessments—Local improvements—Future rights—Jurisdiction* — — — — — 187

See Appeal 1.

FAITS ET ARTICLES.

See Interrogatories.

FALSE BIDDING, RESALE FOR—*Sale by sheriff—Folle enchère—Resale for false bidding—Art.* 690 *et seq. C. C. P.—Questions of practice—Appeal—Art.* 688 *C. C. P.—Privileges and hypothecs—Sheriff's deed—Registration of—Absolute nullity—Rectification of slight errors in judgment—Duty of appellate court*—309

See Appeal 5.

FISHERIES—*Constitutional law—Convention of* 1818—*Treaty, construction of—Statute, construction of—Three-mile limit—Foreign fishing vessels—"Fishing"*—59 *Geo. III., c.* 38, *(Imp.)—R. S. C. cc.* 94 *&* 95.] Where fish had been enclosed in a seine more than three marine miles from the coast of Nova Scotia, and the seine pursed up and secured to a foreign vessel, and the vessel was afterwards seized with the seine still so attached within the three mile limit, her crew being then engaged in the act of bailing the fish out of the seine: *Held*, (the Chief Justice and Gwynne J. dissenting, affirming the decision of the court below, that the vessel when so seized was "fishing" in violation of the convention of 1818 between Great Britain and the United States of America and of the Imperial Act 59 Geo. III., ch. 38, and the Revised Statutes of Canada, ch. 94, and consequently liable with the cargo, tackle, rigging, apparel, furniture and stores to be condemned and forfeited. The Ship "Frederick Gerring Jr." *v.* The Queen — — — 271

FIXTURES.

See Immoveable Property.

FOLLE ENCHÈRE

See False Bidding.

FORFEITURE—*Mines and minerals—Lease of mining areas—Rental agreement—Payment of rent—R. S. N. S.* (5 *ser.*) *c.* 7—52 *V. c.* 23 (*N.S.*)—*Statute, construction of* — 355

See Lease 1.

FRAUDULENT PREFERENCES—*Assignment for the benefit of creditors—Preferred creditors—Money paid under voidable assignment—Liability of assignee—Statute of Elizabeth—Hindering and delaying creditors* — — 589

See Assignment.

2——*Insolvency—Pressure—Assignment of expected profits—Statute of Elizabeth—Assets exigible in execution.*] Blakeley *et al. v.* Gould *et al.* — — — — 687

FUTURE RIGHTS—*Action en bornage—Title to lands—R. S. C. c.* 135, *s.* 29 (*b*)—54 & 55 *V. c.* 25, *s.* 3—56 *V. c.* 29, *s.* 1 — — 193

See Appeal 2.

2——*Appeal—Expropriation of lands—Assessments—Local improvements—R. S. C. c.* 135, *s.* 29 (*b*)—56 *V. c.* 29, *s.* 1 (*D.*) — — 187

See Appeal 1.

3——*Appeal—Jurisdiction—Appealable amount—Future rights—Alimentary allowance—"Other matters and things"—R. S. C. c.* 135, *s.* 29 (*b*)—56 *V.* (*D.*) *c.* 29 — — — 319

See Appeal 7.

HABEAS CORPUS—*Jurisdiction—Form of commitment—Territorial division—Judicial notice—R. S. C. c.* 135, *s.* 32.] A warrant of commitment was made by the stipendiary magistrate for the police division of the municipality of the county of Pictou, in Nova Scotia, upon a conviction for an offence stated therein to have been committed "at Hopewell, in the county of Pictou." The county of Pictou appeared to be of a greater extent than the municipality of the county of Pictou,—there being also four incorporated towns within the county limits—and it did not specifically appear upon the face of the warrant that the place where the offence had been committed was within the municipality of the county of Pictou. The Nova Scotia statute of 1895 respecting county corporations [58 Vict. c. 3, s. 8) contains a schedule which mentions Hopewell as a polling district in Pictou county entitled to return two councillors to the county council. *Held*, that the court was bound to take judicial notice of the territorial divisions declared by the statute as establishing that the place so mentioned in the warrant was within the territorial limits of the police division. *Held* also, that the jurisdiction of a judge of the Supreme Court of Canada in matters of *habeas corpus* in criminal cases is limited to an inquiry into the cause of imprisonment as disclosed by the warrant of commitment. *Ex parte* James W. Macdonald— 683

"HANSARD" STAFF—*Civil service—Extra salary—Additional remuneration—Permanent employees*—51 *V. c.* 12, *s.* 51 — — 657

See Statute, Construction of, 7.

HEIR—*Will—Construction of—Words of futurity—Life estate—Joint lives—Time for ascertainment of class—Survivor dying without issue—"Lawful heir"* — — — 628

See Will 5.

2——*Statute, construction of—Estates tail, acts abolishing—R. S. N. S.* (1 *ser.*) *c.* 112—*R. S. N. S.* (2 *ser.*) *c.* 112—*R. S. N. S.* (3 *ser.*) *c.* 111—28 *V. c.* 2 (*N.S.*)—*Will—Construction of—Executory devise over—"Dying without issue"—"Lawful heirs"—"Heirs of the body"—Estate in remainder expectant—Statutory title—R. S. N. S.* (2 *ser.*) *c.* 144, *ss.* 23 *and* 24—*Title by will—Conveyance by tenant in tail* — — 594

See Will 4.

HIGHWAY—*Waterworks—Repairs—Injunction—R. S. Q. art.* 4485 — — 329

See Injunction.

2——*Title to portion of—Legislative grant of soil—Gas pipes—Fixtures—Assessment—Exemptions*—11 *V. c.* 14 (*Can.*)—55 *V. c.* 48 (*O.*)—*"Ontario Assessment Act,* 1892*"* — 453

See Assessment and Taxes 1.

HIRE OF PERSONAL SERVICES—*Appointment of officers—Summary dismissal—Libellous resolution*—52 *V. c.* 79, *s.* 79 (*Q.*)—539

See Master and Servant 1.

HYPOTHECS.

See Privileges and Hypothecs.

IMMOVEABLE PROPERTY—*Vendor and purchaser—Unpaid vendor—Conditional sale—Suspensive condition—Moveables incorporated with freehold—Immoveables by destination—Hypothecary charges—Arts.* 375 *et seq. C. C.*] A suspensive condition in an agreement for the sale of moveables, whereby, until the whole of the price shall have been paid, the property in the thing sold is reserved to the vendor is a valid condition.—In order to give moveable property the character of immoveables by destination, it is necessary that the person incorporating the moveables with the immoveable should be, at the time, owner both of the moveables and of the real property with which they are so incorporated. *Lainé* v. *Béland*

IMMOVEABLE PROPERTY—*Continued.* (26 Can. S. C. R. 419), and *Filiatrault* v. *Goldie* (Q. R. 2 Q. B. 368), distinguished. Decision of the Court of Queen Bench affirmed, Girouard J. dissenting. LA BANQUE D'HOCHELAGA *v.* THE WATEROUS ENGINE WORKS COMPANY — — — — — — 406

2——*Gas pipes—Title to portion of highway—Fixtures—Legislature grant* — — 453

See ASSESSMENT AND TAXES 1.

INDORSEMENT—*Suretyship — Promissory note—Qualified indorsement* — — 571

See PRINCIPAL AND SURETY 2.

INJUNCTION — *Municipal corporation — Waterworks—Extension of works—Repairs—By-law—Resolution — Agreement in writing—Highways and streets—R. S. Q. art.* 4485—*Art.* 1033*a* *C. C. P.*] By a resolution of the council of the town of Chicoutimi, on 9th October, 1890, based upon an application previously made by him, L. obtained permission to construct waterworks in the town and to lay the necessary pipes in the streets wherever he thought proper, taking his water supply from the River Chicoutimi at whatever point might be convenient for his purposes, upon condition that the works should be commenced within a certain time and completed in the year 1892. He constructed a system of waterworks and had it in operation within the time prescribed, but the system proving insufficient, a company was formed in 1895 under the provisions of R. S. Q. art 4485, and given authority by by-law to furnish a proper water supply to the town, whereupon L. attempted to perfect his system, to alter the position of the pipes, to construct a reservoir and to make new excavations in the streets for these purposes without receiving any further authority from the council. *Held*, (Gwynne J. dissenting,) reversing the judgment appealed from, that these were not merely necessary repairs, but new works, actually part of the system required to be completed during the year 1892, and which after that date could not be proceeded with except upon further permission obtained in the usual manner from the council of the town. *Held*, further, that the resolution and the application upon which it was founded constituted a "contract in writing" and a "written agreement" within the meaning of article 1033*a* of the Code of Civil Procedure of Lower Canada, and violation of its conditions was a sufficient ground for injunction to restrain the construction of the new works. LA VILLE DE CHICOUTIMI *v.* LÉGARÉ — — — — — — — 329

INSOLVENCY—*Assignment of expected profits—Pressure—Fraudulent preferences—Statute of Elizabeth — Assets exigible in execution.*] BLAKELEY *et al.* v. GOULD *et al.* — — 682

INSURANCE, ACCIDENT — *Renewal of policy—Payment of premium—Promissory note —Instructions to agent—Agent's authority—Finding of jury.*] A policy issued by the Manufacturers' Acc. Ins. Co. in favour of P. contained a provision that it might be renewed from year to year on payment of the annual premium. One condition of the policy was that it was not to take effect unless the premium was paid prior to any accident on account of which a claim should be made, and another that a renewal receipt, to be valid, must be printed in office form, signed by the managing director and countersigned by the agent. P. having been killed in a railway accident payment on the policy was refused on the ground that it had expired and not been renewed. In an action by the widow for the insurance it was shown that the local agent of the company had requested P. to renew and had received from him a promissory note for $15 (the premium being $16), which the father of the assured swore the agent agreed to take for the balance of the premium after being paid the remainder in cash. He also swore that the agent gave P. a paper purporting to be a receipt and gave secondary evidence of its contents. The agent's evidence was that while the note was taken for a portion of the premium it was agreed between him and P. that there was to be no insurance until it was paid, and that he gave no renewal receipt and was paid no cash. Some four years before this the said agent and all agents of the company had received instructions from the head office not to take notes for premiums as had been the practice theretofore. The note was never paid but remained in possession of the agent the company knowing nothing of it. The jury gave no general verdict but found in answer to questions that a sum was paid in cash and the note given and accepted as payment of the balance of the premium, and that the paper given to P. by the agent, as sworn to by P.'s father, was the ordinary renewal receipt of the company. Upon these findings judgment was entered against the company. *Held*, affirming the judgment of the Supreme Court of Nova Scotia, Gwynne J. dissenting, that the fair conclusion from the evidence was, that as the agent had been employed to complete the contract and had been entrusted with the renewal receipt, P. might fairly expect that he was authorized to take a premium note, having no knowledge of any limitation of his authority and the policy not forbidding it; and that notwithstanding there was no general verdict, and the specific question had not been passed upon by the jury, such inference could be drawn by the court according to the practice in Nova Scotia. *Held*, further, that there was evidence upon which reasonable men might find as the jury did; that an inference might fairly be drawn from the facts that the transaction

INSURANCE ACCIDENT—*Continued.*

amounted to payment of the premium and it was to be assumed that the act was within the scope of the agent's employment; the fact that the agent was disobeying instructions did not prevent the inference though it might be considered in determining whether or not such inference should be drawn; and that a new trial should not be granted to enable the company to corroborate the testimony of the agent that he had no renewal receipt in his possession except one produced at the trial as the company might have supposed that the plaintiff would seek to show that such receipt had been obtained and were not taken by surprise. THE MANUFACTURERS ACCIDENT INSURANCE COMPANY *v.* PUDSEY — — — 374

INSURANCE, FIRE—*Landlord and tenant —Loss by fire—Cause of fire—Negligence—Civil responsibility—Legal presumption—Rebuttal of —Onus of proof—Hazardous occupation—Extra premiums—Arts.* 1053, 1064, 1071, 1626, 1627, 1629 *C. C.* — — — — 126

See LANDLORD AND TENANT.

INTEREST—*Usury laws—C. S. C. c.* 58—*C. C. art.* 1785 — — — 522

See BUILDING SOCIETY.

INTERLOCUTORY PROCEEDINGS —*Appeal—Interlocutory order—Trial by jury—Final judgment—R. S C. c.* 135, *s.* 24—*C. C. P. arts.* 348-350. DEMERS *v.* THE BANK OF MONTREAL — — — — — 197

INTERROGATORIES—*Evidence—Faits et articles—Judicial admissions—Arts.* 221-225 *C. C. P.*] The constructive admission of a fact resulting from a default to answer interrogatories upon articulated facts recorded under art. 225 C. C. P., cannot be invoked as a judicial admission in a subsequent action of a different nature between the same parties. DUROCHER *v.* DUROCHER — — — 363

JUDGMENT—*Evidence—Admissions—Nullified instruments.*] A will, in favour of the husband of the testatrix, was set aside in an action by the heir-at-law and declared by the judgment to be *un acte faux*, and therefore to be null and of no effect. In a subsequent petitory action between the same parties: *Held*, Girouard J. dissenting, that the judgment declaring the will *faux* was not evidence of admission of the title of the heir-at-law by reason of anything the devisee had done in respect of the will, first, because the will having been annulled was for all purposes unavailable, and, secondly, because the declaration of *faux*, contained in the judgment, did not show any such admission. DUROCHER *v.* DUROCHER — 363

JUDGMENT—*Continued.*

2——*Petition in revocation of—Requête civile—Concealment of evidence—Jurisdiction—Art.* 1177 *C. P.Q.—R. S. C. c.* 135, *s.* 67.] Where judgment on a case in appeal has been rendered by the Supreme Court of Canada and certified to the proper officer of the court of original jurisdiction, the Supreme Court has no jurisdiction to entertain a petition (*requête civile*) for revocation of its judgment on the ground that the opposite party succeeded through the fraudulent concealment of evidence. DUROCHER *v.* DUROCHER — — — — — 634

3——*Appeal—Jurisdiction—Reference to court for opinion*—54 *V. c.* 5 (*B. C.*)—*R. S. C. c.* 135, *ss.* 24 *and* 28.] The Supreme Court of Canada has no jurisdiction to entertain an appeal from the opinion of a provincial court upon a reference made by the Lieutenant-Governor-in-Council under a provincial statute, authorizing him to refer to the court for hearing and consideration any matter which he may think fit, although the statute provides that such opinion shall be deemed a judgment of the court. UNION COLLIERY COMPANY OF BRITISH COLUMBIA *v.* THE ATTORNEY GENERAL OF BRITISH COLUMBIA AND OTHERS — — 637

4——*Appeal—Interlocutory order—Final judgment—Arts.* 348-350 *C. C. P—Trial by jury.* DEMERS *v.* BANK OF MONTREAL — — 197

5——*Rectification of slight errors in—Duty of appellate court* — — — — 309

See APPEAL 5.

6——*By default—Opposition to—Reasons of opposition—False return of service—Arts.* 18, 89 *et seq.*, 483, 489 *C. C. P.* — — — 583

See OPPOSITION.

7——*Appeal—Jurisdiction*—52 *V. c.* 37, *s.* 2 (*D.*)—*Appointment of presiding officers—County court judges*—55 *V. c.* 48 (*Ont.*)—57 *V. c.* 51, *s.* 5 (*Ont.*)—58 *V. c.* 47 (*Ont.*)—*Statute, construction of—Appeal from assessment—Final judgment—"Court of last resort"* — — 640

See STATUTE, CONSTRUCTION OF, 6.

8——*Appeal—Jurisdiction—Discretionary order —Default to plead—R. S. C. c.* 135, *ss.* 24 (*a*) *and* 27—*R. S. O. c.* 44, *s.* 65—*Ontario Judicature Act, rule* 796 — — — 654

See APPEAL 14.

JUDGMENT OF DISTRIBUTION—*Appeal—Collocation and distribution—Art.* 761 *C. C.P.—Hypothecary claims—Assignment—Notice —Registration—Prête-nom—Arts.* 20 *and* 144 *C. C. P.—Action to annul deed—Parties in interest —Incidental proceedings.*] The appeal from judgments of distribution under article 761 of

JUDGMENT OF DISTRIBUTION—*Con.*

the Code of Civil Procedure is not restricted to the parties to the suit but extends to every person having an interest in the distribution of the moneys levied under the execution.—The provisions of article 144 of the Code of Civil Procedure that every fact of which the existence or truth is not expressly denied or declared to be unknown by the pleadings filed shall be held to be admitted, applies to incidental proceedings upon an appeal in the Court of Queen's Bench.—The nullity of a deed of assignment can only be invoked by proceedings to which all persons interested in the deed have been made parties. GUERTIN *v.* GOSSELIN — 514

JURISDICTION — *Appeal — Jurisdiction— Expropriation of lands — Assessments—Local improvements—Future rights—Title to lands and tenements—R. S. C. c.* 135, *s.* 29 (*b*)—56 *V. c.* 29, *s.* 1 (*D.*) — — — — — 187

See APPEAL 1.

2——*Appeal — Interlocutory order — Trial by jury—Final judgment—R. S. C. c.* 135, *s.* 24—*Arts.* 348–350. *C. C. P.* DEMERS *v.* BANK OF MONTREAL — — — — 197

3——*Form of commitment—Territorial division —Judicial notice—R. S. C. c.* 135, *s.* 32 — 682

See HABEAS CORPUS.

JURY—*Accident insurance—Renewal of policy —Payment of premium—Promissory note— Agent's authority—Finding of jury* — 374

See INSURANCE, ACCIDENT.

JUSTICE OF THE PEACE—*Jurisdiction— Form of commitment — Territorial decision — Judicial notice—R.S.C. c.* 135, *s.* 32.] A warrant of commitment was made by the stipendiary magistrate for the police division of the municipality of the county of Pictou, in Nova Scotia, upon a conviction for an offence stated therein to have been committed " at Hopewell, in the county of Pictou." The county of Pictou appeared to be of a greater extent than the municipality of the county of Pictou, there being also four incorporated towns within the county limits—and it did not specifically appear upon the face of the warrant that the place where the offence had been committed was within the municipality of the county of Pictou. The Nova Scotia statute of 1895 respecting county corporations (58 Vict. ch. 3, s. 8) contains a schedule which mentions Hopewell as a polling district in Pictou county entitled to return two councillors to the county council. *Held*, that the court was bound to take judicial notice of the territorial divisions declared by the statute as establishing that the place so mentioned in the warrant was within the territorial extent of the police division. *Held* also, that the jurisdiction of a judge of the Supreme Court of Canada in matters of *habeas corpus* in criminal cases is limited to an inquiry into the cause of imprisonment as disclosed by the warrant of commitment. *Ex parte* JAMES W. MACDONALD — — — 683

LANDLORD AND TENANT—*Loss by fire —Cause of fire—Negligence—Civil responsibility —Legal presumption — Rebuttal of—Onus of proof—Hazardous occupation—Arts.* 1053, 1064, 1071, 1626, 1627, 1629 *C. C.*] To rebut the presumption created by article 1629 of the Civil Code of Lower Canada it is not necessary for the lessee to prove the exact or probable origin of the fire or that it was due to unavoidable accident or irresistible force. It is sufficient for him to prove that he has used the premises leased as a prudent administrator (*en bon père de famille*), and that the fire occurred without any fault that could be attributed to him or to persons for whose acts he should be held responsible. Judgment of the Court of Queen's Bench for Lower Canada affirmed, Strong C.J. dissenting. MURPHY *v.* LABBÉ — 126

LEASE—*Mines and minerals—Lease of mining areas—Rental agreement—Payment of rent —Forfeiture—R. S. N. S.* (5 *ser.*) *c.* 7—52 *V. c.* 23 (*N. S.*)] By R. S. N. S. (5 ser.) ch. 7, the lessee of mining areas in Nova Scotia were obliged to perform a certain amount of work thereon each year on pain of forfeiture of his lease, which, however, could only be effected through certain formalities. By an amendment in 1889 (52 Vic. ch. 23), the lessee is permitted to pay in advance an annual rental in lieu of work, and by subsec. (*c*) the owner of any leased area may, by duplicate agreement in writing with the Commissioner of Mines, avail himself of the provisions of such annual payment and " such advance payments shall be construed to commence from the nearest recurring anniversary of the date of the lease." By sec. 7 all leases are to contain the provisions of the Act respecting payment of rental and its refund in certain cases, and by sec. 8 said sec. 7 was to come into force in two months after the passing of the Act. Before the Act of 1889 was passed a lease was issued to E. dated June 10th, 1889, for twenty-one years from May 21st, 1889. On June 1st, 1891, a rental agreement under the amending Act was executed under which E. paid the rent for his mining areas for three years, the last payment being in May, 1893. On May 22nd, 1894, the commissioner declared the lease forfeited for non-payment of rent for the following year and issued a prospecting license to T. for the same areas. E. tendered the year's rent on June 9th, 1894, and an action was afterwards taken by the Attorney-General, on relation of E. to

LEASE—*Continued.*

set aside said license as having been illegally and improvidently granted. *Held*, affirming the judgment of the Supreme Court of Nova Scotia in such action, that the phrase "nearest recurring anniversary of the date of the lease" in subsec. (*c*) of sec. 1, Act of 1889, is equivalent to "next or next ensuing anniversary," and the lease being dated on June 10th, no rent for 1894 was due on May 22nd of that year, at which date the lease was declared forfeited, and E.'s tender on June 9th was in time. *Attorney General* v. *Sheraton* (28 N. S. Rep. 492) approved and followed. *Held*, further, that though the amending Act provided for forfeiture without prior formalities of a lease in case of non-payment of rent, such provision did not apply to leases existing when the Act was passed in cases where the holders executed the agreement to pay rent thereunder in lieu of work. The forfeiture of E.'s lease was, therefore, void for want of formalities prescribed by the original Act. TEMPLE *v.* THE ATTORNEY GENERAL OF NOVA SCOTIA — — — — — — — 355

2——*Mortgage—Leasehold premises—Terms of mortgage—Assignment or sub-lease.*] A lease of real estate for twenty-one years with a covenant for a like term or terms was mortgaged by the lessee. The mortgage after reciting the terms of the lease proceeded to convey to the mortgagee the indenture and the benefit of all covenants and agreements therein, the leased property by description and "all and singular the engines and boilers which now are or shall at any time hereafter be brought and placed upon or affixed to the said premises, all of which said engines and boilers are hereby declared to be and form part of the said leasehold premises hereby granted and mortgaged or intended so to be and form part of the term hereby granted and mortgaged;" the *habendum* of the mortgage was, "To have and to hold unto the said mortgagees, their successors and assigns, for the residue yet to come and unexpired of the term of years created by the said lease less one day thereof and all renewals, etc." *Held*, reversing the judgment of the court of appeal, that the premises of the said mortgage above referred to contained an express assignment of the whole term and the *habendum*, if intended to reserve a portion to the mortgagor, was repugnant to the said premises and therefore void; that the words "leasehold premises" were quite sufficient to carry the whole term, the word "premises" not meaning lands or property but referring to the recital which described the lease as one for a term of twenty-one years. *Held*, further, that the *habendum* did not reserve a reversion to the mortgagor; that the reversion of a day generally without stating it to be the last day of the term is insufficient to give the instrument the character of a sub-lease. JAMESON *v.* THE LONDON AND CANADIAN LOAN AND AGENCY COMPANY — 435

LEGISLATION—*Revenue—Customs duties—Imported goods—Importation into Canada—Tariff Act—Construction—Retrospective legislation—R. S. C. c. 32—57 & 58 V. c. 33 (D.)—58 & 59 V. c. 23 (D.)*]—By 57 & 58 Vict. ch. 33, sec. 4, duties are to be levied upon certain specified goods "when such goods are imported into Canada." *Held*, reversing the judgment of the Exchequer Court, King and Girouard JJ. dissenting, that the importation as defined by sec. 150 of the Customs Act, (R. S. C. ch. 32) is not complete until the vessel containing the goods arrives at the port at which they are to be landed.—Section 4 of the Tariff Act, 1895, (58 & 59 Vict. ch. 23) provided that "this Act shall be held to have come into force on the 3rd of May in the present year, 1895." It was not assented to until July. *Held*, that goods imported into Canada on May 4th, 1895, were subject to duty under said Act. THE QUEEN *v.* THE CANADA SUGAR REFINING CO. — 395

LEGAL MAXIMS—*Omnia præsumuntur contra spoliatorem* — — — 546

See ARBITRATION.

2——*Le rescindant et le rescissoire sont accumulables* — — — 585

See OPPOSITION.

3——*Usurpateur n'acquiert que pied à pied* — — — — — 546

See ARBITRATION.

4——*Volenti non fit injuria* — 448, 568

See NEGLIGENCE 4, 5.

LIBEL—*Master and servant—Hiring of personal services—Municipal corporation—Appointment of officers—Summary dismissal—Libellous resolution—Statute, interpretation of—Difference in text of English and French versions—52 V. c. 79, s. 79 (Q.)—"A discrétion"—"At pleasure"* — — 539

See MASTER AND SERVANT 1.

LIMITATION OF ACTIONS—*Easement—Necessary way—Implied grant—User—Obstruction of way—Interruption of prescription—Acquiescence—R. S. N. S. (5 ser.) c. 112—R. S. N. S. (4 ser.) c. 100—2 & 3 Wm. IV. (Imp.) c. 71, ss. 2 & 4.*] K. owned lands in the county of Lunenburg, N. S., over which he had for years utilized a roadway for convenient purposes. After his death the defendant became owner of the middle portion, the parcels at either end passing to the plaintiff, who continued to use the old roadway, as a winter

LIMITATION OF ACTIONS—*Continued.*

road, for hauling fuel from his wood-lot to his residence, at the other end of the property. It appeared that though the three parcels fronted upon a public highway, this was the only practical means plaintiff had for the hauling of his winter fuel, owing to a dangerous hill that prevented him getting it off the wood-lot to the highway. There was not any formed road across the lands but merely a track upon the snow, during the winter months, and the way was not used at any other season of the year. This user was enjoyed for over twenty years prior to 1891, when it appeared to have been first disputed, but from that time the way was obstructed from time to time up to March, 1894, when the defendant built a fence across it that was allowed to remain undisturbed and caused a cessation of the actual enjoyment of the way, during the fifteen months immediately preceding the commencement of the action in assertion of the right to the easement by the plaintiff. The statute (R. S. N. S. 5 ser. ch. 112) provides a limitation of twenty years for the acquisition of easements and declares that no act shall be deemed an interruption of actual enjoyment, unless submitted to or acquiesced in for one year after notice thereof and of the person making the same. *Held*, that notwithstanding the customary use of the way as a winter road only, the cessation of user for the year immediately preceding the commencement of the action was a bar to the plaintiff's claim under the statute. *Held* also, that the circumstances under which the roadway had been used did not supply sufficient reason to infer that the way was an easement of necessity appurtenant or appendant to the lands formerly held in unity of possession, which would, without special grant, pass by implication upon the severance of the tenements. KNOCK *v.* KNOCK — — — 664

2——*Seignorial tenure—Charges running with the title — Servitude — Edits et Ordonnances (L. C.)* — — — 147

See SERVITUDE 1.

MAGISTRATE.

See JUSTICE OF THE PEACE.

MAINTENANCE — *Will—Sheriff's deed—Proof of heirship—Rejection of evidence—New trial* — — — — 443

See EVIDENCE 6.

MALICIOUS PROSECUTION— *Probable cause.*] S., being a holder of a promissory note indorsed to him by the payees, sued to recover the amount, but his action was dismissed upon evidence that it had never been signed by the person whose name appeared as maker, nor with his knowledge or consent, but had been signed by his son without his authority. The son's evidence on the trial of the suit was to the effect that he never intended to sign the note, and if he had actually signed it with his father's name, it was because be believed that it was merely a receipt for goods delivered by express. Immediately after the dismissal of the suit, S. wrote to the payees asking them if they would give him any information which would help him in laying a criminal charge in order to force payment of the note and costs. He also applied to the express company's agent, by whom the goods were delivered and the note procured, and was informed that there was a receipt for the goods in the delivery-book, but that the signature was denied and could not be proved. However, without further inquiry, and notwithstanding the warning of a mutual friend against taking criminal proceeding, S. laid information against the son for forgery. The Police Magistrate at Montreal, upon the investigation of the charge, declared it to be unfounded and discharged the prisoner. *Held*, reversing the judgments of both courts below, that, under the circumstances, the prosecution was without reasonable or probable cause, and the plaintiff was entitled to substantial damages. CHARLEBOIS *v.* SURVEYER — 556

MASTER AND SERVANT—*Hiring of personal services—Municipal corporation—Appointment of officers—Summary dismissal—Libellous resolution—Statute, interpretation of—Difference in text of English and French versions—52 V. c. 79, s. 79 (Q.)—"A discrétion"—" At pleasure."*] The charter of the City of Montreal, 1889, (52 Vict. c. 79,) section 79 gives power to the City Council to appoint and remove such officers as it may deem necessary to carry into execution the powers vested in it by the charter, the French version of the Act stating that such powers may be exercised " *à sa discrétion,*" while the English version has the words " *at its pleasure.*" *Held*, that notwithstanding the apparent difference between the two versions of the statute, it must be interpreted as one and the same enactment, and the City Council was thereby given full and unlimited power, in cases where the engagement has been made indefinitely as to duration, to remove officers summarily and without previous notice, upon payment only of the amount of salary accrued to such officer up to the date of such dismissal. DAVIS *v.* CITY OF MONTREAL — — 539

2——*Negligence—Injuries sustained by servant —Responsibility—Contributory negligence —Protection of machinery.*] Where an employee sustains injuries in a factory through coming in contact with machinery, the employer, although he may be in default, cannot be held responsible in damages, unless it is shown that

MASTER AND SERVANT—*Continued.*

the accident by which the injuries were caused was directly due to his neglect. TOOKE *v.* BERGERON — — — — 567

3——*Negligence — Defective machinery — Evidence for jury* — — — — 198

See EVIDENCE 4.

MINES AND MINERALS—*Lease of mining areas—Rental agreement—Payment of rent —Forfeiture—R. S. N. S.* (5 *ser.*) *c.* 7—52 *V. c.* 23 (*N. S.*)] By R. S. N. S. (5 ser.) ch. 7, the lessee of mining areas in Nova Scotia was obliged to perform a certain amount of work thereon each year on pain of forfeiture of his lease, which, however, could only be effected through certain formalities. By an amendment in 1889 (52 Vic. ch. 23), the lessee is permitted to pay in advance an annual rental in lieu of work, and by subsec. (*c*) the owner of any leased area may, by duplicate agreement in writing with the Commissioner of Mines, avail himself of the provisions of such annual payment and "such advance payments shall be construed to commence from the nearest recurring anniversary of the date of the lease." By sec. 7 all leases are to contain the provisions of the Act respecting payment of rental and its refund in certain cases, and by sec. 8 said sec. 7 was to come into force in two months after the passing of the Act. Before the Act of 1889 was passed a lease was issued to E. dated June 10th, 1889, for twenty-one years from May 21st, 1889. On June 1st, 1891, a rental agreement under the amending Act was executed under which E. paid the rent for his mining areas for three years, the last payment being in May, 1893. On May 22nd, 1894, the commissioner declared the lease forfeited for non-payment of rent for the following year, and issued a prospecting license to T. for the same areas. E. tendered the year's rent on June 9th, 1894, and an action was afterwards taken by the Attorney General, on relation of E., to set aside said license as having been illegally and improvidently granted. *Held*, affirming the judgment of the Supreme Court of Nova Scotia in such action, that the phrase "nearest recurring anniversary of the date of the lease" in subsec. (*c*) of sec 1, Act of 1889, is equivalent to "next or next ensuing anniversary," and the lease being dated on June 10th, no rent for 1894 was due on May 22nd of that year at which date the lease was declared forfeited, and E.'s tender on June 9th was in time. *Attorney General* v. *Sheraton* (28 N. S. Rep. 492) approved and followed. *Held*, further, that though the amending Act provided for forfeiture without prior formalities of a lease in case of non-payment of rent, such provision did not apply to leases existing when the Act was passed in cases where the holders executed the agreement to pay rent thereunder in lieu of work. The for-

MINES AND MINERALS—*Continued.*

feiture of E.'s lease was, therefore, void for want of the formalities prescribed by the original Act. TEMPLE *v.* ATTORNEY GENERAL OF NOVA SCOTIA — — — — — — 355

MORTGAGE—*Leasehold premises—Terms of mortgage—Assignment or sub-lease.*] A lease of real estate for twenty-one years with a covenant for a like term or terms was mortgaged by the lessee. The mortgage after reciting the terms of the lease proceeded to convey to the mortgagee the indenture and the benefit of all covenants and agreements therein, the leased property by description and "all and singular the engines and boilers which now are or shall at any time hereafter be brought and placed upon or affixed to the said premises, all of which said engines and boilers are hereby declared to be and form part of the said leasehold premises hereby granted and mortgaged or intended so to be and form part of the term hereby granted and mortgaged;" the *habendum* of the mortgage was: "To have and to hold unto the said mortgagees, their successors and assigns, for the residue yet to come and unexpired of the term of years created by the said lease less one day thereof and all renewals, etc." *Held*, reversing the judgment of the court of appeal, that the premises of the said mortgage above referred to contained an express assignment of the whole term, and the *habendum*, if intended to reserve a portion to the mortgagor, was repugnant to the said premises and therefore void; that the words "leasehold premises" was quite sufficient to carry the whole term, the word "premises" not meaning lands or property but referring to the recital which described the lease as one for a term of twenty-one years. *Held*, further, that the *habendum* did not reserve a reversion to the mortgagor; that the reversion of a day generally without stating it to be the last day of the term is insufficient to give the instrument the character of a sub-lease. JAMESON *v.* THE LONDON AND CANADIAN LOAN AND AGENCY COMPANY — 435

And see PRIVILEGES AND HYPOTHECS.

MOVEABLES—*Vendor and purchaser—Unpaid vendor—Conditional sale—Suspensive condition—Moveables incorporated with freehold—Immoveables by destination — Hypothecary charges—Arts.* 375 *et seq. C. C.*] A suspensive condition in an agreement for the sale of moveables, whereby, until the whole of the price shall have been paid, the property in the thing sold is reserved to the vendor is a valid condition.—In order to give moveable property the character of immoveables by destination, it is necessary that the person incorporating the moveables with the immoveable should be, at the time, owner both of the moveables and of the real property with which they are so incor-

MOVEABLES—*Continued.*

porated. *Lainé* v. *Béland* (26 Can. S. C. R. 419), and *Filiatrault* v. *Goldie* (Q. R. 2 Q. B. 368), distinguished. Decision of the Court of Queen's Bench affirmed, Girouard J. dissenting. La Banque d'Hochelaga *v.* The Waterous Engine Works Co. — — 406

MUNICIPAL CORPORATION — *Negligence—Snow and ice on sidewalks—By-law—Construction of statute—55 V. c. 42, s. 531—57 V. c. 50, s. 13—Finding of jury—Gross negligence.*] A by-law of the City of Kingston requires frontagers to remove snow from the sidewalks. The effect of its being complied with was to allow the snow to remain on the crossings which therefore became higher than the sidewalks, and when pressed down by traffic an incline more or less steep was formed at the ends of the crossings. A young lady slipped and fell on one of these inclines, and being severely injured brought an action of damages against the city and obtained a verdict. The Municipal Act of Ontario makes a corporation, if guilty of gross negligence, liable for accidents resulting from snow and ice on sidewalks; notice of action in such case must be given, but may be dispensed with on the trial if the court is of opinion that there was reasonable excuse for the want of it, and that the corporation has not been prejudiced in its defence. *Held*, affirming the decision of the Court of Appeal, Gwynne J. dissenting, that there was sufficient evidence to justify the jury in finding that the corporation had not fulfilled its statutory obligation to keep the streets and sidewalks in repair; *Cornwall* v. *Derochie* (24 Can. S. C. R. 301) followed; that it was no excuse that the difference in level between the sidewalk and crossing was due to observance of the by-law; that a crossing may be regarded as part of the adjoining sidewalk for the purpose of the Act; that "gross negligence" in the Act means very great negligence, of which the jury found the corporation guilty; and that an appellate court would not interfere with the discretion of the trial judge in dispensing with notice of action. The City of Kingston *v.* Drennan — — — — 46

2——*Appeal—Jurisdiction—Expropriation of lands—Assessments—Local improvements—Future rights—Title to lands and tenements—R. S. C c. 135, s. 29 (b); 56 V. c. 29, s. 1 (D.)*] A by-law was passed for the widening of a portion of a street up to a certain homologated line, and for the necessary expropriations therefor. Assessments for the expropriations for certain years having been made whereby proprietors of a part of the street were relieved from contributing any proportion to the cost, thereby increasing the burden of assessment on the properties actually assessed, the owners of

MUNICIPAL CORPORATION—*Con.*

these properties brought an action to set aside the assessments. The Court of Queen's Bench affirmed a judgment dismissing the action. On an application for leave to appeal: *Held*, that as the effect of the judgment sought to be appealed from would be to increase the burden of assessment not only for the expropriations then made, but also for expropriations which would have to be made in the future, the judgment was one from which an appeal would lie, the matter in controversy coming within the meaning of the words "and other matters or things where the rights in future might be bound," contained in subsec. (*b*) of sec. 29 Supreme and Exchequer Courts Act, as amended by 56 Vict. ch. 29, sec. 1. Stevenson *v.* The City of Montreal — — — — 187

3——*Waterworks—Extension of works—Repairs—By-law—Resolution—Agreement in writing—Injunction—Highways and streets—R. S. Q. art. 4485—Art. 1033a C. C. P.*] By a resolution of the Council of the Town of Chicoutimi, on 9th October, 1890, based upon an application previously made by him, L. obtained permission to construct waterworks in the town and lay the necessary pipes in the streets wherever he thought proper, taking his water supply from the River Chicoutimi at whatever point might be convenient for his purposes, upon condition that the works should be commenced within a certain time and completed in the year 1892. He constructed a system of waterworks and had it in operation within the time prescribed, but the system proving insufficient a company was formed in 1895 under the provisions of R. S. Q., art. 4485, and given authority by by-law to furnish a proper water supply to the town, whereupon L. attempted to perfect his system, to alter the position of the pipes, to construct a reservoir and to make new excavations in the streets for these purposes without receiving any further authority from the council. *Held*, reversing the judgment appealed from, Gwynne J. dissenting, that these were not merely necessary repairs but new works, actually part of the system required to be completed during the year 1892 and which after that date could not be proceeded with except upon further permission obtained in the usual manner from the council of the town. *Held*, further, that the resolution and the application upon which it was founded constituted a "contract in writing" and a "written agreement" within the meaning of art. 1033*a* of the Code of Civil Procedure of Lower Canada, and violation of its conditions was a sufficient ground for injunction to restrain the construction of the new works. La Ville de Chicoutimi *v.* Légaré — — — — — — 329

4——*Assessment and taxation—Exemptions—Real property—Chattels—Fixtures—Gas pipes*

MUNICIPAL CORPORATION—*Con.*

—*Highway—Title to portion—Legislative grant of soil*—11 *V. c.* 14 (*Can.*)—55 *V. c.* 48 (*Ont.*)—"*Ontario Assessment Act*, 1892."] Gas pipes which are the property of a private corporation laid under the highways of a city are real estate within the meaning of the "Ontario Assessment Act of 1892" and liable to assessment as such, as they do not fall within the exemptions mentioned in the sixth section of that Act. The enactment effected by the first and thirteenth clauses of the company's Act of incorporation (11 Vict. ch. 14), operated as a legislative grant to the company of so much of the land of the streets, squares and public places of the city as might be found necessary to be taken and held for the purposes of the company and for the convenient use of the gas works, and when the openings where pipes may be laid are made at the place designated by the city surveyor, as provided in said charter, and they are placed there, the soil they occupy is land taken and held by the company under the provisions of the said Act of incorporation. The proper method of assessment of the pipes so laid and fixed in the soil of the streets, squares and public places in a city ought to be separately in the respective wards of the city in which they may be actually laid, as in the case of real estate. THE CONSUMERS GAS CO. *v.* CITY OF TORONTO — — — — — 453

5——*Drainage — Assessment — Inter-municipal obligations as to initiation and contributions—By-law—Ontario Drainage Act of* 1873—36 *V. c.* 38 (*O.*)—36 *V. c.* 39 (*O.*)—*R. S. O.* (1887) *c.* 184—*Ontario Consolidated Municipal Act of* 1892—55 *V. c.* 42 (*O.*)] The provision of the Ontario Municipal Act (55 V. c. 42, s. 590), that if a drain constructed in one municipality is used as an outlet or will provide an outlet for the water of lands of another the lands in the latter so benefited may be assessed for their proportion of the cost applies only to drains properly so called, and does not include original watercourses which have been deepened or enlarged. If a municipality constructing such a drain has passed a by-law purporting to assess lands in an adjoining municipality for contribution to the cost a person whose lands might appear to be affected thereby, or by any by-law of the adjoining municipality proposing to levy contributions toward the cost of such works, would be entitled to have such other municipality restrained from passing a contributory by-law, or taking any steps towards that end, by an action brought before the passing of such contributory by-law. BROUGHTON *v.* GREY AND ELMA — — — — — — 495

6——*Master and servant — Hiring of personal services — Appointment of officers—Summary dismissal—Libellous resolution—Statute, construction of—Difference in text of English and French versions*—52 *V. c.* 79, *s.* 79 (*Q.*) —"*A discrétion*"—"*At pleasure.*"] The charter of the City of Montreal, 1889 (52 Vict. ch. 79), section 79 gives power to the City Council to appoint and remove such officers as it may deem necessary to carry into execution the powers vested in it by the charter, the French version of the Act stating that such powers may be exercised "*à sa discrétion*," while the English version has the words "*at its pleasure.*" *Held*, that notwithstanding the apparent difference between the two versions of the statute, it must be interpreted as one and the same enactment, and the City Council was thereby given full and unlimited power, in cases where the engagement has been made indefinitely as to duration, to remove officers summarily and without previous notice, upon payment only of the amount of salary accrued to such officer up to the date of such dismissal. DAVIS *v.* CITY OF MONTREAL — — 539

7——*Highway—Private way—Widening streets—Special assessments—Res judicata.*] STEVENSON *v.* CITY OF MONTREAL *et al.* — — 593

8——*Municipal regulations—Edits et Ordonnances, L. C.* — — — — 147

See SERVITUDE. 1

9——*By-law—Widening streets—Expropriation—Title to lands* — — — — 579

See APPEAL 11.

NEGLIGENCE—*Municipal corporation—Snow and ice on sidewalks—By-law—Construction of statute*—55 *V. c.* 42, *s.* 531—57 *V. c.* 50, *s.* 13—*Finding of jury—Gross negligence.*] A by-law of the City of Kingston requires frontagers to remove snow from the sidewalks. The effect of its being complied with was to allow the snow to remain on the crossings which therefore became higher than the sidewalks, and when pressed down by traffic an incline more or less steep was formed at the ends of the crossings. A young lady slipped and fell on one of these inclines, and being severely injured brought an action of damages against the city and obtained a verdict. The Municipal Act of Ontario makes a corporation, if guilty of gross negligence, liable for accidents resulting from snow and ice on sidewalks; notice of action in such case must be given, but may be dispensed with on the trial if the court is of opinion that there was reasonable excuse for the want of it, and that the corporation has not been prejudiced in its defence. *Held*, affirming the decision of the Court of Appeal, Gwynne J. dissenting, that there was sufficient evidence to justify the jury in finding that the corporation had not fulfilled its statutory obligation to keep the

NEGLIGENCE—*Continued.*

streets and sidewalks in repair; *Cornwall* v. *Derochie* (24 Can. S. C. R. 301) followed; that it was no excuse that the difference in level between the sidewalk and crossing was due to observance of the by-law; that a crossing may be regarded as part of the adjoining sidewalk for the purpose of the Act; that "gross negligence" in the Act means very great negligence, of which the jury found the corporation guilty; and that an appellate court would not interfere with the discretion of the trial judge in dispensing with the notice of action. THE CITY OF KINGSTON *v.* DRENNAN — — — **46**

2——*Landlord and tenant—Loss by fire—Cause of fire—Civil responsibility—Legal presumption—Rebuttal of—Onus of proof—Hazardous occupation — Arts.* 1053, 1064, 1071, 1626, 1627, 1629 *C. C.*] To rebut the presumption created by article 1629 of the Civil Code of Lower Canada it is not necessary for the lessee to prove the exact or probable origin of the fire or that it was due to unavoidable accident or irresistible force. It is sufficient for him to prove that he has used the premises leased as a prudent administrator (*en bon père de famille*), and that the fire occurred without any fault that could be attributed to him or to persons for whose acts he should be held responsible. The judgment of the Court of Queen's Bench for Lower Canada affirmed, Strong C. J. dissenting. MURPHY *v.* LABBÉ — — **126**

3——*Defective machinery—Evidence for jury.*] T. was employed as a weaver in a cotton mill and was injured while assisting a less experienced hand, by the shuttle flying out of the loom at which the latter worked, and striking her on the head. The mill contained some 400 looms, and for every forty-six there was a man, called the "loom fixer," whose duty it was to keep them in proper repair. The evidence showed that the accident was caused by a bolt breaking by the shuttle coming in contact with it, and as this bolt served as a guard to the shuttle the latter could not remain in the loom. The jury found that the breaking of the bolt caused the accident, and that the "loom fixer" was guilty of negligence in not having examined it within a reasonable time before it broke. T. obtained a verdict, which was affirmed by the Court of Appeal. *Held*, Gwynne J. dissenting, that the "loom fixer" had not performed his duty properly; that the evidence as to negligence could not have been withdrawn from the jury; and that, as there was evidence to justify their finding, the verdict should stand. Per Gwynne J., that the finding of the jury that the negligence consisted in the omission to examine the bolt was not satisfactory, as there was nothing to show that such examination could have prevented the accident, and there should be a new

NEGLIGENCE—*Continued.*

trial. THE CANADIAN COLOURED COTTON MILLS *v.* TALBOT — — — — **198**

4——*Negligence—Unsafe premises—Risk voluntarily incurred.*] An employee of a company which had contracted to deliver coal at a school building went voluntarily to inspect the place where the coal was to be put on the evening preceding the day upon which arrangements had been made for the delivery, and was accidentally injured by falling into a furnace pit in the basement on his way to the coal-bins. He did not apply to the School Board or the caretaker in charge of the premises before making his visit. *Held*, that in thus voluntarily visiting the premises for his own purposes and without notice to the occupants, he assumed all risks of danger from the condition of the premises and could not recover damages. ROGERS *v.* THE TORONTO PUBLIC SCHOOL BOARD — — **448**

5——*Master and servant—Injuries sustained by servant—Responsibility—Contributory negligence—Protection of machinery.*] Where an employee sustains injuries in a factory through coming in contact with machinery, the employer, although he may be in default, cannot be held responsible in damages, unless it is shown that the accident by which the injuries were caused was directly due to his neglect. TOOKE *v.* BERGERON — — — — — **567**

6——*Appeal—Questions of fact—Second appellate court* — — — — **537**

See APPEAL 10.

NOTICE—*Negligence—Unsafe premises—Risk voluntarily incurred* — — — **448**

See NEGLIGENCE 4.

NULLITY—*Assignment—Prête-nom—Notice—Registration—Action to annul—Parties in interest.*] The nullity of a deed of assignment can only be invoked by proceedings to which all persons interested in the deed have been made parties. GUERTIN *v.* GOSSELIN — **514**

2——*Sale—Donation in form of—Gifts in contemplation of death—Mortal illness of donor—Presumption of nullity—Validating circumstances—Dation en paiement—Arts.* 762, 989 *C. C.*] During her last illness and a short time before her death, B. granted certain lands to V. by an instrument purporting to be a deed of sale for a price therein stated, but in reality the transaction was intended as a settlement of arrears of salary due by B. to the grantee and the consideration acknowledged by the deed was never paid. *Held*, reversing the decision of the Court of Queen's Bench, that the deed could not be set aside and annulled as void, under the provisions of article 762 of the Civil

NULLITY—*Continued.*

Code, as the circumstances tended to show that the transaction was actually for good consideration (*dation en paiement,*) and consequently legal and valid. Valade v. Lalonde — — — — — — — — 551

3——*Evidence—Estoppel—C. C. arts.* 311 *and* 1243 — — — — — — 363

See Admissions.

4——*Assignment for benefit of creditors—Preferences—Moneys paid under voidable assignments—Liability of assignee* — — 589

See Assignment 1.

OPPOSITION—*Action—Service of—Judgment by default—Opposition to judgment—Reasons of—"Rescissoire" joined with "Rescindant"—Arts.* 16, 89 *et seq.*, 483, 489 *C. C. P.—False return of service.*] No entry of default for non-appearance can be made, nor *ex parte* judgment rendered, against a defendant who has not been duly served with the writ of summons, although the papers in the action may have actually reached him through a person with whom they were left by the bailiff.—The provisions of articles 483 and following of the Code of Civil Procedure of Lower Canada (respecting oppositions to judgment) relate only to cases where a defendant is legally in default to appear or to plead and have no application to an *ex parte* judgment rendered, for default of appearance, in an action which has not been duly served upon the defendant, and the defendant may at any time seek relief against any such judgment by opposition, and have it set aside notwithstanding that more than a year and a day may have elapsed from the rendering of the same, and without alleging or establishing that he has a good defence to the action on the merits.—An opposition asking to have a judgment set aside, on the ground that the defendant has not been duly served with the action, which also alleges the defendant's grounds of defence upon the merits, should not be dismissed merely for the reason that the *rescissoire* had thus been improperly joined with the *rescindant.* Turcotte v. Dansereau — — — — 583

2——*Appeal — Collocation and distribution—Hypothecs—Arts.* 20, 144 *and* 761 *C. C. P.—Assignment—Notice—Registration—Prête-nom—Action to annul deed—Parties in interest—Incidental proceedings* — — — 514

See Judgment of Distribution.

PARTIES—*Action for account—Provisional possession — Executors*] Cream v. Davidson — — — — — 362

2—— *Assignment — Hypothecs — Prête-nom—Notice—Action to annul deed* — — 514

See Nullity 1.

PARTITION—*Will—Construction of—Donation—Substitution—Partition, per stirpes or per capita—Usufruct—Alimentary allowance—Accretion between legatees* — — — 347

See Substitution.

PAYMENT—*Mines and minerals—Lease of mining areas—Rental agreement—R. S. N. S.* (5 *ser.*) *c.* 7—52 *V. c.* 23 (*N. S.*) — — 355

See Lease 1.

2——*Sale — Donation in form of — Mortal illness of donor—Nullity—Dation en paiement—Arts.* 762, 989 *C. C.* — — 551

See Sale 5.

PLEDGE—*Title to land—Sale—Right of redemption—Effect as to third parties—Pledge—Delivery and possession of thing sold.*] Real estate was conveyed to S. as security for money advanced by him to the vendor, the deed of sale containing a provision that the vendor should have the right to a re-conveyance on paying to S. the amount of the purchase money, with interest and expenses disbursed, within a certain time. S. subsequently advanced the vendor a further sum and extended the time for redemption. The right of redemption was not exercised by the vendor within the time limited and S. took possession of the property, which was subsequently seized under an execution issued by V. a judgment creditor of the vendor. S. then filed an opposition claiming the property under the deed. *Held,* reversing the judgment of the Court of Queen's Bench, that as it was shown that the parties were acting in good faith, and that they intended the contract to be, as it purported to be, *une vente à réméré*, it was valid as such, not only between themselves but also as respected third persons. Salvas v. Vassal — — 68

POSSESSION—*Action on disturbance—Possessory action—"Possession annale"—Arts.* 946 *and* 948 *C. C. P.—Nature of possession of unenclosed vacant lands — Boundary marks — Delivery of possession.*] In 1890, G. purchased a lot of land 25 feet wide, and the vendor pointed it out to him, on the ground, and showed him the pickets marking its width and depth. The lot remained vacant and unenclosed up to the time of the disturbance, and was assessed as a 25 foot lot to G., who paid all municipal taxes and rates thereon. In 1895 the adjoining lot, which was also vacant and unenclosed, was sold to another person who commenced laying foundations for a building, and, in doing so, encroached by two feet on the width of the lot so purchased by G., who brought a possessory action within a couple of months from the date of the disturbance. *Held,* that the *possession annale*, required by article 946 of the Code of Civil Procedure, was suffi-

POSSESSION—*Continued.*

ciently established to entitle the plaintiff to maintain his action. Gauthier *v.* Masson—575

2——*Deed—Construction of—Ambiguous description—Title to lands—Conduct of parties—Presumptions in favour of occupant* — 102

See Evidence 2.

3——*Testamentary succession—Balance due by tutor—Executors—Account, action for—Action for provisional possession—Parties to action.* Cream and another *v.* Davidson — 362

PRACTICE—*Appeal—Collocation and distribution—Art.* 761 *C. C. P.—Hypothecary claims — Assignment — Notice — Registration — Prête-nom—Arts.* 20 and 144 *C. C. P.—Action to annul deed—Parties in interest—Incidental proceedings.*] The appeal from judgments of distribution under article 761 of the Code of Civil Procedure is not restricted to the parties to the suit but extends to every person having an interest in the distribution of the moneys levied under the execution. The provision of article 144 of the Code of Civil Procedure that every fact of which the existence or truth is not expressly denied or declared to be unknown by the pleadings filed shall be held to be admitted, applies to incidental proceedings upon an appeal in the Court of Queen's Bench. The nullity of a deed of assignment can only be invoked by proceedings to which all persons interested in the deed have been made parties. Guertin *v.* Gosselin — — — 514

2——*Action—Service of—Judgment by default — Opposition to judgment — Reasons of — "Rescissoire" joined with "Rescindant"—Arts.* 16, 89 *et seq.*, 483, 489, *C. C. P.—False return of service.*] No entry of default for non-appearance can be made, nor *ex parte* judgment rendered, against a defendant who has not been duly served with the writ of summons, although the papers in the action may have actually reached him through a person with whom they were left by the bailiff.—The provisions of articles 483 and following of the Code of Civil Procedure of Lower Canada relate only to cases where a defendant is legally in default to appear or to plead and have no application to an *ex parte* judgment rendered, for default of appearance, in an action which has not been duly served upon the defendant, and the defendant may at any time seek relief against any such judgment and have it set aside, notwithstanding that more than a year and a day may have elapsed from the rendering of the same, and without alleging or establishing that he has a good defence to the action on the merits.—An opposition asking to have a judgment set aside, on the ground that the defendant has not been duly served with the action, which also alleges

PRACTICE—*Continued.*

the defendant's grounds of defence upon the merits, should not be dismissed merely for the reason that the *rescissoire* has thus been improperly joined with the *rescindant.* Turcotte *v.* Dansereau — — — — — — 583

3—— *Preliminary objections—Service of election petition — Bailiff's return — Cross-examination* — — — — — — — — 232

See Election Law 5.

4——*Questions of practice—Appeal—Duty of appellate court* — — — — 309

See Appeal 5.

5——*Appeal—Jurisdiction—Discretionary order —Default to plead—R. S. C. c.* 135, *ss.* 24 (*a*) *and* 27—*R. S. O. c.* 44, *s.* 65—*Ontario Judicature Act, rule* 796 — — — — — 654

See Appeal 14.

PREMIUM NOTE — *Accident insurance — Renewal of policy—Payment of premium—Promissory note—Instructions to agent—Agent's authority—Finding of jury* — — — 374

See Insurance, Accident.

PRESCRIPTION — *Interruption of — Necessary way—Implied grant—User—Obstruction of way—Acquiescence — R. S. N. S.* (5 *ser.*) *c.* 112 — — — — — 664

See Limitation of Actions 1.

PRESUMPTION—*Sale—Donation in form of —Gifts in contemplation of death—Mortal illness of donor—Presumption of nullity—Validating circumstances—Dation en paiement—Arts.* 762, 989 *C. C.* — — — 551

See Nullity 2.

And see Evidence.

PRÊTE-NOM—*Assignment—Action to annul —Parties in interest* — — — — 514

See Nullity 1.

2——*Building societies—Participating borrowers —Shareholders—C. S. L. C. c* 68—42 *&* 43 *V.* (*Q.*) *c.* 32—*Liquidation—Expiration of classes—Assessments on loans—Notice of—Interest and bonus—Usury laws—C. S. C. c.* 58—*Art.* 1785 *C. C.—Administrators and trustees—Sales to—Art.* 1484 *C. C.* — — — 522

See Building Society.

PRINCIPAL AND AGENT—*Accident insurance — Renewal of policy — Payment of premium — Promissory note — Instructions to agent—Agent's authority—Finding of jury.*] A policy issued by the Manufacturers' Acc. Ins. Co. in favour of P. contained a provision that it might be renewed from year to year on payment of the annual premium. One condition of the

PRINCIPAL AND AGENT—*Continued.*

policy was that it was not to take effect unless the premium was paid prior to any accident on account of which a claim should be made and another that a renewal receipt, to be valid, must be printed in office form, signed by the managing director and countersigned by the agent. P. having been killed in a railway accident payment on the policy was refused on the ground that it had expired and not been renewed. In an action by the widow for the insurance it was shown that the local agent of the company had requested P. to renew and had received from him a promissory note for $15 (the premium being $16) which the father of the assured swore the agent agreed to take for the balance of the premium after being paid the remainder in cash. He also swore that the agent gave P. a paper purporting to be a receipt and gave secondary evidence of its contents. The agent's evidence was that while the note was taken for a portion of the premium it was agreed between him and P. that there was to be no insurance until it was paid, and that he gave no renewal receipt and was paid no cash. Some four years before this the said agent and all agents of the company had received instructions from the head office not to take notes for premiums as had been the practice theretofore. The note was never paid but remained in possession of the agent, the company knowing nothing of it. The jury gave no general verdict but found in answer to questions that a sum was paid in cash and the note given and accepted as payment of the balance of the premium, and that the paper given to P. by the agent, as sworn to by P.'s father, was the ordinary renewal receipt of the company. Upon these findings judgment was entered against the company. *Held*, affirming the judgment of the Supreme Court of Nova Scotia, Gwynne J. dissenting, that the fair conclusion from the evidence was, that as the agent had been employed to complete the contract and had been entrusted with the renewal receipt P. might fairly expect that he was authorized to take a premium note having no knowledge of any limitation of his authority, and the policy not forbidding it; and that notwithstanding there was no general verdict, and the specific question had not been passed upon by the jury, such inference could be drawn by the court according to the practice in Nova Scotia. *Held*, further, that there was evidence upon which reasonable men might find as the jury did; that an inference might fairly be drawn from the facts that the transaction amounted to payment of the premium and it was to be assumed that the act was within the scope of the agent's employment; the fact that the agent was disobeying instructions did not prevent the inference though it might be considered in determining whether or not such inference should be drawn; and that a new trial should not be granted to enable the company to corroborate the testimony of the agent that he had no renewal receipt in his possession except one produced at the trial as the company might have supposed that the plaintiff would seek to show that such receipt had been obtained and were not taken by surprise. THE MANUFACTURERS ACCIDENT INSURANCE COMPANY *v.* PUDSEY. — — 374

2——*Building society—Liquidation—Administrators and trustees—Sales to—Prête-nom—Art.* 1484 *C. C.* — — — 522

Sss TRUSTS 2.

PRINCIPAL AND SURETY—*Suretyship—Recourse of sureties inter se—Ratable contribution—Action of warranty—Banking—Discharge of co-surety—Reserve of recourse—Trust funds in possession of a surety—Arts.* 1156, 1959 *C. C.*] Where one of two sureties has moneys in his hands to be applied towards payment of the creditor, he may be compelled by his co-surety to pay such moneys to the creditor or to the co-surety himself if the creditor has already been paid by him.—Where a creditor has released one of several sureties with a reservation of his recourse against the others and a stipulation against warranty as to claims they might have against the surety so released by reason of the exercise of such recourse reserved, the creditor has not thereby rendered himself liable in an action of warranty by the other sureties. MACDONALD *v.* WHITFIELD. WHITFIELD *v.* THE MERCHANTS' BANK OF CANADA — — — — 94

2——*Action—Suretyship—Promissory note—Qualified indorsement.*] D. indorsed two promissory notes, *pour aval*, at the same time marking them with the words "not negotiable and given as security." The notes were intended as security to the firm of A. & R. for advances to a third person on the publication of certain guide-books which were to be left in the hands of the firm as further security, the proceeds of sales to be applied towards reimbursement of the advances. It was also agreed that payment of the notes was not to be required while the books remained in the possession of the firm. The notes were protested for non-payment and, A. having died, R. as surviving partner of the firm and vested with all rights in the notes, sued the maker and indorser jointly and severally for the full amount. At the time of the action some of the books were still in the possession of R. and it appeared that he had not rendered the indorser any statement of the financial situation between the principal debtor and the firm. *Held*, that the action was not based upon the real contract between the parties and that the plaintiff was not, under the circumstances,

PRINCIPAL AND SURETY—*Continued.*

entitled to recover in an action upon the notes. *Held*, further, per Sedgewick J., that neither the payee of a promissory note nor the drawer of a bill of exchange can maintain an action against an indorser, where the action is founded upon the instrument itself. ROBERTSON *v.* DAVIS — — — — 571

PRIVILEGES AND HYPOTHECS—*Sale by sheriff—Folle enchère—Resale for false bidding*—690 *et seq. C. C. P.—Questions of practice—Appeal—Art.* 688 *C. C. P.—Sheriff's deed—Registration of—Absolute nullity—Rectification of slight errors in judgment—Duty of appellate court* — — — — 309

See APPEAL 5.
" SALE 3.

2——*Unpaid vendor—Conditional sale—Moveables incorporated with the freehold—Immoveables by destination—C. C. arts.* 375 *et seq.*—406

See MOVEABLES.

3——*Collocation and distribution—Art.* 761 *C. C. P.—Hypothecary claims—Assignment—Notice—Prête-nom—Arts.* 20 *and* 144 *C. C. P.—Nullity of deed—Incidental proceedings—Appeal—Parties* — — — — — 514

See JUDGMENT OF DISTRIBUTION.

PROBABLE CAUSE.

See MALICIOUS PROSECUTION.

PROCEDURE.

See CIVIL CODE OF PROCEDURE.
" PRACTICE.

PROMISSORY NOTE—*Action—Suretyship—Qualified indorsement.*] D. indorsed two promissory notes, *pour aval*, at the same time marking them with the words "not negotiable and given as security." The notes were intended as security to the firm of A. & R. for advances to a third person on the publication of certain guide-books which were to be left in the hands of the firm as further security, the proceeds of sales to be applied towards reimbursement of the advances. It was also agreed that payment of the notes was not to be required while the books remained in the possession of the firm. The notes were protested for non-payment and, A. having died, R. as surviving partner of the firm and vested with all rights in the notes, sued the maker and indorser jointly and severally for the full amount. At the time of the action, some of the books were still in the possession of R. and it appeared that he had not rendered the indorser any statement of the financial situation between the principal debtor and the firm. *Held*, that the action was not based upon the real

PROMISSORY NOTE—*Continued.*

contract between the parties and that the plaintiff was not, under the circumstances, entitled to recover in an action upon the notes. *Held*, further, per Sedgewick J., that neither the payee of a promissory note nor the drawer of a bill of exchange can maintain an action against an indorser, where the action is founded upon the instrument itself. ROBERTSON *v.* DAVIS — — — — — — — 571

REAL PROPERTY—*Gas pipes—Fixtures—Assessment—Exemption from taxes—Title to portion of highway* — — — 453

See ASSESSMENT AND TAXES 1.
And see IMMOVEABLE PROPERTY.

REDEMPTION (DROIT DE RÉMÉRÉ)—*Title to land—Sale—Right of redemption—Effect as to third parties—Pledge—Delivery and possession of thing sold* — — — 68

See PLEDGE.

REFEREE—*Agreement respecting lands—Boundaries—Referee's decision—Bornage—Arbitration—Arts.* 941-945 *and* 1341 *et seq. C. C. P.* — — — — — — 545

See ARBITRATION.

REGISTRY LAWS—*Sale by sheriff—Sheriff's deed—Registration of—Absolute nullity* — 309

See APPEAL 5.
" SALE 3.

REMAINDER—*Statute, construction of—Estates tail, acts abolishing—R. S. N. S.* (1 *ser.*) *c.* 112—*R. S. N. S.* (2 *ser.*) *c.* 112—*R. S. N. S.* (3 *ser.*) *c.* 111—23 *V. c.* 2 (*N. S.*)—*Will—Construction of—Executory devise over—"Dying without issue"—"Lawful heirs"—"Heirs of the body"—Estate in remainder expectant—Statutory title—R. S. N. S.* (2 *ser.*) *c.* 114, *ss.* 23 *and* 24—*Title by will—Conveyance by tenant in tail* — — — — — — 594

See WILL 4.

REPRESENTATION—*By heirs—Partition per stirpes or per capita—Usufruct—Accretion between heirs* — — — — 347

See SUBSTITUTION.

REQUÊTE CIVILE—*Petition in revocation of judgment—Concealment of evidence—Jurisdiction—C. P. Q. art.* 1177—*R. S. C. c.* 135, *s.* 67.] Where judgment on a case in appeal has been rendered by the Supreme Court of Canada and certified to the proper officer of the court of original jurisdiction, the Supreme Court has no jurisdiction to entertain a petition (*requête civile*) for revocation of its judgment on the ground that the opposite party succeeded by the fraudulent concealment of evidence. DUROCHER *v.* DUROCHER — — 634

RESALE FOR FALSE BIDDING—*Sheriff's deed—Registration of absolute nullity—Arts.* 688 & 690 *et seq. C. C. P.* — — 309

See Appeal 5.
" Sale 3.

REVENUE LAWS — *Revenue — Customs duties — Imported goods — Importation into Canada—Tariff Act—Construction—Retrospective legislation—R. S. C. c.* 32—56 & 57 *V. c.* 33 (*D.*)—58 & 59 *V. c.* 23 (*D.*) — — 395

See Legislation.
" Statute, Construction of, 3.

REVERSION—*Mortgage—Leasehold premises—Terms of mortgage—Assignment or sub-lease* — — — — — — — 435

See Lease 2.

REVIEW, COURT OF—*Appeal from Court of Review—Appeal to Privy Council—Appealable amount*—54 & 55 *V.* (*D.*) *c.* 25, *s.* 3. *s.s.* 3 & 4—*C. S. L. C. c.* 77, *s.* 25—*Arts.* 1115, 1178 *C. C. P.*—*R. S. Q. art.* 2311 — 316

See Statute, Construction of, 1.

SALE—*Contract—Sale by sample—Objections to invoice — Reasonable time — Acquiescence — Evidence.*] If a merchant receives an invoice and retains it for a considerable time without any objection, there is a presumption against him that the price stated in the invoice was that agreed upon. (Judgment of the Court of Queen's Bench, that the evidence was sufficient to rebut the presumption, reversed, Gwynne J. dissenting and holding that the appeal depended on mere matters of fact as to which an appellate court should not interfere.) Kearney *v.* Letellier — — — — 1

2——*Title to land—Right of redemption—Effect as to third parties—Pledge—Delivery and possession of thing sold.*] Real estate was conveyed to S. as security for money advanced by him to the vendor, the deed of sale containing a provision that the vendor should have the right to a re-conveyance on paying to S. the amount of the purchase money, with interest and expenses disbursed, within a certain time. S. subsequently advanced the vendor a further sum and extended the time for redemption. The right of redemption was not exercised by the vendor within the time limited and S. took possession of the property, which was subsequently seized under an execution issued by V. a judgment creditor of the vendor. S. then filed an opposition claiming the property under the deed. *Held*, reversing the judgment of the Court of Queen's Bench, that as it was shown that the parties were acting in good faith, and that they intended the contract to be, as it

SALE—*Continued.*

purported to be, *une vente à réméré*, it was valid as such, not only between themselves but also as respected third persons. Salvas *v.* Vassal — — — 68

3——*Sale by sheriff—Folle enchère—Resale for false bidding—Arts.* 690 *et seq. C. C. P.—Art.* 688 *C. C. P.—Privileges and hypothecs—Sheriff's deed—Registration of—Absolute nullity.*] Part of lands seized by the sheriff had been withdrawn before sale but on proceedings for *folle enchère* it was ordered that the property described in the *procès verbal* of seizure should be resold, no reference being made to the part withdrawn. On appeal, the Court of Queen's Bench reversed the order on the ground that it directed a resale of property which had not been sold and further because an apparently regular sheriff's deed of the lands actually sold had been duly registered, and had not been annulled by the order for resale, or prior to the proceedings for *folle enchère*. *Held*, that the sheriff's deed having been issued improperly and without authority should be treated as an absolute nullity notwithstanding that it had been registered and appeared upon its face to have been regularly issued, and it was not necessary to have it annulled before taking proceedings for *folle enchère*. Lambe *v.* Armstrong — 309

4——*Vendor and purchaser—Unpaid vendor—Conditional sale—Suspensive condition—Moveables incorporated with freehold—Immoveables by destination—Hypothecary charges—Arts.* 375 *et seq. C. C.*] A suspensive condition in an agreement for the sale of moveables, whereby, until the whole of the price shall have been paid, the property in the thing sold is reserved to the vendor is a valid condition. La Banque d'Hochelaga *v.* The Waterous Engine Works Co. — — — — 406

5——*Donation in form of sale—Gifts in contemplation of death—Mortal illness of donor—Presumption of nullity—Validating circumstances—Dation en paiement—Arts.* 762, 989 *C. C.*] During her last illness and a short time before her death, B. granted certain lands to V. by an instrument purporting to be a deed of sale for a price therein stated, but in reality the transaction was intended as a settlement of arrears of salary due by B. to the grantee and the consideration acknowledged by the deed was never paid. *Held*, reversing the decision of the Court of Queen's Bench, that the deed could not be set aside and annulled as void, under the provisions of article 762 of the Civil Code, as the circumstances tended to show that the transaction was actually for good consideration (*dation en paiement*,) and consequently legal and valid. Valade *v.* Lalonde — — — 551

SEIGNORIAL TENURE—*Title to lands—Deed of concession—Constructioa of deed—Words of limitation—Covenant by grantee—Charges running with* the *title—Servitude—Condition, si voluero—Prescriptive title—Edits et ordonnances, (L.C.)—Municipal regulations—*23 *Vic.* (*C.*) *c.* 85 — — — **147**
See SERVITUDE.

SEIZIN—*Possessory action—Vacant lands—Boundary marks—Delivery of possession* — **575**
See EVIDENCE 8.

SERVICE OF PROCESS—*Service of election petition—Certified copy—Bailiff's return—Cross-examination—Production of copy* — **232**
See ELECTION LAW 5.

2——*False return of service of summons—Judgment by default—Opposition to judgment—Arts.* 16, 89 *et seq.*, 483, 489 *C. C. P.* — **583**
See ACTION 5.

SERVITUDE—*Title to lands—Seignorial tenure—Deed of concession—Construction of deed—Words of limitation—Covenant by grantee—Charges running with the title—Condition, si voluero—Prescriptive title—Edits & Ordonnances, (L.C.)—Municipal regulations*—23 *V.* (*Can.*) *c.* 85.] In 1768 the Seigneur of Berthier granted an island called "l'île du Milieu," lying adjacent to the "Common of Berthier" to M. his heirs and assigns, (*ses hoirs et ayants cause*,) in consideration of certain fixed annual payments and subject to the following stipulation: —"en outre à condition qu'il fera à ses frais, *s'il le juge nécessaire*, une clôture bonne et valable, à l'épreuve des animaux de la Commune, sans aucun recours ni garantie à cet égard de la part de sieur seigneur, lesquelles conditions ont été acceptées du dit sieur preneur, pour sureté de quoi il a hypothèqué tous ses biens présents et à venir, et spècialement la dite isle qui y demeure affectée par privilège, une obligation ne dérogeant à l'autre." *Held*, reversing the decision of the Court of Queen's Bench, Strong C.J. dissenting, that the clause quoted did not impose merely a personal obligation on the grantee, but created a real charge or servitude upon l'île du Milieu for the benefit of the "Common of Berthier." That the servitude consisted in suffering inroads from the cattle of the Common wherever and whenever the grantee did not exclude them from his island by the construction of a good and sufficient fence. This servitude results not only from the terms of the seignorial grant but also from the circumstances and the conduct of the parties from a time immemorial. That the two lots of land although not contiguous were sufficiently close to permit the creation of a servitude by one in favour of the other. That the stipulation as contained in the original grant

SERVITUDE—*Continued.*

of 1768 was not merely facultative. That the servitude in question is also sufficiently established by the laws in force in Canada at the time of the grant in 1768, respecting fencing and the maintenance of fences in front of habitations or settlements. LA COMMUNE DE BERTHIER *v.* DENIS — — — **147**

2——*Necessary way—Implied grant—User—Obstruction of way—Prescription—Limitation of action—R. S. N. S.* (5 *ser.*) *c.* 112 — **664**
See LIMITATION OF ACTION 1.
And see "EASEMENT."

SHERIFF—*Deed by—Registration of—Absolute nullity—Folle enchère—Resale for false bidding* — — — — — **309**
See APPEAL 5.

2——*Deed by—Champerty—Maintenance* **443**
See EVIDENCE 6.

SHIPPING—*Foreign fishing vessels—"Fishing"—Convention of 1818—Three mile limit—*59 *Geo. III. c.* 38 (*Imp.*)—*R. S. C. c.* 94 *and c.* 95. — — — — — — — **271**
See FISHERIES.

STATUTE, CONSTRUCTION OF—*Appeal from Court of Review—Appeal to Privy Council—Appealable amount—*54 *&* 55 *V. c.* 25, (*D.*) *s.* 3, *s.s.* 3 *and* 4—*C. S. L. C. c.* 77, *s.* 25—*Arts.* 1115, 1178 *C. C. P.—R. S. Q. art.* 2311.] In appeals to the Supreme Court of Canada from the Court of Review (which, by 54 & 55 Vict. ch. 25, s. 3, s.s. 3, must be appealable to the Judicial Committee of the Privy Council,) the amount by which the right of appeal is to be determined is that demanded, and not that recovered, if they are different. *Dufresne* v. *Guevremont* (26 Can. S. C. R. 216) followed. CITIZENS LIGHT & POWER CO. *v.* PARENT — — **316**

2——*Mines and minerals—Lease of mining areas—Rental agreement—Payment of rent—Forfeitures—R. S. N. S.* (5 *ser.*) *c.* 7—52 *V. c.* 23 (*N.S.*)] By R. S. N. S. (5 ser.) ch. 7, the lessee of mining areas in Nova Scotia was obliged to perform a certain amount of work thereon each year on pain of forfeiture of his lease, which, however, could only be effected through certain formalities. By an amendment in 1889 (52 Vic. ch. 23), the lessee is permitted to pay in advance an annual rental in lieu of work, and by subsec. (*c*) the owner of any leased area may, by duplicate agreement in writing with the Commissioner of Mines, avail himself of the provisions of such annual payment and "such advance payments shall be construed to commence from the nearest recurring anniversary of the date of the lease." By sec. 7 all leases are to contain the provisions of the

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Act respecting payment of rental and its refund in certain cases, and by sec. 8 said sec. 7 was to come into force in two months after the passing of the Act. Before the Act of 1889 was passed a lease was issued to E. dated June 10th, 1889, for twenty-one years from May 21st, 1889. On June 1st, 1891, a rental agreement under the amending Act was executed under which E. paid the rent for his mining areas for three years, the last payment being in May, 1893. On May 22nd, 1894, the commissioner declared the lease forfeited for non-payment of rent for the following year and issued a prospecting license to T. for the same areas. E. tendered the year's rent on June 9th, 1894, and an action was afterwards taken by the Attorney General, on relation of E., to set aside said license as having been illegally and improvidently granted. *Held*, affirming the judgment of the Supreme Court of Nova Scotia in such action, that the phrase "nearest recurring anniversary of the date of the lease" in subsec. (*c*) of sec. 1, Act of 1889, is equivalent to "next or next ensuing anniversary," and the lease being dated on June 10th no rent for 1894 was due on May 22nd of that year, at which date the lease was declared forfeited, and E.'s tender on June 9th was in time. *Attorney General* v. *Sheraton* (28 N. S. Rep. 492) approved and followed. *Held*, further, that though the amending Act provided for forfeiture without prior formalities of the lease in case of non-payment of rent, such provision did not apply to leases existing when the Act was passed in cases where the holders executed the agreement to pay rent thereunder in lieu of work. The forfeiture of E.'s lease was, therefore, void for want of the formalities prescribed by the original Act. TEMPLE *v.* THE ATTORNEY GENERAL OF NOVA SCOTIA — — — 355

3——*Revenue—Customs duties—Imported goods —Importation into Canada—Tariff Act—Construction—Retrospective legislation—R. S. C. c. 32—57 & 58 V. c. 33 (D.)—58 & 59 V. c. 23 (D.)*] By 57 & 58 Vict. ch. 33, sec. 4, duties are to be levied upon certain specified goods "when such goods are imported into Canada." *Held*, reversing the judgment of the Exchequer Court, King and Girouard JJ. dissenting, that the importation as defined by sec. 150 of the Customs Act (R. S. C. ch. 32) is not complete until the vessel containing the goods arrives at the port at which they are to be landed.—Section 4 of the Tariff Act, 1895, (58 & 59 Vict. ch. 23) provided that "this Act shall be held to have come into force on the 3rd of May in the present year, 1895." It was not assented to until July. *Held*, that the goods imported into Canada on May 4th, 1895, were subject to duty under said Act. THE QUEEN *v.* THE CANADA SUGAR REFINING CO. — — — — — — 395

4——*Master and servant—Hiring of personal services—Municipal corporation—Appointment of officers—Summary dismissal—Libellous resolution — Difference in text of English and French versions of statute—52 V. c. 79, s. 79 (O.)—"A discrétion"—"At pleasure."*] The charter of the City of Montreal, 1889 (52 Vict. ch. 79), section 79 gives power to the City Council to appoint and remove such officers as it may deem necessary to carry into execution the powers vested in it by the charter, the French version of the Act stating that such powers may be exercised "*à sa discrétion*," while the English version has the words "*at its pleasure.*" *Held*, that notwithstanding the apparent difference between the two versions of the statute, it must be interpreted as one and the same enactment and the City Council was thereby given full and unlimited power, in cases where the engagement has been made indefinitely as to duration, to remove officers summarily and without previous notice, upon payment only of the amount of salary accrued to such officer up to the date of such dismissal. DAVIS *v* CITY OF MONTREAL — — 539

5——*Estates tail, acts abolishing—R. S. N. S. (1 ser.) c. 112—R. S. N. S. (2 ser.) c. 112—R. S. N. S. (3 ser.) c. 111—28 V. c. 2 (N.S.)—Will —Construction of—Executory devise over—Dying without issue—"Lawful heirs"—"Heirs of the body"—Estate in remainder expectant—Statutory title—R. S. N. S. (2 ser.) c. 114, ss. 23 & 24—Title by will—Conveyance by tenant in tail.*] The Revised Statutes of Nova Scotia, 1851, (1 ser.) ch. 112, provided as follows: "All estates tail are abolished, and every estate which would hitherto have been adjudged a fee tail shall hereafter be adjudged a fee simple; and, if no valid remainder be limited thereon, shall be a fee simple absolute, and may be conveyed or devised by the tenant in tail, or otherwise shall descend to his heirs as a fee simple." In the revision of 1858 (R. S. N. S. 2 ser. c. 112) the terms are identical. In 1864 (R. S. N. S. 3 ser. c. 111) the provision was changed to the following: "All estates tail on which no valid remainder is limited are abolished, and every such estate shall hereafter be adjudged to be a fee simple absolute, and may be conveyed or devised by the tenant in tail, or otherwise shall descend to his heirs as a fee simple." This latter statute was repealed in 1865, (28 Vict. c. 2) when it was provided as follows: "All estates tail are abolished, and every estate which hitherto would have been adjudged a fee tail shall hereafter be adjudged a fee simple and may be conveyed or devised or descend as such." Z., who died in 1859, by his will, made in 1857,

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devised lands in Nova Scotia to his son, and in default of lawful heirs, with a devise over to other relatives, in the course of descent from the first donee. On the death of Z., the son took possession of the property as devisee under the will, and held it until 1891, when he sold the lands in question in this suit to the appellant. *Held*, per Taschereau, Sedgewick and King JJ., that notwithstanding the reference to "valid remainder" in the statute of 1851 all estates tail were thereby abolished, and further, that subsequent to that statute there could be no valid remainder expectant on an estate tail, as there could not be a valid estate tail to support such remainder. *Held* further, per Taschereau, Sedgewick and King JJ., that in the devise over to persons in the course of descent from the first devisee, in default of lawful issue, the words "lawful heirs," in the limitation over, are to be read as if they were "heirs of his body"; and that the estate of the first devisee was thus restricted to an estate tail and was consequently, by the operation of the statute of 1851, converted into an estate in fee simple and could lawfully be conveyed by the first devisee. *Held*, per Gwynne and Girouard JJ., that estates tail having a remainder limited thereon were not abolished by the statutes of 1851 or 1864, but continued to exist until all estates tail were abolished by the statute of 1865; that the first devisee, in the case in question, took an estate tail in the lands devised and having held them as devisee in tail up to the time of the passing of the Act of 1865, the estate in his possession was then, by the operation of that statute, converted into an estate in fee simple which could be lawfully conveyed by him. ERNST *v.* ZWICKER — **594**

6——*Appeal—Jurisdiction*—52 *V. c.* 37, *s.* 2 (*D.*)—*Appointment of presiding officers—County Court Judges*—55 *V. c.* 48 (*Ont.*)—58 *V. c.* 47 (*Ont.*)—*Appeal from assessment—Final judgment.*] By 52 Vict. ch. 37, sec. 2, amending "The Supreme and Exchequer Courts Act," an appeal lies in certain cases to the Supreme Court of Canada from courts "of last resort created under provincial legislation to adjudicate concerning the assessment of property for provincial or municipal purposes, in cases where the person or persons presiding over such court is or are appointed by provincial or municipal authority." By the Ontario Act, 55 Vict. ch. 48, as amended by 58 Vict. ch. 47, an appeal lies from rulings of municipal courts of revision in matters of assessment to the county court judges of the county court district where the property has been assessed. On an appeal from the decision of the county court judges under the Ontario statutes: *Held*, King J. dissenting, that if the county court judges constituted a "court of last resort" within the meaning of 52 Vict. ch. 31, sec. 2, the persons presiding over such court were not appointed by provincial or municipal authority, and the appeal was not authorized by the said Act. *Held*, per Gwynne J., that as no binding effect is given to the decision of the county court judges, under the Ontario Acts cited the court appealed from was not a "court of last resort" within the meaning of 52 Vict. ch. 37, sec. 2. *Quære.*—Is the decision of the county court judges a "final judgment" within the meaning of 52 Vict. ch. 37, sec. 2? THE CITY OF TORONTO *v.* THE TORONTO RAILWAY CO. — — **640**

7——51 *V. c.* 12, *s.* 51—*Civil Service—Extra salary—Additional remuneration—Permanent employees.*] The Civil Service Amendment Act, 1888 (51 Vict. ch. 12), by section 51, provides that "no extra salary or additional remuneration of any kind whatever shall be paid to any deputy-head, officer or employee in the Civil Service of Canada, or to any other person permanently employed in the public service of Canada." *Held*, that reporters employed on the Hansard staff of the House of Commons of Canada, are persons subject to the operation of the statute quoted. *Held*, further, that in the section referred to, the words "no extra salary or additional remuneration" apply only to payments which, if made, would be extra or additional to the salary or remuneration payable to an officer for services which, at the time of his acceptance of the appointment, could legitimately have been intended or expected to be within the scope of the ordinary duties of his office, although additional to them. THE QUEEN *v.* BRADLEY—**657**

8——*Snow and ice on sidewalks—By-law*—55 *V. c.* 42, *s.* 531 (*Ont.*)—57 *V. c.* 50, *s.* 13 (*Ont.*)—**46**

See NEGLIGENCE 1.

9——*Convention of* 1818—*Fisheries—Three mile limit—Foreign fishing vessels—"Fishing"*—59 *Geo. III. c.* 38 (*Imp.*)—*R. S. C. c.* 94 *&* *c.* 95. — — — — **271**

See FISHERIES.

STATUTE OF ELIZABETH—*Assignment for the benefit of creditors—Preferred creditors—Money paid under voidable assignment—Liability of assignee—Hindering and delaying creditors* — — — **589**

See ASSIGNMENT 1.

" DEBTOR AND CREDITOR.

2——*Insolvency—Pressure—Assignment of expected profits—Fraudulent preferences—Assets exigible in execution.* BLAKELEY *et al. v.* GOULD *et al.* — — — — — **687**

STATUTES—13 *Eliz. c.* 5 [*Fraudulent conveyances*] — — — — 589
See Debtor and Creditor 1.

2——13 *Eliz. c.* 5 [*Fraudulent conveyances.*] Blakeley *et al. v.* Gould *et al.* — — 687

3——59 *Geo. III. c.* 38 (*Imp.*) [*Fisheries; Three Mile Limit*] — — — — 271
See Constitutional Law 1.
" Fisheries.
" Treaty.

4——2 & 3 *Wm. IV.* (*Imp.*) *c.* 71, *ss.* 2 *and* 4 [*Limitation of actions*] — — — 664
See Easement.
" Limitation of Actions 1.

5——*C. S. C. c.* 58 [*Interest; Usury*] — 522
See Building Society.
" Trusts 2.

6——11 *V. c.* 14 (*Can.*) [*Incorporation of Consumers Gas Co. of Toronto*] — — 453
See Assessment and Taxes 1.

7——23 *V.* (*Can.*) *c.* 85 [ ] — 147
See Servitude.
" Title to Lands 1.

8——*R. S. C. c.* 8, *s.* 50 [" *Dominion Elections Act* "] — — — — — 215
See Appeal 3.
" Election Law 2.

9——*R. S. C. c.* 8 [" *Dominion Elections Act* "] — — — — — 241
See Election Law 6.

10——*R. S. C. c.* 9, *ss.* 12 *and* 50 [" *Dominion Controverted Elections Act* "] — — 219
See Appeal 4.
" Election Law 3.

11——*R. S. C. c.* 9 [" *Dominion Controverted Elections Act* "] — — — 226
See Election Law 4.

12——*R. S. C. c.* 13 [*Act respecting the House of Commons*] — — — 657
See Statute, Construction of 7.

13——*R. S. C. c.* 17 [*Civil Service Act*] — 657
See Statute, Construction of 7.

14——*R. S. C. c.* 18 [*Superannuation of Civil Service Employees*] — — 657
See Statute, Construction of 7.

15——*R. S. C. c.* 32 [*Customs Act*] — 395
See Legislation.
" Statute, Construction of 3.

STATUTES—*Continued.*

16——*R. S. C. c.* 94 [*Foreign Fishing Vessels*] — — — — 271
See Constitutional Law 1.
" Fisheries.
" Treaty.

17——*R. S. C. c.* 95 [*Fisheries*] — 271
See Constitutional Law 1.
" Fisheries.
" Treaty.

18——*R. S. C. c.* 135, *s.* 29 (*b*) [" *Supreme and Exchequer Courts Act* "] — — 187
See Appeal 1.
" Municipal Corporation 2.

19——*R. S. C. c.* 135, *s.* 29 (*b*) [" *The Supreme and Exchequer Courts Act* "] — — 579
See Appeal 11.

20——*R. S. C. c.* 135, *ss.* 24 *and* 28 [*Supreme and Exchequer Courts Act*"] — — 637
See Appeal 12.
" Judgment 3.

21——*R. S. C. c.* 135, *ss.* 24 (*a*) *and* 27 [*Appeals to Supreme Court*] — — 654
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22——*R. S. C. c.* 135, *s.* 67 [*Certificate of judgment of Supreme Court on appeal*] — 634
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23——*R. S. C. c.* 135, *s.* 32 [*Jurisdiction of Supreme Court on Habeas Corpus*] — 682
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24——47 *V. c.* 87, *s.* 3 (*D.*) [*Que. M. O. & O. Ry. Eastern Section*] — — — 102
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25——48 & 49 *V. c.* 58, *s.* 3 (*D.*) [*Que. M. O. & O. Ry. Eastern Section*] — — 102
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26——51 *V. c.* 12, *s.* 51 [*Civil Service Amendment Act*] — — — 657
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27——52 *V. c.* 37, *s.* 2 (*D.*) [*Appeals to Supreme Court of Canada, from Provincial and Municipal Courts*] — — — 640
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STATUTES—*Continued.*

28——54 & 55 *V.* c. 20, s. 3 (*D.*) [*Controverted Elections*] — — — 226
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29——54 & 55 *V.* c. 20, s. 19 (*D.*) [*Controverted Elections*] — — — 241
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30——54 & 55 *V.* (*D.*) c. 25, s. 3, s.s. 3 *and* 4 [*Supreme and Exchequer Courts*] — 316
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31——54 & 25 *V.* c. 35, s. 3 [*Supreme Court*] — — — — — — 579
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32——55 & 55 *V.* c. 29, ss. 275, 276 (*D.*) ["*The Criminal Code*, 1892," *Bigamy sections*] — 461
See Constitutional Law 1.
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33——56 *V.* c. 29 s. 1 (*D.*) ["*Supreme and Exchequer Courts Act*"] — — 187
See Appeal 1.
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34——56 *V.* c. 29, s. 1 [*Supreme Court*] — 579
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35——57 & 58 *V.* c. 33, s. 4 (*D.*) [*Customs Duties*] — — — 395
See Legislation.
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36——58 & 59 *V.* c 23, s. 4 (*D.*) [*Customs Duties*] — — — — 395
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" Statute, Construction of 3.

37——*R. S. O.* c. 44, s. 65 [*Ontario Judicature Act, appeals*] — — — 654
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38——*R. S. O.* (1887) c. 184 [*Municipal Act*] — — — — — — — — 495
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39——36 *V.* c. 38 (*O.*) ["*Ontario Drainage Act*, 1873"] — — — — — — — 495
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40——36 *V.* c. 39 (*O.*) [*Drains and Watercourses*] — — — — — — — 495
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41——55 *V.* c. 42, s. 531 (*O.*) [*Municipal Act*] — — — — — — — 46
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42——55 *V.* c. 42 (*O.*) [*Consolidated Municipal Act*] — — — — — — 495
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" Municipal Corporation 5.

43——55 *V.* c. 48 (*O.*) ["*Ontario Assessment Act*, 1892"] — — — — — 453
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44——55 *V.* c. 48 (*O.*) [*Appeals from assessments and Municipal Courts of Revision*] — 640
See Appeal 13.
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45——57 *V.* c. 50 s. 13 (*O.*) [*Municipal Act*] — — — — — — — 46
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46——57 *V.* c. 51 s. 5 (*O.*) [*Appeals from assessments and Municipal Courts of Revision*] — — — — — — — 640
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47——58 *V.* c. 47 (*O.*) [*Appeals from assessments and Municipal Courts of Revision*] — 640
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" Statute, Construction of 6.

48——*C. S. L.C.* c. 69 [*Building Societies*] 522
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49——*C. S. L. C.* c. 77, s. 25 [*Court of Queen's Bench*] — — — — — 316
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50——*R. S. Q. art.* 2311 [*Appealable amount determined by demand*] — — — 316
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" Statute, Construction of 1.

51——*R. S. Q. art.* 4485 [*Waterworks*] — 329
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" Municipal Corporation 3.

52——42 & 43 *V.* (*Q.*) c. 32 [*Liquidation of Building Societies*] — — — 522
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" Trusts 2.

STATUTES—*Continued.*

53——45 *V.* c. 20 (*Q.*) [*Quebec M. O. & O. Ry. Eastern section*] — — — 102
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54——52 *V.* c. 79 (*Q.*) [*Charter of the City of Montreal*] — — — — — — 539
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55——*R. S. N. S.* (1 *ser.*) c. 112 [*Estates Tail*] — — — — — — — 594
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56——*R. S. N. S.* (2 *ser.*) c. 112 [*Estates Tail*] — — — — — — — 594
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" Will 4.

57——*R. S. N. S.* (2 *ser.*) c. 114 [*The Wills Act*] — — — — — — — 594
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58——*R. S. N. S.* (3 *ser.*) c. 111 [*Estates Tail*] — — — — — — — 594
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" Will 4.

59——*R. S. N. S.* (4 *ser.*) c. 99, *s.* 3 (*Liberty of the subject*) — — — 684
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60——*R. S. N. S.* (4 *ser.*) c. 100 [*Limitation of actions*] — — — 664
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" Limitation of Actions 1.

61——*R. S. N. S.* (5 *ser.*) c. 7 [*Mines and Minerals*] — — — — — 355
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" Statute, Construction of 2.

62——*R. S. N. S.* (5 *ser.*) c. 112 [*Limitation of actions*] — — — — — 664
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" Limitation of Actions 1.

63——28 *V.* c. 2 (*N. S.*) [*Estates Tail*] — 594
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" Will 4.

64——52 *V.* c. 23 (*N. S.*) [*Mining*] — 355
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65——54 *V.* c. 5 (*B. C.*) [*Coal Mines Regulation Amendment Act,* 1890] — — 637
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" Judgment 3.

66——58 *V.* c. 3, *s.* 8 (*N.S.*) [*County corporations*] — — — — 682
See Habeas Corpus.

SUBSTITUTION —*Will— Construction of— Donation—Partition, per stirpes or per capita— Usufruct — Alimentary allowance — Accretion between legatees.*] The late Joseph Rochon made his will in 1852 by which he devised to his two sisters the usufruct of all his estate and the property therein to their children, naming Pierre Dupras, his uncle, as his testamentary executor, and directing that his estate should be realized and the proceeds invested according to the executor's judgment, adding to these directions the words "enfin placer la masse liquide de ma succession à intérêt ou autrement, de la manière qu'il croira le plus avantageux, pour en fournir les revenus à mes dites sœurs et conserver le fonds pour leurs enfants," and providing that these legacies should be considered as an alimentary allowance and should be non-transferable and exempt from seizure. By a codicil in 1890 he appointed a nephew as his testamentary executor in the place of the uncle, who had died, and declared:— "Il sera de plus l'administrateur de mes dits biens jusqu'au décès de mes deux sœurs usufruitères, nommées dans mon dit testament, et jusqu'au partage définitif de mes biens entre mes héritiers propriétaires, et il aura les pouvoirs qu'avait le dit Pierre Dupras dans mon dit testament." *Held*, Gwynne J. dissenting, that the testamentary dispositions thus made did not create a substitution, but constituted merely a devise of the usufruct by the testator to his two sisters and of the estate, (subject to the usufruct), to their children, which took effect at the death of the testator. *Held* also, that the charge of preserving the estate—"conserver le fonds"—imposed upon the testamentary executor could not be construed as imposing the same obligation upon the sisters who were excluded from the administration, or as having, by that term, given them the property subject to the charge that they should hand it over to the children at their decease, or as being a modification of the preceding clause of the will by which the property was devised to the children directly, subject to the usufruct. *Held*, further, that the property thus devised was subject to partition between the children *per capita* and not *per stirpes.* Robin *v.* Duguay — — — — — 347

SURETYSHIP.
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TAXATION—*Appeal—Local improvements—Assessment — Expropriation of lands—Future rights* — — — **187**

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TENANT FOR LIFE—*Will—Construction of —Words of futurity—Joint lives—Time for ascertainment of class—" Lawful heirs "—Survivor dying without issue* — — **628**

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TENANT IN TAIL—*Statute, construction of —Estates tail, acts abolishing—R. S. N. S.* (1 *ser.*) *c.* 112—*R. S. N. S.* (2 *ser.*) *c.* 112—*R. S. N. S.* (3 *ser.*) *c.* 111—28 *V. c.* 2 (*N.S.*)—*Will—Construction of—Executory devise over—" Dying without issue "—" Lawful heirs "—" Heirs of the body "—Estate in remainder expectant—Statutory title—R. S. N. S.* (2 *ser.*) *c.* 114, *ss.* 23 and 24 —*Title by will—Conveyance by tenant in tail* — — — — — **594**

See Statute, Construction of 5.

" Will 4.

And see Substitution.

TERRITORIAL DIVISIONS—*Habeas corpus—Jurisdiction—Form of commitment—Judicial notice—R. S. C. c.* 135, *s.* 32 — **682**

See Justice of the Peace.

TITLE TO LANDS—*Seignorial tenure—Deed of concession—Construction of deed—Words of limitation—Covenant by grantee—Charges running with the title—Servitude—Condition, si voluero — Prescriptive title — Edits & Ordonnances,* (*L.C.*)—*Municipal regulations*—23 *V.* (*Can.*) *c.* 85.] In 1768 the Seigneur of Berthier granted an island called " l'île du Milieu," lying adjacent to the " Common of Berthier" to M. his heirs and assigns, (*ses hoirs et ayants cause,*) in consideration of certain fixed annual payments and subject to the following stipulation: " en outre à condition qu'il fera a ses frais, *s'il le juge nécessaire,* une clôture bonne et valable, à l'épreuve des animaux de la Commune, sans aucun recours ni garantie à cet égard de la part de sieur seigneur, lesquelles conditions ont été acceptées du dit sieur preneur, pour sureté de quoi il a hypothéqué tous ses biens présents et à venir, et spécialement la dite isle qui y demeure affectée par privilège, une obligation ne dérogeant à l'autre." *Held,* reversing the decision of the Court of Queen's Bench, Strong C. J. dissenting, that the clause quoted did not impose merely a personal obligation on the grantee, but created a real change or servitude upon l'île du Milieu for the benefit of the "Common of Berthier." That the servitude consisted in suffering inroads from the cattle of the Common wherever and whenever the grantee did not exclude them from his island by the construction of a good and sufficient fence.

TITLE TO LANDS—*Continued.*

This servitude results not only from the terms of the seignorial grant, but also from the circumstances and the conduct of the parties from a time immemorial. That the two lots of land although not contiguous were sufficiently close to permit the creation of a servitude by one in favour of the other. That the stipulation as contained in the original grant of 1768 was not merely facultative. That the servitude in question is also sufficiently established by the laws in force in Canada at the time of the grant in 1768, respecting fencing and the maintenance of fences in front of habitations or settlements. La Commune de Berthier *v.* Denis — **147**

2——*Right of redemption—Third parties—Delivery and possession of thing sold* — — **68**

See Pledge.

3——*Ambiguous description—Possession—Presumptions in favour of occupant* — — **102**

See Deed 1.

4——*Statute, construction of—Estates tail, acts abolishing—R. S. N. S.* (1 *ser.*) *c.* 112—*R. S. N. S.* (2 *ser.*) *c.* 112—*R. S. N. S.* (3 *ser.*) *c.* 111 —23 *V. c.* 2 (*N.S.*)—*Will—Construction of—Executory devise over—" Dying without issue " —" Lawful heirs " — " Heirs of the body " —Estate in remainder expectant—Statutory title—R. S. N. S.* (2 *ser.*) *c.* 114, *ss.* 23 *and* 24—*Title by will—Conveyance by tenant in tail* — **594**

See Statute, Construction of 5.

" Will 4.

TRANSACTION — *Nullified instruments — Estoppel—C. C. arts.* 311 *and* 1243-1245 — **363**

See Admissions.

TREATY — *Construction of — Convention of* 1818—*Fisheries — Statute, construction of*—59 *Geo. III. c.* 38 (*Imp.*)—*R. S. C. cc.* 94 & 95—*Three mile limit—Foreign fishing vessels—"Fishing."*] Where fish has been enclosed in a seine more than three marine miles from the coast of Nova Scotia, and the seine pursed up and secured to a foreign vessel, and the vessel was aftewards seized with the seine still so attached within the three mile limit, her crew being then engaged in the act of bailing the fish out of the seine: *Held* (the Chief Justice and Gwynne J. dissenting), affirming the decision of the court below, that the vessel when so seized was "fishing" in violation of the convention of 1818 between Great Britain and the United States of America and of the Imperial Act 59 Geo. III., ch 38, and the Revised Statutes of Canada, ch. 94, and consequently liable with the cargo, tackle, rigging, apparel, furniture and stores to be condemned and forfeited. The Ship " Frederick Gerring Jr." *v.* The Queen — — — **271**

TRUSTS—*Trustee—Account of trust funds—Abandonment by cestui que trust—Evidence.*] The holder of two insurance policies, one in the Providence Washington Ins. Co., and the other in the Delaware Mutual, on which actions were pending, assigned the same to M. as security for advances and authorized him to proceed with the said actions and collect the moneys paid by the insurance companies therein. By a subsequent assignment J. became entitled to the balance of said insurance moneys after M.'s claim was paid. The actions resulted in the policy of the Providence Washington being paid in full to the solicitor of M., and for a defect in the other policy the plaintiff in the action thereon was nonsuited. In 1886 M. wrote to J. informing him that a suit in equity had been instituted against the Delaware Mutual Ins. Co. and its agent for reformation of the policy and payment of the sum insured and requesting him to give security for costs in said suit, pursuant to a judge's order therefor. J. replied that as he had not been consulted in the matter and considered the success of the suit problematical he would not give security, and forbade M. employing the trust funds in its prosecution. M. wrote again saying "as I understand it, as far as you are concerned you are satisfied to abide by the judgment in the suit at law, and decline any responsibility and abandon any interest in the equity proceedings," to which J. made no reply. The solicitor of M. provided the security and proceeded with the suit, which was eventually compromised by the company paying somewhat less than half the amount of the policy. Before the above letters were written J. had brought suit against M. for an account of the funds received under the assignment, and in 1887, more than a year after they were written, a decree was made in said suit referring it to a referee to take an account of trust funds received by M., or which might have been received with reasonable diligence, and of all claims and charges thereon prior to the assignment to J., and the acceptance thereof, which decree was affirmed by the full court and by the Supreme Court of Canada. On the taking of said account M. contended that all claim on the Delaware policy had been abandoned by the above correspondence, and objected to any evidence relating thereto. The referee took the evidence and charged M. with the amount received, but on exceptions by M. to his report the same was disallowed. *Held*, reversing the judgment of the Supreme Court of New Brunswick, that the sum paid by the Delaware Company was properly allowed by the referee; that the alleged abandonment took place before the making of the decree which it would have affected and should have been so urged; that M. not having taken steps to have it dealt with by the decree could not raise it on the taking of the account; and that, if open to him, the abandonment was not established as the proceedings against the Delaware Company were carried on after it exactly as before, and the money paid by the company must be held to have been received by the solicitor as solicitor of M. and not of the original holder. *Held*, further, that the referee, in charging M. with interest on money received from the date of receipt of each sum to a fixed date before the suit began, and allowing him the like interest on each disbursement from date of payment to same fixed date had not proceeded upon a wrong principle. JONES *v.* MCKEAN — — — — — 249

TRUSTS—*Continued.*

2——*Building societies—Participating borrowers—Shareholders—C. S. L. C. c. 69—42 & 43 V. c. 32 (Q.)—Liquidation—Expiration of classes—Assessments on loans—Notice of—Interest and bonus — Usury laws—C. S. C. c. 58—Art. 1785 C. C.—Administrators and trustees—Sales to—Prête-nom—Art. 1484 C. C.*] S. applied to a building society for a loan of $3,500 which was subsequently advanced to him upon signing a deed of obligation and hypothec submitting to the conditions and rules applicable to the society's method of carrying on their loaning business and declaring that he had become a subscriber for shares in the company's stock for an amount corresponding to the amount of the loan, namely, 70 shares of the nominal value of $50 each in a class to expire after 72 monthly payments, or in six years from the date of its commencement (July, 1878), this term corresponding with the term fixed for the repayment of the loan. He thereby also agreed to make monthly payments of one per cent each upon the stock and that the loan should be repaid at the expiration of the class, when, upon the liquidation of the business of that class, members would be entitled to the allotment of their shares subscribed as paid up, partly by the monthly instalments and partly by accumulated profits to be derived from whatever moneys had been paid in and invested for the benefit of that class, at which time, whatever he might be so entitled to receive in shares of stock should be credited towards the reimbursement of the loan. He further obliged himself to pay, as interest and bonus, the additional sum of one per cent upon the loan by similar monthly instalments during the time it remained unpaid. S. paid all the instalments by semi-annual payments of $420 each until 1st May, 1884, making a total of seventy monthly instalments of $70 each, leaving two more instalments of each kind still to become due before the date originally fixed for the termination of his class. The society went into liquidation under the provisions of 42 & 43 Vict. (Que.) ch. 32 in January, 1884, prior to A.'s last payment, and about six months before the date fixed for the expiration

TRUSTS—*Continued.*

of his loan. In October, 1884, the liquidators of the society, in the exercise of the powers vested in the directors under the deed and the society's regulations, passed a resolution declaring a deficit in the business of the class to which A. belonged, and, in order to provide the necessary funds to meet the proportion of deficit attributed as his share, they thereby exacted from him a further series of twenty-eight monthly payments in addition to the seventy-two instalments contemplated at the time of the execution of the deed. Subsequently, (in 1892) the plaintiff, as transferee of the society, brought action for the two original instalments remaining unpaid and also for the amount of the twenty-eight additional monthly payments upon the loan and the subscription of shares. *Held,* reversing the judgment of the Court of Queen's Bench, that the subscription for shares and the obligation undertaken in the deed constituted, upon the part of the borrower, merely one transaction involving a loan and an agreement to repay the amount advanced with interest and bonuses thereon amounting together to a rate equivalent to interest at twelve per centum per annum on the amount of his loan. That the contract made by the building society stipulating that they were to receive such rate of interest and bonus, equivalent to a rate of twelve per centum per annum on the amount so loaned by the society, was not a violation of any laws respecting usury in force in the province of Quebec. That the fact of the building society going into liquidation had the effect of causing all classes of loans then current to expire at the date when the society was placed in liquidation, notwithstanding that the various terms for which such classes may have been established had not been fully completed. That under the provisions of the statute, 42 & 43 Vict. (Que.) ch. 32, liquidators have the same powers in regard to the determination of the affairs of expired classes and to declare deficits therein and to call for further payments to meet the same, as the directors of the society had while it continued in operation. That the notice required by the twenty-first section of the Act, 42 & 43 Vict. (Que.) ch. 32, does not apply to cases where liquidators have determined a loss upon the expiration of a class and required the full amount exigible upon loans to be paid by borrowers. That, notwithstanding that the liquidation proceedings deprived the directors of the exercise of their powers as to the determination of the condition of the affairs of a class and the exaction of further payments when exigible in such cases on the expiration of a class, the resolution of the liquidators determining a deficit in the borrower's class and requiring full payment of all sums exigible under his deed of obligation, was sufficient to constitute a valid right of action against the borrower for the amount of the balance of principal money loaned together with the interest and bonus instalments remaining due thereon according to the terms and conditions of his deed of obligation. *Held,* further, affirming the decisions of both courts below, that in an action where no special demand to that effect has been made, the court cannot declare the nullity of a deed of transfer alleged to have been made in contravention of the provisions of article 1484 of the Civil Code. GUERTIN *v.* SANSTERRE — **522**

TUTORS—*Nullified instruments—Compromise—"Transaction"—Estoppel—C. C. arts.* 311 *and* 1243-1245 — — — **363**

See DEED 2.

USUFRUCT — *Will—Construction of—Donation—Substitution—Partition, per stirpes or per capita—Alimentary allowance—Accretion between legatees.*] The late Joseph Rochon made his will in 1852 by which he devised to his two sisters the usufruct of all his estate and the property therein to their children, naming Pierre Dupras, his uncle, as his testamentary executor, and directing that his estate should be realized and the proceeds invested according to the executor's judgment, adding to these directions the words "enfin placer la masse liquide de ma succession à intérêt ou autrement, de la manière qu'il croira le plus avantageux, pour en fournir les revenus à mes dites sœurs et conserver le fonds pour leurs enfants," and providing that these legacies should be considered as an alimentary allowance and should be non-transferable and exempt from seizure. By a codicil in 1890 he appointed a nephew as his testamentary executor in the place of the uncle, who had died, and declared :—"Il sera de plus l'administrateur de mes dits biens jusqu'au décès de mes deux sœurs usufruitières, nommées dans mon dit testament, et jusqu'au partage définitif de mes biens entre mes héritiers propriétaires, et il aura les pouvoirs qu'avait le dit Pierre Dupras dans mon dit testament." *Held,* Gwynne J. dissenting, that the testamentary dispositions thus made did not create a substitution, but constituted merely a devise of the usufruct by the testator to his two sisters and of the estate, (subject to the usufruct), to their children, which took effect at the death of the testator. *Held* also, that the charge of preserving the estate—"conserver le fonds" — imposed upon the testamentary executor could not be construed as imposing the same obligation upon the sisters who were excluded from the administration, or as having, by that term, given them the property subject to the charge that they should hand it over to the children at their decease, or as being a modification of the preceding clause of the will

TRUSTS—*Continued.*

by which the property was devised to the children directly subject to the usufruct. *Held*, further, that the property thus devised was subject to partition between the children *per capita* and not *per stirpes*. ROBIN *v.* DUGUAY — — — — — — 347

USURY — *Building societies — Participating borrowers — Shareholders — C. S. L. C. c.* 58—42 & 43 *V.* (*Q.*) *c.* 32—*Liquidation—Expiration of classes—Assessments on loans—Notice of—Interest and bonus—Usury laws—C. S. C. c.* 58 —*Art.* 1785 *C. C.*—*Administrators and trustees —Sales to—Prête-nom—Art.* 1484 *C. C.* — 522

See BUILDING SOCIETY.

VENDOR AND PURCHASER — *Unpaid vendor—Conditional sale—Suspensive condition —Moveables incorporated with freehold —Immoveables by destination—Hypothecary charges —Arts.* 375 *et seq. C. C.*] A suspensive condition in an agreement for the sale of moveables, whereby, until the whole of the price shall have been paid, the property in the thing sold is reserved to the vendor is a valid condition.—In order to give moveable property the character of immoveables by destination, it is necessary that the person incorporating the moveables with the immoveable should be, at the time, owner both of the moveables and of the real property with which they are so incorporated. *Lainé* v. *Béland* (26 Can. S. C. R. 419), and *Filiatrault* v. *Goldie* (Q. R. 2 Q. B. 368), distinguished. Decision of the Court of Queen's Bench affirmed, Girouard J. dissenting. LA BANQUE D'HOCHELAGA *v.* THE WATEROUS ENGINE WORKS CO. — — — 406

VENDOR AND PURCHASER — *Deed—Construction of— Title to lands — Ambiguous description—Evidence to vary or explain deed—Possession—Conduct of parties— Presumptions from occupation of premises—Arts.* 1019, 1238, 1242, 1473, 1599 *C. C.*—47 *Vic. c.* 87, *s.* 3 (*D.*); 48 & 49 *Vic. c.* 58, *s.* 3 (*D.*)—45 *V. c.* 20 (*Q.*)—102

See DEED 1.

WARRANTY—*Suretyship—Recourse of sureties inter se—Ratable contribution—Action of warranty—Banking—Discharge of co-surety—Reserve of recourse—Trust funds in possession of a surety—Arts.* 1156, 1959 *C. C.*] Where one of two sureties has moneys in his hands to be applied towards payment of the creditor, he may be compelled by his co-surety to pay such moneys to the creditor or to the co-surety himself if the creditor has already been paid by him.—When a creditor has released one of several sureties with a reservation of his recourse against the others and a stipulation against warranty as to claims they might have against

WARRANTY—*Continued.*

the surety so released by reason of the exercise of such recourse reserved, the creditor has not thereby rendered himself liable in an action of warranty by the other sureties. MACDONALD *v.* WHITFIELD. WHITFIELD *v.* THE MERCHANTS BANK OF CANADA — — — 94

WATERCOURSES.

See DRAINS AND WATERCOURSES.

WATERS, CANADIAN—*Treaty of* 1818—*Construction of—Fisheries—Three mile limit—Construction of statutes*—59 *Geo. III. c.* 38 (*Imp.*)—*R. S. C. c.* 94 *and c.* 95—"*Fishing*"—*Foreign fishing vessels* — — — 271

See FISHERIES.

WATERWORKS—*Municipal corporation—Waterworks—Extension of works— Repairs—By-law—Resolution—Agreement in writing—Injunction—Highways and streets—R. S. Q. art.* 4485—*Art.* 1033*a C. C. P.* — — 329

See MUNICIPAL CORPORATION 3.

WILL—*Undue influence—Evidence.*] In order to set aside a will on the ground that its execution was obtained by undue influence on the mind of the testator it is not sufficient to show that the circumstances attending the execution are consistent with the hypothesis that it was so obtained. It must be shown that they are inconsistent with a contrary hypothesis. ADAMS *v.* MCBEATH — — — — 13

2——*Construction of—Donation—Substitution—Partition, per stirpes or per capita—Usufruct—Alimentary allowance—Accretion between legatees.*] The late Joseph Rochon made his will in 1852 by which he devised to his two sisters the usufruct of all his estate and the property therein to their children, naming Pierre Dupras, his uncle, as his testamentary executor, and directing that his estate should be realized and the proceeds invested according to the executor's judgment, adding to these directions the words "enfin placer la masse liquide de ma succession à intérêt ou autrement, de la manière qu'il croira le plus avantageux, pour en fournir les revenus à mes dites sœurs et conserver le fonds pour leurs enfants," and providing that these legacies should be considered as an alimentary allowance and should be non-transferable and exempt from seizure. By a codicil in 1890 he appointed a nephew as his testamentary executor in the place of the uncle, who had died, and declared:—"Il sera de plus l'administrateur de mes dits biens jusqu'au décès de mes deux sœurs usufruitères, nommées dans mon dit testament, et jusqu'au partage définitif de mes biens entre mes héritiers propriétaires,

WILL—*Continued.*

et il aura les pouvoirs qu'avait le dit Pierre Dupras dans mon dit testament." *Held*, Gwynne J. dissenting, that the testamentary dispositions thus made did not create a substitution, but constituted merely a devise of the usufruct by the testator to his two sisters and of the estate, (subject to the usufruct), to their children, which took effect at the death of the testator. *Held* also, that the charge of preserving the estate—"conserver le fonds"—imposed upon the testamentary executor could not be construed as imposing the same obligation upon the sisters who were excluded from the administration, or as having, by that term, given them the property subject to the charge that they should hand it over to the children at their decease, or as being a modification of the preceding clause of the will by which the property was devised to the children directly, subject to the usufruct. *Held*, further, that the property thus devised was subject to partition between the children *per capita* and not *per stirpes*. Robin *v.* Duguay — — 347

3——*Will—Sheriff's deed—Evidence—Proof of heirship—Rejection of evidence—New trial—Champerty—Maintenance.*] A will purporting to convey all the testator's estate to his wife was attacked for uncertainty by persons claiming under alleged heirs-at-law of the testator and through conveyances from them to persons abroad. The courts below held that the will was valid. *Held*, affirming such decisions, that as the evidence of the relationship of the alleged grantors to the deceased was only heresay and the best evidence had not been adduced; that as the heirship at law was dependent upon the alleged heir having survived his father and it was not established and the court would not presume that his father had died before him; and that as the persons claiming under the will had no information as to the identity of the parties in interest who were represented in the transactions by men of straw, one of whom was alleged to be a trustee, and there was no evidence as to the nature of his trust and there was strong suspicion of the existence of champerty or maintenance on the part of the persons attacking the will, the latter had failed to establish the title of the persons under whom they claimed and the appeal should be dismissed. May *v.* Logie — 443

4——*Statute — Construction of — Estates tail, acts abolishing — R. S. N. S (1 ser.) c. 112 — R. S. N. S. (2 ser.) c. 112 — R. S. N. S. (3 ser.) c. 111—28 V. c. 2 (N.S.)—Executory devise over—Dying without issue—"Lawful heirs"—"Heirs of the body"—Estate in remainder expectant—Statutory title—R. S. N. S. (2 ser.) c. 114, ss. 23 & 24—Title by will—Conveyance by tenant in tail.*] The Revised

WILL—*Continued.*

Statutes of Nova Scotia, 1851 (1 ser.) ch. 112, provided as follows: "All estates tail are abolished, and every estate which would hitherto have been adjudged a fee tail shall hereafter be adjudged a fee simple; and, if no valid remainder be limited thereon, shall be a fee simple absolute, and may be conveyed or devised by the tenant in tail, or otherwise shall descend to his heirs as a fee simple." In the revision of 1858 (R. S. N. S. 2 ser. c. 112), the terms are identical. In 1864 (R. S. N. S. 3 ser. c. 111) the provision was changed to the following: "All estates tail on which no valid remainder is limited are abolished, and every such estate shall hereafter be adjudged to be a fee simple absolute, and may be conveyed or devised by the tenant in tail, or otherwise shall descend to his heirs as a fee simple." This latter statute was repealed in 1865 (28 Vict. c. 2) when it was provided as follows: "All estates tail are abolished and every estate which hitherto would have been adjudged a fee tail shall hereafter be adjudged a fee simple and may be conveyed or devised or descend as such." Z., who died in 1859, by his will, made in 1857, devised lands in Nova Scotia to his son, and in default of lawful heirs, with a devise over to other relatives, in the course of descent from the first donee. On the death of Z., the son took possession of the property as devisee under the will, and held it until 1891, when he sold the lands in question in this suit to the appellant. *Held*, per Taschereau, Sedgewick and King JJ., that notwithstanding the reference to "valid remainder" in the statute of 1851 all estates tail were thereby abolished, and further, that subsequent to that statute there could be no valid remainder expectant on an estate, as there could not be a valid estate tail to support such remainder. *Held* further, per Taschereau, Sedgewick and King JJ., that in the devise over to persons in the course of descent from the first devisee, in default of lawful issue, the words "lawful heirs," in the limitation over, are to be read as if they were "heirs of his body"; and that the estate of the first devise was thus restricted to an estate tail and was consequently, by the operation of the statute of 1851, converted into an estate in fee simple and could be conveyed by the first devisee. *Held*, per Gwynne and Girouard JJ., that estates tail having a remainder limited thereon where not abolished by the statutes of 1851 or 1864, but continued to exist until all estates tail were abolished by the statute of 1865; that the first devisee, in the case in question, took an estate tail in the lands devised and having held them as devisee in tail up to the time of the passing of the Act of 1865, the estate in his possession was then, by the operation of that statute, converted into an estate in fee simple which could be lawfully conveyed by him. Ernst *v.* Zwicker — 594

WILL—*Continued.*

5——*Construction of—Words of futurity- Life estate—Joint lives—Time for ascertainment of class—Survivor dying without issue—"Lawful heirs."*] A devise of real estate to the testator's wife and only child for their joint lives, with estate for life to the survivor and remainder in fee to his lawful heirs, is not evidence of intention upon the part of the testator to exclude the child from the class entitled to the fee, in case such child should survive the testator. THOMPSON *v.* SMITH — — — — **628**

WILL—*Continued.*

6——*Testamentary succession—Balance due by tutor—Executors—Account, action for—Action for provisional possession—Parties to action.*] CREAM, *et al.* *v.* DAVIDSON — — — **362**

7——*Evidence—Nullified instruments* — **363**

See ADMISSIONS.

" EVIDENCE 5.